No.

IN THE SUPREME COURT OF THE UNITED STATES

BANI MARCELA DUARTE,

***Petitioner*,**

v.

JENNIFER CORE, Acting Warden,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the Prosecution Fail to Prove the Second Degree Murder Charge Beyond a Reasonable Doubt; Did Appellate Counsel Render Ineffective Assistance?

II. Did the Trial Court Deprive Duarte of Due Process and a Fair Trial by Admitting Evidence of Duarte's 2016 DUI Arrest; Did Appellate Counsel Render Ineffective Assistance?

III. Did the Trial Court Deprive Duarte of Due Process and a Fair Trial by Failing to Issue an Instruction on Foreseeability; Did Trial and Appellate Counsel Render Ineffective Assistance?

IV. Did the Newly Discovered Evidence Show that Duarte Did Not Cause the Deaths; Did Trial Counsel Render Ineffective Assistance?

V. Did the Prosecutor Commit Prejudicial Misconduct During Closing Argument; Did Trial and Appellate Counsel Render Ineffective Assistance?

VI. Did the Cumulative Effect of the Errors in Claims I-V Deprive Duarte of Due Process and a Fair Trial?

VII. Did the Police Deprive Duarte of Her Sixth Amendment Right to Remain Silent by Questioning Her After the Car Accident?

VIII. Did the Prosecutor Commit Misconduct by Relying on an Unpublished Decision to Exclude Significant Statistical Defense Evidence About DUI Fatalities?

IX. Did the California Court of Appeal (CCA) Unreasonably Uphold the Trial Court's Post-Trial Refusal to Release Juror Identifying Information?

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No.

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Petitioner, BANI MARCELA DUARTE, petitions for a writ of certiorari to review the United States Court of Appeals for the Ninth Circuit's denial of Duarte's Request for a Certificate of Appealability. (Appendix A)

OPINION BELOW

On July 29, 2025, the Ninth Circuit Court of Appeals denied Duarte's request for a certificate of appealability. (Appendix A)

JURISDICTION

On July 29, 2025, the Ninth Circuit Court of Appeals

denied Duarte's request for a certificate of appealability. (Appendix A)

The Court has jurisdiction. 28 U.S.C. § 1254(1)

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

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

STATEMENT OF THE CASE

A. State Court Trial Proceedings

A jury convicted Duarte of three counts of second degree murder and one count of driving under the influence of alcohol. The jury found true an allegation of great bodily injury in connection with driving under the influence of alcohol. (Cal. Penal Code § 187; Cts. 1-3, Cal. Veh. Code § 23153; Ct. 4, Cal. Penal Code § 12022.7) [1]

The trial court sentenced Duarte to three consecutive indeterminate terms of 15 years to life plus a six year consecutive determinate term, for an aggregate term of 51 years to life.

B. Direct Appeal

Duarte appealed to the California Court of Appeal (CCA),

[1] Unless otherwise stated, all references are to the California Penal Code.

and on March 30, 2021 the CCA affirmed the judgment. (Appendix G)

Duarte then filed a Petition for Review. On June 30, 2021, the California Supreme Court (CSC) summarily denied her petition. (Appendix F)

C. State Habeas Proceedings

Duarte filed a petition for writ of habeas corpus in the California courts. On April 19, 2023, the California Supreme Court summarily denied the petition for review. (Appendix E)

D. Federal Habeas Proceedings

On, September 2, 2022, Duarte filed a petition for writ of habeas corpus in the district court. On December 4, 2024, the district court denied Duarte's habeas petition. (Appendix B, C)

On February 10, 2025, Duarte filed a Request for Certificate of Appealability to the Ninth Circuit. On July 29, 2025, the Ninth Circuit Court of Appeals denied Duarte's request. (Appendix A)

STATEMENT OF THE FACTS ELICITED FROM THE CALIFORNIA COURT OF APPEAL OPINION

See, CCA's Opinion. (Appendix G)

REASONS TO GRANT CERTIORARI

I. THE PROSECUTION FAILED TO PROVE THE SECOND DEGREE MURDER CHARGE BEYOND A REASONABLE DOUBT; APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE

A. Introduction

The prosecution failed to prove Duarte committed the crime of second degree murder because the evidence failed to show Duarte acted with implied malice. Duarte explained her state of mind when she told Officer Page, "I'm so sorry, like . . . I never meant to hurt anybody . . . I'm a mom and I would die, like die if that happened to me and I can't be in . . . even believe, like put myself in those families' shoes. And I'm really, really sorry. I never meant to do that."

In the "interest of judicial economy, the District Court resolved Duarte's claims on the merits rather than on the issue of procedural default." (Appendix C at 1, 2)

B. The Evidence Failed to Support the Conviction

Duarte's second degree murder conviction required the prosecution to prove implied malice. A review of the entire evidence, not just the evidence that favors guilt, failed to prove

Duarte knew that driving fast while intoxicated would cause a vehicle to rear-end a stopped car, strike a pole, explode, and kill the occupants. And Duarte sincerely never meant to injure anyone.

The District Court disagrees and finds that the state reasonably rejected Duarte's insufficient evidence claim and ineffective assistance of appellate counsel claims. (Appendix C at 2) The District Court finds the evidence sufficient for a jury to find implied malice based on Duarte's driving at a high rate of speed while "heavily intoxicated" and striking a vehicle stopped at a red light killing three of the four occupants of the vehicle. The district court also finds that she had been previously arrested for driving under the influence and "cautioned others on her social media account not to drink and drive, . . . " (Appendix C at 2)

However, factually similar cases provide guidance of the elements of second degree murder. See, e.g., *People v. Ochoa*, 6 Cal.4th 1199, 1205 (1993) (finding sufficient evidence of *gross vehicular manslaughter*, not murder while driving intoxicated). And the district court also overlooks that defendants convicted of

second degree murder had been formally advised of the dangers of drinking and driving. See, *People v. Murray,* 225 Cal.App.3d 734, 746 (1990) (Defendant exposed to drinking and driving educational programs); *People v. Wolfe*, 20 Cal.App.5th 673, 683 (2018); (Defendant signed a DMV license renewal form advising her that driving under the influence could result in a murder charge); *People v. Munoz,* 31 Cal.App.5th 143, 149 (2019) (Defendant received *Watson* advisement, attended an alcohol program, and a MADD a victim impact panel class).

C. Appellate Counsel Rendered Ineffective Assistance

The District Court finds appellate counsel could not have been ineffective for failing to raise the "meritless" issue on appeal. Duarte disagrees because appellate counsel rendered ineffective assistance by failing to raise the meritorious issue that would have resulted in a reversal of her conviction. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

II. THE TRIAL COURT DEPRIVED DUARTE OF DUE PROCESS AND A FAIR TRIAL BY ADMITTING EVIDENCE OF DUARTE'S 2016 DUI ARREST; APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE

A. Introduction

Over defense objection, the trial court allowed the prosecution to present evidence of Duarte's 2016 DUI arrest. The district attorney never prosecuted her, and she never suffered a prior DUI conviction. The trial court admitted the prior acts to show that Duarte knew she did something "not lawful," "illegal," and "wrong."

B. Duarte's Claim Merits Federal Relief

The District Court finds federal relief unavailable for the state's evidentiary error claim. (Appendix C at 2) Duarte disagrees. Duarte recognizes that, generally, the admissibility of evidence concerns a state law matter, and the issue cannot be reviewed in a federal habeas corpus proceeding. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Middleton v. Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985), cert. denied, 478 U.S. 1021, 106 S. Ct. 3336, 92 L. Ed. 2d 741 (1985). But federal courts can determine if a prisoner's constitutional or other federal rights have been

violated. *Estelle,* 502 U.S. at 67-68. And habeas relief can be granted if the trial court unfairly admitted prejudicial evidence that resulted in a denial of due process. *Id. at* 72.

The state court's evidentiary error warrants federal habeas relief because Duarte's trial judge, by failing to carefully consider the purpose and prejudicial nature of the prior arrest, deprived Duarte of her constitutional rights. Duarte had a past arrest, not a conviction by proof beyond a reasonable doubt. The officer stopped Duarte, not for illegally driving, but because she illegally parked her car. Evidence of Duarte's unadjudicated arrest served to prove her propensity to drink and drive, not to prove she knew she could kill someone while driving under the influence.

Without the prior incident, no evidence supported the requisite mental state for a *Watson* murder, not even if Duarte knew she should not drink and drive. And, if the trial court excluded the prior arrest evidence at least one juror would not have found beyond a reasonable doubt that Duarte knew about the dangers of driving under the influence. *Chapman v. California,* 386 U.S. 18 (1967) (Federal constitutional error requires showing beyond a reasonable doubt it was not

prejudicial). In fact, one juror wrote a letter to the court expressing concerns about the guilty verdict.

Duarte has shown "a fundamental defect which inherently result[ed] in a complete miscarriage of justice." *Davis v. United States*, 417 U.S. 333, 346 (1974); see also, *People v. Albarran,* 149 Cal.App.4th 214, 229-230 (2007), fn. omitted; accord, *Jammal v. Van de Kamp,* 926 F.2d 918, 920 (9th Cir. 1991) Relief is warranted because the error of constitutional magnitude had a substantial and injurious effect or influence on the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). The superior court unreasonably applied U.S. Supreme Court precedent when rejecting Duarte's evidentiary claim.

C. The Trial Court's Instruction Failed to Lessen the Prejudice

The District Court finds that the trial court's "limited" makes the issue "meritless on appeal." (Appendix C at 2) Duarte disagrees because the single instruction could not undo the damage. *United States v. Garza*, 608 F.2d 659, 666 (5th Cir. 1979), quoting *Dunn v. United States,* 307 F.2d 883, 886 (5th Cir. 1962) One "cannot unring a bell"; "after the thrust of the saber it

is difficult to say forget the wound"; and finally, "If you throw a skunk into the jury box, you can't instruct the jury not to smell it.")

D. Appellate Counsel Rendered Ineffective Assistance

The District Court finds appellate counsel did not render ineffective assistance because the 2016 DUI arrest showed Duarte's "subjective awareness that driving under the influence was wrong and has consequences." (Appendix C at 3)

Duarte disagrees. The prosecutor relied on the prior incident to prove Duarte had concerns about her children, that she was arrested, her car was towed and her license was suspended for a year. The prosecutor's argument had nothing to do with proving that Duarte knew the dangers of driving under the influence or that she could be charged with murder if she drove a vehicle while under the influence.

Based on the insufficient evidence and the failure of the instruction to cure any error, appellate counsel rendered ineffective assistance by failing to raise the meritorious issue that would have resulted in a reversal of her conviction. *Strickland*,

466 U.S. at 687.

III. THE TRIAL COURT DEPRIVED DUARTE OF DUE PROCESS AND A FAIR TRIAL BY FAILING TO ISSUE AN INSTRUCTION ON FORESEEABILITY; TRIAL AND APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE

A. Introduction

The trial court instructed the jury on second degree murder without explicitly stating that the deaths must have been "foreseeable" for it to have been the natural and probable consequence of Duarte's acts. Instead, the trial court instructed the jury on second degree murder with the CALCRIM No. 520 pattern instruction definition of malice aforethought.

B. The Instructional Omission Deprived Duarte of Due Process and a Fair Trial

The District court finds the state court reasonably rejected the claim because the trial court issued a proper instruction defining murder with malice aforethought (Appendix C at 3)

The District Court finds the instruction merely duplicated the implied malice instruction. (Appendix C at 3) Duarte disagrees because the instructional omission violated Duarte's constitutional right to due process. *Middleton v. McNeil*, 541 U.S.

433, 437 (2004) (A faulty jury instruction will constitute a violation of due process where the instruction by itself "'so infected the entire trial that the resulting conviction violates due process.'" [Citation.]).

The trial court should have instructed the jury that another person's death must be foreseeable to be the natural and probable consequence of a defendant's act. Duarte could not have foreseen that, in the middle of the night, three strange men would stop, approach, talk to her, and follow her as she tried to flee from them. Duarte could not have foreseen that at 3:40 a.m. three people in a car would be stopped at a red light. Duarte could not have known that, by speeding, she would rear-end a car, the car would hit a pole and the impact would cause the car's gas tank to explode killing three people.

And, Duarte qualifies for federal habeas relief because the erroneous jury instruction omission "'so infected the entire trial that the resulting conviction violate[d] due process.'" *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S. Ct. 1730, 52 L. Ed. 2d 203 (1977) (quoting *Cupp v. Naughten,* 414 U.S. at 147(1973)); see *Estelle*, 502 U.S. at 72. And, the error had a "'substantial and injurious

effect or influence in determining the jury's verdict.'" *Hedgpeth v. Pulido*, 555 U.S. 57, 58, 129 S.Ct. 530, 172 L. Ed. 2d 388 (2008) (per curiam) (quoting *Brecht*, 507 U.S. at 623).

Because the case rested on the foreseeability of the harm the accident caused, the instructional omission cannot be said to have been harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18. A COA should have been granted.

C. Trial and Appellate Counsel Rendered Ineffective Assistance

The District Court finds neither trial nor appellate counsel rendered ineffective assistance for failing to raise a meritless issue. Duarte disagrees. The evidence justified the foreseeability instruction because Duarte could not have foreseen that three strange men would approach her and then chase her at a high rate of speed. Duarte could not have foreseen that at 3:40 a.m., three people would have stopped their car. She could not have known that, by speeding to get away from three strange men, she would rear-end a car, the car would crash into a pole, and the car's gas tank would explode killing three people.

Trial counsel should have requested an instruction on

foreseeability because the case rested upon whether Duarte knew driving under the influence would result in killing three people. The defense would have injected a reasonable doubt if trial counsel requested the foreseeability instruction. *Strickland v. Washington*, 466 U.S. at 687. Appellate counsel, too, should have raised the meritorious instructional issue that could have resulted in a reversal of Duarte's conviction. *Id.*

IV. NEWLY DISCOVERED EVIDENCE SHOWS THAT DUARTE DID NOT CAUSE THE DEATHS; TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE

A. Introduction

Duarte's drinking and driving did not cause the accident that killed three people. Duarte never wove in between traffic lanes, and she did not cause cars to stop. Although Duarte drove over the speed limit, the car's faulty gas tank caused the three deaths. See *Blitzstein v. Ford Motor Co.*, 288 F.2d 738 (5th Cir. 1961)(Car negligently made with a cracked gas tank alleged to be cause of plaintiff's injury)

After the jury's October 1, 2019 verdict, in 2020, the decedents' relatives sued Toyota. They alleged the manufacturers

of the 2017 Toyota Corolla failed to warn consumers about the risk of fire, design defects, and defective gas tanks. The cases quickly settled. The newly discovered evidence justifies relief. Cal. Penal Code § 1473; *In re Masters*, 7 Cal. 5th 1054, 1081 (2019).

The District Court finds that the "state court's rejection of the issue was not objectively unreasonable." (Appendix C at 3) The District Court finds that evidence of a gas tank defect would not change the conclusion that Duarte's actions proximately caused the collision. (Appendix C at 3)

B. The Newly Discovered Evidence Merits Relief

The District Court finds that trial counsel was not ineffective because the newly discovered evidence would not have proved Duarte's innocence. Duarte disagrees because, under any legal standard, the newly discovered evidence, consisting of the 2017 Toyota Corolla's defective design and defective gas tank, shows that the 2017 Toyota Corolla was unsafe for its intended use and purpose in the automobile industry. No one could have foreseen that at 3:40 a.m. three people would have been stopped in a car on the street. She could not have known that, by rear-

ending a car, the car's gas tank would explode killing three people.

Trial counsel should have presented an accident reconstructionist or researched whether the 2017 Toyota Corolla had the necessary safety features to make it safe for its intended use and purpose so that it could be operated in a safe manner. Toyota Corolla's defective and unsafe gas tank that exploded upon impact during a rear-end collision caused the deaths and injuries. Trial counsel rendered ineffective assistance by failing to investigate the defective nature of the 2017 Toyota Corolla's gas tank. *Strickland v. Washington*, 466 U.S. 668.

V. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT DURING CLOSING ARGUMENT; TRIAL AND APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE

A. Introduction

During closing argument, the prosecutor committed prejudicial misconduct. The prosecutor misstated the law, argued outside the evidence, and appealed to the sympathies and passions of the jury. The District Court finds the state court's rejection of the claim was not objectively unreasonable. (Appendix

C at 2) The RR finds that the prosecutor fairly commented on the evidence and the trial court instructed the jury not to base their verdict on sympathy or emotion. (Appendix D at 54)

Duarte vehemently disagrees.The prosecutor's improper conduct "materially affected the fairness of the trial." *United States v. Smith,* 893 F.2d 1573, 1583 (9th Cir. 1990) (quoting *United States v. Polizzi*, 801 F.2d 1543, 1558 (9th Cir. 1986)). And if left with "grave doubt" as to whether the error had substantial influence over the verdict, a court must grant collateral relief. *Brecht*, 507 U.S. at 631.

B. The Prosecutor Committed Misconduct by Misstating the Reasonable Doubt Standard

The prosecution had to prove the case beyond a reasonable doubt. *In re Winship,* 397 U.S. 358 (1970). The prosecutor impermissibly quantified the reasonable doubt burden of proof by arguing that the proof beyond a reasonable doubt standard did not mean 100% certainty. Trial counsel rendered ineffective assistance by failing to object. *Strickland*, 466 U.S. at 694; *Brecht*, at 623.

The District Court finds the prosecutor committed no

misconduct because the "reasonable doubt does not require elimination of all possible or imagined doubt and because the trial court properly instructed the jury on reasonable doubt." (Appendix C at 4)

Duarte disagrees because the Due Process Clause requires the prosecution to prove a criminal defendant's guilt beyond a reasonable doubt, and prosecutors must avoid defining reasonable doubt to lead the jury to convict on a lesser showing than due process requires. See, *Victor v. Nebraska,* 511 U.S. 1, 22 (1994).

The prosecutor quantified the reasonable doubt standard to dilute its burden of proof. A prosecutor's misstatement of the law in argument to the jury constitutes misconduct, especially where the misstatement bears on a specific constitutional right. See *Caldwell v. Mississippi,* 472 U.S. 320, 336, 339-40, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985) (finding misconduct where prosecutor misrepresented jury's role in capital sentencing procedure in manner "fundamentally incompatible" with Eighth Amendment); see also, *United States v. Williams,* 504 U.S. 36, 61, 112 S. Ct. 1735, 118 L. Ed. 2d 352 (1992) (including "misstatements of the law in argument to the jury" among

examples of prosecutorial misconduct; citing *Caldwell,* 472 U.S. at 336).

By quantifying the reasonable doubt standard, the prosecutor adversely affected Duarte's right to proof beyond a reasonable doubt. "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he [or she] is charged. *In re Winship*, 397 U.S. at 364.

C. The Prosecutor Committed Misconduct by Misstating the Law

The prosecutor improperly argued that Duarte knew the dangers of driving under the influence by equating the danger of regular driving with the dangers of driving under the influence. The prosecutor misstated the law about the *Watson* advisement. The prosecutor discounted the importance of a *Watson* advisement even though the prosecutor relied heavily on Duarte's prior driving offense to prove she acted with implied malice.

The District Court finds that the superior court properly

found the prosecutor did not mislead the jury and that California law did not require the prosecutor to prove Duarte received a prior *Watson* warning to prove Duarte committed implied malice murder. (Appendix C at 4)

Duarte disagrees. Although *Watson* may not have been an element of the offense, California law requires courts to notify someone convicted of driving under the influence, that if they continue to drive while under the influence and kill someone, they could be could be charged with murder. The *Watson* issue went directly to Duarte's state of mind, namely, whether she knew that by drinking and driving, she could be charged with murder. Cf. *People v. Wolfe*, 20 Cal.App.5th at 683 (2018); *People v. Munoz,* 31 Cal. App. 5th at 149 (2019).

D. The Prosecutor Committed Misconduct by Inviting Jurors to Talk to Him After Trial if They Had Questions

The prosecutor improperly inferred he had information not brought out during trial. See *People v. Quigley*, 157 Cal.App.2d 223 (1963) (Prosecutor committed misconduct by basing his argument on facts that did not appear in the case). The prosecutor invited the jury to ask him questions after trial. By so

doing, the prosecutor improperly implied that he had evidence not presented at trial to prove Duarte's guilt. See, *People v. Bross*, 240 Cal. App. 2d 157, 171 (1966) (Prosecutor commits misconduct by making statements unsupported by the testimony).

Even worse, the prosecutor's invitation to discuss their questions with him after trial lowered the prosecution's burden of proof beyond a reasonable doubt. Instead of allowing the jurors to find reasonable doubt based on the evidence, the prosecutor invited jurors to discuss their doubts with him after trial. See *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (constitutionally deficient reasonable-doubt instruction required reversal of conviction); *In re Winship*, 397 U.S. 358 (due process clause requires proof beyond a reasonable doubt of every fact necessary to constitute the charged crime).

The District Court summarily finds no misconduct. (Appendix C at 4) Duarte disagrees because no law entitles the prosecutor, during argument, to discuss their questions with him separately after trial. Closing argument allows a party to discuss the evidence and to comment on reasonable inferences that may be drawn from the evidence. See *People v. Bemore*, 22 Cal.4th

809, 846 (2000); *People v. Sandoval*, 4 Cal.4th 155, 183 (1992) (both speaking of the prosecutor's entitlement in this regard) *People v. Morales,* 25 Cal. 4th 34, 44 (2001).

E. Trial and Appellate Counsel Rendered Ineffective Assistance

The District Court finds neither trial nor appellate counsel rendered ineffective assistance because the prosecutor did not commit misconduct, trial counsel's failure to object, and appellate counsel's failure to raise the issues on appeal were not objectively unreasonable. (Appendix C at 4)

Duarte disagrees. Duarte has shown that the prosecutor's improper conduct "materially affected the fairness of the trial." *United States v. Smith,* 893 F.2d at 1583. And if left with "grave doubt" whether the error substantially influenced the verdict, a court must grant collateral relief. *Brecht*, 507 U.S. at 631.

Trial counsel rendered ineffective assistance by failing to object, and appellate counsel rendered ineffective assistance by failing to raise trial counsel's failure to object. Trial and appellate counsels' omissions deprived Duarte of effective counsel. Absent counsels' deficiencies, the result would have been different.

Strickland, 466 U.S. at 688, 694.

VI. THE CUMULATIVE EFFECT OF THE ERRORS IN CLAIMS I-V DEPRIVED DUARTE OF DUE PROCESS AND A FAIR TRIAL

The District Court finds the state court's rejection of the claim was not objectively unreasonable, no prejudice resulted and "there was no prejudice to accumulate." (Appendix C at 4)

Duarte disagrees. The numerous constitutional errors individually deprived Duarte of a fair trial; the cumulative effect of multiple trial errors violated due process even if no single error warranted reversal. *Chambers v. Mississippi,* 410 U.S. 284, 302 (1973), *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (citation omitted); see also, e.g., *Thomas v. Hubbards,* 273 F.3d 1164, 1181 (9th Cir. 2011).

VII. THE POLICE DEPRIVED DUARTE OF HER SIXTH AMENDMENT RIGHT TO REMAIN SILENT BY QUESTIONING HER AFTER THE CAR ACCIDENT

A. Introduction

At the accident scene, two police officers interviewed Duarte without giving her *Miranda* [*Miranda v. Arizona,* 384 U.S. 436 (1966)] warnings. *Miranda* applied because the police

focused on Duarte, detained her and refused to let her leave and go home. The trial court agreed that the police focused on Duarte and detained her. But, the trial court admitted Duarte's statements by finding Duarte was not subjected to custodial interrogation.

B. The State Court Reached an Unreasonable Decision

The District Court finds the state court's rejection of the claim "was not objectively unreasonable" because Duarte was not in custody for "'Miranda purposes[,]'" the interview "lasted only one hour," "much of the time was spent on medical intervention, the interview was in an open area, only one officer interacted with [Duarte] at any given time, [Duarte] was never restrained or handcuffed," the officers never told Duarte "she had to answer questions or take a field sobriety test and the officers did not dominate the interview." (Appendix C at 5)

Duarte disagrees because the state court erroneously and unreasonably applied *Miranda v. Arizona*, 384 U.S. 436, 444. *Miranda* encompasses ". . . a set of prophylactic measures designed to safeguard the constitutional guarantee against

self-incrimination" during custodial interrogations. *J.D.B. v. North Carolina*, 564 U.S. 261, 269, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011).

"[W]hether a suspect is 'in custody' is an objective inquiry," *J.D.B.*, 564 U.S. at 270. Under the "objective circumstances of the interrogation, a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." *Howes v. Fields*, 565 U.S. 499, 509, 132 S. Ct. 1181, 182 L. Ed. 2d 17 (2012) (internal quotation marks and citations omitted).

"Relevant factors include the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning[.]" *Id.* (internal citations omitted).

The police focused their investigation on Duarte. Despite her requests to go home, the officers refused to allow Duarte to leave. The officers questioned Duarte for over an hour. Cf. *Berkemer v. McCarty*, 468 U.S. 420, 437-438 (1984) (observing that "temporary and brief" nature of ordinary traffic stop—usually "lasting only a few minutes"—mitigates the danger

of compelled interrogation.) And, the officers arrested Duarte after the interrogation.

VIII. THE PROSECUTOR COMMITTED MISCONDUCT BY RELYING ON AN UNPUBLISHED DECISION TO EXCLUDE SIGNIFICANT STATISTICAL DEFENSE EVIDENCE ABOUT DUI FATALITIES

A. The Relevant Facts

Before trial, the prosecutor filed a motion to exclude statistical evidence of the relationship between DUI arrests, DUI fatalities, and the natural and probable consequence that DUI is dangerous to human life. To support his claim, the prosecutor relied heavily on a decade old 2011 unpublished decision, *People v. Gandarilla,* WL 600436 (Feb. 22, 2011). The trial court, relying on *Gandarilla*, excluded the evidence as irrelevant and confusing.

The District Court agrees that although trial counsel "should not have relied on an unpublished decision, the incident did not infect the entire trial with unfairness." (Appendix C at 5) The District Court also finds that the state court properly excluded the evidence because its prejudice outweighed its probative value. (Appendix C at 5) The district court also found that the Supreme Court has not addressed whether the trial court

must balance factors and exercise its discretion violates a defendant's constitutional right to present a complete defense. (Appendix C at 5) Duarte disagrees.

B. The Trial Court Denied Duarte Due Process and the Right to Present a Defense by Excluding Relevant Statistical Evidence Based on an Unpublished Decision

The CCA agreed that the prosecutor's citation to the unpublished decision was contrary to the California court rules, but found the prosecutor's conduct did not amount to "deceptive or reprehensible" behavior. The District Court also finds no constitutional error resulted. (Appendix C at 5)

Duarte disagrees. A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such "'unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright,* 477 U.S. 168, 181 (1986). The prosecutor improperly presented an unpublished case to the court and caused the court to unreasonably rely on the nonpublished decision to Duarte's detriment and unjustifiably denied her due process. See *People v.*

Ramirez, 25 Cal.3d 260, 268 (1979); *People v. Bedrossian,* 20 Cal.App.5th 1070, 1074 (2018).

The prosecutor's reliance on a decade old unpublished opinion provides a basis for federal habeas relief because the misconduct is deemed prejudicial. See *Shaw v. Terhune*, 380 F.3d 473, 478 (9th Cir. 2004). Habeas relief should be granted because the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637.

C. The State Court Unreasonably Excluded Statistical Evidence Relevant to the Implied Malice Murder Charges

The trial court violated Duarte's constitutional rights to due process and a complete defense by prohibiting the defense from presenting statistical evidence to prove that Duarte did not commit implied malice murder. See U.S. Const. amends. VI, XIV; *California v. Trombetta,* 467 U.S. 479, 485 (1984); *Davis v. Alaska,* 415 U.S. 308, 317-320 (1974); *Chambers v. Mississippi,* 410 U.S. at 302; Cal. Const., Art. I, § 28(d) ("relevant evidence shall not be excluded in any criminal trial. . . .".)

The statistical evidence proved that Duarte did not act with implied malice and would have refuted the objective element of

implied malice, requiring the jury to find that Duarte committed an act, the natural consequences of which were dangerous to human life. *People v. Knoller,* 41 Cal.4th 139, 143 (2007); *People v. Watson,* 30 Cal.3d 290, 296 (1981)

By showing the jury that only a small number of driving under the influence cases result in fatalities, the defense would have defeated the notion that the consequences of driving while intoxicated are dangerous to human life because the act alone does not involve a high degree of probability that it will result in death. *People v. Knoller,* 41 Cal.4th at 152.

The District Court overlooks that the favorable statistical evidence had "persuasive assurances of trustworthiness" and was "critical" to the defense. *Chambers v. Mississippi*, 410 U.S. at 302.

The CCA unreasonably deprived Duarte of her constitutional rights to due process and to present a complete defense. The jury never heard that the statistical evidence would prove that Duarte did not commit implied malice murder. At least one juror doubted that the evidence proved the subjective elements of implied malice. If the jury knew that statistical evidence proved that only a small number of driving under the

influence cases resulted in deaths, it would have found Duarte did not know her act endangered human life.

IX. THE STATE COURT UNREASONABLY UPHELD THE TRIAL COURT'S POST-TRIAL REFUSAL TO RELEASE JUROR IDENTIFYING INFORMATION

A. Introduction

A criminal defendant has a Sixth Amendment right to a "fair trial by a panel of impartial, 'indifferent' jurors." See *Irvin v. Dowd,* 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961); *Morgan v. Illinois,* 504 U.S. 719, 727-728 (1992). The trial court's refusal to disclose juror identifying information violated Duarte's constitutional rights to due process and a fair trial by an impartial jury.

Trial counsel sought to file a motion for new trial based on juror misconduct and moved the court to disclose the jurors' contact information so that he could investigate the potential juror misconduct. Counsel based his request on a post-verdict letter a juror sent to the court. Finding no prima facie case, the court denied the petition without even allowing defense counsel to even contact the juror who had written the letter.

B. The State Court Unreasonably Upheld the Trial Court's Decision Denying Defense Counsel's Request for Juror Identifying Information

The District Court finds the state court's decision not objectively unreasonable. (Appendix C at 6) The District Court also finds Duarte's claim, based on state law, not cognizable on federal habeas review. (Appendix C at 6) Duarte disagrees. Duarte challenges the trial court's ruling that deprived her of her constitutional right to present a defense. *Estelle*, 502 U.S. at 67.

The District Court also finds no clearly established federal law recognizing a right to juror identifying information. (Appendix C at 6) Duarte disagrees. The Supreme Court requires that the trial court hold a hearing when a party alleges jury misconduct. At the hearing, the trial court would determine what happened, how the misconduct affected the jurors, and if prejudice resulted. See, *Remmer v. United States*, 347 U.S. 227, 229-30, 74 S. Ct. 450, 98 L. Ed. 654, 1954-1 C.B. 146 (1954); see also, *Smith v. Phillips*, 455 U.S. 209, 216, 102 S. Ct. 940, 946, 71 L. Ed. 2d 78 (1982).

Unless the trial court released the juror information to trial counsel, trial counsel could not contact the jurors to find the

evidence of juror misconduct, Duarte could not prove that juror misconduct had occurred or if the jurors committed misconduct by threatening the holdout juror.

By upholding the trial court's decision to deny trial counsel's motion to release juror information, the California courts violated Duarte's Sixth Amendment rights, the Due Process Clause of the Fourteenth Amendment, and Duarte's guarantee to a defendant the right to a fair trial by an impartial jury. *Morgan v. Illinois,* 504 U.S. at 727-728; *Estelle v. Williams,* 425 U.S. 501, 504 (1976).

*

*

*

CONCLUSION

A COA may issue upon the "substantial showing of the denial of a constitutional right." 28 U.S. C. § 2253. A petitioner need only show that reasonable jurists could debate or agree that the petition should have been resolved differently or that the issues presented "'deserve encouragement to proceed further.'" *Slack v. McDaniel,* 529 U.S. 473 (2000) (quoting *Barefoot v. Estelle,* 463 U.S. 880, 893 and n. 4 (1983).)

Duarte need not show she should prevail on the merits; she need only show she did not raise frivolous issues. Habeas petitioners need an "opportunity to persuade [the appellate court] through full briefing and argument of the potential merit of issues that may appear, at first glance, to lack merit." *Lambright v. Stewart,* 220 F.3d 1022, 1025 (9th Cir. 2000).

Duarte respectfully requests this Court to grant Certiorari.

DATED: October 22, 2025

Respectfully submitted,
FAY ARFA, A LAW CORPORATION
/s Fay Arfa

Fay Arfa, Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 29 2025

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

BANI MARCELA DUARTE,

Petitioner - Appellant,

v.

JENNIFER CORE, Acting Warden,

Respondent - Appellee.

No. 24-7515

D.C. No.
8:22-cv-01633-SSS-AJR
Central District of California,
Santa Ana

ORDER

Before: CALLAHAN and FORREST, Circuit Judges.

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

Any pending motions are denied as moot.

DENIED.

APPENDIX A

JS-6

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

BANI MARCELA DUARTE,

Petitioner,

v.

JENNIFER CORE, ACTING WARDEN

Respondent.

Case No. 8:22-cv-01633-SSS-AJR

JUDGMENT

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

IT IS HEREBY ADJUDGED that this action is dismissed with prejudice.

DATED: December 4, 2024

SUNSHINE S. SYKES
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

BANI MARCELA DUARTE,

Petitioner,

v.

JENNIFER CORE, Acting Warden,

Respondent.

Case No. 8:22-cv-01633-SSS-AJR

ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, all the records and files herein, and the Report and Recommendation of the United States Magistrate Judge. The Court has considered Petitioner's Objections and conducted a *de novo* review of those portions of the Report and Recommendation to which Petitioner objected.

The Report recommends the denial of the Petition and dismissal of this action with prejudice. [Dkt. 31]. Petitioner's objections to the Report [Dkt. 34] do not warrant a change to the Magistrate Judge's findings or recommendations.

As an initial matter, Petitioner objects that none of her claims are procedurally defaulted. [Dkt. 34 at 12]. In the interest of judicial economy,

however, Petitioner's claims are better resolved on the merits rather than on the issue of procedural default. [Dkt. 31 at 16 n.7].

Petitioner objects that the prosecutor failed to prove second-degree murder beyond a reasonable doubt and that appellate counsel was ineffective for failing to raise the issue. [Dkt. 34 at 12-15]. Petitioner alleges that she "sincerely never meant to injure anyone" and that she had not been "formally advised of the dangers of drinking and driving." *Id*. at 13-14. The state court's rejection of these claims was not objectively unreasonable. The evidence was sufficient for a jury to find implied malice. The evidence showed that, while heavily intoxicated, Petitioner drove her car at a high rate of speed, striking a vehicle stopped at a red light, causing the vehicle to strike a pole and catch fire, resulting in the deaths of three of the four persons inside. [Dkt. 20-15 at 12]. Moreover, Petitioner had previously been arrested in 2016 for driving while under the influence and had previously cautioned others on her social media account not to drink and drive, yet engaged in precisely that same behavior on the day of the fatal collision despite her awareness of the dangers. *Id*. And because this issue is meritless, Petitioner's appellate counsel could not have been ineffective for failing to raise it on appeal. *Id*.

Petitioner objects that the trial court violated due process by admitting evidence of her 2016 DUI arrest and that appellate counsel was ineffective for failing to raise the issue. [Dkt. 34 at 15-19]. Federal habeas relief is unavailable for the claim of evidentiary error because of the absence of clearly established federal law by the United States Supreme Court that the admission of irrelevant or overtly prejudicial evidence constitutes a due process violation. [Dkt. 31 at 36 (citing *Holley v . Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009).]. Moreover, the state court reasonably found that appellate counsel was not ineffective for failing to argue on appeal that the evidence should not have been admitted. That issue would have been meritless on appeal because

APPENDIX C

evidence of Petitioner's 2016 DUI arrest was relevant to the issue of her subjective awareness that driving under the influence is wrong and has consequences, and because the trial court gave a limiting instruction on the use of the evidence. [Dkt. 20-15 at 16-17].

Petitioner objects that the trial court violated due process by failing to instruct the jury on foreseeability and that her trial and appellate counsel were ineffective for failing to raise the issue. [Dkt. 34 at 19-22]. The state court's rejection of these claims was not objectively unreasonable. Petitioner failed to show instructional error because the proposed instruction on foreseeability was already encompassed within the instruction defining murder with malice aforethought that was given to the jury. [Dkt. 20-15 at 21]. A criminal defendant is not "entitled to an instruction that merely duplicates what the jury has already been told." *United States v. Lopez-Alvarez*, 970 F.2d 583, 597 (9th Cir. 1992). Moreover, Petitioner's trial and appellate counsel were not ineffective for failing to raise meritless arguments about the necessity for this duplicative instruction. [Dkt. 20-15 at 21-23].

Petitioner objects that newly-discovered evidence showed that she did not cause the deaths of the victims and that trial counsel was ineffective for failing to raise the issue. [Dkt. 34 at 22-25]. Petitioner alleges that the evidence, purportedly showing a faulty gas tank on the victims' car, was the cause of their deaths. *Id*. at 22. The state court's rejection of these claims was not objectively unreasonable. Even if it assumed, for purposes of argument, that federal habeas relief is available for a claim of actual innocence, evidence of a gas tank defect does not alter the conclusion that it was Petitioner's actions that were the proximate cause of the fatal collision. [Dkt. 20-15 at 25-26]. Moreover, because the evidence would not establish actual innocence, trial counsel was not ineffective for failing to investigate the issue. *Id*. at 26.

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Petitioner objects that the prosecutor committed misconduct in his remarks during closing argument and that trial and appellate counsel were ineffective for failing to raise the issue. [Dkt. 34 at 25-31]. The state court's rejection of these claims was not objectively unreasonable. The prosecutor's remark about reasonable doubt – "I am not required to eliminate all possible or imaginary doubt, and I don't have to prove this case by 100 percent certainty" [Dkt. 20-2 at 491] – was not prejudicial misconduct because reasonable doubt does not require elimination of all possible or imagined doubt and because the trial court properly instructed the jury on reasonable doubt. [Dkt. 20-15 at 30]. The prosecutor's remark that he was not required to show Petitioner had been afforded warning under *People v. Watson*, 30 Cal. 3d 290 (1981), about the consequences of driving under the influence – "I don't have to prove that I have to notify people they could be charged with the consequences" [Dkt. 20-2 at 492] – was not misconduct but an accurate statement of the law. [Dkt. 20-15 at 30]. The prosecutor's remark that allegedly invited the jurors to talk to him – "I make myself available to any one of you whenever it's convenient" [Dkt. 20-2 at 515] – was not an improper implication of facts not in evidence. [Dkt. 20-15 at 30]. Moreover, because these remarks did not amount to misconduct, trial and appellate counsel were not ineffective for failing to raise these issues. *Id*. at 31.

Petitioner objects that the cumulative effect of the errors in Grounds One to Five deprived her of due process and a fair trial. [Dkt. 34 at 31]. The state court's rejection of this claim was not objectively unreasonable. Because Petitioner has not established prejudicial error from any of these claims, there was no prejudice to accumulate. [Dkt. 20-15 at 33].

Petitioner objects that the police deprived her of her right to silence under *Miranda v. Arizona*, 384 U.S.436 (1966), by questioning her after the car accident. [Dkt. 34 at 31-33]. The state court's rejection of this claim was not

APPENDIX C

objectively unreasonable. Petitioner was not in custody because "a DUI investigation doesn't equal in custody for *Miranda* purposes." [Dkt. 20-7 at 12]. Moreover, the interview lasted only one hour, a sizeable part of that time was spent on medical intervention, the interview was in an open area, only one officer interacted with Petitioner at any given time, Petitioner was never restrained or handcuffed, Petitioner was never told she had to answer questions or take a field sobriety test, and the officers did not dominate the interview. *Id*. at 12-14.

Petitioner objects that the prosecutor committed misconduct by relying on an unpublished decision to argue for exclusion of statistical defense evidence about the rarity of DUI fatalities, and that the trial court erred in excluding the evidence. [Dkt. 34 at 33-36]. The state court's rejection of these claims was not objectively unreasonable. Although the prosecutor should not have relied on an unpublished decision, the incident did not infect the entire trial with unfairness. [Dkt. 20-7 at 17]. Moreover, the state court found that the statistical evidence about the rarity of DUI deaths was properly excluded under Cal. Evidence Code § 352 because its probative value was substantially outweighed by the risk of undue consumption of time, undue prejudice, confusion of the issues, and misleading the jury. *Id*. at 20-21. Federal habeas relief is unavailable for this claim because "the Supreme Court has not 'squarely addressed' whether an 'evidentiary rule requiring a trial court to balance factors and exercise its discretion' to exclude evidence . . . itself violates a defendant's 'right to present a complete defense.'" *Sherman v. Gittere*, 92 F.4th 868, 880 (9th Cir. 2024) (quoting *Moses v. Payne*, 555 F.3d 742, 758 (9th Cir. 2009)).

Petitioner objects that the California Court of Appeal unreasonably upheld the trial court's post-trial refusal to release juror identifying information, based on a juror's letter expressing her struggle to reach a decision. [Dkt. 34 at 37-38]. The state court's rejection of this claim was not objectively

unreasonable. "First and foremost, [Petitioner] was not entitled under clearly established federal law either to juror contact information or to an evidentiary hearing on his claim of juror misconduct. [Petitioner] identifies no Supreme Court decision addressing a defendant's entitlement to written discovery upon suggestion of juror misconduct." *Pha v. Swarthout*, 658 F. App'x 849, 850-51 (9th Cir. 2016). Moreover, in any event, Petitioner did not show good cause for release of the information because the letter merely expressed normal feelings of difficulty in reaching a decision, not juror intimidation or similar misconduct. [Dkt. 20-7 at 24-25].

Having completed this review, the Court accepts and adopts the findings, conclusions, and recommendations of the Magistrate Judge.

IT IS ORDERED that Judgment be entered **DENYING** the Petition on the merits and dismissing this action **WITH PREJUDICE**.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order and the Judgment herein on the parties at their addresses of record.

DATED: December 4, 2024

SUNSHINE S. SYKES
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BANI MARCELA DUARTE,

Petitioner,

v.

JENNIFER CORE, Acting Warden,

Respondent.

No. 8:22-cv-01633-SSS-AJR

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

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

I.

PROCEEDINGS

On September 2, 2022, Petitioner Bani Marcela Duarte ("Petitioner"), a California state prisoner represented by counsel, filed a Petition for Writ of Habeas Corpus by a Person in State Custody under 28 U.S.C. § 2254 ("Petition"), alleging

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nine grounds for habeas relief.[1] (Dkt. 1.) Petitioner admitted that she had not raised Grounds One through Six before the California Supreme Court, but stated she was currently pursuing these claims in a habeas petition pending in the California Court of Appeal and that she had raised Grounds Seven through Nine on direct appeal in the California Supreme Court. (See Dkt. 1 at 5-10.)

Accordingly, the prior Magistrate Judge assigned to this case determined that the Petition was subject to dismissal as "mixed" (containing both exhausted and unexhausted claims) and on October 3, 2022, ordered Petitioner to select the following options: (1) in the event Petitioner contended she had exhausted her state remedies with respect to all claims alleged in the Petition, file a response setting forth the basis for her contention; (2) request a voluntary dismissal of this action without prejudice pursuant to Federal Rule of Civil Procedure 41(a); (3) request a voluntary dismissal of Grounds One through Six and elect to proceed on her exhausted claims (Grounds Seven to Nine); (4) request a stay and abeyance of the Petition pursuant to Rhines v. Webber, 544 U.S. 269, 277-78 (2005); and/or (5) seek a stay and abeyance of the Petition pursuant to Kelly v. Small, 315 F.3d 1063, 1070-71 (9th Cir. 2003) (as amended), overruled on other grounds by Robbins v. Carey, 481 F.3d 1143 (9th Cir. 2007). (Dkt. 4.) On October 27, 2022, Petitioner filed a request for a stay pursuant to Rhines and/or Kelly. (Dkt. 5.) On October 31, 2022, the prior Magistrate Judge issued an Order granting Petitioner's request for a stay under Rhines. (Dkt. 6.)

On April 20, 2023 (pursuant to the October 31, 2022 Order, see Dkt. 6 at 6), Petitioner filed a motion to lift the stay based on the California Supreme Court's April 19, 2023 denial of Petitioner's habeas corpus petition. (Dkt. 7.) On April 21, 2023, the prior Magistrate Judge granted Petitioner's request and lifted the stay.

[1] Because the parties' pleadings and attachments thereto and the majority of lodged documents do not bear consecutive page numbers, the Court uses the CM/ECF pagination except for the Clerk's Transcript and Reporter's Transcript.

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(Dkt. 8.) On August 3, 2023, Respondent Jennifer Core, Acting Warden of the California Institution for Women, ("Respondent"), filed an Answer. (Dkt. 19.) On November 20, 2023, Petitioner filed a Traverse. (Dkt. 29.)

II.

BACKGROUND

On October 1, 2019, an Orange County Superior Court jury found Petitioner guilty of three counts of second degree murder under California Penal Code § 187(a) (Counts 1 to 3) and one count of driving under the influence of alcohol causing bodily injury under California Vehicle Code § 23153(a) (Count 4). (Dkt. 20-1 at 355-58; Dkt. 20-2 at 505-06.) The jury found true the allegation that Petitioner personally inflicted great bodily on the victim in Count 4 under California Penal Code § 12022.7(a). (Dkt. 20-1 at 358; Dkt. 20-2 at 506.) On February 27, 2020, the trial court sentenced Petitioner to an aggregate state prison term of 51 years to life, consisting of 15 years to life on Count 1, two consecutive terms of 15 years to life on Counts 2 and 3, a consecutive term of 4 years on Count 4, and a consecutive term of 3 years for the personal infliction of great bodily injury finding. (Dkt. 20-1 at 531-34; Dkt. 20-2 at 613-18.)

Petitioner appealed her conviction to the California Court of Appeal. (Dkts. 20-4, 20-6). In a reasoned decision issued on March 30, 2021, the California Court of Appeal affirmed the judgment, with directions to the trial court to correct the abstract of judgment with respect to the court security fee and criminal conviction assessment for the indeterminate prison commitment (Counts 1, 2, and 3). (Dkt. 20-7.) Petitioner then filed a Petition for Review, (Dkt. 20-8), which, on June 30, 2021, the California Supreme Court denied "without prejudice to any relief to which

defendant might be entitled after this court decides *People v. Kopp*, S257844."[2] (Dkt. 20-9.)

On August 29, 2022, Petitioner, represented by counsel, filed a habeas petition in the California Court of Appeal, (Dkt. 20-10), and then filed first amended and second amended habeas petitions on August 30, 2022. (Dkts. 20-11, 20-12.) On September 1, 2022, the California Court of Appeal denied the habeas petition "without prejudice so that petitioner may seek relief in the superior court in the first instance." (Dkt. 20-13.) As noted above, Petitioner filed the Petition in this Court on September 2, 2022, the day after the California Court of Appeal's denial of her habeas petition.[3]

Petitioner, represented by counsel, then filed a habeas petition in the Orange County Superior Court on September 9, 2022, (Dkt. 20-14), which was denied in a reasoned decision on January 3, 2023. (Dkt. 20-15.) Petitioner, represented by counsel, then filed a habeas petition in the California Court of Appeal on February 2, 2023, (Dkt. 20-16), which was summarily denied on February 16, 2023. (Dkt. 20-17.) Petitioner, represented by counsel, then filed a habeas petition in the California Supreme Court on February 22, 2023, (Dkt. 20-18), which was summarily denied on April 19, 2023. (Dkt. 20-19.)[4]

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[2] In Kopp, the California Supreme Court granted review on the following questions: "Must a court consider a defendant's ability to pay before imposing or executing fines, fees, and assessments? If so, which party bears the burden of proof regarding defendant's inability to pay?" People v. Kopp, 254 Cal. Rptr. 3d 637 (2019). These issues are not raised in the Petition.

[3] Consequently, the statement in the Petition that Grounds One through Six were raised in a pending habeas petition in the California Court of Appeal, (Dkt. 1 at 7), turns out to no longer have been accurate as of September 1, 2022.

[4] Neither party has provided the Court with a copy of the California Supreme Court's Order denying the habeas petition.

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III.

SUMMARY OF TRIAL EVIDENCE

The following facts, taken from the California Court of Appeal's decision on direct review, have not been rebutted with clear and convincing evidence and must, therefore, be presumed correct. See 28 U.S.C. § 2254(e)(1); Nasby v. McDaniel, 853 F.3d 1049, 1052-53 (9th Cir. 2017); see also Slovik v. Yates, 556 F.3d 747, 749 n.1 (9th Cir. 2009) (taking factual summary from state court decision).[5]

I.

The Fatal Collision

On the night of March 28, 2018, Duarte drove her car to a restaurant to have dinner with a friend. At about 11:00 p.m., Duarte and her friend went to a bar and, at about 11:30 p.m., walked across the street to another bar.

At about 1:00 a.m. on March 29, Esteban Espinosa, Eric Martinez, and Alex Martinez were in a car, driven by Espinosa, heading toward Huntington Beach from Newport Beach. Espinosa noticed that a white car was swerving between lanes and had nearly hit several parked cars. The white car sped past them on the right hand side, pulled in front of them, struck a curb, and came to a stop. Espinosa pulled up next to the white car and parked. The driver of the white car, later identified as Duarte, got out and looked toward Espinosa. He could see she was intoxicated: Her speech was impaired, she burped, and she struggled to walk. Espinosa and Alex Martinez asked Duarte if she was "okay." She said yes. Espinosa offered three or four times to give her a ride "to wherever she was going." Duarte

[5] The California Court of Appeal refers to Petitioner by her last name, "Duarte," throughout the decision. Petitioner has adopted the facts stated in the California Court of Appeal's decision for purposes of the Petition. (Dkt. 1-1 at 21 n.1.)

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declined the offers and got back into her car.

Espinosa drove his vehicle in front of Duarte's car and parked. Alex Martinez called 911 to report the incident. About five minutes later, Duarte drove around Espinosa and sped off. Espinosa and his friends followed her, all the while Alex Martinez stayed on the line with the 911 operator.

As Duarte drove northbound on Pacific Coast Highway, she continued to swerve between lanes and drove recklessly at about 80 miles an hour in a 55 mile per hour zone. Duarte maintained the same high rate of speed as she approached a red traffic light. Stopped at the red light was a Toyota automobile. Inside the Toyota were four teenagers: Brooke Hawley, Albert Rossi, Dylan Mack, and Alexis Vargas Andrade.

Duarte drove her car smack into the rear of the Toyota. The force of impact was so great that it propelled the Toyota into a traffic pole. The Toyota caught on fire.[FN1]. Espinosa, who had followed Duarte to the scene, ran toward the Toyota to try to help the victims inside, but he stopped when his friends told him the situation was too dangerous.

[FN 1] As these events unfolded before his eyes, Alex Martinez related them to the 911 operator. The transcript of the 911 call is chilling. Once Martinez and his friends had crossed the bridge over the Santa Ana River and entered Huntington Beach, the operator asked Martinez if the car they were following was still swerving. Martinez told the operator, "[o]h fuck . . . . She just hit a car. She just hit a car." Moments later Martinez reported, "[o]ne of the cars is on fire. [¶] . . . [¶] . . . the car is on fire right now." The operator asked Martinez if he had seen what had happened; he replied, "[y]eah, she hit a car in front of her" that was stopped at a red light. He begged the operator, "Hurry,

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please. The car is on fire and there's still people trapped inside." As Martinez watched the flames grow, he told the operator, "[t]hey're still in there. [¶] . . . [¶] . . . it's lighting up. [¶] . . . [¶] Oh shit." Finally, he exclaimed, "The car's on fire, man. Holy shit."

Police officers arrived within minutes. Huntington Beach police detective Sean McDonough used his flashlight to break the front driver's side window of the Toyota, reached inside the car, and tried to open the door to rescue those inside. The car door had been badly damaged and would not open. The flames were growing and McDonough could feel them burning his uniform. He tried to douse the flames with a fire extinguisher, but it was of little use. The fire grew stronger and soon the vehicle was engulfed in flames. Firefighters arrived and extinguished the fire.

Hawley, Rossi, and Mack died inside the car. The cause of death was extensive thermal injuries and/or carbon monoxide inhalation. Vargas Andrade, who had been in the front passenger seat, managed to get out of the car alive. He suffered extensive burns to his hair and a hand. He was found after the crash in a state of shock: He did not know what had happened or how he had gotten out of the car.[FN2].

[FN 2] At trial, Vargas Andrade testified the only thing he remembered about the collision was "waking up." He still had no idea how he got out of the car.

II.

Police Investigation

Huntington Beach police officers interviewed Duarte at the scene. At first, she told them she did not know how much alcohol she had consumed that night or how she collided with the victims' car. She later stated she had started drinking at about 11:00 p.m. and drank

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perhaps three alcoholic drinks. She refused to take a breathalyzer test at the scene or participate in a field sobriety test.

The officers arrested Duarte and her blood was drawn at 2:45 a.m. on March 29, 2018. Her blood alcohol concentration was .28 percent; at 1:00 a.m., the time of the collision, her blood alcohol concentration would have been .30 or .31 percent. Inside Duarte's car, police investigators found a partially empty one-ounce bottle of vodka, an empty 24-ounce can of malt liquor, and an empty, broken Styrofoam cup.

Police investigators found tire skid marks in the intersection. The event data recorder from Duarte's car showed it had traveled at nearly 79 miles per hour for the last half second before the collision. The event recorder for the Toyota showed it had been fully stopped for about two seconds before the collision. The brakes in Duarte's car had not been activated in the five seconds before the collision.

III.

Duarte's Prior Arrest and Instagram Posts

At about 3:40 a.m. on June 22, 2016, Orange County Sheriff's Deputy Jeremy Johnson made a traffic stop of a Ford Expedition driven by Duarte. The interior of the vehicle smelled of alcohol, and Duarte's eyes were watery. Johnson asked Duarte if she had been drinking; she replied that she had been drinking in a bar earlier in the evening. Duarte submitted to a breathalyzer test which showed a blood alcohol concentration that was higher than the legal limit to drive a motor vehicle.

Johnson read Duarte her rights pursuant to *Miranda*, *supra*, 384 U.S. 436, confiscated her driver's license, and placed her under arrest for driving under the influence (DUI). Inside Duarte's vehicle, Johnson

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found an empty beer can, an empty bottle of vodka, and a water bottle containing an alcoholic beverage. Duarte was issued a citation and her driver's license was suspended for a year, however, it appears she was not prosecuted for this offense.[FN3]

[FN 3] There is no evidence in the record that Duarte ever received the advisement based on *People v. Watson* (1981) 30 Cal.3d 290 (*Watson* advisement) that "[i]f you continue to drive while under the influence of alcohol or drugs, or both, and, as a result of that driving, someone is killed, you can be charged with murder." (Veh. Code, § 23592, subd. (a).)

In November 2017, Duarte posted an Instagram message stating, "don't drink and drive." At about the same time, she responded to an Instagram message about a collision caused by a drunk driver by posting that she had used a rideshare service the previous weekend to avoid driving while under the influence. Duarte advised, "rather be safe than sorry." She also posted an Instagram message stating: "Well, I was pretty messed up. I fall asleep when I'm drunk LOL."

(Dkt. 20-7 at 3-6); see People v. Duarte, 2021 WL 1187100, at *1-3 (Cal. Ct. App. Mar. 30, 2021).

IV.

PETITIONER'S CONTENTIONS

Petitioner asserts the following nine grounds for relief (including subparts):

1. The prosecution failed to prove the second degree murder charge beyond a reasonable doubt (Ground One). (Dkt. 1 at 5; Dkt. 1-1 at 25-33.) Petitioner's appellate counsel rendered ineffective assistance by failing to raise this claim on direct appeal. (Dkt. 1 at 5; Dkt. 1-1 at 25, 33.)

2. The trial court admitted evidence of Petitioner's 2016 driving under the

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influence arrest in violation of due process and a fair trial (Ground Two). (Dkt. 1 at 5-6; Dkt. 1-1 at 33-43.) Petitioner's appellate counsel rendered ineffective assistance by failing to raise this claim on direct appeal. (Dkt. 1 at 5; Dkt. 1-1 at 33-34, 43-44.)

3. The trial court failed to give the jury an instruction on foreseeability in violation of due process and a fair trial (Ground Three). (Dkt. 1 at 6; Dkt. 1-1 at 44-49.) Petitioner's trial counsel rendered ineffective assistance by failing to request that the trial court give the jury an instruction on foreseeability. (Dkt. 1 at 6; Dkt. 1-1 at 44-45, 49-50.) Petitioner's appellate counsel rendered ineffective assistance by failing to raise this instructional error claim on direct appeal. (Dkt. 1 at 6; Dkt. 1-1 at 44-45, 49-51.)

4. There is newly discovered evidence showing that Petitioner did not cause the deaths (Ground Four). (Dkt. 1 at 6; Dkt. 1-1 at 51-57.) Petitioner's trial counsel rendered ineffective assistance by failing to investigate the cause of the crash. (Dkt. 1 at 6; Dkt. 1-1 at 51, 57-59.)

5. The prosecutor committed misconduct during closing argument by misstating the law, arguing outside the evidence, and appealing to the sympathies and passions of the jury (Ground Five). (Dkt. 1 at 6; Dkt. 1-1 at 59-66.) Petitioner's trial counsel rendered ineffective assistance by failing to object to the prosecutor's misconduct. (Dkt. 1 at 6; Dkt. 1-1 at 59, 66-68.) Petitioner's appellate counsel rendered ineffective assistance by failing to raise this prosecutorial misconduct claim on direct appeal. (Dkt. 1 at 6; Dkt. 1-1 at 59, 66-68.)

6. The cumulative effect of the errors alleged in Grounds One through Five violated due process and a fair trial (Ground Six). (Dkt. 1 at 8; Dkt. 1-1 at 68-69.)

7. The trial court erred when it failed to suppress the videotape recording of the police's hour-long questioning of Petitioner at the scene without Miranda warnings, in violation of Petitioner's federal and state constitutional right to due

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process (Ground Seven). (Dkt. 1 at 8; Dkt. 1-1 at 69-81.)

8. The trial court erred when it precluded the defense from presenting "statistical evidence of the relationship between arrests for DUI, DUI fatalities, and the natural and probable consequences that DUI is dangerous to human life," in violation of Petitioner's federal and state constitutional rights to due process and a fair trial (Ground Eight). (Dkt. 1 at 9; Dkt. 1-1 at 81-92.)

9. The trial court denied Petitioner's post-trial motion for juror identifying information, in violation of Petitioner's federal and state constitutional rights to due process and a fair trial by an impartial jury (Ground Nine). (Dkt. 1 at 9-10; Dkt. 1-1 at 92-99.)

V.

STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may not grant an application for writ of habeas corpus on behalf of a person in state custody with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); Wilson v. Sellers, 584 U.S. 122, 124-25 (2018); see also Sherman v. Gittere, 92 F.4th 868, 875 (9th Cir. 2024); Ochoa v. Davis, 16 F.4th 1314, 1325 (9th Cir. 2021).

"Clearly established Federal law" refers to the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision on the merits. See Lopez v. Smith, 574 U.S. 1, 2, 4 (2014) (*per curiam*); see also Greene v. Fisher, 565 U.S. 34, 38 (2011). A state court's decision is

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"contrary to" clearly established federal law if: (1) it applies a rule that contradicts governing Supreme Court law; or (2) it "confronts a set of facts . . . materially indistinguishable" from a decision of the Supreme Court but reaches a different result. See Early v. Packer, 537 U.S. 3, 8 (2002) (citation omitted).

Under the "unreasonable application" prong of section 2254(d)(1), a federal court may grant habeas relief "based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." Lockyer v. Andrade, 538 U.S. 63, 76 (2003) (citation omitted); see also Woodford v. Visciotti, 537 U.S. 19, 24-26 (2002) (state court decision "involves an unreasonable application" of clearly established federal law if it identifies the correct governing Supreme Court law but unreasonably applies the law to the facts).

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

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claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Id. at 103.

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

Moreover, on federal habeas review, a federal court will not disturb a conviction for a non-structural error unless the error had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637-38 (1993) (citation and internal quotations omitted). Under this standard, "[t]here must be more than a 'reasonable possibility' that the error was harmful." Crespin v. Ryan, 46 F.4th 803, 811 (9th Cir. 2022) (citations omitted).

In applying the foregoing standards, federal courts look to the last reasoned state court decision. See, e.g., Stanley v. Cullen, 633 F.3d 852, 859 (9th Cir. 2011). Here, Petitioner presented Grounds Seven through Nine of the Petition on direct review to the California Court of Appeal and the California Supreme Court. (Dkts. 20-4, 20-6, 20-8.) The California Court of Appeal denied the claims on the merits, while the California Supreme Court issued a denial "without prejudice to any relief to which defendant might be entitled after this court decides *People v. Kopp*, S257844." (Dkts. 20-7, 20-9.) This Court therefore reviews the California Court of Appeal's denial of the claims under the AEDPA standard. See Wilson, 584 U.S. at 125 (endorsing presumption that unexplained decision of state higher court adopted the reasoning of the last reasoned state court decision); see also Brown v. Davenport, 596 U.S. 118, 141 (2022) (holding that under AEDPA, federal habeas court must "assess the reasonableness of the last state-court adjudication on the

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merits of the petitioner's claim" (citation and quotation marks omitted)); see also Fox v. Johnson, 832 F.3d 978, 985-86 (9th Cir. 2016) ("Under Ylst, we only look through the last state court decision to a prior decision on the merits if the last decision is unreasoned, that is, if the decision 'does not disclose the reason for the judgment.'" (quoting Ylst v. Nunnemaker, 501 U.S. 797, 802 (1991))).

Petitioner presented Grounds One through Six of the Petition in his state habeas petitions before the Orange County Superior Court, California Court of Appeal, and California Supreme Court. (Dkt. 20-14, 20-16, 20-18.) The superior court issued a reasoned decision denying the claims on numerous grounds: (1) Grounds One (sufficiency of the evidence) and Two (admission of evidence) were not cognizable on habeas corpus because Petitioner did not raise these claims on direct appeal, (2) Ground Three (instructional error) and Ground Five (prosecutorial misconduct) were not cognizable on habeas corpus because Petitioner did not raise these claims at trial or on direct appeal; (3) as to Ground One, the evidence was sufficient to support the jury's finding that Petitioner had the requisite implied malice to commit second degree murder; (4) as to Ground Two, the trial court did not err in admitting the evidence, and assuming evidentiary error, any error in admitting the evidence was harmless; (5) as to Ground Three, the trial court did not commit instructional error, Petitioner failed to show his trial counsel "failed to request a pinpoint instruction on foreseeability," and assuming deficient performance by trial counsel and appellate counsel, Petitioner failed to show "prejudicial deficient performance"; (6) as to Ground Four (newly discovered evidence), Petitioner failed to "meet her burden of setting forth a prima facie case for habeas relief based on newly discovered evidence," and Petitioner failed to show that his trial counsel's failure to investigate the cause of the crash "was unreasonable and demonstrably prejudicial to [P]etitioner's defense"; (7) as to Ground Five, the record did not show prosecutorial misconduct, and Petitioner failed to show his trial counsel "unreasonably failed to object to the prosecutor's closing argument"; (8) as

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to Grounds One, Two, Three, and Five, Petitioner failed to show that his appellate counsel "unreasonably failed to raise an arguable issue on appeal that was prejudicial to [P]etitioner's appeal"; and (9) as to Ground Six (cumulative error), Petitioner failed to "set[] forth a prima facie case for habeas corpus relief based on cumulative error." (Dkt. 20-15 at 2-33.) The California Court of Appeal and California Supreme Court summarily rejected all six claims. (Dkts. 20-17, 20-19.)

This Court therefore reviews the superior court's denial of Grounds One through Six under the AEDPA standard. See Wilson, 584 U.S. at 125 (endorsing presumption that unexplained decision of state higher court adopted the reasoning of the last reasoned state court decision); Sherman, 92 F.4th at 875 ("We apply this presumption even when the state court resolves the federal claim in a different manner or context than advanced by the petitioner so long as the state court 'heard and *evaluated* the evidence and the parties' substantive arguments." (internal quotation marks omitted, emphasis in original)).

VI.

DISCUSSION[6]

A. Federal Habeas Relief Is Not Warranted on Petitioner's Sufficiency of the Evidence Claim or Related Ineffective Assistance of Appellate Counsel Claim (Ground One).

In Ground One, Petitioner alleges that the evidence was insufficient to support her convictions for second degree murder. (Dkt. 1 at 5; Dkt. 1-1 at 25-33; see also Dkt. 29 at 13-17.) Specifically, Petitioner contends that "the evidence failed to show [Petitioner] acted with implied malice," meaning, "deliberately engaging in conduct that endangered another person's life." (Dkt 1-1 at 25-26; see

[6] For ease of analysis and clarity, the Court addresses Petitioner's claims in a slightly different order than alleged in the Petition.

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also Dkt. 1-1 at 30 ("The totality of the evidence fails to support a finding of implied malice, a deliberate course of conduct with knowledge that such conduct endangers the life of others manifesting a conscious disregard for life.").) Petitioner relies on the fact that she "had never suffered a driving under the influence conviction" and that the evidence (her statements to the police) showed that she "fled [the bar] in fear of the three strange men who approached her" and that she "drove her car to get away from the men who pursued her at 70 mph" and "just wanted to go home." (Dkt. 1-1 at 31-33). As part of her claim, Petitioner also contends that her appellate counsel rendered ineffective assistance by failing to raise the "meritorious" sufficiency of the evidence claim on direct appeal. (Dkt. 1 at 5; Dkt. 1-1 at 25-26, 33; see also Dkt. 29 at 17-18.)[7] For the reasons set forth below, Petitioner is not

[7] Respondent contends that Petitioner's sufficiency of the evidence claim (Ground One), as well as Petitioner's evidentiary error claim (Ground Two), instructional error claim (Ground Three), and prosecutorial misconduct claim (Ground Five) are procedurally barred based on the superior court's finding that the claim was not cognizable on habeas corpus because it was not raised on direct appeal or at trial. (Dkt. 19-1 at 17 (citing Dkt. 20-15 at 10); Dkt. 19-1 at 22-23 (citing Dkt. 20-15 at 14-15); Dkt. 10-1 at 27-28 (citing Dkt. 20-15 at 18-19); Dkt. 19-1 at 35 (citing Dkt. 20-15 at 29).)

The state court's denial of Petitioner's claims on procedural grounds may bar federal habeas review of those claims. See Lambrix v. Singletary, 520 U.S. 518, 523 (1997) (explaining that the independent and adequate state ground doctrine bars consideration on federal habeas of federal claims that have been defaulted under state law). While procedural bar issues should ordinarily be addressed before considering the merits of a claim, courts sometimes decline to consider the procedural bar issue first in the interest of judicial economy. See id. at 524-25; Flournoy v. Small, 681 F.3d 1000, 1004 n.1 (9th Cir. 2012) ("While we ordinarily resolve the issue of procedural bar prior to any consideration of the merits on habeas review, we are not required to do so when a petition clearly fails on the merits."); Franklin v. Johnson, 290 F.3d 1223, 1232 (9th Cir. 2002) ("[A]ppeals courts are empowered to, and in some cases should, reach the merits of habeas petitions if they are, on their face and without regard to any facts that could be developed below, clearly not meritorious despite an asserted procedural bar."); see also Brown v. Watters, 599 F.3d 602, 610 (7th Cir. 2010) (reaching merits where procedural default issue was "difficult" and "the constitutional norms applicable to a merits decision are clear and warrant affirmance" of denial of petition); Barrett v. Acevedo, 169 F.3d 1155, 1162 (8th Cir. 1999) ("Although the procedural bar issue should (cont'd . . .)

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entitled to federal habeas relief on either aspect of Ground One.

1. Sufficiency of the Evidence.

a. Legal Standard.

On habeas review, the Court's inquiry into the sufficiency of the evidence is subject to two layers of judicial deference. See Coleman v. Johnson, 566 U.S. 650, 651 (2012) (*per curiam*). First, on direct appeal, "it is the responsibility of the jury - not the court - to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury." Id. (quoting Cavazos v. Smith, 565 U.S. 1, 2 (2011) (*per curiam*)); see Jackson v. Virginia, 443 U.S. 307, 319 (1979) (standard of review on sufficiency of the evidence claim is 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" (emphasis in original)); Coleman, 566 U.S. at 656 ("[T]he only question under Jackson is whether [the jury's] finding was so insupportable as to fall below the threshold of bare rationality."). If the facts support conflicting inferences, a reviewing court "'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.'" Bruce v. Terhune, 376 F.3d 950, 957 (9th Cir. 2004) (*per curiam*) (quoting Jackson, 443 U.S. at 326).

Second, on habeas review, "a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the

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ordinarily be resolved first, judicial economy sometimes dictates reaching the merits if the merits are easily resolvable against a petitioner while the procedural bar issues are complicated."). The Court finds it appropriate here to deny Petitioner's claims on the merits, rather than analyze the procedural bar issues.

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state court decision was 'objectively unreasonable.'" Coleman, 566 U.S. at 651, 656 (state court determination that jury's finding was not so insupportable as to fall below the threshold of bare rationality is entitled to considerable deference on habeas review) (citations omitted); see Juan H. v. Allen, 408 F.3d 1262, 1274-75 (9th Cir. 2005) (as amended) (federal habeas relief may be granted only if state court's adjudication of insufficiency of the evidence claim involved unreasonable application of Jackson to the facts of the case).

Sufficiency of the evidence claims are judged by the elements defined by state law. See Jackson, 443 U.S. at 324 n.16. Evidence must be considered in the light most favorable to the prosecution. See id. at 319; McDaniel v. Brown, 558 U.S. 120, 133 (2010); United States v. Nevils, 598 F.3d 1158, 1164 (9th Cir. 2010). The testimony of a single witness is sufficient to sustain a conviction. See Bruce, 376 F.3d at 957-58. Circumstantial evidence and the inferences drawn therefrom also may be sufficient to sustain a conviction. See Ngo v. Giurbino, 651 F.3d 1112, 1114-15 (9th Cir. 2011) (citations omitted). The Court "must determine whether this evidence, so viewed, is adequate to allow *any* rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." Nevils, 598 F.3d at 1164 (citation and internal quotation marks omitted; emphasis in original). A reviewing court "may not ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." Id. (citations and internal quotation marks omitted; emphasis in original).

Finally, the Court must conduct an independent review of the record when a habeas petitioner challenges the sufficiency of the evidence. See Jones v. Wood, 114 F.3d 1002, 1008 (9th Cir. 1997). This Court has conducted such an independent review. In applying these principles, the Court "must consider all of the evidence admitted by the trial court, regardless of whether that evidence was admitted erroneously." McDaniel, 558 U.S. at 131 (citation omitted).

Under California law, second degree murder is the unlawful killing of a

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human being with malice aforethought. Cal. Penal Code §§ 187, 189; see also People v. Knoller, 41 Cal.4th 139, 151 (2007) ("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."). "[M]alice may be express or implied." Cal. Penal Code § 188(a). Malice is express when a person "manifest[s] a deliberate intention to unlawfully take away the life of a fellow creature." Cal. Penal Code § 188(a)(1). Malice is implied "when the circumstances attending the killing show an abandoned and malignant heart." Cal. Penal Code § 188(a)(2).

"[S]econd degree murder based on implied malice has been committed when a person does an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life. . . . Phrased in a different way, malice may be implied when defendant does an act with a high probability that it will result in death and does it with a base antisocial motive and with a wanton disregard for human life." People v. Watson, 30 Cal. 3d 290, 300 (1981) (citations and internal quotation marks omitted). "[A] finding of implied malice depends upon a determination that the defendant *actually appreciated* the risk involved, i.e., a *subjective* standard." Id. at 296-97 (citation omitted and emphasis in original); People v. Wolfe, 20 Cal. App. 5th 673, 681 (2018) ("Malice may be implied when a person willfully drives under the influence of alcohol.").[8]

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[8] The trial court, without objection, instructed the jury with CALCRIM No. 520 ("First or Second Degree Murder with Malice Aforethought"), as follows:

> The defendant is charged in Counts 1, 2, and 3 with murder in violation of Penal Code Section 187. To prove that the defendant is guilty of this crime[,] the People must prove that[] one, the defendant committed an act that caused the death of another person. And two, when the defendant acted, she had a state of mind called malice aforethought. [¶] There are two kinds of malice aforethought, express malice and implied

(cont'd . . .)

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California courts addressing whether the evidence of implied malice was sufficient to support a second degree murder conviction in drunk driving cases generally have relied on the following factors present in Watson: "(1) blood alcohol level above the .08 percent legal limit; (2) a predrinking intent to drive; (3) knowledge of the hazards of driving while intoxicated; and (4) highly dangerous driving." Wolfe, 20 Cal. App. 5th at 682-83 (quoting People v. Autry, 37 Cal. App. 4th 351, 358 (1995).) All four factors do not have to be proven in order to affirm a second degree murder conviction. People v. Munoz, 31 Cal. App. 5th 143, 152 (2019); Wolfe, 20 Cal. App. 5th at 683. Implied malice can be established without a "'predicate act,' i.e., a prior DUI or an alcohol-related accident[.]" People v. Johnigan, 196 Cal. App. 4th 1084, 1091 (2011).

> malice. Proof of either is sufficient to establish the state of mind required for murder. The defendant acted with express malice if she lawfully intended to kill. The defendant acted with implied malice if[] one, she intentionally committed an act. Two, the natural and probable consequences of the act were dangerous to human life. Three, at the time she acted she knew her act was dangerous to human life. And four, she deliberately acted with conscious disregard for human life. [¶] . . . [¶] Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time. [¶] An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. [¶] There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A substantial factor is more than a trivial or remote factor. However, it does not need to be the only factor that causes death. If you find the defendant guilty of murder, it is murder of the second degree.

(Dkt. 20-2 at 435-46; see Dkt. 20-1 at 290-92.)

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b. The Superior Court Decision.

Petitioner raised her sufficiency of evidence claim in her state habeas petitions. (See Dkt. 20-14 at 18-26; Dkt. 20-16 at 19-31; Dkt. 20-18 at 14-22.) The superior court reasoned that the evidence presented at trial was sufficient to convict Petitioner of second degree murder:

> While heavily intoxicated, [P]etitioner drove her car at a high rate of speed striking a vehicle stopped at a red light causing the vehicle to strike a pole and catch fire resulting in the deaths of three of the four persons inside. Evidence establishing that [P]etitioner drove while under the influence of alcohol constitutes the performance of an act the natural and probable consequences of which is dangerous to life satisfying the physical component of implied malice murder. With respect to the mental component of implied malice murder, sufficient evidence also supports the jury's conclusion that petitioner was subjectively aware that her conduct endangered human life yet acted in to conscious disregard of the same by driving while intoxicated. Petitioner admitted driving while under the influence of alcohol, was found to have had a blood alcohol content of .30 or .31% at the time of the offenses, and refused to submit to field sobriety or breathalyzer tests. Petitioner was observed driving recklessly by swerving, nearly hitting parked cars, and striking a curb shortly before the fatal collision. Rather than take advantage of repeated offers for a ride to wherever she was going from another motorist who had stopped to render assistance after [P]etitioner's vehicle struck a curb, [P]etitioner declined the offers opting instead to return to her car and resume driving. Petitioner was previously arrested for driving while under the influence in 2016 and had previously cautioned others on her social media account not to drink and drive yet engaged in precisely that same behavior on the day of the fatal collision despite her awareness of the dangers.

(Dkt. 20-15 at 12.)

c. Analysis.

Petitioner does not dispute the evidence cited by the California Court of Appeal in finding there was sufficient evidence of implied malice. Rather, Petitioner argues that "[t]he facts failed to prove [she] knew that driving fast while intoxicated would cause a vehicle to rear-end a stopped car, strike a pole, explode,

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and kill the occupants." (Dkt. 29 at 15.)

To the extent that Petitioner relies on the absence of a prior driving under the influence conviction, (see Dkt. 1-1 at 31-32), the existence of such a prior conviction is not required to support a finding of implied malice, as discussed above. Moreover, the superior court was entitled to rely on Petitioner's 2016 arrest for driving under the influence as part of its analysis. See McDaniel v. Brown, 558 U.S. 120, 131 (2011) ("[A] reviewing court must consider all of the evidence admitted by the trial court, regardless [of] whether that evidence was admitted erroneously." (internal quotation marks omitted)) (*per curiam*).[9]

Petitioner's attempt to rely on evidence of her own statements to the police regarding: (a) why she declined the invitation of the three men to drive her home -- "[Petitioner] must have felt threatened because [Petitioner] drove her car to get away from the men," (Dkt. 1-1 at 25 (citing Dkt. 20-1 at 575, 610-11, 619-21, 647, 649 and Dkt. 20-2 at 473-74 (defense closing argument)); see also Dkt. 1-1 at 32 ("The evidence showed that [Petitioner] fled in fear of the three strange men who approached her.")); (b) why she drove at an excessive speed -- "The men pursued [Petitioner] at 70 mph. She drove 80 mph in a 55 mph speed zone," (Dkt. 1-1 at 25 (citing Dkt. 20-2 at 328-29, 332 and Dkt. 20-1 at 661-62); see also Dkt. 1-1 at 32 ("[Petitioner] drove her car to get away from the men who pursued her at 70 mph.")); and (c) her lack of intention to hurt or kill anybody and her desire just to go home, (Dkt. 1-1 at 25-26 (citing Dkt. 20-1 at 650 ("I'm so sorry, like . . . I never meant to hurt anybody. . . . I'm a mom and I would die, like die if that happened to me and I can be in . . . even believe, like put myself in those families' shoes. And I'm really, really sorry. I never meant to do that.")); Dkt. 1-1 at 32-33 (citing Dkt. 20-1 at 548-49, 552, 560, 573-74, 581, 586, 597, 618-19, 623, 650); see also Dkt. 29

[9] The Court will address Petitioner's claim concerning the trial court's admission of such evidence (Ground Two) below.

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at 16 (citing Dkt. 20-1 at 650)), is unpersuasive. That evidence does not undermine the evidence cited by the superior court. Petitioner is essentially asking the Court to reweigh the evidence, something which the Court is precluded from doing. See Jackson, 443 U.S. at 326; Jones v. Wood, 207 F.3d 557, 563 (9th Cir. 2000) ("It is not enough that we might have reached a different result ourselves or that, as judges, we may have a reasonable doubt.").

In the Traverse, Petitioner argues for the first time that the superior court's analysis on whether there was sufficient evidence to support a finding of implied malice was deficient because "no evidence proved that [Petitioner] knew she had a BAC of .31%" and [n]o law required [Petitioner] to submit to field sobriety tests." (Dkt. 29 at 16). However, Petitioner has failed to cite any authority that a reviewing court cannot find sufficient evidence of implied malice without evidence that a defendant actually knew his or her blood alcohol content level. Indeed, as discussed above, the first identified factor in the sufficiency of the evidence analysis is simply a blood alcohol content level over .08 percent. See Wolfe, 20 Cal. App. 5th at 682-83.

Finally, although Petitioner asserts the evidence of implied malice was insufficient based on comparisons to other California cases involving drunk drivers and/or other vehicular homicide cases, (see Dkt. 1-1 at 27-32; Dkt. 29 at 16-17), those cases do not lead to the conclusion that the evidence of implied malice was insufficient in this case. Viewing the evidence in the light most favorable to the prosecution, the Court concludes that the evidence at trial was sufficient to allow a jury to find that Petitioner had the requisite implied malice under California law.

Considering the "sharply limited nature of constitutional sufficiency review" and applying the "additional layer of deference" required by the AEDPA, the superior court's denial of Petitioner's sufficiency of the evidence claim was not contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States. See Juan H., 408 F.3d at

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1274-75. Accordingly, Petitioner is not entitled to federal habeas relief on her sufficiency of the evidence claim.

2. Ineffective Assistance of Appellate Counsel.

As part of Ground One, Petitioner contends that his appellate counsel was ineffective for failing to raise the above sufficiency of the evidence claim on appeal. (Dkt. 1 at 5; Dkt. 1-1 at 25-26, 33; see also Dkt. 29 at 17-18.) The superior court issued the last reasoned opinion rejecting this subclaim on habeas review. (Dkt. 20-15 at 10-12.) The superior court ruled as follows: "Appellate counsel is not shown to have unreasonably failed to raise an arguable issue on appeal that was prejudicial to [P]etitioner's appeal. The record before the court, viewed in the light most favorable to the judgment, reveals a challenge to the sufficiency of the evidence supporting [P]etitioner's murder convictions would not have succeeded if raised on appeal." (Id. at 12.)

a. Legal Standard.

The Sixth Amendment guarantees a criminal defendant the right to the effective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 686 (1984). The Strickland standards govern claims of ineffective assistance of appellate counsel as well as claims of ineffective assistance of trial counsel. See Smith v. Robbins, 528 U.S. 259, 285-86 (2000); Bailey v. Newland, 263 F.3d 1022, 1028 (9th Cir. 2001). To establish ineffective assistance of counsel, Petitioner must prove: (1) counsel's representation fell below an objective standard of reasonableness; and (2) resulting prejudice, i.e., a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. See Strickland, 466 U.S. at 694, 697. A reasonable probability of a different result "is a probability sufficient to undermine confidence in the outcome." Id. at 694. The court may reject an ineffective assistance of counsel claim upon finding either that counsel's performance was reasonable or that the claimed error was not prejudicial. See id. at 697; Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002) ("Failure to satisfy

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either prong of the Strickland test obviates the need to consider the other.").

Review of counsel's performance is "highly deferential" and there is a "strong presumption" that counsel rendered adequate assistance and exercised reasonable professional judgment. Williams v. Woodford, 384 F.3d 567, 610 (9th Cir. 2004) (quoting Strickland, 466 U.S. at 689)). The court must judge the reasonableness of counsel's conduct "on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. The court may "neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight." Matylinsky v. Budge, 577 F.3d 1083, 1091 (9th Cir. 2009) (internal quotation marks omitted); see Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). "Defense lawyers have limited time and resources, and so must choose from among countless strategic options." Dunn v. Reeves, 594 U.S. 731, 738 (2021) (internal quotation marks omitted). "Such decisions are particularly difficult because certain tactics carry the risk of harming the defense by undermining credibility with the jury or distracting from more important issues." Id. (internal quotation marks and brackets omitted).

Petitioner bears the burden to show that "counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." Richter, 562 U.S. at 104 (internal quotation marks omitted); see Strickland, 466 U.S. at 689 (holding that a petitioner bears the burden to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy" (internal quotation marks omitted)); see also Morris v. California, 966 F.2d 448, 456 (9th Cir. 1992) ("We need not determine the actual explanation for trial counsel's failure to object, so long as his failure to do so falls within the range of reasonable representation.").

"In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is

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possible a reasonable doubt might have been established if counsel acted differently." Richter, 562 U.S. at 111. Rather, the issue is whether, in the absence of counsel's alleged error, it is "'reasonably likely'" that the result would have been different. Id. (quoting Strickland, 466 U.S. at 696). "The likelihood of a different result must be substantial, not just conceivable." Id. at 112.

As to appellate counsel, Petitioner must show that her appellate counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for her appellate counsel's error, she would have prevailed on appeal. See Cockett v. Ray, 333 F.3d 938, 944 (9th Cir. 2003). Appellate counsel has no constitutional obligation to raise all non-frivolous issues on appeal. See Pollard v. White, 119 F.3d 1430, 1435 (9th Cir. 1997); see also Moormann v. Ryan, 628 F.3d 1102, 1109 (9th Cir. 2010) (holding that appellate counsel is not required to raise a meritless issue on appeal). "A hallmark of effective appellate counsel is the ability to weed out claims that have no likelihood of success, instead of throwing in a kitchen sink full of arguments with the hope that some argument will persuade the court." Pollard, 119 F.3d at 1435.

Where there has been a state court decision rejecting a Strickland claim, review is "doubly" deferential. Richter, 562 U.S. at 105 (citing Knowles v. Mirzayance, 556 U.S. 111,123-24 (2009)). "The pivotal question is whether the state court's application of the Strickland standard was unreasonable." Richter, 562 U.S. at 101; see also 28 U.S.C. § 2254(d). "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." Richter, 562 U.S. at 102 (citing Lockyer, 538 U.S. at 71). Relief is available only if "there is no possibility fairminded jurists could disagree" that the state court's application of Strickland was incorrect. Richter, 562 U.S. at 102. Moreover, since "[t]he Strickland standard is a general one, . . . the range of reasonable applications is substantial." Id. at 105 (citing Knowles, 556 U.S. at 123).

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b. Analysis.

As set forth above, there is no merit to Petitioner's sufficiency of the evidence claim. As a result, Petitioner cannot show that her appellate counsel was deficient for failing to present the sufficiency of the evidence claim on appeal, or that the outcome of Petitioner's appeal would have been different had her appellate counsel done so. See Gonzalez v. Knowles, 515 F.3d 1006, 1017 (9th Cir. 2018) ("[The petitioner's] [appellate] counsel cannot be deemed ineffective for failing to raise this meritless claim."); Moormann, 628 F.3d at 1106 ("[T]he petitioner must show prejudice, which in this context means that the petitioner must demonstrate a reasonable probability that, but for appellate counsel's failure to raise the issue, the petitioner would have prevailed on appeal."); Wildman v. Johnson, 261 F.3d 832, 840 (9th Cir. 2001) ("[A]ppellate counsel's failure to raise issues on direct appeal does not constitute ineffective assistance when appeal would not have provided grounds for reversal."). Accordingly, the Court concludes that the superior court's denial of this ineffective assistance of appellate counsel claim was not contrary to or an unreasonable application of Strickland.

B. Federal Habeas Relief Is Not Warranted on Petitioner's Evidentiary Error Claim (Admission of Prior DUI Arrest) or Related Ineffective Assistance of Appellate Counsel Claim (Ground Two).

In Ground Two, Petitioner contends that the trial court admitted evidence of Petitioner's 2016 arrest for driving under the influence in violation of Petitioner's federal constitutional rights to due process and a fair trial. (Dkt. 1 at 5-6; Dkt. 1-1 at 33-43; see also Dkt. 29 at 18-21.) Petitioner argues that the trial court "improperly admit[ed] [Petitioner's] prior arrest to prove [Petitioner's] 'character trait' for driving under the influence." (Dkt. 1-1 at 37; see also Dkt. 1-1 at 38 ("The prior driving incident proved only [Petitioner's] propensity to drink and drive.").) After noting that the police officer in the prior arrest did not see Petitioner drive the car, Petitioner asserts that the past conduct did not have "close similarity" with the

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present offense and therefore was not relevant and was highly prejudicial. (Dkt. 1-1 at 37.) Petitioner claims that the prosecutor's statements about the arrest during opening argument "enhanced the prejudice," and that the trial court's limiting instruction failed to "lessen the prejudice." (Dkt. 1-1 at 39-41.)

According to Petitioner: "[Petitioner's] prior DUI arrest did not prove that she may have known about the dangers of drinking and driving any more than drivers who never suffered prior alcohol related arrests. Evidence of [Petitioner's] driving under the influence arrest was more prejudicial than probative and only proved [Petitioner's] propensity to commit the charged offense." (Dkt. 1-1 at 41; see also Dkt. 29 at 20 ("Evidence of Petitioner's unadjudicated arrest served to prove her propensity to drink and drive, not to prove she knew that she could kill someone while driving under the influence.").) As part of her claim, Petitioner contends that her appellate counsel was ineffective for failing to raise this claim on direct appeal. (Dkt. 1 at 5; Dkt. 1-1 at 33-34, 43-44; see also Dkt. 29 at 22.) For the reasons set forth below, Petitioner is not entitled to federal habeas relief on either aspect of Ground Two.

1. Admission of Evidence.

a. The Trial Court Proceedings.

Prior to trial, Petitioner moved to exclude evidence of her 2016 arrest for driving under the influence on the grounds that (a) it was not relevant to Petitioner's case and should be precluded under California Evidence Code § 1101(a),[10] and (b)

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[10] California Evidence Code § 1101 provides in pertinent part that:

> (a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.
> (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some

(cont'd . . .)

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its probative value was substantially outweighed by its prejudicial effect and should be precluded under California Evidence Code § 352.[11] (See Dkt. 20-1 at 152-60.)

A lengthy hearing was held. (See Dkt. 20-2 at 42-59.) The trial court initially clarified that Petitioner was arrested but not formally charged with driving under the influence. (Id. at 42-43.) Petitioner's counsel argued that the prior arrest related to Petitioner's propensity to drink and drive, but did not relate to Petitioner's knowledge of the dangers of drinking and driving. (Id. at 43.) The prosecutor responded that the prior arrest was relevant to Petitioner's understanding that drinking and driving is wrong and has consequences. (Id. at 43-45.) Finding that the prior arrest was relevant to one of the identified Watson factors—"knowledge of the hazards of driving while intoxicated"—and was not unduly prejudicial, the trial court denied the motion to exclude the prior arrest. (Id. at 45, 53).[12] The parties then stipulated that Petitioner's license was suspended as a result of the prior arrest. (Id. at 60-62.)

During opening argument, the prosecutor made the following statements:

> [Petitioner] was arrested in 2016 for a DUI. You will hear from that sheriff's deputy about the stop he made, about the fact that when she was arrested [Petitioner] used her children to try to get out of it and said, "Please don't do this, I have four kids." [¶] She ignored the

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> fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecutor 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.

[11] California Evidence Code §352 provides: "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."

[12] The trial court excluded evidence of Petitioner's blood alcohol level at the time of the prior arrest. (Dkt. 20-2 at 46, 59.)

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warnings. She was arrested. She was brought to jail. Her car was towed. Her license was suspended for a year. She ignored it."

(Dkt. 20-2 at 182.)

At trial, Orange County Sheriff Department Deputy Jeremy Johnson testified about Petitioner's 2016 arrest. On June 22, 2016, at approximately 3:40 a.m., Deputy Johnson stopped Petitioner in a Ford Expedition parked at a convenience store, with a male in the passenger seat. (Id. at 191-94). Deputy Johnson approached the car and noticed Petitioner's eyes were watery and that there was the odor of alcohol coming from inside the car. (Id. at 195.) Upon questioning, Petitioner said she had had a couple of drinks earlier in the evening. (Id.) During the conversation, Petitioner pleaded that she had four children at home and this was going to mess up her life. (Id. at 195-96.) Deputy Johnson radioed for additional assistance. (Id. at 196.) After additional deputies arrived, Deputy Johnson asked Petitioner and the passenger to exit the vehicle. (Id.) Following additional questioning, during which Petitioner provided more specific information about her drinking earlier in the evening, and a field sobriety test, Deputy Johnson asked if Petitioner would submit to a preliminary alcohol screening test, which Petitioner declined as was her legal right. (Id. at 197-202.) Deputy Johnson then arrested Petitioner for driving under the influence. (Id. at 202.) Petitioner then opted for a breath test, which indicated Petitioner's blood alcohol level was over the legal limit to drive. (Id. at 203-06.) Deputy Johnson then took Petitioner's license, as he was required to do. (Id. at 206-07.)

Prior to towing Petitioner's car, Deputy Johnson conducted an inventory of the car. (Id. at 207.) Inside the car, Deputy Johnson found an empty Bud Light (Petitioner said it was from a baseball game three weeks before), an empty bottle of vodka (Petitioner said the front passenger had been drinking it), and a water bottle containing approximately 4 ounces of what smelled like alcohol (Petitioner said it was the Vodka which the front passenger had been drinking). (Id. at 208-09, 213-

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14.) Petitioner was placed in handcuffs, transported in a patrol car to the police station, and then transported to the Orange County Jail for booking. (Id. at 209-12.) A person in Petitioner's situation, *i.e.*, was not involved in an accident, and did not have prior DUI arrests, typically would be issued a citation and released. (Id. at 218-20.)[13] The parties stipulated that Petitioner's driver's license was suspended from June 22, 2016 to June 21, 2017 as a result of the 2016 arrest. (Id. at 403.)

Prior to closing arguments, the trial court instructed the jury with CALCRIM No. 375 ("Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, Etc."), as follows:

> Here is the limiting instruction I told you about. The People have presented evidence of other behavior by the defendant that was not charged in this case. You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the act. Proof of a preponderance of the evidence is a different burden of proof that proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude it is more likely than not that the fact is true.
>
> If the People have not met this burden, you must disregard this evidence entirely. If you decide that the defendant committed the act, you are but are not required to consider that evidence for the limited purpose of deciding whether the defendant knew her act was dangerous to human life when she allegedly acted in this case. Do not consider this evidence for any other purpose. Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime. If you conclude that the defendant committed the act,

[13] After the crash, Petitioner told the police that following the 2016 arrest, no case was ever filed against her and she did not have to attend any DUI class. (Id. at 642, 650.)

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that conclusion is only one fact to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of murder second degree. The People must still prove the charge beyond a reasonable doubt.

I'm going back to that one-liner. I do want to [] re-read it. If you decide that the defendant committed the act, you may but are not required to consider that evidence for the limited purpose of deciding whether, and then it's just this one part here. This knowledge issue right here. It will be corrected in the packet that you get in the jury room.

(Dkt. 20-2 at 433-34; see Dkt. 20-1 at 287-88.)

During closing argument, the prosecutor made the following statements:

So [Petitioner] knew the risks of drinking and driving. [Petitioner] understood those risks and she did it anyway. That's why she is charged with three counts of murder.

Before that night, what did she know? What did she understand? She was arrested in 2016 by the sheriff's deputies. Arrested, handcuffed, her driver's license was suspended for a year. Now, I tread lightly on this. That is a mother of four without a driving privilege for a year. You think that had an effect on her daily life? It sure did.

Her car was impounded and towed, and she was booked in the jail. A wake-up call. A wake-up call that she ignored. In a situation where she pled [*sic*] with the sheriff's deputy that she had four kids and a DUI arrest would mess up her life. She knew the ramifications right then. And in that case your remember the deputy inventoried her and car and found the vodka, a water bottle full of vodka, and empty beer bottle.

(Dkt. 20-2 at 444-45.)

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b. Analysis.

(1) A Claim Challenging the Admission of Evidence Under State Law Is Not Cognizable.

To the extent Petitioner is contending that the admission of Petitioner's 2016 arrest violated state law because the evidence assertedly was improper propensity evidence and was more prejudicial than probative, such argument fails to raise an issue cognizable on federal habeas review. See Wilson v. Corcoran, 562 U.S. 1, 5 (2010) ("[I]t is only noncompliance with *federal* law that renders a State's criminal judgment susceptible to collateral attack in the federal courts." (emphasis in original)); Estelle v. McGuire, 502 U.S. 62, 67 (1991) ("We have stated many times that federal habeas corpus relief does not lie for errors of state law." (internal quotation marks omitted)); Park v. California, 202 F.3d 1146, 1154 (9th Cir. 2000) ("[A]dmission of evidence is a state law concern, unless the state trial court's decision is error rising to the level of a due process violation."). The superior court found that under California law the trial court did not abuse its discretion in admitting the evidence of Petitioner's 2016 arrest. (Dkt. 20-15 at 16 ("The trial court did not abuse its discretion in admitting [P]etitioner's prior arrest for driving while under the influence into evidence because the evidence was relevant to the issue of [P]etitioner's knowledge of whether driving under the influence is wrong and has consequences.").) The Court cannot redetermine an issue of state law. See Waddington, 555 U.S. at 192 n.5 ("[W]e have repeatedly held that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." (internal quotations omitted)); Mullaney v. Wilbur, 421 U.S. 684, 691 (1975) ("[S]tate courts are the ultimate expositors of state law . . . .").

(2) The Admission of Evidence of Petitioner's 2016 Arrest Did Not Violate Her Federal Constitutional Rights to Due Process and a Fair Trial.

"A habeas petitioner bears a heavy burden in showing a due process violation

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based on an evidentiary decision." Boyde v. Brown, 404 F.3d 1159, 1172 (9th Cir. 2005), as amended, 421 F.3d 1154 (9th Cir. 2005). "The admission of evidence does not provide a basis for habeas relief unless it rendered the trial fundamentally unfair in violation of due process." Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009) (internal quotation marks omitted); Gonzalez, 515 F.3d at 1011 (9th Cir. 2008). In the context of a claim of improperly admitted evidence, "[a] writ of habeas corpus will be granted . . . only where the testimony is almost entirely unreliable and the factfinder and the adversary system will not be competent to uncover, recognize, and take due account of its shortcomings." Mancuso v. Olivarez, 292 F.3d 939, 956 (9th Cir. 2002) (internal quotation marks and ellipses omitted). "Only if there are *no* permissible inferences the jury may draw from evidence can its admission violate due process." Alcala v. Woodford, 334 F.3d 862, 887 (9th Cir. 2003) (emphasis in original); Houston v. Roe, 177 F.3d 901, 910 n.6 (9th Cir. 1999). "Even then, the evidence must be of such quality as necessarily prevents a fair trial." Jammal v. Van de Kamp, 926 F.2d at 918, 920 (9th Cir. 1991) (internal quotation marks omitted); see also Randolph v. People of the State of Cal., 380 F.3d 1133, 1147 (9th Cir. 2004) ("In order to grant relief, a federal habeas court must find that the absence of . . . fairness fatally infected the trial; the acts complained of must be of such quality that they necessarily prevented a fair trial." (internal quotation marks and brackets omitted)).

Even when there was evidentiary error amounting to a constitutional violation, habeas relief is not warranted unless the error "had a substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)); see also Plascencia v. Alameida, 467 F.3d 1190, 1203 (9th Cir. 2006) ("[T]he admission of the challenged evidence did not violate [the petitioner's] due process rights" because "[e]ven if the admission of the [evidence] was improper, the error could not have had a substantial and injurious effect on the

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jury's verdict." (internal quotation marks omitted)).

The superior court found that the evidence of Petitioner's 2016 arrest was "relevant to the issue of [P]etitioner's knowledge of whether driving under the influence is wrong and has consequences." (Dkt. 20-15 at 16.) Contrary to Petitioner's assertions, and as the trial court found, that evidence was relevant to the jury's determination about whether Petitioner had "knowledge of the hazards of driving while intoxicated," one of the Watson factors cited above. See Jammal, 926 F.2d at 920 ("Here, there is a rational inference the jury could draw from the challenged evidence, an inference that is not constitutionally impermissible."). As noted above, the trial court instructed the jury that such evidence was admitted for the limited purpose of deciding whether Petitioner "knew her act was dangerous to human life when she allegedly acted in this case." (Dkt. 20-2 at 433-34; see Dkt. 20-1 at 287-88.) Moreover, the trial court gave the jury another instruction about the admission of evidence for a limited purpose. (Dkt. 20-2 at 429 ("During the trial [certain] evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and no other."); see Dkt. 20-1 at 330.)

The Court must presume that the jury followed the trial court's instructions. See Weeks v. Angelone, 528 U.S. 225, 234 (2000) ("A jury is presumed to follow its instructions.") (citation omitted); Boyde, 404 F.3d at 1173 ("Because we must presume that the jury followed its instructions to consider only the permissible inference that Boyde committed the Gibson robbery, we conclude that admission of evidence about the prior robbery did not violate due process."). Petitioner's speculative assertion that the prior arrest evidence was so powerful that the jury could not have realistically followed the trial court's instructions, (Dkt. 1-1 at 40-41), is insufficient to rebut that presumption. Moreover, to the extent Petitioner complains about the prosecutor's use of Petitioner's 2016 arrest during opening and closing arguments, the trial court repeatedly instructed the jury that statements of counsel are not to be considered as evidence. (See Dkt. 1-1 at 38-39; Dkt. 29 at

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22.)[14]

Thus, the Court concludes that the admission of evidence of Petitioner's 2016 arrest did not violate her constitutional right to a fundamentally fair trial. See Colley v. Sumner, 784 F.2d 984, 990 (9th Cir. 1986) ("Given these facts, Hohl's testimony must be deemed relevant evidence; its admission did not deprive Colley of a fair trial."). Accordingly, the superior court's rejection of Petitioner's evidentiary error claim was not contrary to or an unreasonable application of clearly established federal law as determined by the United States Supreme Court.

(3) Alternatively, a Claim Challenging the Admission of a Prior Bad Act Cannot Succeed Under AEDPA.

Under AEDPA, even clearly erroneous admissions of evidence that render a trial fundamentally unfair may not permit the grant of federal habeas relief unless forbidden by "clearly established Federal law," as laid out by the U.S. Supreme Court. 28 U.S.C. § 2254(d). "The admission of evidence does not provide a basis for habeas relief unless it rendered the trial fundamentally unfair in violation of due process." Holley, 568 F.3d at 1101 (quoting Johnson v. Sublett, 63 F.3d 926, 930 (9th Cir. 1995)). Indeed, the Ninth Circuit has explained: "The Supreme Court has made very few rulings regarding the admission of evidence as a violation of due process. Although the [Supreme] Court has been clear that a writ should be issued when constitutional errors have rendered the trial fundamentally unfair, it has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ." Holley, 568 F.3d at 1101 (citation omitted). The Ninth Circuit has further explained that "[a]bsent such 'clearly established Federal law,' we cannot conclude that [a] state court's ruling [on the admission of evidence] was an 'unreasonable

[14] The Court will address Petitioner's separate claim of prosecutorial misconduct (Ground Five) below.

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application.'" Id. (quoting Carey v. Musladin, 549 U.S. 70, 77 (2006)).

Where AEDPA's deferential standard applies to a claim concerning the admission of evidence, the claim generally must fail because the state court's reasoning cannot be contrary to or an unreasonable application of non-existent U.S. Supreme Court precedent. See Holley, 568 F.3d at 1101 & n.2 (concluding that AEDPA precluded habeas relief because of the lack of clearly established federal law from the Supreme Court, even though the state court's admission of evidence would have constituted a fundamentally unfair trial under Ninth Circuit precedent). Because AEDPA deference applies here, Petitioner's claim challenging the admission evidence of Petitioner's prior arrest for driving under the influence must fail because the superior court did not unreasonably apply U.S. Supreme Court precedent when rejecting this claim on habeas review. Accordingly, Petitioner is not entitled to federal habeas relief on her evidentiary error claim.

2. Ineffective Assistance of Appellate Counsel.

As part of Ground Two, Petitioner contends that her appellate counsel was ineffective for failing to raise the above evidentiary error claim appeal. (Dkt. 1 at 5; Dkt. 1-1 at 33-34, 43-44; see also Dkt. 29 at 22.) The superior court issued the last reasoned opinion rejecting this subclaim on habeas review. (Dkt. 20-15 at 15-17.) The superior court ruled as follows: "Appellate counsel is not shown to have unreasonably failed to raise an arguable issue on appeal that was prejudicial to [P]etitioner's appeal. The record before the court reveals a challenge to the trial court's admission into evidence of [P]etitioner's prior 2016 arrest for driving while under the influence would not have succeeded if raised on appeal." (Id. at 16.)

b. Analysis.[15]

As set forth above, Petitioner's claim concerning the admission of evidence of

[15] The legal standard for ineffective assistance of appellate counsel claims is set forth in section A.2.a. above.

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her 2016 arrest lacks merit. In rejecting Petitioner's ineffective assistance claim, the superior court found no "prejudice" resulting from Petitioner's appellate counsel's failure to raise the admission of evidence claim based on (1) the limiting instruction discussed above, and (2) the fact that evidence other than Petitioner's 2016 arrest established "[Petitioner's] subjective awareness of the dangers of driving while under the influence to human life and [Petitioner's] conscious disregard for the same." (Id. at 16-17). As to the second point, the superior court cited the following evidence:

> Petitioner admitted driving while under the influence of alcohol, was found to have had a blood alcohol content of .30 or .31% at the time of the offenses, and refused to submit to field sobriety or breathalyzer tests.[16] Petitioner was observed driving recklessly by swerving, nearly hitting parked cars, and striking a curb shortly before the fatal collision.[17] Rather than take advantage of repeated offers for a ride to wherever she was going from another motorist who had stopped to render assistance after [P]etitioner's vehicle struck a curb, [P]etitioner declined the offers opting instead to return to her car and resume driving.[18] Petitioner previously cautioned others on her social media account not to drink and drive[19] yet engaged in precisely that same behavior on the day of the fatal collision despite her awareness of the dangers.

(Dkt. 20-15 at 17, bracketed footnotes added.)

Petitioner has failed to show that her appellate counsel was deficient for

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[16] (Dkt. 20-1 at 598-99, 617, 622; Dkt. 20-2 at 365, 380-81, 403.)

[17] (Dkt. 20-2 at 319-21.)

[18] (Dkt. 20-2 at 325-26, 331-32, 340.)

[19] (Dkt. 20-2 at 283-85.)

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failing to present this evidentiary error claim on appeal, or that there is a reasonable probability she would have prevailed on appeal had her appellate counsel raised this evidentiary error claim. Accordingly, the superior court's denial of this ineffective assistance of appellate counsel claim was not contrary to or an unreasonable application of Strickland.

C. Federal Habeas Relief Is Not Warranted on Petitioner's Instructional Error Claim or Related Ineffective Assistance of Trial Counsel and Appellate Counsel Claims (Ground Three).

In Ground Three, Petitioner contends that the trial court failed to instruct the jury on foreseeability in violation of her rights to due process and a fair trial. (Dkt. 1 at 6; Dkt. 1-1 at 44-49; see also Dkt. 29 at 23-25.) Specifically, Petitioner challenges the trial court's failure, when instructing the jury on second degree murder, to state that "the death of another person must be foreseeable in order to be the natural and probable consequences of a defendant's act." (Dkt. 1 at 6; Dkt. 1 at 48.) Petitioner claims that as a result of the trial court's omission, the jury was allowed to find Petitioner guilty of second degree murder "even if it believed the deaths were not foreseeable." (Dkt. 1 at 6; Dkt. 1-1 at 48.) As part of her claim, Petitioner contends her trial counsel was ineffective for failing to request an instruction on foreseeability and that her appellate counsel was ineffective for failing to raise this instructional error claim on direct appeal. (Dkt. 1 at 6; Dkt. 1-1 at 44-45, 49-51; see also Dkt. 29 at 25-27.) For the reasons set forth below, Petitioner is not entitled to federal habeas relief on any aspect of Ground Three.

1. Instructional Error.

a. Factual Background.

Prior to closing arguments, the trial court, without objection, instructed the jury with CALCRIM No. 520, as referenced in footnote 8 above. The trial court's instruction did not include the "foreseeability" language proposed by Petitioner, specifically, that "the death of another person must be foreseeable in order to be the

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natural and probable consequences of a defendant's act." (See Dkt. 20-2 at 435-46; Dkt. 20-1 at 290-92.)

b. Legal Standard.

Claims of error concerning state jury instructions are generally matters of state law that are not cognizable on federal habeas review. See Gilmore v. Taylor, 508 U.S. 333, 343 (1993); see also Menendez v. Terhune, 422 F.3d 1012, 1029 (9th Cir. 2005). Federal habeas relief based on a claim of instructional error is available only when a petitioner demonstrates that "[an] ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Waddington, 555 U.S. at 191 (citation and internal quotation marks omitted); see also Jurado v. Davis, 12 F.4th 1084, 1099 (9th Cir. 2021). As the Supreme Court has made clear, "not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation." Middleton v. McNeil, 541 U.S. 433, 437 (2004) (*per curiam*).

Instead, a petitioner must show there was a "reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." Id. (citations and internal quotation marks omitted). Some slight possibility that the jury misapplied the instructions is not enough. See Waddington, 555 U.S. at 191. A petitioner challenging the failure to give an instruction bears an "especially heavy" burden because "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." Henderson v. Kibbe, 431 U.S. 145, 155 (1977). In determining whether a jury instruction amounted to a constitutional violation, an ailing instruction is not judged in isolation, but must be considered in the context of the instructions as a whole. See Waddington, 555 U.S. at 191; see also Estelle, 502 U.S. at 72. Due process does not require an otherwise accurate instruction to contain any particular language as long as it fairly and adequately addresses the relevant issues. See United States v. Hernandez-Escarsega, 886 F.2d 1560, 1570 (9th Cir. 1989) ("[S]o long as the instructions fairly and adequately

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cover the issues presented, the judge's formulation of those instructions or choice of language is a matter of discretion." (internal quotation marks omitted)).

c. The Superior Court's Decision.

The superior court rejected Petitioner's instructional error claim on habeas review, as follows:

> Based on the record before the court, the trial court did not err in not giving an additional pinpoint instruction on foreseeability. The substance of the pinpoint instruction on foreseeability [P]etitioner claims the trial court should have given is already encompassed within the instruction defining murder with malice aforethought given to the jury (CALCRIM No. 520). A portion of the given instruction instructed the jury that "an act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A substantial factor is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death." The instruction given necessarily refers to consequences that are reasonably foreseeable. (See, *People v. Fiu* (2008) 1652 Cal.App.4th 360, 372).

(Dkt. 20-15 at 21.)

d. Analysis.

Petitioner does not contend that CALCRIM No. 520 incorrectly states the law. Indeed, Petitioner acknowledges that "California courts have split on whether a causation instruction must include the concept of foreseeability." (Dkt. 1-1 at 46.)

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Rather, she argues that, without the proposed foreseeability language, the jury was allowed to find Petitioner guilty of second degree murder "even if it believed the deaths were not foreseeable." (Dkt. 1 at 6; Dkt. 1-1 at 48.) According to Petitioner, such language was critical because Petitioner could not have foreseen "that three strange men would stop her, ask to help her, and the men would chase her," "that at 3:40 a.m. three people would have been stopped on the street in a car," and "that, by speeding, she would rear end a car, [and] the car's gas tank would explode killing three people." (Dkt. 1-1 at 48; see also Dkt. 29 at 24-25.)

The Court concurs with the superior court's analysis and reasoning. (Dkt. 20-15 at 21.) The superior court reasonably concluded that the trial court's instruction to the jury -- specifically, "An act causes death if the death is the direct, natural, and probable consequences of the act and the death would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes." (Dkt. 20-2 at 435-36; see Dkt. 20-1 at 291) -- adequately explained the need for the consequences of a defendant's acts to be reasonably foreseeable. Petitioner has failed to cite, and the Court has been unable to locate, any authority stating that that such an interpretation was unreasonable. As such, Petitioner has failed to show that the omission of the proposed foreseeability language in the second degree murder instruction "by itself so infected the entire trial that the resulting conviction violates due process." Waddington, 555 U.S. at 191. Accordingly, the superior court's rejection of Petitioner's instructional error was not contrary to or an unreasonable application of clearly established federal law as determined by the U.S. Supreme Court.

2. Ineffective Assistance of Trial Counsel.

As part of Ground Three, Petitioner contends her trial counsel was ineffective for failing to request an instruction on foreseeability. (Dkt. 1 at 6; Dkt. 1-1 at 44-45, 49-51; see also Dkt. 29 at 25-27.) Petitioner argues as follows: "Trial counsel should have requested an instruction on foreseeability because the case involved

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whether [Petitioner] could have known that driving under the influence would result in killing three people. It is possible a reasonable doubt might have been established if [trial] counsel requested the foreseeability instruction." (Dkt. 1-1 at 50.)

a. The Superior Court's Decision.

The superior court found that trial counsel's failure to request the foreseeability instruction did not constitute "deficient performance" for two reasons: (1) given that there was no instructional error, "[t]rial counsel is not shown to have unreasonably failed to request a pinpoint instruction on foreseeability"; and (2) "Given the substance of the jury instruction given to the jury, counsel may have reasonably concluded that an additional instruction on foreseeability was redundant and unnecessary." (Id. at 21-22.) Even assuming that trial counsel erred in failing to request a foreseeability instruction, the superior court found no "prejudice" resulting from trial counsel's error, reasoning: "The victims' death(s) are a direct, natural, and probable consequence of [P]etitioner driving under the influence of alcohol that otherwise would not have occurred but for [P]etitioner's actions. The actions of the three individuals in attempt to dissuade [P]etitioner from driving under the influence of alcohol do not constitute an unforeseeable and extraordinary intervening cause which contributed to the victims' death(s) such as to relieve [P]etitioner from criminal liability." (Id. at 22.)

b. Analysis.[20]

Since, as discussed above, there is no merit to Petitioner's claim of instructional error, Petitioner has failed to show that his trial counsel's failure to request the proposed foreseeability instruction was objectively unreasonable. Moreover, trial counsel reasonably could have concluded that a request for the proposed foreseeability instruction would not have been successful. The failure to

[20] The legal standard for ineffective assistance of trial counsel claims is set forth in section A.2.a. above.

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request an instruction that would not have been given does not constitute ineffective assistance of counsel. See Rupe v. Wood, 93 F.3d 1434, 1444-45 (9th Cir. 1996) ("[T]he failure to take a futile action can never be deficient performance . . . ."). Finally, Petitioner has failed to show there is a reasonable probability that, but for trial counsel's failure to request the proposed foreseeability instruction, the outcome of her trial would have been different. Contrary to Petitioner's assertion, (see Dkt. 1-1 at 50), a "possible" different trial outcome is insufficient to establish "prejudice" under Strickland. Accordingly, the superior court's denial of this ineffective assistance of trial counsel claim was not contrary to or an unreasonable application of Strickland.

3. Ineffective Assistance of Appellate Counsel.

As part of Ground Three, Petitioner contends her appellate counsel was ineffective for failing to raise the instructional error claim on direct appeal. (Dkt. 1 at 6; Dkt. 1-1 at 44-45, 49-51; see also Dkt. 29 at 25-27.) Petitioner claims her appellate counsel "fail[ed] to raise the meritorious instructional issue that could have resulted in a reversal of [her] conviction." (Dkt. 1-1 at 50-51; see also Dkt. 29 at 26-27.) The superior court found that, based on the absence of instructional error, appellate counsel's failure to raise the instructional error claim on appeal did not constitute "deficient performance." (Dkt. 20-15 at 21.) The superior court, assuming appellate counsel acted deficiently, found that appellate counsel's error was not "demonstrably prejudicial in view of the evidence adduced at trial." (Id. at 22-33.)

b. Analysis.[21]

As discussed above, there is no merit to Petitioner's instructional error claim. Petitioner has failed to show that her appellate counsel was deficient for failing to

[21] The legal standard for ineffective assistance of appellate counsel claims is set forth in section A.2.a. above.

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present this instructional error claim on appeal, or that there is a reasonable probability she would have prevailed on appeal had her appellate counsel raised this instructional claim. Accordingly, the superior court's rejection of this ineffective assistance of appellate counsel claim was not contrary to or an unreasonable application of Strickland.

D. Federal Habeas Relief Is Not Warranted on Petitioner's Actual Innocence Claim or Related Ineffective Assistance of Trial Counsel Claim (Ground Four).

In Ground Four, Petitioner contends there is newly discovered evidence showing that Petitioner's drinking and driving did not cause the deaths of three people. (Dkt. 1 at 6; Dkt. 1-1 at 51-57; see also Dkt. 29 at 27-30.) Petitioner claims that the faulty gas tank of the 2017 Toyota Corolla, the car carrying the three people when Petitioner drove into them, was the cause of their deaths. (Dkt. 1; Dkt. 1-1 at 51; Dkt. 29 at 27.) As support for her claim, Petitioner relies on evidence of lawsuits filed by the decedents' relatives against Toyota and Petitioner in 2020 (after the verdict in this case) which "alleged that the manufacturers of the 2017 Toyota Corolla failed to warn consumers about the risk of fire, about design defects, and defective gas tanks" and which were quickly settled. (Dkt. 1-1 at 51, 58, citing Dkt. 1-2 at 134-48, 160-68, 176-78, 191-202.)[22] As part of her claim, Petitioner contends

[22] Attached to the Petition is the following evidence relied on by Petitioner: (1) Hawley, et al. v. Toyota Motor North America, Inc., et al., Case No. 30-2020-01141092-CU-PL-CJC, Orange County Superior Court, a Complaint for Survival and Wrongful Death Damages, signed on March 23, 2020 (Dkt. 1-2 at 130-40); (2) Hawley, et al. v. Toyota Motor North America, Inc., et al., Case No. 30-2020-01141092-CU-PL-CJC, Orange County Superior Court, a Complaint for Survival and Wrongful Death Damages, signed on March 23, 2020 (Dkt. 1-2 at 141-51); (3) Rossi v. Toyota Motor Sales, et al., Case No. 30-2020-01140254-CU-PA-CJC, Orange County Superior Court, Complaint—Personal Injury, Property Damage, Wrongful Death, signed on March 18, 2020 (Dkt. 1-2 at 152-69); (4) Rossi v. Toyota Motor Sales, et al., Case No. 30-2020-01140254-CU-PA-CJC, Orange County Superior Court, First Amended Complaint—Personal Injury, Property (cont'd . . .)

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that her trial counsel was ineffective for failing to investigate the cause of the crash. (Dkt. 1 at 6; Dkt. 1-1 at 51, 57-59; see also Dkt. 29 at 29-30.) For the reasons set forth below, Petitioner is not entitled to federal habeas relief on any aspect of Ground Four.

1. Actual Innocence Based On Newly Discovered Evidence.

a. Legal Standard.

The U.S. Supreme Court has not yet decided whether federal habeas relief may be granted based on a freestanding claim of actual innocence. See McQuiggin v. Perkins, 569 U.S. 383, 392 (2013); Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 71 (2009) ("Whether such a federal right exists is an open question."); see also Herrera v. Collins, 506 U.S. 390, 400 (1993) ("The existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus."). The Ninth Circuit also "ha[s] not resolved whether a freestanding actual innocence claim is cognizable in a federal habeas corpus proceeding in the non-capital context, although [it has] assumed that such a claim is viable." Jones v. Taylor, 763 F.3d 1242, 1246 (9th Cir. 2014); see also Taylor v. Beard, 811 F.3d 326, 334 (9th Cir. 2016) ("It is still an open question as to whether a petitioner 'may be entitled to habeas relief based on a freestanding

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Damage, Wrongful Death, signed on August 28, 2020 (Dkt. 1-2 at 170-78) (5) Mack, et al. v. Toyota Motor North America, Inc., et al., Case No. 30-2020-01140785-CU-PL-CJC, Orange County Superior Court, Complaint for Survival and Wrongful Death Damages, signed on March 23, 2020 (Dkt. 1-2 at 179-89); (6) Rossi, et al. v. Toyota Motor Sales, U.S.A., Inc., et al., Case No. 30-2020-01140254-CU-PA-CJC, Orange County Superior Court, Notice of Settlement of Entire Case, filed on February 24, 2022 (Dkt. 1-2 at 191-94); (7) Rossi, et al. v. Toyota Motor Sales, U.S.A., Inc., et al., Case No. 30-2020-01140254-CU-PA-CJC, Orange County Superior Court, Notice of Settlement of Entire Case, filed on February 24, 2022 (Dkt. 1-2 at 195-98); and (8) Rossi, et al. v. Toyota Motor Sales, U.S.A. Inc., et al., Case No. 30-2020-01140254-CU-PA-CJC, Orange County Superior Court, Notice of Settlement of Entire Case, filed on February 24, 2020 (Dkt. 1-2 at 199-202).

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claim of actual innocence.'") (quoting McQuiggin, 569 U.S. at 392).

If an actual innocence claim is cognizable, a petitioner "must 'go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent.'" Gimenez v. Ochoa, 821 F.3d 1136, 1145 (9th Cir. 2016) (quoting Carringer v. Stewart, 132 F.3d 463, 476 (9th Cir. 1993)). The standard for establishing actual innocence is "'extraordinarily high.'" Jones, 763 F.3d at 1246 (quoting Carringer, 132 F.3d at 476). A petitioner may prevail on an actual innocence claim only by demonstrating that "in light of new evidence, it is more likely than not that no reasonable juror would have found [the] petitioner guilty beyond a reasonable doubt." Jones, 763 F.3d at 1247 (quoting House v. Bell, 547 U.S. 518, 537 (2006)) (internal quotation marks omitted). "The federal habeas court 'must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial.'" Jones, 763 F.3d at 1247 (quoting House, 547 U.S. at 538). Based on consideration of the entire record, the Court "must make 'a probabilistic determination about what reasonable, properly instructed jurors would do.'" Jones, 763 F.3d at 1247 (quoting House, 547 U.S. at 538).

b. The Superior Court's Decision.

The superior court addressed Petitioner's actual innocence claim as follows:

> Petitioner does not meet her burden of setting forth a prima facie case for habeas corpus relief based on newly discovered evidence. Petitioner does not identify newly discovered evidence credibly establishing an independent intervening cause for the victims' death that absolves [P]etitioner of criminal liability. There is no competent evidence presently before the court establishing a design defect in the gas tank of the victims' vehicle or any other part of the car. The mere fact civil litigation between the victims' decedents and Toyota settled out of court without an admission of liability does not establish this

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alleged fact.

> Assuming arguendo the gas tank of the victims' vehicle was defective as alleged, such newly discovered evidence is not material nor of such decisive force that it would have more likely than not changed the outcome of [P]etitioner's trial in view of the evidence adduced at trial. Even if a defective gas tank in the victims' vehicle was a contributing cause of the victims' death, it is a dependent intervening cause that does not relieve petitioner of criminal liability. (*Zemek v. Superior Court*, [(2020)], 23 Cal.App.5th [535][,] [] 552-553.) Petitioner's actions were the proximate cause of the fatal collision which otherwise would not have occurred. Despite being aware of the dangers of driving while under the influence, [P]etitioner drove with a blood alcohol content of .30 or .31%. She drove recklessly at 80 mph in a 55 mph zone swerving between lanes and nearly striking parked vehicles.[23] She struck the victims' vehicle that was at a complete stop while traveling 79 mph and without applying the brakes.[24] Under these circumstances, [P]etitioner's actions were the proximate cause of the victims' death which is not materially altered by the possibility of a design defect in the gas tank of the victims' vehicle.

(Dkt. 20-15 at 25-26.)

c. Analysis.

To the extent that Petitioner is alleging actual innocence under state law, (see Dkt. 1-1 at 52), her claim is not cognizable on federal habeas review. See Estelle, 502 U.S. at 67. Since, as discussed above, the U.S. Supreme Court has not held that

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[23] (Dkt. 20-2 at 327-28, 332.)

[24] (Dkt. 20-2 at 264-66, 270-71, 302-03.)

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a freestanding actual innocence claim is cognizable on federal habeas review, the Court is unable to find that the superior court's rejection of Petitioner's actual innocence claim was an unreasonable application of clearly established U.S. Supreme Court law. See Wright v. Van Patten, 552 U.S. 120, 126 (2008) ("Because our cases give no clear answer to the question presented, let alone one in Van Patten's favor, it cannot be said that the state court unreasonabl[y] appli[ed] clearly established federal law.") (citation and internal quotation marks omitted) (*per curiam*); see also Harrington, 562 U.S. at 101 ("[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court.").

Finally, as the superior court found, the evidence on which Petitioner relies as support for her claim—the lawsuits alleging a design defect in the victims' car's gas tank and the civil settlement between the victims' families and the car manufacturer without an admission of liability—does not establish that the victims' car's gas tank had a design defect. Moreover, as the superior court found, even if the victims' car's gas tank was defective and contributed to the victims' deaths, Petitioner's reckless drunk driving remains the proximate cause of the victims' deaths. Therefore, Petitioner has failed to meet the "extraordinarily high" standard of showing that "in light of new evidence, it is more likely than not that no reasonable jury would have found [her] guilty beyond a reasonable doubt." House, 547 U.S. at 537. Accordingly, the superior court's denial of Petitioner's actual innocence claim was not contrary to or an unreasonable application of clearly established federal law as determined by the U.S. Supreme Court.

2. Ineffective Assistance of Trial Counsel.

As part of Ground Four, Petitioner contends that her trial counsel was ineffective for failing to investigate the cause of the deaths, which allegedly was the defective nature of the 2017 Toyota Corolla's gas tank. (Dkt. 1 at 6; Dkt. 1-1 at 51,

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57-59; see also Dkt. 29 at 29-30.)[25] Petitioner argues: "Trial counsel should have presented an accident reconstructionist or researched whether the 2017 Toyota Corolla had the necessary safety features to make it safe for its intended use and purpose so that it could be operated in a safe manner. The proximate cause of the deaths and injuries resulted from the defective and unsafe Toyota Corolla's gas tank that exploded upon impact during a rear-end collision." (Dkt. 1-1 at 58; see also Dkt. 29 at 29.) As support for her claim, Petitioner relies not only on the evidence of the lawsuits and civil settlements, but also on a Bloomberg News report that "in 2016, Toyota recalled 3.4 million vehicles to repair separate flaws involving leaky fuel tanks." (Dkt. 1-1 at 58.)

The superior court rejected Petitioner's ineffective assistance of trial counsel claim, as follows: "For the[] same reasons [the actual innocence claim was rejected], it cannot be said that trial counsel's alleged omission[] in not investigating the crash worthiness [*sic*] of the victims' vehicle and asserting at trial that the defective vehicle was the proximate cause of the victims' death rather than [P]etitioner's actions[] was unreasonable and demonstrably prejudicial to [P]etitioner's defense in the sense it resulted in the withdrawal of a potentially meritorious defense." (Dkt. 20-15 at 26.)

Because, as discussed above, the newly discovered evidence does not show that the 2017 Toyota Corrolla's gas tank had a design defect, Petitioner has failed to show that her trial counsel's failure to investigate that car's allegedly defective gas tank was objectively unreasonable. Moreover, based on the evidence of Petitioner's reckless drunk driving, Petitioner has failed to show that there is a reasonable probability that, but for her trial counsel's failure to investigate the allegedly defective gas tank, the result of her trial would have been different. Finally, to the

[25] The legal standard for ineffective assistance of trial counsel claims is set forth in section A.2.a. above.

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extent Petitioner is alleging that her trial counsel failed to call an accident reconstructionist to testify at trial, Petitioner has failed to state with specificity what the accident reconstructionist would have testified to or how that testimony would have changed the outcome of her trial. See United States v. Berry, 814 F.2d 1406, 1409 (9th Cir. 1987). Accordingly, the superior court's denial of this ineffective assistance of trial counsel claim was not contrary to or an unreasonable application of Strickland.

E. Federal Habeas Relief is Not Warranted on Petitioner's Prosecutorial Misconduct Claim or Related Ineffective Assistance of Trial Counsel and Appellate Counsel Claims (Ground Five).

In Ground Five, Petitioner contends that the prosecutor committed misconduct during closing argument in the following respects: (1) appealing to the sympathy and passions of the jury; (2) misstating the reasonable doubt standard; (3) improperly equating the danger of driving with the dangers of driving under the influence; (4) misstating the law about the Watson advisement; and (5) inviting the jurors to talk to the prosecutor after trial if they had questions. (Dkt. 1 at 6; Dkt. 1-1 at 59-66; see also Dkt. 29 at 30-36.)[26] As part of her claim, Petitioner contends that her trial counsel was ineffective for failing to object to the prosecutor's misconduct during closing argument. (Dkt. 1 at 6; Dkt. 1-1 at 59, 66-68; see also Dkt. 29 at 37.) Also as part of her claim, Petitioner contends that her appellate counsel was ineffective for failing to raise this prosecutorial misconduct claim on direct appeal. (Dkt. 1 at 6; Dkt. 1-1 at 59, 66-68; see also Dkt. 29 at 37.)

Each of Petitioner's claims will be examined in turn. For the reasons discussed below, the superior court's rejection of Petitioner's prosecutorial

[26] Although it is not clear whether Petitioner intended to raise the prosecutor's alleged misconduct of improperly equating the danger of driving with the dangers of driving under the influence as a separate instance of prosecutorial misconduct, the Court will address it separately out of an abundance of caution.

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misconduct claim, ineffective assistance of trial counsel claim, and ineffective assistance of appellate counsel claim was not contrary to or an unreasonable of clearly established federal law as determined by the U.S. Supreme Court. Therefore, Petitioner is not entitled to federal habeas relief on Ground Five.

1. Prosecutorial Misconduct.

a. Legal Standard.

Prosecutorial misconduct merits habeas relief only where the misconduct "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) (internal quotation marks omitted); Bonin v. Calderon, 59 F.3d 815, 843 (9th Cir. 1995) ("To constitute a due process violation, the prosecutorial misconduct must be so severe as to result in the denial of [the petitioner's] right to a fair trial."). "[T]he 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).

"In fashioning closing arguments, prosecutors are allowed reasonably wide latitude and are free to argue reasonable inferences from the evidence." United States v. McChristian, 47 F.3d 1499, 1507 (9th Cir. 1995) (internal quotation marks and brackets omitted). Arguments of counsel "generally carry less weight with a jury than do instructions from the court." Waddington, 555 U.S. at 195 (citation and quotation marks omitted); Ortiz-Sandoval v. Gomez, 81 F.3d 891, 898 (9th Cir. 1996) ("The arguments of counsel are generally accorded less weight by the jury than the court's instructions and must be judged in the context of the entire argument and the instructions."). "Improper argument does not, per se, violate a defendant's constitutional rights." Runningeagle v. Ryan, 686 F.3d 758, 781 (9th Cir. 2012) (internal quotation marks omitted). "To determine whether prosecutorial misconduct has deprived a defendant of a fair trial, we look to the substance of any curative instructions, and the strength of the case against the defendant absent the

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misconduct." United States v. Sanchez, 659 F.3d 1252, 1257 (9th Cir. 2011).

Furthermore, on federal habeas review, a federal court will not disturb a conviction for prosecutorial misconduct unless the misconduct had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 637-38 (internal quotations omitted); Shaw v. Terhune, 380 F.3d 473, 478 (9th Cir. 2004) (Brecht applies to claim of prosecutorial misconduct). Under this standard, "[t]here must be more than a reasonable possibility that the error was harmful." Crespin v. Ryan, 46 F.4th 803, 811 (9th Cir. 2022) (internal quotation marks omitted).

b. Analysis.

(1) Appealing to the Sympathy and Passions of the Jury.

Petitioner contends that the prosecutor improperly appealed to the sympathy and passions of the jury during closing argument. (Dkt. 1 at 6; Dkt. 1-1 at 60-61; see also Dkt. 29 at 30-32.) Specifically, Petitioner argues: "The prosecutor did not charge [Petitioner] with any crime against the police officers. The actions of the police officers were not in issue in the case. Yet the prosecutor urged the jury to convict [Petitioner] because she placed the first responders in jeopardy. The prosecutor argued the first responders' actions to appeal to the passions of the jury and inflame the jury against [Petitioner]." (Dkt. 1-1 at 61; see also Dkt. 29 at 31 ("During closing, even though the prosecutor never charged [Petitioner] with any crime against law enforcement and first responders, the prosecutor impermissibly urged the jurors to find [Petitioner] guilty based on how she affected firefighters and civilians.").)

During closing argument, the prosecutor made the following statements:

> Let's talk about the officers, the officers who risked their lives to save those kids and weren't able to. Officer McDonough. He tried to rescue them. Fire extinguisher, used his flashlight to break the window, got there as the fire consumed the occupants. [¶] Officer Kim.

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> Car was engulfed in flames. And he gave you the body worn camera. And the sergeant who commanded the whole investigation.

(Dkt. 20-2 at 448-49.)

The superior court addressed Petitioner's claim as follows:

> [T]here is also no clear indication the prosecutor improperly appealed to the sympathies and passions of jurors by asking them to consider the first responders and civilians who were at the crime scene and witnessed the aftermath of [P]etitioner's actions. The prosecutor's statements represent fair comment on the evidence and were followed shortly thereafter by an express admonition for jurors to block out emotion and not to take into account sympathy in rendering their verdicts which is consistent with the admonition given by the trial court (CALCRIM No. 200). Courts presume jurors follow instructions. (*People v. Chhoun*, [(2021)], 11 Cal.5th [1][,] [] 30.)

(Dkt. 20-15 at 31.)

The Court agrees with the superior court's analysis and reasoning. A prosecutor is not permitted to make comments with the sole purpose of arousing the passion and prejudice of the jurors. See Vierick v. United States, 318 U.S. 236, 247-48 (1943); United States v. Weatherspoon, 410 F.3d 1142, 1149 (9th Cir. 2005) ("We have consistently cautioned against prosecutorial statements designed to appeal to the passions, fears and vulnerabilities of the jury . . . ."). Here, however, the prosecutor's brief statements were fair comments on the evidence and/or reasonable inferences from the evidence. (See, e.g., Dkt. 20-2 at 228-30, 238-40, 243-44); see Menendez, 422 F.3d at 1037 ("The prosecutor may argue reasonable inferences from the evidence presented, which is precisely what he did here."). Moreover, before and during closing arguments, including shortly after the prosecutor's above comments, the jurors were told not to let sympathy or prejudice influence their decision. (See Dkt. 20-2 at 171, 419, 450, 460-61, 481.) Thus, the

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prosecutor's above comments did not so infect the trial with unfairness as to make Petitioner's conviction a denial of due process.

(2) Misstating the Reasonable Doubt Standard.

Next, Petitioner contends that the prosecutor misstated the reasonable doubt standard during closing argument. (Dkt. 1 at 6; Dkt. 1-1 at 61-63; see also Dkt. 29 at 32-33.) Petitioner argues that "[a]lthough the law prohibits a prosecutor from quantifying the proper burden of proof, the prosecutor quantified the reasonable doubt burden of proof by arguing that the proof beyond a reasonable doubt standard did not mean 100% certainty. (Dkt. 1-1 at 45; see also Dkt. 29 at 33 ("The prosecutor's argument that quantified the reasonable doubt standard[] affected [Petitioner's] right to have the prosecution prove its case beyond a reasonable doubt.").)

The trial court instructed the jurors that the prosecution must prove Petitioner's guilt beyond a reasonable doubt, defining proof beyond a reasonable doubt as follows: [P]roof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt." (Dkt. 20-2 at 171-72, 421; see Dkt. 20-1 at 267 (CALCRIM No. 220 ("Reasonable Doubt")).) During closing argument, the prosecutor made the following comments:

> Your only job is to determine if the facts have been proven, and then you decide those facts, reject any facts that you find to be unreasonable. I asked you about that. Then apply the standard beyond a reasonable doubt. We'll get to that right now. [¶] The standard is beyond a reasonable doubt. The jury is to impartially compare and consider all of the evidence. All of it. Everything. You don't get to just throw something out unless you find it unreasonable, it doesn't fit, it makes no sense. Her blood alcohol concentration, her warnings, her Instagram, body worn camera, you can look at all of it. Then

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> remember your oath and the law. I am not required to eliminate all possible or imaginary doubt, and I don't have to prove this case by 100 percent certainty. This is a search for the truth, not a search for doubt. [¶] It's proof that leaves you with an abiding conviction that the charge is true. An abiding conviction. Not specifically defined, even though it might not be words we use in every day context, what is something that is abiding? It's lasting. What is a conviction? It's a belief. You have a lasting belief these charges are true.

(Dkt. 20-2 at 462-63, emphasis added.)

The superior court ruled that the prosecutor's statement did not constitute misconduct:

> Though the prosecutor did state he was not required to prove [P]etitioner's guilty with 100% certainty, the statement was made in the context of explaining the People's burden of establishing guilt beyond a reasonable doubt which does not require elimination of all possible or imagined guilty and is consistent with the instruction given to the jury by the trial court defining reasonable doubt (CALCRIM No. 220). Courts presume jurors follow instructions. (*People v. Chhoun* (2021) 11 Cal.5th 1, 30.)

(Dkt. 20-15 at 30.)

"[T]he Due Process Clause 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). A prosecutor is not permitted to misstate the law during closing argument. See Ford v. Peery, 999 F.3d 1214, 1224 9th Cir. 2021) ("Prosecutorial misconduct includes misstatements of law."); United States v. Moreland, 622 F.3d 1147, 1162 (9th Cir. 2010) ("Obviously, a prosecutor should not misstate the law in closing argument.") (internal quotation marks omitted). The superior court reasonably found that the

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prosecutor's statement about not having to prove the case with one hundred percent certainty, when viewed in context, simply explained that guilt beyond a reasonable doubt did not require the prosecution to eliminate all possible or imaginary doubt.

Moreover, the superior court reasonably found that the prosecutor's statement was consistent with the trial court's instruction to the jury on the reasonable doubt standard. The jury is presumed to have followed the trial court's instruction, see Weeks, 528 U.S. at 226, a presumption which Petitioner has failed to rebut. Contrary to Petitioner's assertion, (see Dkt. 1-1 at 62-63; Dkt. 29 at 29), the prosecutor's statement did not impermissibly lessen the prosecution's burden of proof because the prosecutor did not offer a number that would satisfy the reasonable doubt standard. Therefore, the prosecutor's statement on reasonable doubt did not so infect the trial with unfairness as to make Petitioner's conviction a denial of due process.

(3) Equating the Danger of Driving with the Dangers of Driving Under the Influence.

Petitioner contends that during closing argument, "[t]he prosecutor improperly argued [P]etitioner knew the dangers of driving under the influence by equating the danger of driving with the dangers of driving under the influence[.]" (Dkt. 1-1 at 63; see also Dkt. 29 at 34.)

During closing argument, the prosecutor made the following statements:

> Child seats. In the back of her car after drinking to the level that she drank more than three times the legal limit she still had to find her car and get in her car. As they walked to it there in plain view in the back seat were her children's car seats. What does that tell you? She understands that driving is dangerous. That is why we put our loved ones and our children in car seats. She got into that very car. [¶] The seat belt. When she drank to that level, she still knew enough to put her own seat belt on because she knew it was dangerous. That is why we

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> wear a seat belt. [¶] Curb strike. After taking a shot remaining at Sharkeez for a half hour, she said, leaving sometime around midnight, she pulls out to go home. She had a plan. She was able to formulate that plan, and she strikes the curb hard enough to send out sparks. That alerts three young men in the jeep behind her. [¶] That was the universe telling [Petitioner] you are not right to drive. There are consequences and she knew it because she stopped her car. And when the three young men motioned for her to put down the window, she got out of the car. She walks over. And they tell her and plead with her, "Do you need a ride? You are not okay." And [Petitioner] ignored it. And in less than 5 minutes three kids were killed by her."

(Dkt. 20-2 at 446-47, emphasis added.)

The superior court found that the prosecutor's statements were not improper: "The prosecutor's comments about [P]etitioner being aware of the dangers of driving was made in the context of the prosecutor explaining to the jury how the evidence showed [P]etitioner was not only aware of the dangers of driving in general but also subjectively aware of the dangers of driving while under the influence and her conscious disregard of the same." (Dkt. 20-15 at 29-30.)

As the superior court reasonably found, the prosecutor's statements did not suggest that Petitioner was only aware of the dangers of driving generally and that this awareness alone was sufficient to establish her guilt. Rather, the prosecutor's statements, when viewed in context, appear to be that Petitioner had knowledge of both the dangers of driving in general and the dangers of driving under the influence. (See Dkt. 20-2 at 444-47, 452-59.) Simply put, the prosecutor's statements did not violate Petitioner's right to due process.

(4) Misstating the Law About the Watson Advisement.

Next, Petitioner contends that the prosecutor misstated the law about the

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Watson advisement during closing argument.[27] (Dkt. 1-1 at 61-63; see also Dkt. 29 at 34-35.) Petitioner argues that "[t]he prosecutor discounted the importance of a Watson advisement even though the prosecutor relied heavily on [Petitioner's] prior driving offense to prove she acted with implied malice." (Dkt. 1-1 at 65; Dkt. 29 at 34.) According to Petitioner: "Although Watson may not have been an element of the offense, California law requires courts to notify someone convicted of driving under the influence, that if they continue to drive while under the influence and kill someone, they could be . . . charged with murder. . . . The *Watson* issue went directly to [Petitioner's] state of mind, namely, whether she knew that by drinking and driving, she could be charged with murder." (Dkt. 29 at 34-35; see also Dkt. 1-1 at 64.)

During closing argument, when discussing implied malice, the prosecutor stated that:

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[27] In People v. Watson, 30 Cal.3d 290 (1981), the California Supreme Court held that malice may be implied "when a person, knowing that his conduct endangers the life of another, nonetheless acts deliberately with conscious disregard for life" and that "a finding of implied malice depends upon a determination that the defendant *actually appreciated* the risk involved, i.e., a *subjective* standard." Id. at 296-97 (citations omitted, italics in original). The California Supreme Court found that there was sufficient evidence -- specifically, the defendant consumed enough alcohol so that his blood alcohol content was above the legal limit; the defendant drove his car to the establishment where he had been drinking, necessarily knowing he would have to drive his car later; the defendant drove at excessive speed; the defendant nearly collided with another car after running a red light (the defendant avoided the accident by skidding to a stop); the defendant resumed his excessive speed; and the defendant collided with another car after attempted to brake (there were skid marks) -- to hold the defendant on a second degree murder charge. Id. at 300-01.

At trial, Deputy Johnson testified during cross-examination that "[a] Watson advisement is essentially a warning or admonition given to people that are arrested for driving under the influence about the dangers of driving under the influence, and that if they continue to drive under the influence and happen to kill somebody, they can be charged with murder." (Dkt. 20-2 at 221-22.)

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> And you heard about a Watson advisement where someone who got a DUI gets warned that you could be charged with murder if someone dies as a result of you drinking and driving under the influence. Look at the elements. I don't have to prove that I have to notify people they could be charged with the consequences. That is not an element. Of some interest. Not when we talk about your responsibility of holding us to the burden of proof. Only the elements.

(Dkt. 20-2 at 464, emphasis added.)

The superior court rejected Petitioner's claim, reasoning that:

> The prosecutor's argument that he did not have to show that [P]etitioner had been afforded a prior *Watson* warning in order to prove implied malice murder is an accurate statement of the law contrary to [P]etitioner's suggestion. "There is no requirement of a "predicate act," i.e., a prior DUI or an alcohol-related accident necessary to establish implied malice." [Citation.]

(Dkt. 20-15 at 30.)

The Court agrees with the superior court that the prosecutor's comment was an accurate statement of the law. Moreover, Petitioner does not state why the prosecutor's comment was a misstatement of the law, or cite to any authority holding that such a comment was a misstatement of the law. Petitioner's reliance on the fact that "the California Legislature passed a law that requires the court to notify someone convicted of a driving under the influence offense, that if they continue to drive while under the influence and kill someone, they could be . . . charged with murder," (Dkt. 1-1 at 64-65), does nothing to advance Petitioner's claim. Therefore, the prosecutor's comment did not so infect the trial with unfairness as to make Petitioner's conviction a denial of due process.

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(5) Inviting the Jurors to Talk to the Prosecutor After Trial.

Finally, Petitioner contends that during closing argument, the prosecutor improperly invited the jurors to talk to the prosecutor after trial if they had questions. (Dkt. 1 at 6; Dkt. 1-1 at 65; see also Dkt. 29 at 35.) As a result, according to Petitioner, the prosecutor "improperly inferred he had information not brought out in the case," "improperly implied that other issues existed outside the evidence," and "lowered the prosecution's burden of proof beyond a reasonable doubt." (Dkt. 1-1 at 65-66; Dkt. 29 at 35.)

During rebuttal argument, the prosecutor made the following statements:

> And [Petitioner's counsel] gave you the example, a powerful example. Because my guess is there are people in this room that have texted, put on makeup, and even eaten in their car. And he asked you is that murder? Let's be real clear here. We are not drawing a parallel between anything that you may know or have done to what [Petitioner] is charged with. [¶] If you are curious whether or not anyone can be charged for a crime for any of those things in any different circumstance, I make myself available to any one of you whenever it's convenient. We can talk law all day long. It's what I do. But the question before you is, were the elements proven beyond a reasonable doubt.

(Dkt. 20-2 at 487.)

Soon thereafter, the prosecutor stated:

> And I have no doubt that over the course of this trial things have popped up in your head that probably at some point you thought I would love to ask this question while this is happening, but unanswered questions do not equal reasonable doubt. You don't have unanswered questions about the elements because the evidence, specifically

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> [Petitioner] has answered all of those for you. [¶] I have the utmost respect for [Petitioner's counsel]. I have known him for years. Know this though. No gift of oration or a passion plea to you means there is reasonable doubt based on the evidence in this case. [¶] As we mentioned before, any of those questions you are curious about I make myself available. You can talk to anyone you want. You can walk right out of here. But you don't have questions about the elements.

(Dkt. 20-2 at 489.)

The superior court addressed Petitioner's claim as follows:

> Contrary to [P]etitioner's claim, there is no clear indication the prosecutor implied facts not in evidence during his rebuttal argument by telling jurors they could speak to him after the trial about any unanswered questions they might have concerning whether dissimilar actions taken by drivers in general, mentioned by defense counsel during his closing argument, might constitute a crime. In the same vein, the prosecutor made it clear his position that there were no questions about the evidence establishing each of the elements necessary to establish implied malice murder.

(Dkt. 20-15 at 30.)

The Court agrees with the superior court's analysis and reasoning. The prosecutor clearly stated that his invitation to the jurors was limited to hypothetical legal questions about a non-defendant's possible criminal liability. There is nothing in the prosecutor's comments that would lead the Court to conclude that the prosecutor inferred he had information not brought out during trial, implied that other issues existed outside the evidence, or lowered the prosecution's burden of proof. Again, the prosecutor's comments did not violate Petitioner's right to due process.

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2. Ineffective Assistance of Trial Counsel.

As part of Ground Five, Petitioner contends that her trial counsel was ineffective for failing to object to the five instances of the prosecutor's misconduct during closing argument. (Dkt. 1 at 6; Dkt. 1-1 at 59, 66-68; see also Dkt. 29 at 37.)[28] The superior court found that, because there was no prosecutorial misconduct during closing argument, Petitioner's trial counsel's failure to object was not unreasonable or prejudicial to Petitioner's defense. (Dkt. 20-15 at 31.)

Since, as discussed above, the prosecutor did not commit misconduct during closing argument, Petitioner has failed to show that her trial counsel's failure to object to the prosecutor's statements was objectively unreasonable. See Flournoy v. Small, 681 F.3d 1000, 1006 (9th Cir. 2012) ("The failure to make an objection that would have been overruled was not deficient performance."). For the same reason, Petitioner has failed to show that there is a reasonable probability that, but for her trial counsel's failure to object to the prosecutor's statements, the result of her trial would have been different. Accordingly, the superior court's denial of this ineffective assistance of trial counsel claim was not contrary to or an unreasonable application of Strickland.

3. Ineffective Assistance of Appellate Counsel.

As part of Ground Five, Petitioner contends that her appellate counsel was ineffective for failing to raise this prosecutorial misconduct claim on direct appeal. (Dkt. 1 at 6; Dkt. 1-1 at 59, 66-68; see also Dkt. 29 at 37.)[29] The superior court found that, based on the absence of prosecutorial misconduct during closing argument, appellate counsel's failure to raise this prosecutorial misconduct claim on

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[28] The legal standard for ineffective assistance of trial counsel claims is set forth in section A.2.a. above.

[29] The legal standard for ineffective assistance of appellate counsel claims is set forth in section A.2.a. above.

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appeal was not unreasonable or prejudicial to Petitioner.

As discussed above, there is no merit to Petitioner's prosecutorial misconduct claim. Petitioner has failed to show that her appellate counsel was deficient for failing to present this prosecutorial misconduct claim on appeal, or that there is a reasonable probability she would have prevailed on appeal had her appellate counsel raised this prosecutorial claim. Accordingly, the superior court's rejection of this ineffective assistance of appellate counsel claim was not contrary to or an unreasonable application of Strickland.

F. Federal Habeas Relief Is Not Warranted on Petitioner's Cumulative Error Claim (Ground Six).

In Ground Six, Petitioner contends the cumulative effect of the errors in Grounds One through Five deprived her of due process and a fair trial. (Dkt. 1 at 8; Dkt. 1-1 at 68-69; see also Dkt. 29 at 37-38.) Petitioner argues that: "The numerous constitutional errors in Claims I – V individually deprived [Petitioner] of a fair trial; the cumulative effect of multiple trial errors violated due process even if no single error warranted reversal." (Dkt. 29 at 38.)

The superior court issued the last reasoned opinion rejecting Petitioner's cumulative error claim: "Petitioner does not meet her burden of setting forth a prima facie case for habeas corpus relief based on cumulative error. Having failed to establish prejudicial error with respect to any of her five individual claims of error, there is likewise no merit to [P]etitioner's assertion of cumulative error." (Dkt. 20-15 at 33.)

"The cumulative error doctrine in habeas recognizes that, even if no single error were prejudicial, where there are several substantial errors, their cumulative effect may nevertheless be so prejudicial as to require reversal." Parle v. Runnels, 387 F.3d 1030, 1045 (9th Cir. 2004) (internal quotation marks omitted); accord Ybarra v. McDaniel, 656 F.3d 984, 1001 (9th Cir. 2011). Habeas relief for cumulative error is appropriate "when there is a 'unique symmetry' of otherwise

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harmless errors, such that they amplify each other in relation to a key contested issue in the case." Ybarra, 656 F.3d at 1001 (quoting Parle, 505 F.3d at 933).

Here, as discussed in the sections addressing the claims of sufficiency of the evidence (Ground One), evidentiary error (Ground Two), instructional error (Ground Three), newly discovered evidence (Ground Four), and prosecutorial misconduct (Ground Five), no constitutional violations occurred. Moreover, as discussed in the sections addressing ineffective assistance of appellate counsel subclaims (Grounds One, Two, Three, and Five) and ineffective assistance of trial counsel subclaims (Grounds Three, Four, and Five), there was no showing of "deficient performance" or "prejudice." Petitioner has failed to demonstrate the existence of any error cognizable on federal habeas review, so there are no errors to cumulate. See Hayes v. Ayers, 632 F.3d 500, 524 (9th Cir. 2011) ("Because we conclude that no error of constitutional magnitude occurred, no cumulative prejudice is possible."). Moreover, no symmetry of otherwise harmless errors exists in the present case. Ybarra, 656 F.3d at 1001.

Accordingly, the superior court's rejection of Petitioner's cumulative error claim was not contrary to or an objectively unreasonable application of any clearly established federal law as determined by the U.S. Supreme Court. Petitioner is not entitled to federal habeas relief on his cumulative error claim.

G. Federal Habeas Relief Is Not Warranted on Petitioner's Miranda Claim (Ground Seven).

In Ground Seven, Petitioner contends that the trial court erred when it failed to suppress the videotape recording of the police officers' hour-long questioning of Petitioner at the scene without Miranda warnings, in violation of Petitioner's federal and state constitutional right to due process (Ground Seven). (Dkt. 1 at 8; Dkt. 1-1

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at 69-81; see also Dkt. 29 at 38-44.)[30] According to Petitioner, she was subject to a custodial interrogation because "the officers' questioning of [her] did not occur on the side of a road in full view of the public," she "was the sole focus of the officers' investigation into the incident," the officers "made clear to [Petitioner] that she could not go home and was not free to leave even though [she] repeatedly told them that she wanted to go home," "the officers' questioning of [her] lasted about an hour, and was far longer than at a typical traffic stop," "she did not agree to the officers interviewing her, but instead told [Officer] Altenbach she did not want to tell him what had happened[,] . . . they never told her she could terminate their questioning," "the officers 'dominated and controlled the interrogation,'" and "the majority of the time they treated her as a suspect, posing questions they should reasonably have known were likely to elicit an incriminating response from her." (Dkt. 1-1 at 75-77.) Petitioner asserts that the trial court's finding that the police officers questioning of Petitioner constituted a driving under the influence investigation, and not a custodial interrogation, violated Petitioner's right to remain silent under the Fifth Amendment. (Dkt. 1 at 8.)

1. Relevant Proceedings.

a. Petitioner's Interview.

The California Court of Appeal generally described the circumstances of the interview of Petitioner as follows: "Immediately after the fatal collision, Huntington Beach police officers Daniel Kim and Roman Altenbach questioned [Petitioner] for about an hour. The interview was video recorded by means of a body-worn camera." (Dkt. 20-7 at 6-7.) The California Court of Appeal summarized the

[30] To the extent Petitioner in Grounds Seven through Nine is alleging the violation of his rights under the California Constitution, (see Dkt. 1 at 8-10), his claims are not cognizable on federal habeas review. See Wilson, 562 U.S. at 5; Estelle, 502 U.S. at 67; Smith v. Phillips, 455 U.S. 209, 221 (1982) ("A federally issued writ of habeas corpus, of course, reaches only convictions obtained in violation of some provision of the United States Constitution.").

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interview[31] as follows:

> Officer Kim began questioning [Petitioner] while she was still seated in her car after the collision. Kim started by asking [Petitioner] her name, where she had been, in which direction she had been traveling, and where she had been.[32] After answering a few questions, [Petitioner] said she wanted to go home.[33] She told the officers she lived in San Clemente and asked if they could take her there.[34] When asked how much she had had to drink, [Petitioner] said she did not know.[35] She also said she did not know whether she had been driving.[36]
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> Kim asked [Petitioner] more generally what had happened.[37] She said she wanted to go home and asked if she was going to jail.[38] Kim replied, "I don't know. We haven't determined that yet."[39] Kim asked [Petitioner] for her driver's license, vehicle registration, and proof of insurance.[40] [Petitioner] was surprised to learn that she had been in an accident and that her car had been totaled.[41] Kim informed [Petitioner] the interview was being recorded because he was

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[31] The transcript of the interview is contained in the Clerk's Transcript. (See Dkt. 20-1 at 175-213.)

[32] (Dkt. 20-1 at 177-78.)

[33] (Dkt. 20-1 at 178.)

[34] (Dkt. 20-1 at 178-79.)

[35] (Dkt. 20-1 at 180.)

[36] (Dkt. 20-1 at 180-81.)

[37] (Dkt. 20-1 at 181.)

[38] (Dkt. 20-1 at 181.)

[39] (Dkt. 20-1 at 181.)

[40] (Dkt. 20-1 at 182.)

[41] (Dkt. 20-1 at 182.)

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conducting an investigation, "an investigation we need to do."[42]

Officer Altenbach took over the investigation.[43] He had [Petitioner] step out her car and escorted her to the sidewalk.[44] Altenbach told [Petitioner] he was going to conduct a "little investigation" to make sure she was not too impaired to drive.[45] He then asked questions about her medical conditions, when she last slept, and when and what she had last eaten.[46] [Petitioner] asked why he was asking those questions.[47] Altenbach replied, "it's just part of our investigation into what happened."[48] [Petitioner] acknowledged that she had been driving but said she was not going to drive anymore.[49] She asked if she was going to get a ticket.[50] Altenbach said he did not know because he was still investigating the accident and did not yet know if she had done anything wrong.[51] When Altenbach questioned [Petitioner] about what she had had to drink that night, she gave various answers and asked, "Why do I have to say it?"[52] Altenbach responded, "Well I can't force you to answer but I'm asking the question. [¶] . . . [¶] . . . I'm doing an investigation to see if you're

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[42] (Dkt. 20-1 at 183.)
[43] (Dkt. 20-1 at 183.)
[44] (Dkt. 20-1 at 184-85.)
[45] (Dkt. 20-1 at 185.)
[46] (Dkt. 20-1 at 185-86.)
[47] (Dkt. 20-1 at 186.)
[48] (Dkt. 20-1 at 186.)
[49] (Dkt. 20-1 at 186-87.)
[50] (Dkt. 20-1 at 187.)
[51] (Dkt. 20-1 at 187.)
[52] (Dkt. 20-1 at 188-89.)

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impaired enough or too impaired to drive."[53]

[Petitioner] again said she wanted to go home and asked Altenbach to take her there.[54] He said he would not do that.[55] She asked why.[56] He replied: "Because you're being detained per my investigation. [¶] . . . [¶] . . . [B]ecause some of the things I'm seeing lead me to believe you might be impaired so I'm going to do my investigation."[57] He continued, "[s]o you're not free to leave and we're going to do our investigation, okay?"[58]

Altenbach again asked [Petitioner] how much she had had to drink, when did she start drinking, where had she been drinking, at what time had she stopped drinking, and what medications, if any, had she taken.[59] [Petitioner] refused to let Altenbach check her eyes.[60] He told her he could not force her to comply and repeated that statement moments later.[61]

The investigation was halted while paramedics examined [Petitioner].[62] Altenbach stepped back while paramedics spoke with her.[63] The paramedics told [Petitioner] that she needed to be checked at a hospital, and one paramedic told her "we're going to bring a

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[53] (Dkt. 20-1 at 189.)
[54] (Dkt. 20-1 at 189.)
[55] (Dkt. 20-1 at 189.)
[56] (Dkt. 20-1 at 189.)
[57] (Dkt. 20-1 at 189.)
[58] (Dkt. 20-1 at 190.)
[59] (Dkt. 20-1 at 190-91.)
[60] (Dkt. 20-1 at 192.)
[61] (Dkt. 20-1 at 192-93, 195.)
[62] (Dkt. 20-1 at 195-96.)
[63] (See Dkt. 20-1 at 195-99.)

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backboard over here and put you on that and then get you transported, sound good?"[64] [Petitioner] asked if she should go to the hospital.[65] A paramedic replied, "yeah[,] . . .[i]t'd be advisable to get checked out by a doctor and then . . . they'll do the rest of it at the hospital."[66] [Petitioner] denied having injuries and declined to be taken to the hospital.[67]

When the investigation resumed, Altenbach tried to conduct field sobriety tests on [Petitioner] but she declined to participate and declined to take a breathalyzer test.[68] Several times she said that she wanted to go home.[69] At the close of the investigation, Altenbach arrested [Petitioner] for DUI.[70]

(Dkt. 20-7 at 7-9.)

b. Motion to Suppress.

Prior to trial, Petitioner moved to exclude her post-accident statements to the police on the grounds that she made the statements during a custodial interrogation without being given Miranda warnings and that she did not voluntarily, knowingly, and intelligently waive her Miranda rights. (See Dkt. 20-1 at 152-53, 161-65, 167-73.) Petitioner argued that Petitioner's statements, including her requests to be taken to San Clemente and to go home and her concerns about going to jail and being in trouble, and the officers' responses, including that she could not leave the scene during the investigation and that she was "detained," indicate that "she

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[64] (Dkt. 20-1 at 197-98.)

[65] (Dkt. 20-1 at 198.)

[66] (Dkt. 20-1 at 198.)

[67] (Dkt. 20-1 at 198-201.)

[68] (Dkt. 20-1 at 201-03, 205-06.)

[69] (Dkt. 20-1 at 201-03.)

[70] (Dkt. 20-1 at 206-07.)

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experienced a restraint tantamount to an arrest" because "[n]o reasonable person in her shoes would feel free to end the interrogation and walk away[.]" (Id. at 163, 170.)

The prosecution opposed the motion. (Id. at 38-39.) The prosecution argued: "Miranda is not applicable during 'preliminary questioning such as that involved in a traffic stop because the officer suspects the driver is under the influence." (Id. at 238 (citations omitted).)

The trial judge held a hearing. (See Dkt. 20-2 at 87-94.) The trial judge, who had watched the 59-minute video of the interview, (see id. at 87, 93),[71] initially found that Petitioner was the focus of the investigation and that Petitioner was detained pending a DUI investigation. (Id. at 88.) After noting that "a DUI investigation doesn't equal in custody for Miranda purposes," (id. at 88-89 (citing Berkemer v. McCarty, 468 U.S. 420 (1984)), the trial judge denied the motion, finding, based on the totality of the circumstances, that the officers' questions to Petitioner were made during a DUI investigation, and not a custodial interrogation. (Dkt. 20-2 at 89-94 (relying on Pennsylvania v. Bruder, 488 U.S. 9 (1988), California v. Behemer, 463 U.S. 1121 (1983), and People v. Tully, 54 Cal.4th 952 (2012).)

2. Legal Standard.

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Miranda generally bars the use of statements elicited by custodial interrogation unless the person in custody first was informed of his or her constitutional rights. See Stansbury v. California, 511 U.S. 318, 322 (1994) (*per curiam*); Miranda v. Arizona, 384 U.S. 384, 444-45 (1966); United States v. Henley, 984 F.2d 1040,

[71] At the hearing, the prosecutor stated that the paramedics interaction with Petitioner took approximately 10 minutes. (Dkt. 20-2 at 94.)

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1043 (9th Cir. 1993). In particular, Miranda requires that before questioning a suspect in custody, law enforcement officials must inform the suspect that:

> [h]e has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Miranda, 384 U.S. at 444. Statements obtained in violation of Miranda must be excluded from the prosecution's case-in-chief at a criminal trial. Id.; see also Missouri v. Seibert, 542 U.S. 600, 608 (2004) ("Miranda conditioned the admissibility at trial of any custodial confession on warning a suspect of his rights: failure to give the prescribed warning and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained."); Fare v. Michael C., 442 U.S. 707, 718 (1979) ("Any statements obtained during custodial interrogation conducted in violation of these rules may not be admitted against the accused, at least during the State's case in chief.").

Miranda's protections apply only in the context of "custodial interrogations." Yarborough v. Alvarado, 541 U.S. 652, 661 (2004); Bradford v. Davis, 923 F.3d 599, 618 (9th Cir. 2019). "Custodial interrogation" means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda, 384 U.S. at 444; Yarborough, 541 U.S. at 661.

In deciding whether a person is in custody, "the ultimate inquiry is simply whether there was formal arrest or restraint on freedom of movement of the degree associated with formal arrest." Stansbury, 511 U.S. at 322 (internal quotation marks and brackets omitted). A reviewing court must examine the totality of the circumstances surrounding the interrogation and then decide whether a reasonable person would have felt free to end the interrogation and leave. See Dyer v. Hornbeck, 706 F.3d 1134, 1138 (9th Cir. 2013) (citations omitted); see also Stansbury, 511 U.S. at 322 ("In determining whether an individual was in custody, a

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court must examine all of the circumstances surrounding the interrogation . . . ."). Relevant factors to consider in evaluating how a reasonable person would have gauged his or her "freedom of movement" include: "the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning." Howes v. Fields, 565 U.S. 499, 509 (2012) (citations omitted).

3. The California Court of Appeal's Opinion.

After an extensive discussion of the Miranda legal principles, (see Dkt. 20-7 at 9-11), the California Court of Appeal addressed Petitioner's claim as follows:

> The video recording of the investigation (exhibit 5) and its transcript (exhibit 5A) are part of the record on appeal. The facts are undisputed. We conclude, after considering all the relevant circumstances, [Petitioner] was not in custody for purposes of *Miranda* before her formal arrest.
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> The evidence established that [Petitioner] had been subject to the equivalent of an investigation subsequent to a traffic stop. Kim and Altenbach did not pull over [Petitioner]; however, as the trial court correctly stated, "that doesn't make a difference. She is there."[72] Kim and Altenbach arrived at the scene of a fatal collision and found [Petitioner] seated behind the steering wheel of her car.[73] The air bag had been deployed.[74] The car was severely damaged.[75] It was reasonable to suspect that [Petitioner] had been driving while under the

[72] (Dkt. 20-2 at 91.)

[73] (Dkt. 20-1 at 178.)

[74] (Dkt. 20-1 at 180, 182.)

[75] (Dkt. 20-1 at 182.)

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influence of alcohol and might have had something to do with the collision. As the trial court concluded, "a DUI investigation doesn't equal in custody for *Miranda* purposes."[76]

An immediate investigation was necessary and, naturally enough, the officers wanted to know whether [Petitioner] had been drinking and to get her explanation about what had just happened. "'When circumstances demand immediate investigation by the police, the most useful, most available tool for such investigation is general on-the-scene questioning, designed to bring out the person's explanation . . . and enable the police to quickly determine whether they should allow the suspect to go about his business or hold him to answer charges.'" (*People v. Davidson* (2013) 221 Cal.App.4th 966, 968.)

The investigation was about an hour long,[77] which was no longer than necessary given the circumstances. [Petitioner] argues the length of the investigation made it a custodial interrogation, but the law does not set any time limit on the permissible length of a detention. "'[T]he law contemplates that the officer may temporarily detain the offender at the scene for the period of time *necessary to discharge the duties* that he incurs by virtue of the traffic stop.'" (*People v. Tully* (2012) 54 Cal.4th 952, 980, italics added.) In the present case, the length of the investigation was due primarily to the difficulty in getting [Petitioner] to provide answers to even the most basic questions. She rambled, provided inconsistent answers, and constantly meandered off

[76] (Dkt. 20-2 at 88-89.)

[77] (Dkt. 20-2 at 87, 93.)

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the topic of questioning.[78] In addition, a sizeable part of the time reflected on the video recording showed the intervention by the paramedics, who examined [Petitioner] and urged her to go to the hospital to be checked.[79] (See *People v. Forster* (1994) 29 Cal.App.4th 1746, 1753-1754 [detention of more than one hour did not establish the defendant was in custody because the length was "rationally explainable"].)

[Petitioner] argues the area of the investigation, apparently along or on Pacific Coast Highway, had been closed off to the public and a number of police vehicles blocked entry and exit. True that might be, but the location of the investigation was an open area, not a police interrogation room, and was in plain view of other police officers, firefighters, and paramedics.

Two officers were present, but only one officer interacted with [Petitioner] at any given time. Kim asked questions for a while, then turned the investigation over to Altenbach.[80] The two officers never spoke with [Petitioner] at the same time.[81]

Although [Petitioner] was the focus of the investigation into the cause of the fatal crash, neither Kim nor Altenbach ever told her that. Whenever she asked why she was being questioned, they responded that it was part of the investigation into what had happened or that it was necessary to determine whether she was too impaired to drive.[82]

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[78] (See Dkt. 20-1 at 177-95.)
[79] (See Dkt. 20-1 at 196-201.)
[80] (See Dkt. 20-1 at 177-83.)
[81] (See Dkt. 20-1 at 177-207.)
[82] (Dkt. 20-1 at 181, 183, 185-87, 189-90, 192, 195.)

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There were no indicia of arrest: [Petitioner] was never restrained or handcuffed.

Other factors demonstrate there was no *Miranda* violation. [Petitioner] was never told she had to answer questions. To the contrary, Altenbach told [Petitioner] she did not have to answer questions and did not have to have her eyes examined, participate in the field sobriety test, or take a breathalyzer test.[83] [Petitioner's] freedom of movement was never restricted: She could walk freely, was never restrained, and was allowed to sit on a curb.[84] She was given the option of being taken by paramedics to a hospital, even encouraged to do so, but declined.[85]

The officers did not dominate the investigation. Neither Kim nor Altenbach was aggressive, confrontational, or accusatory. [Petitioner] was asked whether she was the driver of the car,[86] but that is not necessarily an accusatory question. (See *People v. Bellomo* (1992) 10 Cal.App.4th 195, 199.) The video recording demonstrates the officers, both in their words and their actions, were professional, courteous, and reserved; indeed, as the trial court remarked, "the officers were very cordial to her."[87] When the paramedics spoke with [Petitioner], the officers backed away. The officers placed no pressure on [Petitioner]: They never forced her to answer questions or take the field sobriety or breathalyzer test. When Petitioner said she

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[83] (Dkt. 20-1 at 189, 19-95, 202-03, 205-06.)

[84] (See Dkt. 20-1 at 184-85, 191-92, 196, 202, 205-06.)

[85] (See Dkt. 20-1 at 196-201.)

[86] (Dkt. 20-1 at 177-78, 180, 185, 187.)

[87] (Dkt. 20-2 at 93.)

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was cold, they brought her jacket to her. The trial court found the atmosphere of the investigation was not coercive,[88] and substantial evidence supports that finding.

[Petitioner] emphasizes the officers' statements that she could not leave as proof she was in custody. The officers justifiably told [Petitioner] she could not leave because they were conducting an investigation.[89] In any case, she could not have driven away because she was intoxicated and her car was severely damaged. The officers did not restrain her movement so she could have walked away if she were able.

In sum, a reasonable person in [Petitioner's] position would not have believed that during the police investigation her freedom of action was curtailed to a degree associated with a formal arrest. (*Berkemer*, *supra*, 468 U.S. at p. 440.) [Petitioner] was not in the least coerced, tricked, or pressured, and the officers did nothing that might have undermined her will to resist. (*Id.* at p. 433.) The trial court therefore did not err by denying [Petitioner's] motion to exclude the video recording, and both the recording and the transcript were properly admitted into evidence.

(Dkt. 20-7 at 11-14.)

4. Analysis.

Based on the totality of the circumstances, the California Court of Appeal reasonably concluded that the trial court properly found that Petitioner's statements to the police were made during a DUI investigation, and not during a custodial interrogation. Although one factor -- the fact that she was arrested and not released

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[88] (Dkt. 20-2 at 93.)
[89] (Dkt. 20-1 at 178-79, 181, 189-90, 201-02.)

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at the end of questioning, (see Dkt. 20-1 at 206-07) -- is in her favor, the majority of factors, including the open location of the officers' questioning of her, the not-so-lengthy duration of the officers' questioning of her (taking into consideration her many non-responses and/or confusing and contradictory responses, as well as her interaction with paramedics), the officers' statements that the questioning was part of the investigation into what had happened or was necessary to determine whether she was too impaired to drive, the officers' statements that she did not have to answer questions or take the field sobriety or breathalyzer test, the officers were polite and cordial and not aggressive, confrontational or accusatory, and the absence of physical restraints during questioning, favored a finding that a reasonable person in her position would not have felt a restraint in her freedom of movement. See Howes, 565 U.S. at 509.

Therefore, the California Court of Appeal reasonably concluded that "a reasonable person in [Petitioner's] position would not have believed that during the police investigation her freedom of action was curtailed to a degree associated with a formal arrest." See Yarborough, 541 U.S. at 665 (finding that the "differing indications [about whether the defendant was in custody at the time of an interview] lead us to hold that the state court's application of our custody standard was reasonable"); see also Berkemer, 486 U.S. at 442 ("We conclude, in short, that respondent was not taken into custody for the purposes of Miranda until [Trooper] Williams arrested him. Consequently, the statements respondent made prior to that point were admissible against him."). Accordingly, the Court concludes that the California Court of Appeal's rejection of Petitioner's Miranda claim was not contrary to or an unreasonable application of clearly established federal law as determined by the United States Supreme Court. Federal habeas relief on this claim is not warranted.

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H. Federal Habeas Relief Is Not Warranted on Petitioner's Exclusion of Evidence Claim (Ground Eight).

In Ground Eight, Petitioner contends that the trial court erred when it precluded the defense from presenting "statistical evidence of the relationship between arrests for DUI, DUI fatalities, and the natural and probable consequences that DUI is dangerous to human life," in violation of Petitioner's federal and state constitutional rights to due process and a fair trial. (Dkt. 1 at 9; Dkt. 1-1 at 81-92.) Petitioner sought to present this evidence in the trial court to prove that she did not act with implied malice. (Dkt. 1-1 at 88.) Specifically, Petitioner wanted to present evidence "that only a very small number of DUI's result in fatalities," and that therefore "the consequences of driving while intoxicated" do not "involve a high degree of probability that it will result in death." (Id. at 88-89.) Petitioner contends that "[t]he evidence would have shown that [Petitioner] had no reason to think her act of DUI was dangerous to human life since very few DUI's end in fatalities." (Id. at 89.)

The trial court excluded Petitioner's statistical evidence under California Evidence Code Section 352, finding that the statistical evidence would not be probative, and if anything, would tend to confuse and mislead the jury. (Dkt. 20-2 at 147.) In so finding, the trial court relied in part on an unpublished California appellate decision, People v. Gandarilla, 2011 WL 600436 (Cal. Ct. App. Feb. 22, 2011), which the prosecutor had cited in a motion to exclude the statistical evidence. (Dkt. 20-2 at 146-47.) Petitioner argues that the prosecutor's citation to Gandarilla amounts to prosecutorial misconduct because California Rule of Court 8.1115(a) prohibits the citation of unpublished opinions. (Dkt. 1-1 at 84-85.)

The California Court of Appeal rejected Petitioner's claim, holding that neither the prosecution nor the trial court committed misconduct. (Dkt. 20-7 at 16.) First, the California Court of Appeal found that the trial court should not have relied on Gandarilla and that the prosecutor should not have cited it. (Id.) However, the

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court of appeal also held that "the prosecutor's citation to a single nonpublished opinion in a motion in limine did not infect the entire trial with unfairness or deny Duarte a fair trial." (Id. at 17.) Further, the court of appeal found that "any error in citing or relying on the nonpublished opinion was harmless because, had that opinion never been cited by the prosecution, there would have been no reasonable probability the trial court would have allowed [Petitioner] to present the statistical evidence." (Id. at 18.) Finally, the court of appeal rejected Petitioner's argument that the statistical evidence was "relevant to either component of implied malice" because "[i]t is virtually self-evident that a natural consequence of driving while intoxicated is a danger to human life." (Id. at 19.) The court of appeal also affirmed the trial court's exclusion of the statistical evidence, finding that "the statistical evidence proffered by [Petitioner] was irrelevant to any issue presented at trial." (Id. at 20.)

1. Legal Standard.

The exclusion of evidence in violation of state law fails to raise an issue cognizable on federal habeas review. See Wilson, 562 U.S. at 5 ("[I]t is only noncompliance with *federal* law that renders a State's criminal judgment susceptible to collateral attack in the federal courts." (emphasis in original)); Estelle, 502 U.S. at 67 ("We have stated many times that federal habeas corpus relief does not lie for errors of state law." (internal quotation marks omitted)). The U.S. Supreme Court has held that "[w]hile the Constitution prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." Holmes v. South Carolina, 547 U.S. 319, 326, (2006). A defendant does not have an unfettered right to offer evidence or testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. Montana v.

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Egelhoff, 518 U.S. 37, 42 (1996); Taylor v. Illinois, 484 U.S. 400, 410 (1988).

The exclusion of defense evidence or testimony also does not violate the Constitution if, among other things, the excluded evidence was only "marginally relevant," "repetitive," or "pose[d] an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" Crane v. Kentucky, 476 U.S. 683, 689-90 (1986). "To evaluate whether exclusion of evidence reaches constitutional proportions, we should consider five factors: (1) the probative value of the excluded evidence on the central issue; (2) its reliability; (3) whether it is capable of evaluation by the trier of fact; (4) whether it is the sole evidence on the issue or merely cumulative; and (5) whether it constitutes a major part of the attempted defense." Tinsley v. Borg, 895 F.2d 520, 530 (9th Cir. 1990). "A habeas petitioner bears a heavy burden in showing a due process violation based on an evidentiary decision." Boyde, 404 F.3d at 1172.

2. Analysis.

To the extent Petitioner challenges the state court's evidentiary ruling under state law, that claim is not cognizable claim on federal habeas review. Estelle, 502 U.S. at 70 (state evidentiary ruling does not give rise to a cognizable federal habeas claim unless the ruling violated petitioner's due process rights); Rhoades v. Henry, 638 F.3d 1027, 1034 n.5 (9th Cir. 2011) (state evidentiary rulings cannot form independent basis for federal habeas relief). The California Court of Appeal found that the trial court did not abuse its discretion under California law in excluding the statistical evidence. (Dkt. 20-7 at 15-21.) This Court cannot redetermine an issue of state law. See Waddington v. Sarausad, 555 U.S. 179, 192 n.5 ("[W]e have repeatedly held that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions" (internal quotations omitted)); Mullaney, 421 U.S. at 691 (1975) ("[S]tate courts are the ultimate expositors of state law . . . ."). Thus, the court of appeal's finding on the exclusion of evidence under state law must remain undisturbed.

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To the extent Petitioner alleges that the state evidentiary ruling violated her constitutional rights, the court of appeal's decision is fully consistent with federal constitutional standards. The court of appeal affirmed the exclusion of the statistical evidence based on its appropriate application of a reasonable state evidence law that "permits trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." Holmes, 547 U.S. at 326; (see Dkt. 20-7 at 20 citing Cal. Evid. Code §§ 350, 352). Neither the state law nor its application here violated Petitioner's constitutional rights. See United States v. Scheffer, 523 U.S. 303, 308 (1998) ("[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials," and such rules "do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" (citations omitted)). Indeed, the California Court of Appeal determined that "the statistical evidence proffered by [Petitioner] was irrelevant to any issue presented at trial." (Dkt. 20-7 at 20.)

Moreover, the court of appeal also found that the trial court properly excluded the evidence under California Evidence Code § 352 because the probative value of the proffered evidence "was substantially outweighed by the probability that its admission would necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Id. (citing Cal. Evid. Code § 352).) Thus, the relevant consideration of probative value also supports the court of appeal's conclusion. See Tinsley, 895 F.2d at 530 ("probative value" is a factor to determine whether the exclusion of evidence reaches "constitutional proportions"), Crane, 476 U.S. at 689-90 (1986) (The exclusion of defense evidence does not violate the Constitution if, among other things, the excluded evidence was only "marginally relevant.").

The Court agrees with the California Court of Appeal's determination that the

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statistical evidence Petitioner sought to introduce at trial was both irrelevant and very likely to confuse and mislead the jury. Accordingly, the Court concludes that the exclusion of the statistical evidence did not violate Petitioner's constitutional rights and the California Court of Appeal's decision was neither contrary to, nor an unreasonable application of, federal law. Petitioner is not entitled to habeas relief on Ground Eight.

I. Federal Habeas Relief Is Not Warranted on Petitioner's Denial of Juror Identification Information Claim (Ground Nine).

In Ground Nine, Petitioner contends that the trial court denied Petitioner's post-trial motion for juror identifying information in violation of Petitioner's federal and state constitutional rights to due process and a fair trial by an impartial jury (Ground Nine). (Dkt. 1 at 9-10; Dkt. 1-1 at 92-99.) By refusing to release juror identifying information, Petitioner argues that the trial court abused its discretion and violated Petitioner's constitutional rights to due process and a fair trial by an impartial jury. (Dkt. 1-1 at 98-99.) Petitioner had requested the juror identifying information in a post-trial motion pursuant to California Code of Civil Procedure § 206 and § 237(b), in an effort to investigate possible jury misconduct. (Id. at 92.) Petitioner based the allegation of possible juror misconduct on a letter sent by one of the jurors stating in part that she "was not on the same page as everyone else," and that when she "read the instructions on the juror process and the elements that were needed to convict the defendant of murder[,]" she "still just didn't see it." (Dkt. 20-7 at 22.)

California Code of Civil Procedure § 237(a)(2) provides that "[u]pon the recording of a jury's verdict in a criminal jury proceeding, the court's record of personal juror identifying information names, addresses, and telephone numbers, shall be sealed until further order of the court as provided by this section." A party seeking to unseal personal information of jurors must establish "a prima facie showing of good cause for the release of the personal juror identifying information."

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Cal. Code Civ. Proc. § 237(b). Good cause to support a petition to disclose juror personal identifying information based on misconduct means a showing that is sufficient to support a reasonable belief that jury misconduct occurred. People v. Cook, 236 Cal. App. 4th 341, 345–46 (2015). "Good cause does not exist where the allegations of jury misconduct are speculative, conclusory, vague, or unsupported." (Id.)

The trial court denied the motion to disclose juror identifying information on the ground that Petitioner had not made a *prima facie* showing of good cause for disclosure. (Dkt. 20-7 at 23.) The trial court concluded that there was "absolutely nothing in that letter that would suggest anything that comes close to jury misconduct . . . . At no time does [the juror] mention being bullied, ignored, forced[,] intimidated, [or] coerced." (Id.) The California Court of Appeal affirmed the trial court's denial, holding that Petitioner "failed to provide a showing sufficient to support a reasonable belief that juror misconduct had occurred during deliberations." (Id. at 24.) The trial court had found that the juror's statement in the letter was one of "buyer's remorse" rather than a revelation of misconduct. (Id. at 25.) The California Court of Appeal deemed the trial court's assessment to be fair and determined that the trial court did not err in denying Petitioner's motion for juror identifying information. (Id.)

To the extent Petitioner objects to the state courts' application of California Code of Civil Procedure §§ 206 and 237, that claim is not cognizable on federal habeas review. See Estelle, 502 U.S. at 67. Further, while Petitioner attempts to characterize the denial of her motion for juror identifying information as a violation of her constitutional right to due process and a fair an impartial jury, Petitioner's conclusory reference to a due process violation is insufficient to transform a non-cognizable state-law issue into a cognizable federal claim. See Langford v. Day, 110 F.3d 1380, 1389 (9th Cir. 1996) ("[A petitioner] may not, however, transform a state-law issue into a federal one merely by asserting a violation of due

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process."); Rivera v. Illinois, 556 U.S. 148, 158 (2009) ("A mere error of state law . . . is not a denial of due process." (brackets and internal quotation marks omitted)); Little v. Crawford, 449 F.3d 1075, 1983 n. 6 (9th Cir. 2006) ("We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question.").

Petitioner cites no authority, nor can the Court identify any authority, recognizing a federal constitutional right to juror identifying information. See White v. Knipp, 2013 WL 5375611, at *38 (E.D. Cal. Sept. 24, 2013) ("[N]o federal law requires a state court to permit post-trial access to jurors' personal information, even when evidence of jury misconduct exists."); Turner v. McEwen, 2013 WL 3778845, at *4 (C.D. Cal. July 17, 2013) (same), aff'd, 819 F.3d 1171 (9th Cir. 2016); Logan v. Runnels, 2011 WL 1441940, at *19 (E.D. Cal. Apr. 14, 2011) (same). The Ninth Circuit has affirmed the denial of habeas relief in the absence of Supreme Court precedent, even where the California Court of Appeal identified juror misconduct in the trial court:

> Much of Grotemeyer's argument is based on state law, since the California Court of Appeal held that, under state law, **the jury foreman committed misconduct in two remarks she made. None of that has any relevance to us.** A federal court of appeals considering a petition for a writ of h[a]beas corpus does not review state court decisions pursuant to state law like a state appellate court. We have authority to grant the writ if and only if the last reasoned state court opinion "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Thus, we look not for a California decision that treats certain remarks made by jurors during deliberations as juror misconduct, but for a United States Supreme Court decision to that effect.

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Grotemeyer v. Hickman, 393 F.3d 871, 877 (9th Cir. 2004) (footnotes omitted and emphasis added).

Thus, the California Court of Appeal's decision to affirm the denial of juror identifying information cannot be contrary to or an unreasonable application of clearly established federal law as determined by the U.S. Supreme Court. Accordingly, federal habeas relief on this claim is not warranted.

VII.

RECOMMENDATION

IT IS RECOMMENDED that the District Court issue an Order: (1) accepting and adopting this Report and Recommendation; and (2) directing that Judgment be entered DENYING the Petition and DISMISSING this action WITH PREJUDICE.

DATED: September 3, 2024

HON. A. JOEL RICHLIN
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. **Under Local Rule 72-3.4, any objection to this Report and Recommendation must be filed within twenty (20) days**. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

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Court of Appeal, Fourth Appellate District, Division Three - No. G062265

S278731

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re BANI MARCELA DUARTE on Habeas Corpus.

The petition for review is denied.

GUERRERO

Chief Justice

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Supreme Court

Change court

Case Summary	Docket	Briefs
Disposition	Parties and Attorneys	Lower Court

Disposition

PEOPLE v. DUARTE
Division SF
Case Number S268522

Only the following dispositions are displayed below: Orders Denying Petitions, Orders Granting Rehearing and Opinions. Go to the Docket Entries screen for information regarding orders granting review.

Case Citation: **none**

Date	Description
06/30/2021	Petition for review denied

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

APPENDIX F

Filed 3/30/21 P. v. Duarte CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. BANI MARCELA DUARTE, Defendant and Appellant.	G058965 (Super. Ct. No. 18WF0980) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary S. Paer, Judge. Affirmed with directions.

Peter H. Gold, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Heather B. Arambarri, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

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INTRODUCTION

While heavily intoxicated, Bani Marcela Duarte drove her car at a speed of nearly 80 miles per hour and rammed into another vehicle that was stopped at a red light. The other vehicle was propelled into a pole, caught on fire, and soon was engulfed in flames. Three of the four persons inside, all teenagers, died, despite the efforts of a police officer to rescue them. The fourth teen managed to get himself out of the car alive but suffered burns. Just minutes before these horrifying events occurred, Duarte had driven into a curb, bringing her car to a stop, and had declined offers for a ride by a driver of another car who had observed her driving recklessly and believed she was too drunk to drive.

A jury convicted Duarte of three counts of second degree murder and one count of driving under the influence of alcohol, and found true the allegation of great bodily injury in connection with the last count. Duarte was sentenced to three consecutive indeterminate terms of 15 years to life with a consecutive determinate term of six years, for an aggregate term of 51 years to life.

We reject Duarte's claims of error and affirm. The trial court did not err by denying Duarte's motion to exclude a video recording of a police interview conducted at the scene soon after the fatal collision because Duarte was not in custody at the time for purposes of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). The prosecutor did not commit misconduct by relying on a nonpublished opinion in support of a motion in limine to exclude statistical evidence, and the trial court did not commit misconduct by citing the nonpublished opinion in granting that motion. Any error in citing the nonpublished opinion was harmless, and the trial court did not err by excluding the statistical evidence proffered by Duarte because it was irrelevant. The trial court did not err by denying Duarte's motion to disclose personal juror identifying information because Duarte failed to make a preliminary showing of possible juror misconduct.

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Finally, we affirm the restitution fine and victim restitution. The abstract of judgment for the indeterminate prison commitment does not accurately reflect the trial court's sentence waiving the court security fee and the criminal conviction assessment, and, therefore, we shall direct the trial court to prepare a corrected abstract.

FACTS

I.

The Fatal Collision

On the night of March 28, 2018, Duarte drove her car to a restaurant to have dinner with a friend. At about 11:00 p.m., Duarte and her friend went to a bar and, at about 11:30 p.m., walked across the street to another bar.

At about 1:00 a.m. on March 29, Esteban Espinosa, Eric Martinez, and Alex Martinez were in a car, driven by Espinosa, heading toward Huntington Beach from Newport Beach. Espinosa noticed that a white car was swerving between lanes and had nearly hit several parked cars. The white car sped past them on the right hand side, pulled in front of them, struck a curb, and came to a stop. Espinosa pulled up next to the white car and parked. The driver of the white car, later identified as Duarte, got out and looked toward Espinosa. He could see she was intoxicated: Her speech was impaired, she burped, and she struggled to walk. Espinosa and Alex Martinez asked Duarte if she was "okay." She said yes. Espinosa offered three or four times to give her a ride "to wherever she was going." Duarte declined the offers and got back into her car.

Espinosa drove his vehicle in front of Duarte's car and parked. Alex Martinez called 911 to report the incident. About five minutes later, Duarte drove around Espinosa and sped off. Espinosa and his friends followed her, all the while Alex Martinez stayed on the line with the 911 operator.

As Duarte drove northbound on Pacific Coast Highway, she continued to swerve between lanes and drove recklessly at about 80 miles an hour in a 55 mile per

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hour zone. Duarte maintained the same high rate of speed as she approached a red traffic light. Stopped at the red light was a Toyota automobile. Inside the Toyota were four teenagers: Brooke Hawley, Albert Rossi, Dylan Mack, and Alexis Vargas Andrade.

Duarte drove her car smack into the rear of the Toyota. The force of impact was so great that it propelled the Toyota into a traffic pole. The Toyota caught on fire.[1] Espinosa, who had followed Duarte to the scene, ran toward the Toyota to try to help the victims inside, but he stopped when his friends told him the situation was too dangerous.

Police officers arrived within minutes. Huntington Beach police detective Sean McDonough used his flashlight to break the front driver's side window of the Toyota, reached inside the car, and tried to open the door to rescue those inside. The car door had been badly damaged and would not open. The flames were growing and McDonough could feel them burning his uniform. He tried to douse the flames with a fire extinguisher, but it was of little use. The fire grew stronger and soon the vehicle was engulfed in flames. Firefighters arrived and extinguished the fire.

Hawley, Rossi, and Mack died inside the car. The cause of death was extensive thermal injuries and/or carbon monoxide inhalation. Vargas Andrade, who had been in the front passenger seat, managed to get out of the car alive. He suffered

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[1] As these events unfolded before his eyes, Alex Martinez related them to the 911 operator. The transcript of the 911 call is chilling. Once Martinez and his friends had crossed the bridge over the Santa Ana River and entered Huntington Beach, the operator asked Martinez if the car they were following was still swerving. Martinez told the operator, "[o]h fuck. . . . She just hit a car. She just hit a car." Moments later Martinez reported, "[o]ne of the cars is on fire. [¶] . . . [¶] . . . the car is on fire right now." The operator asked Martinez if he had seen what had happened; he replied, "[y]eah, she hit a car in front of her" that was stopped at a red light. He begged the operator, "Hurry, please. The car is on fire and there's still people trapped inside." As Martinez watched the flames grow, he told the operator, "[t]hey're still in there. [¶] . . . [¶] . . . it's lighting up. [¶] . . . [¶] Oh shit." Finally, he exclaimed, "The car's on fire, man. Holy shit."

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extensive burns to his hair and a hand. He was found after the crash in a state of shock: He did not know what had happened or how he had gotten out of the car.[2]

II.

Police Investigation

Huntington Beach police officers interviewed Duarte at the scene. At first, she told them she did not know how much alcohol she had consumed that night or how she collided with the victims' car. She later stated she had started drinking at about 11:00 p.m. and drank perhaps three alcoholic drinks. She refused to take a breathalyzer test at the scene or participate in a field sobriety test.

The officers arrested Duarte and her blood was drawn at 2:45 a.m. on March 29, 2018. Her blood alcohol concentration was .28 percent; at 1:00 a.m., the time of the collision, her blood alcohol concentration would have been .30 or .31 percent. Inside Duarte's car, police investigators found a partially empty one-ounce bottle of vodka, an empty 24-ounce can of malt liquor, and an empty, broken Styrofoam cup.

Police investigators found tire skid marks in the intersection. The event data recorder from Duarte's car showed it had traveled at nearly 79 miles per hour for the last half second before the collision. The event recorder for the Toyota showed it had been fully stopped for about two seconds before the collision. The brakes in Duarte's car had not been activated in the five seconds before the collision.

III.

Duarte's Prior Arrest and Instagram Posts

At about 3:40 a.m. on June 22, 2016, Orange County Sheriff's Deputy Jeremy Johnson made a traffic stop of a Ford Expedition driven by Duarte. The interior of the vehicle smelled of alcohol, and Duarte's eyes were watery. Johnson asked Duarte if she had been drinking; she replied that she had been drinking in a bar earlier in the

[2] At trial, Vargas Andrade testified the only thing he remembered about the collision was "waking up." He still had no idea how he got out of the car.

evening. Duarte submitted to a breathalyzer test which showed a blood alcohol concentration that was higher than the legal limit to drive a motor vehicle.

Johnson read Duarte her rights pursuant to *Miranda, supra*, 384 U.S. 436, confiscated her driver's license, and placed her under arrest for driving under the influence (DUI). Inside Duarte's vehicle, Johnson found an empty beer can, an empty bottle of vodka, and a water bottle containing an alcoholic beverage. Duarte was issued a citation and her driver's license was suspended for a year, however, it appears she was not prosecuted for this offense.[3]

In November 2017, Duarte posted an Instagram message stating, "don't drink and drive." At about the same time, she responded to an Instagram message about a collision caused by a drunk driver by posting that she had used a rideshare service the previous weekend to avoid driving while under the influence. Duarte advised, "rather be safe than sorry." She also posted an Instagram message stating: "Well, I was pretty messed up. I fall asleep when I'm drunk LOL."

DISCUSSION

I.

The Trial Court Did Not Err by Denying Duarte's Motion to Exclude the Video Recording of the Police Investigation

Immediately after the fatal collision, Huntington Beach police officers Daniel Kim and Roman Altenbach questioned Duarte for about an hour. The interview was video recorded by means of a body-worn camera. Duarte moved to exclude the video recording on the ground she was in custody when interviewed but had not been read her rights pursuant to *Miranda, supra*, 384 U.S. 436. The trial court denied Duarte's

[3] There is no evidence in the record that Duarte ever received the advisement based on *People v. Watson* (1981) 30 Cal.3d 290 (*Watson* advisement) that "[i]f you continue to drive while under the influence of alcohol or drugs, or both, and, as a result of that driving, someone is killed, you can be charged with murder." (Veh. Code, § 23592, subd. (a).)

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motion to exclude the video recording, it was received into evidence as exhibit 5, and it was played for the jury. A transcript of the video recording was received into evidence as exhibit 5A and copies of the transcript were given to the jurors.

Duarte argues the trial court prejudicially erred by denying her motion to exclude the video recording of the on-scene police interview. We disagree. Although Duarte does not mention the transcript (exhibit 5A), we conclude it was admissible too.

A. *Background: The On-scene Investigation*

Officer Kim began questioning Duarte while she was still seated in her car after the collision. Kim started by asking Duarte her name, where she had been, in which direction she had been traveling, and where she had been. After answering a few questions, Duarte said she wanted to go home. She told the officers she lived in San Clemente and asked if they could take her there. When asked how much she had had to drink, Duarte said she did not know. She also said she did not know whether she had been driving.

Kim asked Duarte more generally what had happened. She said she wanted to go home and asked if she was going to jail. Kim replied, "I don't know. We haven't determined that yet." Kim asked Duarte for her driver's license, vehicle registration, and proof of insurance. Duarte was surprised to learn that she had been in an accident and that her car had been totaled. Kim informed Duarte the interview was being recorded because he was conducting an investigation, "an investigation we need to do."

Officer Altenbach took over the investigation. He had Duarte step out her car and escorted her to the sidewalk. Altenbach told Duarte he was going to conduct a "little investigation" to make sure she was not too impaired to drive. He then asked questions about her medical conditions, when she last slept, and when and what she had last eaten. Duarte asked why he was asking those questions. Altenbach replied, "it's just part of our investigation into what happened." Duarte acknowledged that she had been

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driving but said she was not going to drive anymore. She asked if she was going to get a ticket. Altenbach said he did not know because he was still investigating the accident and did not yet know if she had done anything wrong. When Altenbach questioned Duarte about what she had had to drink that night, she gave various answers and asked, "Why do I have to say it?" Altenbach responded, "Well I can't force you to answer but I'm asking the question. [¶] . . . [¶] . . . I'm doing an investigation to see if you're impaired enough or too impaired to drive."

Duarte again said she wanted to go home and asked Altenbach to take her there. He said he would not do that. She asked why. He replied: "Because you're being detained per my investigation. [¶] . . . [¶] . . . [B]ecause some of the things I'm seeing lead me to believe you might be impaired so I'm going to do my investigation." He continued, "[s]o you're not free to leave and we're going to do our investigation, okay?"

Altenbach again asked Duarte how much she had had to drink, when did she start drinking, where had she been drinking, at what time had she stopped drinking, and what medications, if any, had she taken. Duarte refused to let Altenbach check her eyes. He told her he could not force her to comply and repeated that statement moments later.

The investigation was halted while paramedics examined Duarte. Altenbach stepped back while paramedics spoke with her. The paramedics told Duarte that she needed to be checked at a hospital, and one paramedic told her "we're going to bring a backboard over here and put you on that and then get you transported, sound good?" Duarte asked if she should go to the hospital. A paramedic replied, "yeah[,] . . . [i]t'd be advisable to get checked out by a doctor and then . . . they'll do the rest of it at the hospital." Duarte denied having injuries and declined to be taken to the hospital.

When the investigation resumed, Altenbach tried to conduct field sobriety tests on Duarte but she declined to participate and declined to take a breathalyzer test.

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Several times she said that she wanted to go home. At the close of the investigation, Altenbach arrested Duarte for DUI.

B. *Legal Principles and Circumstances Relevant to Determining Whether a Suspect Is in Custody*

In reviewing a trial court's ruling on a motion to suppress based on a *Miranda* violation, the appellate court accepts the trial court's resolution of disputed facts and inferences, as well as credibility evaluations, if supported by substantial evidence. (*People v. Thomas* (2011) 51 Cal.4th 449, 476.) The appellate court independently determines from the undisputed facts and facts properly found by the trial court whether the challenged statement was obtained in violation of *Miranda*. (*People v. Thomas, supra*, at p. 476.)

In *Miranda*, the United States Supreme Court held that the Fifth Amendment privilege against self-incrimination prevents the prosecution from using statements obtained from a defendant during a custodial interrogation unless the prosecution demonstrates "the use of procedural safeguards effective to secure the privilege." (*Miranda, supra*, 384 U.S. at p. 444.) Suspects in police custody must be told they have a right to remain silent, anything they say may be used against them in court, and they are entitled to the presence of an attorney, either retained or appointed, at the interrogation. (*Thompson v. Keohane* (1995) 516 U.S. 99, 107.) "The purposes of the safeguards prescribed by *Miranda* are to ensure that the police do not coerce or trick captive suspects into confessing, [and] to relieve the '"inherently compelling pressures"' generated by the custodial setting itself, '"which work to undermine the individual's will to resist."'" (*Berkemer v. McCarty* (1984) 468 U.S. 420, 433, italics omitted, fn. omitted (*Berkemer*).) The prosecution may not use statements obtained in violation of *Miranda* to establish guilt. (*Id*. at p. 428.)

Miranda warnings are required only when a defendant is subject to a custodial interrogation. (*Stansbury v. California* (1994) 511 U.S. 318, 322 (*Stansbury*);

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Miranda, supra, 384 U.S. at pp. 444, 478-479.) Thus, a defendant must have been in custody at the time of the interrogation in order to assert a *Miranda* violation. (*People v. Bejasa* (2012) 205 Cal.App.4th 26, 35.)

A suspect is in custody when placed under arrest or when a reasonable person in the suspect's position would believe his or her "freedom of action is curtailed to a 'degree associated with a formal arrest.'" (*Berkemer, supra*, 468 U.S. at p. 440; see *People v. Leonard* (2007) 40 Cal.4th 1370, 1400.) This is an objective test. (*Stansbury, supra,* 511 U.S. at p. 323; *People v. Leonard, supra*, at p. 1400.) In determining whether a defendant was in custody when no formal arrest has been made, a court must examine all the circumstances surrounding the interrogation. (*Stansbury, supra,* at p. 322.) These circumstances include (1) the length of the detention, (2) the location of the detention, (3) whether the suspect was the focus of the investigation, and (4) whether any indicia of arrest was present. (*People v. Moore* (2011) 51 Cal.4th 386, 395; but see *Stansbury, supra,* at p. 326 [whether the interrogating officers have focused their suspicions on the person being questioned is not relevant for purposes of *Miranda* if those suspicions are undisclosed].) The subjective views of the officers present are not considered. (*Stansbury, supra,* at p. 323.)

Other relevant factors include the ratio of police officers to suspects, whether the suspect was told he or she could terminate the questioning, whether the officers told the suspect he or she was considered a witness or suspect, whether the suspect's freedom of movement was restricted during the interrogation, whether the officers dominated or controlled the interrogation or were aggressive, confrontational, or accusatory, whether the officers pressured the suspect, and whether the suspect was arrested at the end of the interrogation. (*People v. Bejasa, supra*, 205 Cal.App.4th at p. 36.)

Application and assessment of the various indicia of custody have led the United States Supreme Court to conclude that detention and questioning of a driver

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subsequent to a routine traffic stop do not constitute a custodial interrogation. (*Berkemer, supra*, 468 U.S. at pp. 435, 437-440. "[D]etention of a motorist pursuant to a traffic stop is presumptively temporary and brief." (*Id*. at p. 437.) In *Berkemer*, a highway patrol officer stopped a car after observing it weave in and out of a lane. (*Id*. at p. 423.) The defendant had difficulty standing when he got out of the car. (*Ibid*.) Without advising the defendant of his *Miranda* rights, the officer asked him whether he had been using intoxicants. (*Ibid*.) The defendant said he had two beers and smoked marijuana a short time before. (*Ibid*.) The officer placed the defendant under arrest. (*Ibid*.)

The United States Supreme Court concluded the defendant's prearrest statements were admissible because the defendant was not in custody within the meaning of *Miranda* until he was placed under arrest. (*Berkemer, supra*, 468 U.S. at p. 442.) A short period of time elapsed between the initial traffic stop and the arrest, only one officer was present, that officer asked the defendant a modest number of questions, the questioning was in a public spot that was visible to passing motorists, and although the officer made the decision to arrest the defendant as soon as he stepped out of the car, the officer did not tell the defendant he would be placed in custody. (*Id*. at pp. 441-442.) "Treatment of this sort," the Supreme Court concluded, "cannot fairly be characterized as the functional equivalent of formal arrest." (*Id.* at p. 442.)

Pennsylvania v. Bruder (1988) 488 U.S. 9, 9-11 presented facts similar to those of *Berkemer*. The United States Supreme Court concluded that "*Berkemer*'s rule, that ordinary traffic stops do not involve custody for purposes of *Miranda*, governs this case." (*Pennsylvania v. Bruder, supra*, at p. 11.)

C. *Duarte Was Not in Custody for Purposes of* Miranda

The video recording of the investigation (exhibit 5) and its transcript (exhibit 5A) are part of the record on appeal. The facts are undisputed. We conclude,

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after considering all the relevant circumstances, Duarte was not in custody for purposes of *Miranda* before her formal arrest.

The evidence established that Duarte had been subject to the equivalent of an investigation subsequent to a traffic stop. Kim and Altenbach did not pull over Duarte; however, as the trial court correctly stated, "that doesn't make a difference. She is there." Kim and Altenbach arrived at the scene of a fatal collision and found Duarte seated behind the steering wheel of her car. The air bag had been deployed. The car was severely damaged. It was reasonable to suspect that Duarte had been driving while under the influence of alcohol and might have had something to do with the collision. As the trial court concluded, "a DUI investigation doesn't equal in custody for *Miranda* purposes."

An immediate investigation was necessary and, naturally enough, the officers wanted to know whether Duarte had been drinking and to get her explanation about what had just happened. "'When circumstances demand immediate investigation by the police, the most useful, most available tool for such investigation is general on-the-scene questioning, designed to bring out the person's explanation . . . and enable the police to quickly determine whether they should allow the suspect to go about his business or hold him to answer charges.'" (*People v. Davidson* (2013) 221 Cal.App.4th 966, 968.)

The investigation was about an hour long, which was no longer than necessary given the circumstances. Duarte argues the length of the investigation made it a custodial interrogation, but the law does not set any time limit on the permissible length of a detention. "'[T]he law contemplates that the officer may temporarily detain the offender at the scene for the period of time *necessary to discharge the duties* that he incurs by virtue of the traffic stop.'" (*People v. Tully* (2012) 54 Cal.4th 952, 980, italics added.) In the present case, the length of the investigation was due primarily to the difficulty in getting Duarte to provide answers to even the most basic questions. She

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rambled, provided inconsistent answers, and constantly meandered off the topic of questioning. In addition, a sizeable part of the time reflected on the video recording showed the intervention by the paramedics, who examined Duarte and urged her to go to the hospital to be checked. (See *People v. Forster* (1994) 29 Cal.App.4th 1746, 1753-1754 [detention of more than one hour did not establish the defendant was in custody because the length was "rationally explainable"].)

Duarte argues the area of the investigation, apparently along or on Pacific Coast Highway, had been closed off to the public and a number of police vehicles blocked entry and exit. True that might be, but the location of the investigation was an open area, not a police interrogation room, and was in plain view of other police officers, firefighters, and paramedics.

Two officers were present, but only one officer interacted with Duarte at any given time. Kim asked questions for a while, then turned the investigation over to Altenbach. The two officers never spoke with Duarte at the same time.

Although Duarte was the focus of the investigation into the cause of the fatal crash, neither Kim nor Altenbach ever told her that. Whenever she asked why she was being questioned, they responded that it was part of the investigation into what had happened or that it was necessary to determine whether she was too impaired to drive. There were no indicia of arrest: Duarte was never restrained or handcuffed.

Other factors demonstrate there was no *Miranda* violation. Duarte was never told she had to answer questions. To the contrary, Altenbach told Duarte she did not have to answer questions and did not have to have her eyes examined, participate in the field sobriety test, or take a breathalyzer test. Duarte's freedom of movement was never restricted: She could walk freely, was never restrained, and was allowed to sit on a curb. She was given the option of being taken by paramedics to a hospital, even encouraged to do so, but declined.

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The officers did not dominate the investigation. Neither Kim nor Altenbach was aggressive, confrontational, or accusatory. Duarte was asked whether she was the driver of the car, but that is not necessarily an accusatory question. (See *People v. Bellomo* (1992) 10 Cal.App.4th 195, 199.) The video recording demonstrates the officers, both in their words and their actions, were professional, courteous, and reserved; indeed, as the trial court remarked, "the officers were very cordial to her." When the paramedics spoke with Duarte, the officers backed away. The officers placed no pressure on Duarte: They never forced her to answer questions or take the field sobriety or breathalyzer test. When Duarte said she was cold, they brought her jacket to her. The trial court found the atmosphere of the investigation was not coercive, and substantial evidence supports that finding.

Duarte emphasizes the officers' statements that she could not leave as proof she was in custody. The officers justifiably told Duarte she could not leave because they were conducting an investigation. In any case, she could not have driven away because she was intoxicated and her car was severely damaged. The officers did not restrain her movement so she could have walked away if she were able.

In sum, a reasonable person in Duarte's position would not have believed that during the police investigation her freedom of action was curtailed to a degree associated with a formal arrest. (*Berkemer, supra*, 468 U.S. at p. 440.) Duarte was not in the least coerced, tricked, or pressured, and the officers did nothing that might have undermined her will to resist. (*Id*. at p. 433.) The trial court therefore did not err by denying Duarte's motion to exclude the video recording, and both the recording and the transcript were properly admitted into evidence.

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II.

There Was No Prosecutorial Misconduct, Judicial Misconduct, or Prejudicial Error in Connection with Exclusion of Duarte's Statistical Evidence

Duarte argues the prosecutor committed misconduct by citing a nonpublished opinion in support of a motion in limine to exclude her statistical evidence on the relationship between DUI arrests and DUI fatalities. She argues the trial court committed misconduct by relying on that nonpublished opinion and erred by granting the prosecution's motion in limine. We conclude there was no misconduct, any error in citing the nonpublished opinion was harmless, and the trial court did not err by granting the motion to exclude the statistical evidence.

A. *Background*

The prosecution brought a motion in limine to exclude "statistical evidence of the relationship between arrests for DUI, DUI fatalities, and the natural and probable consequence that DUI is dangerous to human life." In support of the motion, the prosecution cited *People v. Gandarilla* (Feb. 22, 2011, G042743) (nonpub. opn.).

At the hearing on the motion in limine, the trial court asked defense counsel, "[i]s the defense looking to get into statistics with a witness?" Counsel responded: "I think the case law kind of says I can't on some grounds. What I really want to explore with the witnesses is their experiences with DUI arrests and their experiences with DUI fatalities." The court asked for an offer of proof. Defense counsel responded: "Their knowledge base. I believe Mr. Page will come in and testify as an expert. He is going to testify as relates to the accident scene. He is going to give measurements and talk about diagrams." The prosecutor explained that Joshua Page would be called as an expert witness to testify about the "collision sequence" and his examination of the road after the fatal collision.

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The trial court granted the motion in limine. The court stated: "I don't believe that statistical evidence would be probative in this case. If anything, under 352, it would tend to confuse and mislead the jury. They're going to be given a menu on the implied malice, and the jury will need to decide whether the menu has been proven based on all the evidence, which would include direct and circumstantial evidence. [¶] . . . [¶] Sure, maybe one out of a hundred DUI's resulted in death, but what does that have to do with this case? The jury is going to get the menu on second degree murder. And the [district attorney] has the big burden of proving up this whole knowledge requirement. I just don't think it's a proper topic for this case." In reaching this conclusion, the trial court cited *People v. Gandarilla, supra,* G042743.

Duarte explains the nature and theory of relevance of the statistical evidence in the appellant's opening brief. She states she wanted to present evidence that "only a very small number of DUI's result in fatalities" and therefore her prior DUI arrest would not have made her aware that a high probability of death would result from driving while intoxicated.

B. *Neither the Prosecution nor the Trial Court Committed Misconduct*

A nonpublished appellate opinion "must not be cited or relied on by a court or a party in any other action," except in limited circumstances not relevant here. (Cal. Rules of Court, rule 8.1115(a), (b).) The trial court should not have relied on *People v. Gandarilla, supra,* G042743, and the prosecutor should not have cited it.

Duarte, by failing to object, forfeited any claim of misconduct or error by the prosecutor or the trial court. "To avoid forfeiture of a claim of prosecutorial misconduct, a defendant must object and request an admonition." (*People v. Perez* (2018) 4 Cal.5th 421, 450.) "As a general rule, a specific and timely objection to judicial misconduct is required to preserve the claim for appellate review." (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1320.) In the present case, an objection would have cured any

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harm caused by the citation to a nonpublished opinion because the trial court would have been alerted not to consider it. (See *People v. Hoyt* (2020) 8 Cal.5th 892, 952.)

But there was no prosecutorial error. A prosecutor's conduct violates the federal constitution when the conduct "'infects the trial with such unfairness as to make the conviction a denial of due process'"; that is, when the conduct is "'of sufficient significance to result in the denial of the defendant's right to a fair trial.'" (*People v. Harrison* (2005) 35 Cal.4th 208, 242.) A prosecutor's conduct that does not render a criminal trial fundamentally unfair under federal law violates California law only if the conduct involves """'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'""" (*Ibid*.)

Here, the prosecutor's citation to a single nonpublished opinion in a motion in limine did not infect the entire trial with unfairness or deny Duarte a fair trial. A claim of prosecutorial error therefore must be founded on state law. The prosecutor's citation to the nonpublished opinion, though not permitted by the California Rules of Court, was not deceptive or reprehensible.

We firmly reject Duarte's claim that the trial court committed misconduct by citing the nonpublished opinion. A legal error or an erroneous ruling does not in itself constitute judicial misconduct. (Rothman et al., *Cal. Judicial Conduct Handbook* (4th ed. 2017) § 3:46, pp. 192-193.) Legal error constitutes judicial misconduct only when the error "clearly and convincingly reflects" bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of law, or "any purpose other than faithful discharge of judicial duty." (*Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371, 398; see Rothman et al., *Cal. Judicial Conduct Handbook, supra*, §§ 3:47, 3:48 at pp. 195-196.) The trial court's citation of the nonpublished opinion did not reflect any of those traits; indeed, in every aspect of this case, the trial judge acted with the utmost integrity, respect for the law, and regard for the rights of everyone involved.

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C. *Any Error in Citing the Nonpublished Opinion Was Harmless*

The trial court's citation to the nonpublished decision is subject to the general rule that a conviction will not be reversed unless the error resulted in a miscarriage of justice, that is, the error was prejudicial. (Cal. Const., art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 835-837.) Citing a nonpublished opinion violates nonstructural state law—California Rules of Court, rule 8.1115—and therefore prejudice is considered under the standard of *People v. Watson, supra*, at p. 836. (See *People v. Gonzalez* (2018) 5 Cal.5th 186, 195; *People v. McNeal* (2009) 46 Cal.4th 1183, 1203.) Under the Watson standard, reversal is required only if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson, supra*, at p. 836.)

The rule is the same for prosecutorial misconduct. A conviction will not be reversed for prosecutorial misconduct based on state law unless the misconduct resulted in prejudice, that is, "it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct." (*People v. Crew* (2003) 31 Cal.4th 822, 839.)

In this case, any error in citing or relying on the nonpublished opinion was harmless because, had that opinion never been cited by the prosecution, there would have been no reasonable probability the trial court would have allowed Duarte to present the statistical evidence. Without the nonpublished opinion, the trial would have reached the same conclusion and granted the prosecution's motion in limine for the reason that the statistical evidence proffered by Duarte was irrelevant.

Duarte argues the statistical evidence was relevant to the issue of implied malice. She argues, first, that evidence would have "tended to refute the objective element of implied malice requiring the jury to find that Duarte committed an act, the natural consequences of which were dangerous to human life." She argues, second, that the statistical evidence was "relevant to the jury's consideration of the subjective

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elements of implied malice which required the prosecutor to prove that Duarte knew her act was dangerous to human life and deliberately acted with conscious disregard for human life."

Duarte was charged with, and convicted of, three counts of implied malice murder. Malice is implied when the defendant deliberately engaged in conduct the natural consequences of which were dangerous to life, the conduct proximately caused the death of another, the defendant knew that the conduct would endanger the life of another, and the defendant acted with conscious disregard for life. (*People v. Knoller* (2007) 41 Cal.4th 139, 143.) Implied malice murder has a physical (objective) component and a mental (subjective) component. (*People v. Chun* (2009) 45 Cal.4th 1172, 1181; *People v. Knoller, supra,* at pp. 153-154.) The physical component is the defendant performs an act the natural consequences of which are dangerous to life. (*People v. Chun, supra,* at p. 1181.) The mental component is the defendant knows that his or her conduct endangers the life of another yet acts with conscious disregard for life. (*Ibid.*)

The statistical evidence proffered by Duarte was not relevant to either component of implied malice. Whether or not a small number of DUI arrests results in fatalities has no bearing on whether the natural consequences of driving while intoxicated are dangerous to life. Looking solely at the ratio between DUI arrests and DUI fatalities ignores the overall danger and risk presented by drunk drivers. It is virtually self-evident that a natural consequence of driving while intoxicated is a danger to human life: "[O]ur observation that '[drunken] drivers are extremely dangerous people' [citation] seems almost to understate the horrific risk posed by those who drink and drive." (*Burg v. Municipal Court* (1983) 35 Cal.3d 257, 262.)

The mental component of implied malice could only have been determined by consideration of evidence of Duarte's own knowledge and understanding. Whether or not statistics showed that a small number of DUI arrests results in fatalities has no

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bearing on whether Duarte knew her conduct endangered the lives of others and acted in conscious disregard of life. The trial court said it succinctly and best: "[s]ure, maybe one out of a hundred DUI's resulted in death, but what does that have to do with this case?"

The legal validity of our analysis, as well as that of the trial court, does not depend for legal validity upon the nonpublished opinion cited by the prosecution. The proffered statistical evidence was inadmissible under fundamental principles of relevance as applied to the components of implied malice. The trial court reached the conclusion the statistical evidence would not be probative and engaged in an analysis under Evidence Code section 352 before citing the nonpublished opinion. Duarte cites no authority that would have made the statistical evidence admissible.

Thus, there is no reasonable probability that, had the prosecution never cited the nonpublished opinion, the trial court would have denied the prosecution's motion in limine and admitted the statistical evidence. Because there was no reasonable probability that the ruling on the motion in limine would have been different, there was no reasonable probability the jury would have reached a verdict more favorable to Duarte if the prosecution and the trial court had not cited the nonpublished opinion.

D. *The Trial Court Did Not Err by Excluding the Statistical Evidence*

The trial court did not err by granting the prosecution's motion in limine and excluding the statistical evidence. Only relevant evidence is admissible. (Evid. Code, § 350.) We have concluded the statistical evidence proffered by Duarte was irrelevant to any issue presented at trial.

The trial court engaged in an analysis under Evidence Code section 352. Because the proffered statistical evidence had no relevance, its probative value was substantially outweighed by the probability that its admission would necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, § 352.)

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In addition, defense counsel's offer of proof at trial did not advance a theory or identify evidence of a preliminary fact by which a foundation would have been laid to make the statistical evidence admissible. (Evid. Code, §§ 400, 402, 403.) Defense counsel said he wanted to "explore" statistics with the witnesses, but the only witness identified was Page, the prosecution's accident reconstruction expert. Defense counsel did not identify any defense witness who would be able to testify about the statistics. Defense counsel never described what statistics he wanted to present other than to say they concerned the witnesses' "experiences with DUI arrests and their experiences with DUI fatalities." The failure of the offer of proof alone justified the trial court's decision to exclude the statistical evidence. (Evid. Code, § 403, subd. (a).)

III.

The Trial Court Did Not Err by Denying Duarte's Motion to Disclose Personal Juror Identifying Information

Duarte argues the trial court erred by denying her motion to disclose personal juror identifying information. We find no error.

A. *Background*

About two months after the jury rendered its verdicts, Duarte filed a motion to disclose personal juror identifying information pursuant to Code of Civil Procedure section 237, subdivision (b). The motion was based on a letter the trial court had received from one of the jurors after the verdicts had been rendered. Duarte argues the letter demonstrated the juror had felt intimidated and ignored during deliberations and had, at a minimum, been "bullied" into voting to convict Duarte of murder.

A redacted version of the letter was submitted with the motion. In the letter, the juror stated that Duarte's case was the first time the juror had been chosen to serve on a jury, the trial was difficult, and the juror was exhausted when deliberations started. The juror then described the course of deliberations: "Within a very short period

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of time, most of the jurors started to say that she was guilty. Many expressing their feeling about getting in a car drunk. Her knowing what she was doing was wrong. That she was acting when she was crying in the video. After many people had expressed their feelings, I had to speak up. I said 'It sounds to me like you are all going off of emotion. This is the exact thing that the judge told us not to do. Do you not remember him saying that we had to have the ingredients to the recipe??' Another jury spoke up and said and the totem pole, remember what he said about that? A couple of jurors agreed about the recipe and said that we have the elements to prove the verdict."

The letter relates that the jurors discussed the elements of implied malice. All the jurors but the letter writer and another agreed that the acting with conscious disregard of life element of implied malice had been met. The juror who wrote the letter asked about the *Watson* advisement. A discussion followed, and "it came down to telling me it was not necessary to convict the defendant." The juror expressed the belief that Duarte did not get in the car with the intent to kill anyone. Other jurors made comments, and one juror said "it had something to do with intentional intoxication." The juror also expressed self-doubt: "I had so many things going through my head . . . . What was wrong with me?? I knew I listened but maybe I missed something important. How could I be the only one holding out?"

The letter continued: "I told everyone that I didn't mean to be difficult. I just wasn't on the same page as everyone else. I said maybe you need to educate me a little more or I really need to read more. I read the instructions on the juror process and the elements that were needed to convict the defendant of murder. I still just didn't see it. I remember reading a paragraph after the four elements, and it somehow swayed me a little bit. I kept reading the elements and just wanted it to jump out at me, what everyone else was agreeing on. After what seemed a long time for me, I raised my hand. I raised it because I felt like I missed something."

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The juror wrote, "I felt wrong about the whole thing" and "wished I had written [the trial court] a note" during the deliberations to ask if a prior *Watson* advisement were necessary for a later murder conviction. The juror concluded by writing: "I never imagined all of the pressure that a juror feels in the deliberation room" and "I just had to write to you to get this off of my conscience."

The trial court denied the motion to disclose personal juror identifying information on the ground that Duarte had not made a prima facie showing of good cause for disclosure. The court stated it had read the juror's letter "many, many times line for line word for word," the letter showed the juror was an active participant in the deliberation process, and "[n]owhere in the letter does the juror state improper interaction or coercion with the other jurors." The jury was polled after the verdict, and all jurors confirmed the verdict as theirs.

The trial court concluded: "So there is absolutely nothing in that letter that would suggest anything that comes close to jury misconduct. . . . At no time does she mention being bullied, ignored, forced[,] intimidated, coerced. [¶] If anything, it's the opposite. She took an active role."

B. *Duarte Failed to Show Good Cause*

A trial court's record of the jurors' personal identifying information must be sealed after the verdict is recorded. (Code Civ. Proc., § 237, subd. (a)(2).) "Pursuant to [Code of Civil Procedure] Section 237, a defendant or defendant's counsel may, following the recording of a jury's verdict in a criminal proceeding, petition the court for access to personal juror identifying information within the court's records necessary for the defendant to communicate with jurors for the purpose of developing a motion for new trial or any other lawful purpose." (*Id.*, § 206, subd. (g).) A petition for access to personal juror identifying information must be "supported by a declaration that includes

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facts sufficient to establish good cause for the release of the juror's personal identifying information." (*Id.*, § 237, subd. (b).)

Good cause to support a petition to disclose juror personal identifying information based on juror misconduct means a showing that is sufficient to support a reasonable belief that juror misconduct occurred. (*People v. Cook* (2015) 236 Cal.App.4th 341, 345-346.) "Good cause does not exist where the allegations of jury misconduct are speculative, conclusory, vague, or unsupported." (*Ibid.*) "'Absent a satisfactory, preliminary showing of possible juror misconduct, the strong public interests in the integrity of our jury system and a juror's right to privacy outweigh the countervailing public interest served by disclosure of the juror information.'" (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 990.) Denial of a petition for access to personal juror identifying information is reviewed under the abuse of discretion standard. (*People v. Jones* (1998) 17 Cal.4th 279, 317; *People v. Johnson* (2013) 222 Cal.App.4th 486, 492.)

The trial court did not err because Duarte failed to provide a showing sufficient to support a reasonable belief that juror misconduct had occurred during deliberations. As the trial court concluded, the juror's letter did not state or suggest that the juror who wrote the letter had been intimidated, forced, or coerced into voting to convict. The letter does not state or suggest that improper deliberations had occurred or the jurors reached their verdicts by chance or other improper means. The letter reveals that the jurors did precisely what they were supposed to do during deliberations: They reviewed the evidence, read and studied the instructions, expressed their thoughts, and debated points of disagreement. The juror who wrote the letter had actively participated in deliberations and nothing in the letter suggests that her views had been ignored or that she was shunned or marginalized.

In the letter, the juror wrote of her struggle to reach a decision and the pressure she felt during the deliberation process. Those feelings are normal, not signs of

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misconduct. Jury trials can be difficult and exhausting for jurors, particularly in cases with facts like this one. Deliberations can be pressure-filled and stressful; jurors often struggle to reach a decision.

Duarte argues the juror's statement in the letter that she "felt wrong about the whole thing" is an acknowledgment that juror voted to convict based on "perceived pressure to conform to what the other jurors believed." The trial court viewed the letter as an expression of "buyer's remorse" rather than a revelation of misconduct. The court's assessment was a fair one. The juror agreed with the verdicts and, when polled, confirmed the verdicts were hers. Whatever the juror might have subjectively felt during deliberations, access to personal juror identifying information is permissible only upon a showing of possible juror misconduct, and no such showing was made by Duarte.

IV.

The Restitution Fine and the Victim Restitution Are Affirmed; the Abstract of Judgment Must Be Corrected to Strike the Court Security Fee and the Criminal Conviction Assessment

The following fine, fee, assessment, and restitution award appear on the abstract of judgment for the indeterminate prison commitment: $300 restitution fine (Pen. Code, § 1202.4, subd. (b)(1)); $160 court security fee (*id*., § 1465.8, subd. (a)(1)); $120 criminal conviction assessment (Gov. Code, § 70373, subd. (a)(1)); and $26,585.37 in victim restitution (Pen. Code, § 1202.4, subd. (f) (section 1202.4(f)). Duarte argues all of these must be stricken pursuant to *People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1172-1173 (*Dueñas*) because she does not have the ability to pay them.

A. Dueñas *Is Inapplicable to Victim Restitution Under Section 1202.4(f)*

The *Dueñas* court held that due process of law requires a trial court to determine a defendant's "present ability to pay" before imposing court security assessments, criminal conviction assessments, and restitution fines. (*Dueñas*, *supra*, 30

Cal.App.5th at pp. 1164, 1169-1172.) Assuming for purposes of this opinion only that *Dueñas* was correctly decided, we conclude *Dueñas* is inapplicable to victim restitution under section 1202.4(f).

Dueñas addressed restitution fines under Penal Code section 1202.4, subdivision (b), which are paid to the court. Here, the trial court awarded $26,585.37 in victim restitution under section 1202.4(f). *Dueñas* did not address direct restitution to the victim. In *People v. Evans* (2019) 39 Cal.App.5th 771 (*Evans*) the Court of Appeal concluded the rule of *Dueñas* did not extend to victim restitution under section 1202.4(f) because victim restitution is paid directly to the victims as compensation for economic losses caused by the defendant's criminal conduct. (*Evans, supra*, at p. 777.) A criminal defendant's ability to pay victim restitution is not a factor to consider in setting a restitution award under section 1202.4(f) because victim restitution is enforceable as a civil penalty and the wealth of a defendant in a civil action is irrelevant to liability. (*Evans, supra*, at pp. 776-777.)

Several courts have adopted the reasoning of *Evans* and its conclusion that *Dueñas* does not extend to victim restitution under section 1202.4(f). (*People v. Pack-Ramirez* (2020) 56 Cal.App.5th 851, 859; *People v. Abrahamian* (2020) 45 Cal.App.5th 314, 338; *People v. Allen* (2019) 41 Cal.App.5th 312, 326.) We agree with these opinions and likewise conclude that *Dueñas* does not extend to victim restitution under section 1202.4(f).

B. *The Abstract of Judgment Must Be Corrected by Striking the Court Security Fee and the Criminal Conviction Assessment*

At sentencing, defense counsel asserted that Duarte was indigent and asked the trial court to waive "the fines and fees." In response, the trial court waived the court security fee (Pen. Code, § 1465.8, subd. (a)(1)) ($40 per count, $160 total) and the criminal conviction assessment (Gov. Code, § 70373, subd. (a)(1)) ($30 per count, $120 total) and found that Duarte did not have the ability pay. The court imposed the

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restitution fine (Pen. Code, § 1202.4, subd. (b)(1)) in the minimum amount of $300. The court stated the record would show that Duarte had made a *Dueñas* motion. The sentencing minutes also reflect that the court security fee and the criminal conviction assessment had been waived.

However, the abstract of judgment for the indeterminate prison commitment includes the court security fee and the criminal conviction assessment that the trial court had waived. The oral pronouncement of sentence controls over the abstract of judgment. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) The appellate court has inherent power to order correction of the abstract of judgment if it does not accurately reflect the oral judgment of the court. (*Ibid*.) The Attorney General does not argue the abstract correctly reflects the trial court's decision on the court security fee and the criminal conviction assessment, or that fee and assessment must be imposed notwithstanding the trial court's decision to waive them. We therefore direct the trial court to correct the abstract of judgment for the indeterminate prison commitment by striking the court security fee of $160 and the criminal conviction assessment of $120.

Duarte also challenges the $300 restitution fine. We conclude the trial court did not err by imposing that fine. If a defendant has been convicted of a felony, a trial court has discretion to set the restitution fine in an amount of not less than $300 or more than $10,000. (Pen. Code, § 1202.4, subd. (b)(1).) The trial court in the present case imposed the minimum, and confirmed that amount after making a finding on Duarte's ability to pay. This was a reasonable decision considering, as the court put it, "I could have given her up to $10,000."

If the trial court erred by imposing the $300 restitution fine, the error was harmless beyond a reasonable doubt because Duarte will be able to earn enough in prison wages while incarcerated to pay it. (*People v. Jones* (2019) 36 Cal.App.5th 1028, 1035; *People v. Johnson* (2019) 35 Cal.App.5th 134, 140; see (*People v. Cervantes* (2020) 46

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Cal.App.5th 213, 229 [Defendant's ability to pay includes the ability to obtain prison wages and to earn money after his release from custody].)

DISPOSITION

The judgment is affirmed. The trial court is directed to correct the abstract of judgment for the indeterminate prison commitment by striking the $160 court security fee and the $120 criminal conviction assessment, prepare a corrected abstract of judgment, and forward a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

FYBEL, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.

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