# APPENDIX

# APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT



ANA ROSENDA MANCIO,

Petitioner - Appellant,

v.

LAVELLE PARKER,

Respondent - Appellee.

No. 24-7499

D.C. No. 2:21-cv-09156-SVW-RAO
Central District of California,
Los Angeles

ORDER

Before: SILVERMAN and RAWLINSON, Circuit Judges.

The motion (Docket Entry No. 8) for reconsideration and reconsideration en banc is denied. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

# APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT



ANA ROSENDA MANCIO,

Petitioner - Appellant,

v.

LAVELLE PARKER,

Respondent - Appellee.

No. 24-7499

D.C. No. 2:21-cv-09156-SVW-RAO
Central District of California,
Los Angeles

ORDER

Before: PAEZ and M. SMITH, Circuit Judges.

Appellant's motion (Docket Entry Nos. 5 and 6) for an extension of time to file a motion for reconsideration is granted. The motion for reconsideration is due September 12, 2025.

# APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 17 2025

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

ANA ROSENDA MANCIO,

Petitioner - Appellant,

v.

LAVELLE PARKER,

Respondent - Appellee.

No. 24-7499

D.C. No. 2:21-cv-09156-SVW-RAO
Central District of California,
Los Angeles

ORDER

Before: H.A. THOMAS and DESAI, 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 D

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

| | |
|---|---|
| ANA ROSENDA MANCIO,<br>Petitioner,<br>v.<br>MONA D. HOUSTON, Warden,<br>Respondent. | Case No. CV 2:21-09156 SVW (RAO)<br><br>JUDGMENT |

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

IT IS ORDERED AND ADJUDGED that the First Amended Petition is denied and this action is dismissed with prejudice.

DATED: November 7, 2024

STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

ANA ROSENDA MANCIO,

Petitioner,

v.

MONA D. HOUSTON, Warden,

Respondent.

Case No. CV 2:21-09156 SVW (RAO)

ORDER DENYING CERTIFICATE OF APPEALABILITY

The Court has reviewed the Report and Recommendation of United States Magistrate Judge and the other papers on record in these proceedings. For the reasons set forth in the Magistrate Judge's Report and Recommendation, filed June 4, 2024, the Court finds that the Petitioner has not made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253, Fed. R. App. P. 22(b); *see also Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

IT IS ORDERED that the Certificate of Appealability is denied.

DATED: November 7, 2024

STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

| | |
|---|---|
| ANA ROSENDA MANCIO,<br>Petitioner,<br>v.<br>MONA D. HOUSTON, Warden,<br>Respondent. | Case No. CV 2:21-09156 SVW (RAO)<br><br>ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE |

Pursuant to 28 U.S.C. § 636, the Court has reviewed the First Amended Petition, all of the records and files herein, the Magistrate Judge's Report and Recommendation ("Report"), and Petitioner's Objections to the Report and her Supplemental Lodging of documents. Further, the Court has engaged in a *de novo* review of those portions of the Report to which Petitioner has objected.

The Court does not find Petitioner's objections to be meritorious but does comment on a factual challenge raised by Petitioner. Petitioner objects to the Report's statement that the 9 mm casings found at her house were fired from the same gun as an expended 9 mm casing found at the crime scene. *See* Dkt. No. 83 at 37. The factual summary set forth in the California Court of Appeal's opinion stated that the government's firearms expert "concluded two of the 5 nine-millimeter casings recovered at [Petitioner]'s home had been fired from the same weapon as the shell

casing found at the crime scene." (Lodg. No. 2 at 10-11.) The Court's review of the firearms expert's trial testimony is consistent with the appellate court's factual summary. Because Petitioner has not rebutted the presumption that the state court's findings of fact are correct with clear and convincing evidence, the Court overrules Petitioner's objection. *See Tilcock v. Budge*, 538 F.3d 1138, 1141 (9th Cir. 2008).

The Court accepts and adopts the findings, conclusions, and recommendations of the Magistrate Judge.

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

DATED: November 7, 2024

STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE



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# APPENDIX E

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE CENTRAL DISTRICT OF CALIFORNIA**

| | |
|---|---|
| ANA ROSENDA MANCIO,<br>Petitioner,<br>v.<br>MONA D. HOUSTON, Warden,<br>Respondent. | Case No. CV 21-09156-SVW (RAO)<br><br>REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE |

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

## I. INTRODUCTION

On October 27, 2021, Petitioner Ana Rosenda Mancio ("Petitioner"), a California state prisoner proceeding *pro se*, constructively filed a Petition for Writ of Habeas Corpus by a Person In State Custody ("Petition").[1] (Dkt. No. 1.) Respondent filed a motion to dismiss the Petition for failure to allege a cognizable federal claim,

[1] Under the "mailbox rule," when a *pro se* prisoner gives prison authorities a pleading to mail to court, the court deems the pleading constructively "filed" on the date it is signed. *Roberts v. Marshall*, 627 F.3d 768, 770 n.1 (9th Cir. 2010). The Petition was filed in this Court on November 22, 2021.

but the Court denied the motion to dismiss, without prejudice, because Respondent had narrowly construed the Petition as containing only one claim and had failed to address all the claims contained in the Petition. (Dkt. Nos. 14, 21.) On August 4, 2022, Respondent filed a renewed motion to dismiss the Petition. (Dkt. No. 33.)

On June 3, 2022, Petitioner constructively filed a First Amended Petition ("FAP") raising six claims. (Dkt. No. 29.) The Court construed the FAP as a motion to amend the Petition, granted the motion, denied as moot Respondent's renewed motion to dismiss the original Petition, and ordered Respondent to file a response to the FAP. (Dkt. No. 42.)

Respondent filed a motion to dismiss the FAP as partially unexhausted and also raised timeliness and procedural default arguments. (Dkt. No. 51.) On July 26, 2023, the Court found that Petitioner had exhausted her claims and ordered Respondent to file an Answer addressing the merits of all claims and containing any timeliness or procedural default arguments Respondent wished to raise. (Dkt. No. 58.)

On January 23, 2024, Respondent filed an Answer to the FAP. (Dkt. No. 72.) Respondent also lodged pertinent portions of the state record supplementing the documents she had lodged in connection with her motions to dismiss.[2] (*See* Dkt. Nos. 15, 34, 52, 73.) On February 28, 2024, Petitioner filed a Traverse. (Dkt. No. 74.)

## II. PRIOR PROCEEDINGS

On June 5, 2018, a Los Angeles County Superior Court jury convicted Petitioner of first-degree murder and found that she was armed with a firearm during the commission of the offense, within the meaning of Cal. Penal Code § 12022(a)(1). (Lodg. No. 15, Clerk's Transcript ("CT") 474A.) On July 6, 2018, the trial court sentenced Petitioner to 26 years to life in prison. (3 CT 505-06.)

[2] Petitioner has also lodged pertinent documents. (*See* Dkt. Nos. 39, 56, 59, 75.)

Petitioner appealed to the California Court of Appeal, which affirmed her conviction in an unpublished opinion filed January 21, 2020. (Lodg. Nos. 2, 20.) On April 1, 2020, the California Supreme Court summarily denied review. (Lodg. Nos. 3, 10.)

After the conclusion of direct review, Petitioner filed two habeas petitions in the Los Angeles County Superior Court. Petitioner constructively filed the first habeas petition on March 28, 2021, and the Superior Court denied it on April 15, 2021. (Lodg. Nos. 11, 12.) On May 4, 2021, the Superior Court denied Petitioner's second habeas petition, which sought discovery. (Lodg. No. 5.)

On May 15, 2021, Petitioner constructively filed a habeas petition in the California Court of Appeal, alleging the same government misconduct and ineffective assistance claims that she raised in the Superior Court. (Lodg. No. 6.) On May 26, 2021, the Court of Appeal summarily denied the petition. (Lodg. No. 7.) On June 8, 2021, Petitioner constructively filed a habeas petition in the California Supreme Court, alleging that the Court of Appeal had violated her due process rights by issuing a "postcard denial" of her petition. (Lodg. No. 8.) On October 13, 2021, the California Supreme Court summarily denied the petition. (Lodg. No. 9.)

On August 15, 2022, after she had commenced this action, Petitioner constructively filed a habeas petition in the California Supreme Court asserting ineffective assistance claims. (Lodg. No. 13.) On October 26, 2022, the California Supreme Court denied the petition with citations to *In re Clark*, 5 Cal. 4th 750, 767-69 (1993) (courts will not entertain successive habeas claims); *People v. Duvall*, 9 Cal. 4th 464, 474 (1995) (habeas petition must include copies of reasonably available documentary evidence); *In re Swain*, 34 Cal. 2d 300, 304 (1994) (habeas petition must allege sufficient facts with particularity); and *In re Miller*, 17 Cal. 2d 734, 735 (1941) (courts will not entertain repetitive habeas claims). (Lodg. No. 14.)

On April 19, 2023, Petitioner filed a habeas petition in the California Supreme Court, and on July 10, 2023, she filed an amended petition that asserted claims

corresponding to Grounds Two through Six of the FAP. (Lodg. Nos. 16-17.) On July 26, 2023, the California Supreme Court summarily denied the petition. (Lodg. No. 18.)

## III. PETITIONER'S CLAIMS

Petitioner raises the following grounds for relief:

1. The California Supreme Court's "postcard denial" of habeas relief violated Petitioner's due process rights because it did not indicate whether the denial was procedural or on the merits. (FAP at 5.)[3]

2. The government committed misconduct by (a) "fail[ing] to preserve records, page[s] 52 through 72 vol. 1"; (b) falsifying documents; (c) providing a prejudicial probation report; and (d) sealing the record without informing Petitioner of the "poll of jury." (*Id.* at 5-6.)

3. The evidence was constitutionally insufficient to support Petitioner's conviction. (*Id.* at 6.)

4. Petitioner's defense counsel rendered ineffective assistance in violation of the Sixth Amendment.[4] (*Id.*).

5. "Cumulative errors by counsel" violated Petitioner's Sixth Amendment rights. (*Id.*)

6. Petitioner's due process rights were violated when the trial court imposed a restitution fine and fees without determining her ability to pay. (*Id.* at 7.)

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[3] The Court will use the page numbers assigned by the ECF system for Petitioner's filings and all lodgments.

[4] Ground Four of the FAP states that defense counsel was ineffective for failing to (1) investigate a defense, (2) call witnesses, and (3) communicate with Petitioner. (FAP at 6.) However, Ground Four also contains the notation "see Appendix C." (*Id.*) Appendix C is a copy of Petitioner's brief on direct appeal, in which she raised a claim that counsel was ineffective for failing to object to certain firearm evidence. (Dkt. No. 29-3 at 35-49.) The Court will liberally construe Ground Four to include this ineffective assistance claim, which according to both parties Petitioner asserted in her original Petition and which Petitioner views as still pending. (*See* Answer at 26; Traverse at 26-27, 30.)



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## IV. FACTUAL SUMMARY

The Court adopts the factual summary set forth in the California Court of Appeal's opinion affirming Petitioner's conviction. [5]

A. *The Evidence at Trial*[6]

1. *The principals*

In 2015 [Petitioner] lived in Littlerock, California with her husband of 20 years, Edwin Mancio, and their two daughters, Scarlett and Tamara. [7] [Petitioner] worked as a real estate agent and notary public. Edwin handled livestock, slaughtering cattle and selling the meat, and he also repaired fences. Scarlett worked at a restaurant in Palmdale; Tamara was a recent high school graduate. Tamara had a 2014 gray two-door Scion TC that [Petitioner] and Edwin purchased for her as a high school graduation present.

The Mancios were friends with Romero and his family, and the two families had socialized together a few times. Romero lived in the Lake Los Angeles area of the Antelope Valley with his wife of 11 years, Karim Illescas, and their two daughters.[8] Romero worked as an

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[5] The Court "presume[s] that the state court's findings of fact are correct unless [p]etitioner rebuts that presumption with clear and convincing evidence." *Tilcock v. Budge*, 538 F.3d 1138, 1141 (9th Cir. 2008); 28 U.S.C. § 2254(e)(1). Because Petitioner has not rebutted the presumption with respect to the underlying events, the Court relies on the state court's recitation of the facts. *Tilcock*, 538 F.3d at 1141. To the extent that an evaluation of Petitioner's individual claims depends on an examination of the trial record, the Court has made an independent evaluation of the record specific to those claims.

[6] [Petitioner] did not call any witnesses. [Petitioner]'s husband and two daughters each took the stand to assert their Fifth Amendment privilege in the presence of the jury.

[7] To avoid confusion, we refer to Edwin, Tamara, and Scarlett by their first names.

[8] Lake Los Angeles and Littlerock are communities in the Antelope Valley of Los Angeles County.



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electrician and operated a side business delivering feed for livestock and horses. Unbeknownst to their spouses, [Petitioner] and Romero had engaged in an extramarital affair for four years.

Ricardo Pech was a close friend of the Mancio family who sometimes spent weekends at the Mancio home. Pech worked odd jobs and assisted Edwin in slaughtering cattle and repairing fences.

2. *Discovery of the affair*

In April 2015 Illescas suspected her husband was having an extramarital affair, and she concealed a voice-activated digital recorder in Romero's car. The recordings confirmed her suspicions. On April 24 Illescas confronted Romero about the affair, and they discussed the possibility of his moving out of the family home. Illescas was incensed and texted [Petitioner], "Pray to God that you don't come across me." [Petitioner] responded, "You must have the wrong number. Who is this?" Illescas replied, "You will soon find out."

The following day Illescas received a voicemail message from Edwin saying he too had just learned about the affair and was very sorry. He referred to [Petitioner] and Romero as "dogs." Edwin attempted to call Illescas again later that day, but when Romero picked up Illescas's phone, Edwin threatened to kill him. That night Edwin used cash at the airline counter in the Los Angeles International Airport to purchase a one-way ticket to Guatemala for a flight leaving a few hours later, at 1:30 a.m. on April 26. Edwin's cell phone was inactive from that time forward.

Two days later (April 27) Romero visited his close friend, Jose Gonzalez. Romero used Gonzalez's phone to call [Petitioner].

Gonzalez overheard Romero tell [Petitioner] their relationship was over and she should not call him again.

3. *The murder*

Around midday on April 28 Romero was having lunch with Illescas when he received a text message from an unknown number asking him to deliver feed to 9420 East Avenue W-8, outside of Littlerock.[9] Because Romero was unfamiliar with the address, Illescas looked up the address on her phone and computer. Romero called the number to discuss the delivery but there was no answer; instead, at 4:37 p.m., Romero received a text message asking him to confirm whether he was coming. Romero responded that he would leave his home at 5:00 p.m. to make the delivery. At around 5:00 p.m. Romero left his home in his pickup truck.

At around 5:45 or 6:00 p.m., Illescas called Romero to ask if she should put their horse in its stable, but Romero did not answer. Growing anxious, Illescas called and texted Romero several times over the next two hours, receiving no response. At around 7:40 p.m. Illescas left to look for Romero near the address of the feed delivery.

When Illescas arrived at the delivery location, she observed it was a desert area with just a few houses spread among empty lots. Romero's truck was parked near an open lot with a "for sale" sign. Illescas parked behind Romero's truck, and as she approached the truck on the driver's side, she saw Romero's body was slumped over onto the passenger side. She tugged on Romero's arm and shirt, and his body fell back,

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[9] Forensic analysts linked the phone number used to contact Romero to a "burner" phone—a phone that can be prepaid and activated without any subscriber information.



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unresponsive. Illescas called the police.

Deputies from the Los Angeles County Sheriff's Department (LASD) arrived at the scene shortly after 8:00 p.m.[10] They observed Romero's driver's side window was down and Romero's seat belt was still fastened. The front windshield and rear window had bullet holes, and the passenger side window was shattered. LASD homicide detective, Karen Shonka, responded to the scene and found a single expended nine-millimeter shell casing in the dirt outside the truck and several expended projectiles inside the truck. Romero's pockets were turned inside out, and his cell phone and wallet were missing.

Robert Fierro, an investigator with the Los Angeles County Coroner's Office, also responded to the crime scene. Fierro opined Romero died from multiple gunshot wounds, including five shots to his head and one to his left arm, indicating Romero may have raised his arm defensively. Several of Romero's head wounds showed stippling, skin damage indicating the shots were fired from within a few feet. Detective Shonka opined the shooter was likely to have fired the shots in rapid succession in a position parallel to or just behind Romero, while Romero was seated with his driver's side window down, consistent with the killer firing the shots from a vehicle pulled alongside Romero's truck. Detective Shonka also opined the shooter was likely to be a skilled shooter with experience in how to address recoil from the firearm in

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[10] The sheriff's deputy who responded to the scene questioned Illescas, who was later transported to the police station for further questioning. Illescas told the homicide detectives she did not own and had never handled a gun. Sheriff's deputies sampled Illescas and her car for gunshot residue; however, the samples were never analyzed.

order to fire a series of shots with such consistent aim.

4. *The gray Scion TC observed near the crime scene*

Between 4:45 and 5:00 p.m. on April 28, shortly before the murder, Tyler Duke and Emily Burke were driving home on 103rd Street outside of Littlerock. As they slowed down to turn onto a dirt road leading to their property, they saw a gray two-door Scion TC parked at 103rd Street and Avenue W-8. Burke described the driver as a small Hispanic man, possibly in his late 20's, and the passenger as a medium-sized Hispanic woman. The woman appeared to be in her 30's, older and larger than the man, and she had long, wavy, dark brown hair.[11] Duke and Burke took note of the vehicle and its occupants because the vehicle was parked in a remote location and the man in the driver's seat was wearing blue surgical gloves, which caused Duke and Burke to fear the occupants might be burglars. Duke and Burke hastened home, and as Burke looked back she noticed the Scion start to drive up Avenue W-8. They arrived at their home around 5:00 p.m., and about 15 or 20 minutes later they heard several gunshots in rapid succession.

5. *The flight of the Mancio family from the country*

On the evening of the murder, [Petitioner] called Carlos Orellana, her boss at the real estate agency, and told him she was quitting her job and leaving the country.[12] [Petitioner] told Orellana her husband had

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[11] [Petitioner] had dark brown or black hair at the time of trial. A photograph of [Petitioner] was admitted at trial showing [Petitioner], including her hairstyle and bodyweight, as she looked in April 2015. Illescas's hair was a similar dark brown color. Pech was Hispanic, and as of April 2015, he was 28 to 30 years old, with black hair, under five feet tall, and weighing less than 120 pounds.

[12] The record does not reflect the timing of the call.

been diagnosed with stomach cancer and the Mancios were seeking a second opinion in Guatemala, where Edwin had family. [Petitioner] asked Orellana to take over a pending real estate listing; a week later, she telephoned Orellana from a different number with a Guatemala area code to check on the listing. In a subsequent call from Guatemala, [Petitioner] said she would be renting out her house in Littlerock once it had been cleaned.

The night of the murder Scarlett texted her supervisor at the restaurant, Alejandra Sanchez, to say her father had a stroke and she could not come in to work. Scarlett called Sanchez again a week later from a number with a Mexican area code to say there had been a family emergency, and she requested a relative be allowed to pick up her paycheck.

Scarlett and Tamara also called and sent text messages to their close friend Pedro Arellana[13] between 9:00 and 11:00 p.m. on April 28 to tell him the Mancios had to leave town because of a family emergency. Scarlett asked Pedro to pick up Tamara's Scion from a shopping mall parking lot near Ontario, which he and his mother Martha did the following morning.[14] However, when Pedro tried calling Scarlett and Tamara back, his calls went straight to voicemail, and he did not hear from them again. A short time after they left, [Petitioner] called Martha and told her Edwin was seeking treatment for liver cancer in Cuba. Several weeks after the Mancio family's departure, Pedro

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[13] To avoid confusion, we refer to Pedro and his mother Martha Arellana by their first names.

[14] Martha was a close friend of the Mancio family and had co-signed the loan for Tamara's Scion.

visited the Mancio home and found it deserted, with the horses and farm animals appearing to be unfed. The family's dog Perris, a small pug, was gone, but the family's three larger dogs were abandoned at the home.

In May or June 2015 [Petitioner] called her brother, Moises Delgado, to tell him the family was in Cuba seeking treatment for Edwin.[15] [Petitioner] asked Delgado to clean up the Mancio house. Prior to the Mancio family's departure, Delgado had not been aware Edwin was sick. When Delgado visited the Mancio home, the family's two horses and several of the farm animals were missing. Pedro and a neighbor had been feeding the remaining animals. Delgado found the inside of the house was "really messy," with items out of place and clothes strewn on the beds.

6. *The search of the Mancio family home and vehicle*

In July 2015 Detective Shonka, her partner, and a search team executed a warrant to search the Mancios' home. They found blue surgical gloves in the master bedroom, on [Petitioner]'s dresser and the floor, and in a sandwich bag in the garage. They also found mail addressed to [Petitioner] that had handwriting on the envelope with directions to the crime scene. A senior criminalist at the LASD crime lab, Darrick Lertyaobarit, compared the writing on the envelope against exemplars of [Petitioner]'s handwriting from her checkbook and her arrest paperwork. Lertyaobarit concluded: "It is my opinion that the

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[15] Delgado spoke with both [Petitioner] and Edwin on the telephone and recalled Edwin was weak and coughing during their call. [Petitioner] told Delgado that Edwin was in treatment and his hair was falling out. Delgado did not recall whether he was told Edwin was seeking treatment for cancer.

questioned document may have been written by the writer of the exemplar documents."[16]

The search team also found a box for a nine-millimeter Beretta 92FS handgun, with a retail purchase receipt bearing [Petitioner]'s name taped to the box.[17] Although they did not find the Beretta handgun, they found a speed loader, an owner's manual, and a cleaning kit for a Beretta. They also found five expended nine-millimeter shell casings, one in the master bedroom and four outside the house.[18] April Whitehead, a firearms identification expert at the LASD crime lab, conducted a forensic analysis of the expended nine-millimeter shell casing found at the crime scene and those recovered from [Petitioner]'s home. She concluded two of the 5 nine-millimeter casings recovered at [Petitioner]'s home had been fired from the same weapon as the shell casing found at the crime scene.[19]

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[16] Lertyaobarit testified he had never given an opinion that two documents were definitively written by the same person. He explained LASD analysts use a confidence scale in which a conclusion two documents "may have been" written by the same person expresses greater confidence in a match than an "inconclusive" conclusion, but less confidence than a conclusion the documents were "probably" written by the same person.

[17] Delgado testified he knew his sister owned a nine-millimeter pistol and once saw Edwin use the gun to slaughter a bull.

[18] The search team also found a receipt for a second firearm, an assault rifle bullet, a live shotgun cartridge, and multiple expended shotgun casings.

[19] The other three casings found at the Mancio home, which were more tarnished and dirty than the two matching casings, were fired from a single gun, but Whitehead could not conclusively match them to the casing found at the crime scene.

In July 2015 Detective Shonka and an LASD senior criminalist examined Tamara's Scion TC, which they retrieved from Pedro. The senior criminalist found gunshot residue on the vehicle's headliner (ceiling covering) and the interior door panels. Pedro testified his family did not possess firearms, and he had not used a firearm in or near the car.

*7. Cell phone records connecting [Petitioner] to the murder*

Alex Mancia, a crime analyst assigned to the LASD homicide bureau, analyzed call records and cell tower data to track the location of the cell phones belonging to Romero, [Petitioner], Pech, Scarlett, Illescas, and the burner phone around the time of the murder. [Petitioner]'s cell phone was used near her home at 4:10 p.m. on April 28, 2015, then six calls made or received between 4:15 and 5:37 p.m. showed her phone utilized the cell tower closest to the scene of the murder.[20] Calls on [Petitioner]'s phone at 5:41 and 5:47 p.m. connected to the tower closest to [Petitioner]'s home. A call at 6:04 p.m. placed [Petitioner]'s phone near the crime scene; at 6:14 p.m. to the northeast of Littlerock; then multiple calls showed the phone travelling east—at 6:30 p.m. near Phelan, at 6:46 p.m. in the San Bernardino area; and at 7:05 p.m. near the Victoria Gardens shopping center in Rancho Cucamonga. The phone was used for several calls from the same location in Rancho Cucamonga until 8:14 p.m.

[Petitioner]'s phone was next located the following morning in Otay Mesa, near the Mexican border, for calls at 1:06, 1:16 and 1:20

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[20] Mancia explained wireless service providers typically only maintain cell tower data for billable services; consequently, he was only able to track the location of the cell phones while in active use.



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a.m. There were no records of [Petitioner] using the phone again in the United States. Mancia's analysis of the numbers called on [Petitioner]'s phone reflected that calls made around the time of the murder showed a similar pattern of calls made for the entire time period of [Petitioner]'s phone records.[21]

Pech's cell phone data showed a call between his phone and [Petitioner]'s at 1:20 in the early morning before the murder. At 12:06 p.m. Pech's phone connected to the tower closest to the crime scene, then the call continued as the phone travelled toward [Petitioner]'s home in Littlerock. At 3:23 p.m. Pech's phone had returned to the crime scene, where it was at 5:47 p.m. when it received an incoming call from [Petitioner]'s phone.

Pech's phone was near [Petitioner]'s home at 7:02 p.m., then it headed east—near Phelan at 7:22 p.m. and near the Victoria Gardens Shopping Center in Rancho Cucamonga area at 7:55 p.m. Starting at 9:25 p.m. Pech's phone travelled south, showing calls near the Mexican border at Otay Mesa the next morning between 12:03 and 5:18 a.m. (overlapping with the time [Petitioner]'s phone was near Otay Mesa—from 1:06 to 1:20 a.m.). Pech's phone pinged off a tower along the Mexican border on the afternoon of April 29, after which there was no

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[21] On appeal, [Petitioner] asserts her call records on the day of the murder included calls that were not "normal" for her, which indicated someone else had [Petitioner]'s phone. This misstates the record. Mancia testified to the contrary, "As far as the totals that are being called to between [Mancio] and destination, no, it is the same behavior throughout the whole time frame of the records that we have for her." [Petitioner] relies only on Mancia's response to a hypothetical question asking whether he would have expected to see calls that were not normal for [Petitioner]'s behavior if her phone was stolen. He responded he would.

record of use in the United States.

Both [Petitioner]'s and Pech's phones received multiple calls from the same international number throughout the day of Romero's murder.

The burner phone that sent the delivery location was activated on the morning of April 28, 2015 and was used only on that day. At 7:34 a.m. Pech's phone made an unanswered call to the burner phone. At 7:47 a.m. the burner phone was in Palmdale and contacted Romero's phone. At 3:27 p.m. the burner phone was in the vicinity of the crime scene when it received a call from Romero's phone. Then, as noted, it sent a text message to Romero at 4:37 p.m. At 4:41 p.m. the burner phone was near the Palmdale airport moving toward Lancaster, where it was located at 5:14 p.m.[22] At 7:15 p.m. the phone used the cell tower near the Victoria Gardens shopping area.

On the day of the murder, Scarlett's phone was located near the Mancio home from 4:51 to 5:37 p.m., then it used the cell tower near the Victoria Gardens shopping mall in Rancho Cucamonga between 7:13 and 7:45 p.m., around the same time [Petitioner]'s and Pech's phones and the burner phone were nearby.

Analysis of Illescas's phone showed it made calls to Romero's phone from near the Romero-Illescas residence in Lake Los Angeles at 5:40, 6:53, 7:17, 7:29, and 7:41 p.m. At 7:47 p.m. Illescas's phone called Romero's phone from the tower closest to the crime scene. An 8:01 p.m. call connected again to the tower closest to the crime scene.

8. *[Petitioner]'s 2017 arrest in Florida*

Following Romero's murder, LASD detectives searched for

[22] No evidence was offered at trial to explain who used the burner phone or why it travelled to Palmdale and Lancaster.



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[Petitioner], but they were unable to locate her and learned the Mancio family had fled. More than two years later, on July 1, 2017, Detective Shonka was contacted by Detective Steve Smith with the Orlando Police Department, who reported that [Petitioner] and Edwin were at a gun show in Orlando, Florida. [Petitioner] had been detained after submitting an application to purchase a Beretta 92FS and an AR-15-type assault rifle—weapon models [Petitioner] had owned in California—after the background check turned up [Petitioner]'s outstanding California arrest warrant. [Petitioner] was detained in Orlando, then was transported back to California. When she was first interviewed by Orlando police, [Petitioner] denied ever having lived in California.

After [Petitioner]'s arrest, Detective Shonka and Mancia made an unannounced visit to the Mancio residence in Orlando, where they met Edwin, Tamara, and Scarlett. The Mancio family's pug Perris was also present at the residence.[23] When Detective Shonka asked Edwin for his passport and medical documentation, Edwin pulled from a red satchel-type bag he was holding his stamped Guatemalan passport and an airline boarding pass showing he left the United States prior to Romero's murder. Edwin also removed from the bag two doctors' letters dated November 15, 2015 and August 2, 2017, stating Edwin suffered from obesity, high blood pressure, and diabetes. There was no indication he suffered from or had been treated for cancer or a stroke.[24]

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[23] Although the reporter's transcript spells the pug's name as "Paris," we assume it is the same dog referenced in the earlier transcript as "Perris."

[24] Edwin also showed the investigators a revolver he had stored in an aluminum can outside on the patio. During a recorded jail call between [Petitioner] and Edwin, [Petitioner] asked Edwin to transplant her "little plant" outside because "it's really dangerous for the little plant to be

*9. [Petitioner]'s jailhouse phone calls with Edwin*

In July 2017, while in jail in Orlando, [Petitioner] made a series of telephone calls to Edwin and their daughters, the recordings of which were played for the jury.[25] During her first call, [Petitioner] told Edwin about her interview with Orlando police: "They say my husband sent someone to cook the chicken. [¶]. [ . . ¶] And I sent someone to cook whoever cooked the chicken." Edwin told [Petitioner] to "deny everything" and said he would be "on the same channel." [Petitioner] relayed how she had told police, "I had a romance there and when he found out, out of embarrassment, my husband got sick and we left . . . ." Edwin confirmed, "Okay, so I'll say that[.] [¶] . . . [¶] I got sick and I have the documents—where are the documents, honey?" [Petitioner] answered, "They're right there, . . . [a]t the bottom of my closet . . . a red purse." Later [Petitioner] said, "Shut up because this is being recorded, baby. You're going to hurt me." Edwin responded, "I know baby, but I can't take it anymore. [¶] . . . [¶] A mistake, a mistake, I made that mistake. Me." When Edwin on their next call said "it backfired on us," [Petitioner] responded, "[n]othing has backfired," and she added she "didn't do anything."

On several of the calls, [Petitioner] and Edwin discussed their

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there." Edwin responded, "Don't worry. I'll take the plant outside right away, I already thought about it."

[25] Transcripts of the calls translated from Spanish were admitted and published to the jury.



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hen, rooster, and chickens.[26] On one call, [Petitioner] thought the police would want to "look for the rooster," prompting Edwin to ask, "Should I get out of the corral?" [Petitioner] told him he needed to "take care of my little animals" but to remain "alert to keep the coyotes from eating him." [¶] . . . [¶] . . . what I'm going to say is that Rooster stayed here in Florida." In a subsequent call, when [Petitioner] asked Edwin why he had not visited her in jail, Edwin responded, "Didn't you tell me to keep away from the hen house?" [Petitioner] responded, "Oh, that's why."

In another call, [Petitioner] stated, "[R]emember when you got sick 2 years ago. Like—no, it was 3 years ago, right? That you got sick ... after what happened. [¶] . . . [¶] That while you were there, you got seriously ill, and I went after you and everything and after all that . . . because of the shame and everything that was going on here, we didn't go back." Edwin responded, "It was like that." [Petitioner] continued, "And you got even worse. Then finally when they gave you the release so you could travel, that's when we ended up coming back here." Edwin responded, "Correct. That's how it's gonna be."

As [Petitioner]'s transfer to California approached, Edwin advised [Petitioner] "to keep pedaling your bike . . . [¶] . . . [¶] [i]n the same gear you started with. [¶] . . . [¶] Don't you steer it up, down, ahead, whatever you do don't back up and don't go sideways. . . . [¶] . . . [¶] . . . When you reach California, you'll do exactly as you've done here." Later, [Petitioner] appeared to reconsider her account, saying to Edwin, "[L]et me tell you something, the one who threatened me was

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[26] Detective Shonka did not observe any poultry at the Mancios' Orlando residence.



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the other woman. She's the dangerous one. [¶] . . . [¶] And I'm gonna tell them that. She sent . . . this text to me, threatening me. [¶] . . . [¶] And I'm gonna say that . . . ." Edwin interrupted: "But listen, honey, honey, remember that if you're already riding a bike, stay on that same bike, keep it going." He added, "And yeah, whatever you said here, say the same thing there, the exact same thing . . . ."

(Lodg. No. 2 at 3-17.)

## V. STANDARD OF REVIEW

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

A state court's decision is "contrary to" clearly established federal law if: (1) the state court applies a rule that contradicts governing Supreme Court law; or (2) the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court but nevertheless arrives at a result that is different from the Supreme Court precedent. *See Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (citing *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000)). A state court need not cite or even be aware of the controlling Supreme Court cases "so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8 (2002).



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A state court's decision is based upon an "unreasonable application" of clearly established federal law if it applies the correct governing Supreme Court law but unreasonably applies it to the facts of the prisoner's case. *Williams*, 529 U.S. at 412-13. A federal court may not grant habeas relief "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable. *Id.* at 411 (emphasis added).

In determining whether a state court decision was based on an "unreasonable determination of the facts" under 28 U.S.C. § 2254(d)(2), such a decision is not unreasonable "merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010). The "unreasonable determination of the facts" standard may be met where: (1) the state court's findings of fact "were not supported by substantial evidence in the state court record"; or (2) the fact-finding process was deficient in some material way. *Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012) (citing *Taylor v. Maddox*, 366 F.3d 992, 999-1001 (9th Cir. 2004), overruled on other grounds by *Murray v. Schriro,* 745 F.3d 984, 999-1000 (9th Cir. 2014)).

In applying these standards, a federal habeas court looks to the "last reasoned decision" from a lower state court to determine the rationale for the state courts' denial of the claim. *See Cannedy v. Adams*, 706 F.3d 1148, 1156 (9th Cir. 2013) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991)). There is a presumption that a claim that has been silently denied by a state court was "adjudicated on the merits" within the meaning of 28 U.S.C. § 2254(d), and that AEDPA's deferential standard of review therefore applies, in the absence of any indication or state-law procedural principle to the contrary. *See Johnson v. Williams*, 568 U.S. 289, 298 (2013) (citing *Richter*, 562 U.S. at 99).

As discussed below, Ground One does not constitute a cognizable federal habeas claim and Petitioner has requested the Court to dismiss it.



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Petitioner presented Ground Two to the state courts on state habeas review. (Lodg. Nos. 6, 11, 17.) The Los Angeles County Superior Court denied relief because Petitioner failed to state a prima facie claim, and the California Court of Appeal and the California Supreme Court denied relief summarily. (Lodg. Nos. 7, 12, 18.) Thus, under the "look through" doctrine, this claim is deemed to have been rejected for the reasons given in the Superior Court's decision, and AEDPA deference applies to that decision. *See Ylst*, 501 U.S. at 803; *Ramsey v. Yearwood*, 231 F. App'x 623, 625 (9th Cir. 2007) (stating that Superior Court's finding that habeas petition failed to state prima facie claim was "the last reasoned decision on the merits" and AEDPA required federal court "to defer to the Superior Court's determination"). Because the Superior Court did not further explain the basis for its decision, the Court will conduct an independent review of the record to determine whether the state court was objectively unreasonable in applying controlling federal law. *Walker v. Martel*, 709 F. 3d 925, 939 (9th Cir. 2013); *see also Ramsey*, 231 F. App'x at 625 (where last reasoned decision was denial for failure to state prima facie claim, court must perform independent review of record to ascertain whether state court's decision was objectively unreasonable). Although the federal habeas court independently reviews the record, it must "still defer to the state court's ultimate decision." *Libberton v. Ryan*, 583 F.3d 1147, 1161 (9th Cir. 2009) (internal quotations and citation omitted).

Petitioner presented her sufficiency-of-the-evidence claim in Ground Three and a portion of her ineffective assistance claim in Ground Four to the state courts on direct appeal. (Lodg. Nos. 10, 20.) The California Court of Appeal rejected the claims in a reasoned opinion and the California Supreme Court summarily denied review. (Lodg. Nos. 2, 3.) Thus, the Court will look through the California Supreme Court's summary denial of review to the Court of Appeal's reasoned opinion, which is the relevant decision for AEDPA purposes with respect to these claims. *See Ylst*, 501 U.S. at 803.

Petitioner presented the bulk of her ineffective assistance claims in Ground Four and her cumulative error claim in Ground Five to the state courts in habeas petitions. (Lodg. No. 11 at 3-4; Lodg. No. 13 at 3; Lodg. No. 17 at 9.) The Superior Court denied the ineffective assistance claims under the erroneous assumption that they had been raised on direct appeal (Lodg. No. 12); the California Supreme Court denied the ineffective assistance claims on procedural grounds (Lodg. No. 14); and the California Supreme Court summarily denied Petitioner's most recent habeas petition, which included the ineffective assistance claim raised on appeal as well as the ones raised in her previous habeas petitions, and also included her cumulative error claim (Lodg. No. 18).

The "look through" presumption set forth in *Ylst* may be rebutted by showing that the subsequent unexplained decision relied on different grounds, "such as alternative grounds for affirmance that were briefed or argued to the state supreme court or obvious in the record it reviewed." *Wilson v. Sellers*, 584 U.S. 122, 125-26 (2018). "Where there are convincing grounds to believe the silent court had a different basis for its decision than the analysis followed by the previous court," the federal habeas court may find the presumption rebutted. *Id.* at 134. Respondent argues that "convincing grounds" exist here to believe that the California Supreme Court's silent denial rested on different grounds than its earlier procedural denial, because the defects identified through citations to *Duvall* and *Swain* were correctable defects and Petitioner corrected them in her subsequent habeas petition in the California Supreme Court, which set forth her ineffective assistance claims in greater detail and attached pages from the Reporter's Transcript. (Answer at 28-30; *compare* Lodg. 13 at 3 *with* Lodg. 17 at 10-11 & attachs.)

The Court agrees that the "look through" presumption has been rebutted. *See Lyles v. Sherman*, __ F. Supp. 3d __, 2023 WL 9227017, *6 ( C.D. Cal. Nov. 29, 2023) (finding "look through" presumption rebutted when California Supreme Court denied petition under *Duvall* and petitioner rectified error in subsequent habeas



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petition which California Supreme Court denied summarily). The relevant decision for AEDPA purposes is the California Supreme Court's silent denial, which constituted a decision on the merits. *See Johnson*, 568 U.S. at 293. Because the California Supreme Court did not explain the basis for its decision, the Court will conduct an independent review of the record to determine whether the state court was objectively unreasonable in applying controlling federal law. *See Walker*, 709 F. 3d at 939.

As discussed below, Ground Six does not constitute a cognizable federal claim.

## VI. DISCUSSION

### A. Ground One: "Postcard Denial"

In Ground One, Petitioner contends that the California Supreme Court's "post card denial" of habeas relief violated her due process rights because there is "nothing in the record that indicates [whether] the denial was procedural or . . . on the merits." (FAP at 5.) Respondent contends that the claim is not cognizable. (Answer at 7-9.) In her Traverse, Petitioner agrees and requests that the claim be dismissed "without prejudice." (Traverse at 17.)

Federal habeas relief is not available to redress errors in state post-conviction proceedings. *Franzen v. Brinkman*, 877 F.2d 26, 26 (9th Cir. 1989). Habeas petitioners proceeding under 28 U.S.C. § 2254(a) must allege that their detention violates the United States Constitution, a federal statute, or a treaty. *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011). An attack on a state prisoner's post-conviction proceedings "is an attack on a proceeding collateral to the detention and not the detention itself." *Nicholas v. Scott*, 69 F.3d 1255, 1275 (5th Cir.1995) (internal citation and quotation marks omitted).

In Ground One, Petitioner objects to the manner in which the California Supreme Court adjudicated her habeas petition, *i.e.*, summarily without providing reasoning. This is not a cognizable federal habeas claim. *See Berry-Vierwinden v. McDowell*, No. ED CV 15-23-R (PLA), 2016 WL 3556625, at * 33 (C.D. Cal. Apr.



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26, 2016) ("although the federal claims that petitioner presented in his various state habeas petitions may be cognizable in this action, the manner in which the state courts resolved those claims does not constitute a separate basis for habeas relief"), *adopted by* 2016 WL 3563283 (C.D. Cal. June 12, 2017). Although Petitioner agrees, she seeks dismissal without prejudice. (Traverse at 17.) Dismissal for failure to state a cognizable federal habeas claim is with prejudice. *See, e.g., Brooks v. McDowell*, 22-cv-06334-JST, 2024 WL 536352, at *2 (N.D. Cal. Feb. 9, 2024).

Accordingly, Ground One should be dismissed as non-cognizable, with prejudice.

**B. Ground Two: Government Misconduct**

In Ground Two, Petitioner contends that the government committed misconduct by (1) failing to "preserve records, page[s] 52 through 72 vol. 1," (2) falsifying documents, (3) submitting a probation report prepared six months before the sentence, and (4) sealing the record without informing Petitioner of the "poll of jury." (FAP at 5-6.) Respondent argues that Ground Two is untimely or alternatively was reasonably denied by the Los Angeles County Superior Court. (Answer at 9-20.)

**1. Timeliness**

*a. Statute of Limitations*

AEDPA altered federal habeas litigation, in part, by imposing a time limit on the filing of federal habeas petitions. Under 28 U.S.C. § 2244(d)(1)(A)-(D), a prisoner must file her federal habeas petition within one year of the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by the State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially



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recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

The statute of limitations applies to each claim on an individual basis. *See Mardesich v. Cate,* 668 F.3d 1164, 1171 (9th Cir. 2012).

*b. Calculating the Limitation Period*

The California Supreme Court denied Petitioner's petition for review on direct appeal on April 1, 2020. (Lodg. No. 3.) Petitioner did not file a petition for writ of certiorari in the United States Supreme Court. (FAP at 5.) A state prisoner's conviction becomes final when the period for seeking a writ of certiorari expires. *See Zepeda v. Walker*, 581 F.3d 1013, 1016 (9th Cir. 2009) ("The period of direct review after which a conviction becomes final includes the 90 days during which the state prisoner can seek a writ of certiorari from the United States Supreme Court.") (citation omitted). Although this period is usually 90 days, on March 19, 2020, the Supreme Court temporarily extended the deadline to file a petition for a writ of certiorari to 150 days due to public health concerns relating to Covid-19. *See Wiley v, Hill*, No. 2:21-cv-03874-VAP (KES), 2021 WL 5968452, at *1 (C.D. Cal. Oct. 27, 2021) (discussing Supreme Court's order ). Since the 150-day period applied to Petitioner, her conviction became final on August 29, 2020. Absent tolling, the AEDPA statute of limitations expired one year later, on August 29, 2021.

*c. Statutory Tolling*

AEDPA's limitation period is tolled during the pendency of any "properly filed" application for state collateral review. 28 U.S.C. § 2244(d)(2); *see also Waldrip v. Hall*, 548 F.3d 729. 734 (9th Cir. 2008) (application is pending while California prisoner completes full round of state collateral review as long as each filing is within reasonable time of lower court's decision). On March 28, 2021,

Petitioner filed a habeas petition in the Superior Court, which denied it in a reasoned decision on April 15, 2021; on May 15, 2021, she filed a habeas petition in the Court of Appeal, which denied it summarily on May 26, 2021; and on June 8, 2021, she filed a habeas petition in the California Supreme Court, which denied it summarily on October 13, 2021. Petitioner is entitled to continuous tolling during the pendency of this round of petitions, or to 200 days (the period between March 28, 2021 and October 13, 2021) of statutory tolling. These 200 days extended the limitations period to March 17, 2022.

Since Petitioner constructively filed her original Petition on October 27, 2021, the Petition is timely. But Petitioner did not include Ground Two in the original Petition; she first asserted it in the FAP, constructively filed on June 3, 2022. Unless Ground Two relates back to the original Petition, it is timely only if Petitioner is entitled to additional tolling.

Petitioner is not entitled to additional statutory tolling based on the state habeas petitions she filed in the California Supreme Court on August 15, 2022, April 19, 2023, and July 10, 2023 (LD 13, 16, 17), because these were filed after the AEDPA limitations period expired. *See Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003) (confirming that state habeas petition filed after expiration of one-year statute of limitations cannot restart limitations period); *Johnson v. Lewis,* 310 F. Supp. 2d 1121, 1125 (C.D. Cal. 2004) ("[I]n order to qualify for statutory tolling during the time the petitioner is pursuing collateral review in state courts, the prisoner's state habeas petition must be constructively filed *before*, not after, the expiration of AEDPA's one-year limitations period." (emphasis in original)).

*d. Equitable Tolling*

In addition to statutory tolling under 28 U.S.C. § 2244(d), the AEDPA limitation period may be tolled whenever "equitably required." *Doe v. Busby*, 661 F.3d 1001, 1011 (9th Cir. 2011); *see Holland v. Florida*, 560 U.S. 631, 645 (2010); (citations omitted). For equitable tolling to apply, a petitioner must show that (1) he

has pursued his rights diligently, and (2) an "extraordinary circumstance prevented timely filing." *Holland*, 560 U.S. at 649. "Equitable tolling is justified in few cases," and "the threshold necessary to trigger equitable tolling under AEDPA is very high, lest the exceptions swallow the rule." *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003) (as amended) (citation omitted). Petitioner has not shown any extraordinary circumstance preventing her from timely filing the FAP. She states that she was confused about the timeliness of her petition (Traverse at 15), but a petitioner's confusion about applicable legal requirements is not an extraordinary circumstance warranting tolling. *See Ford v. Pliler,* 590 F.3d 782, 789 (9th Cir. 2009) (equitable tolling "standard has never been satisfied by a petitioner's confusion or ignorance of the law alone"); *Waldron-Ramsey v. Pacholke,* 556 F.3d 1008, 1013 n.4 (9th Cir. 2009) ("[A] pro se petitioner's confusion or ignorance of the law is not, itself, a circumstance warranting equitable tolling."). Petitioner is not entitled to equitable tolling.

Ground Two, therefore, is time-barred unless it relates back to the original Petition.

*e. Relation Back*

"Amendments made after the statute of limitations has run relate back to the date of the original pleading if the original and amended pleadings 'ar[i]se out of the [same] conduct, transaction, or occurrence.'" *Mayle v. Felix*, 545 U.S. 644, 655 (2005) (quoting Fed. R. Civ. P. 15(c)(2)). "So long as the original and amended petitions state claims that are tied to a common core of operative facts, relation back will be in order." *Id.* at 664. Relation back is not proper, however, when an amended petition "asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Id.* at 650.

The original Petition contained the following claims: (1) "the Supreme Court issued a 'post card denial'"; (2) "insufficient evidence"; (3) "ineffective assistance of counsel"; (4) "cumulative errors by counsel"; and (5) "restitution." (Pet. at 3-4; *see*



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Dkt. No. 21 at 1-2.) In the FAP, Ground Two asserts governmental misconduct in connection with the Clerk's Transcript, Petitioner's pre-sentencing probation report, and the sealing of the juror identifying information. (FAP at 5-6.) Although the original Petition attached a state habeas petition that included these claims (Pet. at 16), nothing in the body of the original Petition suggests that Petitioner was asserting them in the Petition. (*See* Pet. at 3-4.) Because Ground Two and the claims in the original Petition are not "tied to a common core of operative facts," *id.* at 664, Ground Two does not relate back to the original Petition and is time-barred.[27]

**2. Merits**

In addition to being time-barred, Ground Two fails on the merits.

*a. Subclaim (a): Failure to Preserve Evidence*

Petitioner contends that the government failed "to preserve records" because pages 52 through 72 of Volume 1 of the Clerk's Transcript "do not exist." (FAP at 5.)

The government has a duty under the United States Constitution to preserve evidence that might be expected to play a significant role in the defendant's defense. *California v. Trombetta*, 467 U.S. 479, 488 (1984). The evidence "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* at 489. Failure to preserve evidence that is only "potentially useful" does not violate due process absent a showing of bad faith by the government. *Arizona v. Youngblood*, 488 U.S. 51, 57-58 (1988).

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[27] Petitioner argues that Ground Two relates back to the original Petition because it arises out of the same trial, conviction, and sentence. (Traverse at 19.) Petitioner relies on reasoning that was expressly rejected by the Supreme Court. *See Mayle*, 545 U.S. at 656-57.

Petitioner has not shown that the government failed to preserve material exculpatory evidence under *Trombetta* or potentially useful evidence under *Youngblood*. A review of the Clerk's Transcript indicates that pages 52 to 73 never existed. Pages 50 and 51 contain a minute order dated March 6, 2018, which states that trial is continued to May 22, 2018. (1 CT 50-51.) The page after page 51 contains the following notation: "Due to inadvertence of numbering machine or clerical error page[s] 52 through 72 do not exist." (1 CT foll. 51.) The next page is page 73, which is the first page of a two-page minute order reflecting proceedings on May 22, 2018. (1 CT 73-74.) Nothing suggests that the omission of these pages reflects anything but a numbering error.

Accordingly, subclaim (a) fails on the merits and was reasonably rejected by the Superior Court.

b. *Subclaim (b): Falsification of Documents*

Petitioner contends that the government "falsified documents," but she does not set forth the nature of the alleged falsification. (FAP at 6.) "Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief." *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994).

In her Traverse, Petitioner states that there were "multiple instances" of falsified documents but describes only one. She contends that the jury verdict form was falsified because it was filed one day before the jury reached a verdict and the date was then changed by a handwritten notation. (Traverse at 17.) In state court she also complained that the jury foreperson's signature on the jury verdict form was redacted. (LD 11 at 3.)

The knowing use of false evidence to obtain a conviction violates a defendant's due process rights. *Napue v. Illinois,* 360 U.S. 264, 269 (1959). But Petitioner does not contend that false evidence was submitted to the jury; she argues that the jury verdict as reflected in the Clerk's Transcript was falsified. The record belies Petitioner's contention. The verdict form has a date stamp of June 4, 2018, but the

"4" is crossed out and corrected to "5" by a handwritten notation initialed "VR," the initials of court clerk Vanessa Riley. (3 CT 474A.) The June 5 date is the same as the date the jury foreperson signed the jury verdict. (3 CT 474.) A minute order reflecting the proceedings and the Reporter's Transcript both show that the jury reached its verdict on June 5, 2018. (2 CT 476-77; 5 Reporter's Transcript ("RT") 2101-02.) Nor has Petitioner shown any prejudice from the initial error. *Cf. Madera v. Risley*, 885 F.2d 646, 648-49 (9th Cir. 1989) (failure to record portions of trial did not violate due process because petitioner was not prejudiced).

Similarly, there was no impropriety in the redaction of the jury foreperson's signature on the verdict form. California requires juror identifying information such as juror names to be "extract[ed] or otherwise remov[ed]" from the court record. Cal. Civ. Proc. Code § 237(a)(2)&(3); *see also* Cal. Rules of Court, Rule 8.332. California also provides procedures for petitioning the court for access to juror information, *see* Cal. Civ. Proc. Code § 237 (b)-(d), but Petitioner does not appear to have availed herself of them.

Accordingly, subclaim (2) fails on the merits and was reasonably denied by the Superior Court.

*c. Subclaim (c ): Outdated Probation Report*

Petitioner contends that she was prejudiced at sentencing because the probation report submitted to the trial court was prepared six months earlier. (FAP at 5-6; Traverse at 18.) The probation report was prepared on January 10, 2018, and was filed in court on July 6, 2018. ( Dkt. No. 29-2 at 8-12.)

A criminal defendant has no federal constitutional right to a probation report before sentencing. *Nunez-Barajas v. Kabban-Miller*, EDCV 12-1551-CAS (AJW), 2013 WL 5676079, at *3 & n.5 (C.D. Cal. Oct. 15, 2013) (collecting cases). It follows that there is no federal constitutional right to an updated probation report.

To the extent Petitioner alleges a violation of state law, her claim is not cognizable on federal habeas review. *See Huntley v. McGrath*, 261 F. App'x 4, 5

(9th Cir. 2007) (claim that state court's use of old probation report violated California law was not cognizable on federal habeas); *see generally Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("federal habeas corpus relief does not lie for errors of state law" (internal quotation marks and citation omitted)). Moreover, under California law a probation report is not required when a defendant is statutorily ineligible for probation; in such cases, the preparation of a probation report is discretionary. *See People v. Dobbins,* 127 Cal. App. 4th 176, 180 (2005); *People v. Johnson*, 70 Cal. App. 4th 1429, 1432 (1999). Petitioner was convicted of first-degree murder and was statutorily ineligible for probation. *See* Cal. Penal Code §1203(e)(1). Her sentence was set by law, *see* Cal. Penal Code § 190, and she suffered no prejudice from the six-month-old probation report.

Accordingly, subclaim (3) fails on the merits and was reasonably denied by the Superior Court.

*d. Subclaim (d): Polling Jury*

Petitioner contends that the government committed misconduct by sealing the record without informing her of "the poll of the jury." (FAP at 6.)

Petitioner has not identified either misconduct by the government or prejudice to herself. Petitioner's counsel waived polling of the individual jurors. (3 CT 477; 3 RT 2103.) Petitioner argues in the Traverse that her counsel did not explain polling of the jury to her, and she did not agree to the waiver (Traverse at 18); however, whether to poll the jury is a decision reserved to counsel. *See Taylor v. United States*, 285 F.2d 703, 705 (9th Cir. 1960) ("A lawyer may ordinarily act for a defendant (and, for example, waive the polling of a jury . . .) without any showing of a waiver by a defendant.") The government did not commit misconduct in relying on defense counsel's waiver or by sealing the juror identifying information, which is required by California law. *See* Cal. Civ. Proc. Code § 237.

Moreover, Petitioner's claim does not implicate any clearly established federal right. The right to poll the jury is not a federal constitutional right, *see Saldana v.*



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*McDonald*, No. 1:10-cv-01747-JLT, 2013 WL 1626567, at *19 (E.D. Cal. Apr. 15, 2013) (collecting cases), and the United States Supreme Court has never recognized a constitutional right to disclosure of the jurors' identifying information after a verdict, *see Castaneda v. Cisneros*, No. CV 21-03248-JAK (DFM), 2021 WL 4341980, at *5 (C.D. Cal. Aug. 26, 2021) (collecting cases), *adopted by* 2021 WL 4330852 (C.D. Cal. Sep. 23, 2021).

Accordingly, subclaim (d) fails on the merits and was reasonably denied by the Superior Court.

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Ground Two, therefore, is barred by the statute of limitations and also fails on the merits.

**C. Ground Three: Sufficiency of Evidence**

In Ground Three, Petitioner contends that the evidence at trial was insufficient to support her murder conviction. (FAP at 6.) For the reasons set forth below, the California Court of Appeal reasonably rejected this claim on direct appeal.

**1. California Court of Appeal's Opinion**

On appeal, Petitioner argued that the evidence at trial was insufficient to support a finding that she personally killed the victim or aided and abetted his killing. (Lodg. No. 20 at 26-35.) The Court of Appeal rejected her claim, stating:

> There is substantial evidence of [Petitioner]'s motive to kill Romero; [Petitioner]'s presence at the crime scene; her relationship with Pech (the likely shooter or accomplice); and incriminating conduct before and after the murder. [Citations omitted]
>
> [Petitioner] had a strong motive to kill: her lover of four years abruptly spurned her and returned to his wife, while at the same time Edwin learned of the affair. Further, significant evidence implicates [Petitioner] in the planning and commission of the crime. Tamara's car, which tested positive for gunshot residue, matched the description of the



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gray Scion TC parked near the crime scene shortly before the murder; Burke and Duke saw a woman of [Petitioner]'s approximate age, build, and hair color in the Scion along with a man matching Pech's description; [Petitioner] used her phone near the crime scene around the time of the murder (between 4:15 and 5:37 p.m.);[28] Pech likewise made or received calls near the crime scene at 3:23 and 5:47 p.m.; [Petitioner] and Pech called each other, and Pech called the burner phone on the day of the murder; and [Petitioner] and Pech received multiple calls from the same international number the day of the murder.

In addition, the LASD search team recovered 5 nine-millimeter shell casings at [Petitioner]'s home, two of which were fired from the same gun as the shell casing found at the crime scene. The search team also recovered from [Petitioner]'s home a box for a nine-millimeter Beretta, a receipt for the Beretta in [Petitioner]'s name, and accessories for the Beretta. Further, the search revealed an envelope addressed to [Petitioner] with the handwritten address of the murder scene; a handwriting analysis concluded the address "may have been written" by [Petitioner]. Blue surgical gloves matching Duke's description of the gloves worn by the Scion driver were found on [Petitioner]'s dresser and elsewhere in her home.

[Petitioner]'s conduct after the murder also provides significant evidence of her involvement. [Petitioner] quit her job the day of the murder, and she and her daughters fled just hours after the murder, leaving the house in disarray. [Petitioner] abandoned the family horses,

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[28] Given the absence of evidence that someone other than [Petitioner] or Pech was in possession of their phones, it was a reasonable inference that [Petitioner] and Pech were in the locations of their phones and made or received the calls reflected in the cell phone records.



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livestock and large pets with no provision for their care, taking only the small pug dog. [Petitioner] and her daughters told multiple people, including [Petitioner]'s brother, [Petitioner]'s boss, Scarlett's boss, and close friends Martha and Pedro that Edwin had cancer or a stroke requiring emergency treatment in Guatemala or Cuba, yet no one was aware of Edwin's condition before the day of the murder. Edwin's medical records showed no evidence of treatment for cancer or a stroke

Further, according to the cell phone records, on the evening of the murder [Petitioner] and her daughters drove south on Interstate 15 to the vicinity of the Victoria Gardens Shopping Center in Rancho Cucamonga, where they remained for an hour (from 7:05 to 8:14 p.m.); at 7:15 p.m. the burner phone was in the same location; and Pech was in the same location when he used his phone at 7:55 p.m. The Mancio family abandoned Tamara's Scion in a shopping mall parking lot in the neighboring city of Ontario. Later in the evening [Petitioner] and her daughters travelled to the border in Otay Mesa, at the same time as Pech, before vanishing altogether. When [Petitioner] resurfaced two years later in Orlando, she was trying to buy a nine-millimeter Beretta 92FS matching the model she owned in California. When she was detained, [Petitioner] lied to Orlando police, telling them she had never lived in California. [footnote omitted]

Finally, [Petitioner]'s jailhouse calls show she and Edwin were trying to coordinate their account of the family's departure (and Edwin's illness) and to strategize regarding Edwin's alibi, including [Petitioner] advising Edwin where to find her red purse with relevant documents. When [Petitioner] proposed she change her story to focus blame on Illescas by pointing to Illescas's threats to [Petitioner], Edwin encouraged [Petitioner] to stick to her earlier version of what happened,



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to "stay on that same bike, keep it going." Although the jailhouse calls, which the Mancios knew were recorded, included [Petitioner]'s repeated declarations of innocence, the jury could reasonably have concluded the conversations were consistent with [Petitioner]'s involvement in Romero's murder.

(Lodg. No. 2 at 21-24.)

**2. Applicable Federal Law**

It is well established that sufficient evidence exists to support a conviction if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis included). "[I]t is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial." *Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (per curiam). Accordingly, a federal reviewing court must not usurp the role of the finder of fact by considering how it would have resolved any conflicts in the evidence, made the inferences, or considered the evidence at trial. *See Jackson,* 443 U.S. at 318-19, 326 (holding that if the record supports 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"); *Walters v. Maass*, 45 F.3d 1355, 1358 (9th Cir. 1995) (holding that the reviewing court "must respect the province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts by assuming that the jury resolved all conflicts in a manner that supports the verdict").

In applying the *Jackson* standard, the federal court "look[s] to state law for 'the substantive elements of the criminal offense.'" *Coleman v. Johnson*, 566 U.S. 650, 655 (2012) (per curiam) (*quoting Jackson*, 443 U.S. at 324 n.16); *see also Boyer v. Belleque*, 659 F.3d 957, 965 (9th Cir. 2011) (when assessing sufficiency of the



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evidence claims in a habeas petition, the court looks to state law to establish the elements of the crime, then turns to the federal question of whether the state court was objectively unreasonable in concluding that the evidence was sufficient).

Under AEDPA, when the state court has rendered a decision on the merits of an insufficient evidence claim, federal courts must "apply the standards of *Jackson* with an additional layer of deference." *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005). A federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees; rather, it "may do so only if the state court decision was objectively unreasonable." *Cavazos*, 565 U.S. at 2 (internal quotations omitted). Thus, where a *Jackson* claim is "subject to the strictures of AEDPA, there is a double dose of deference that can rarely be surmounted." *Boyer*, 659 F.3d at 964; *see also Coleman*, 566 U.S. at 651 ("We have made clear that *Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference.").

**3. Analysis**

Although the FAP does not specify in what respects the evidence at trial was insufficient, the Court assumes that Petitioner is raising the same claim that she exhausted on direct appeal, namely, that the evidence did not establish that she shot Romero or aided and abetted his shooting. Under California law, an aider and abettor is someone who, "acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." *People v. Prettyman*, 14 Cal.4th 248, 259 (1966) (internal quotation marks and citation omitted). Relevant factors include presence at the crime scene, companionship, and conduct before and after the offense. *People v. Campbell*, 25 Cal. App. 4th 402, 409 (1994).

Petitioner had a motive to kill Romero, who had broken off their affair after his wife had confronted him about it. (2 RT 311-15, 405-406.) Romero was shot

within a fairly narrow window of time. He left his house around 5:00 p.m. (2 RT 321-22); witnesses living near the crime scene heard "five or so" gunshots sometime after arriving home at 5:00 p.m. (3T 611-12, 628); and around 5:45 or 6:00 p.m., Romero's wife began to call him without receiving a response (2 RT 322-23). There was evidence from which the jury could infer that Petitioner and Pech were on the scene around the time of the shooting. Between 4:30 p.m. and 5:00 p.m., witnesses saw a woman whose appearance matched Petitioner's sitting in the passenger seat of a gray Scion parked near the crime scene, along with a man in the driver's seat whose physical build matched Pech's and who was wearing blue surgical gloves. (3 RT 606, 608-10, 612-13, 617, 622, 624-27.) A gray Scion that Petitioner had bought for her daughter was later found to contain gunshot residue. (2 RT 353-54; 4 RT 954-55, 958-59.) Petitioner's cell phone was used near the crime scene between 4:39 p.m. and 5:37 p.m., and Pech's cell phone was used near the crime scene around the same time. (4 RT 1221-25, 1241-43.)

Evidence found during a search of Petitioner's house linked her to the planning and commission of the crime. Handwritten directions to the crime scene were found on an envelope and may have been in her writing, and surgical gloves were found in her dresser. (4 RT 914, 919-20, 923-24, 971, 972-73.) A receipt and accessories for a 9 mm Beretta firearm were found at Petitioner's house, but the gun itself was not. (4 RT 976-77, 985-86.) Expended 9 mm casings found at her house were fired from the same gun as an expended 9 mm casing found at the crime scene. (4 RT 949, 1546-47.)

Petitioner and Pech made multiple phone calls to each other the day of the murder and coordinated their flight to the border. (3 RT 659-60, 669-71; 4 RT 1221-23.) The burner phone that was used to send a message to Romero about delivering feed to the murder location was activated and used only the day of the murder -- in the morning to call Romero and from the vicinity of the murder location at 3:27 p.m. and 4:37 p.m. -- and in the evening was in a similar location to Petitioner's phone.

(4 RT 965-66, 1238, 1257-58, 1263-66.)

The jury could also infer guilt from Petitioner's conduct immediately after the murder. Petitioner quit her job; abandoned her house, possessions, livestock, and large dogs; drove to the border with her daughters; and left the country. (2 RT 339, 242-43, 360-62, 389, 393-95; 4 RT 1226-33.) Petitioner told family and friends that the family had left because Edwin had cancer or a stroke requiring medical treatment in Guatemala or Cuba, but there was no evidence that Edwin ever had cancer or a stroke. (2 RT 371-72, 387, 389, 393-95; 4 RT 1285-87.)

Petitioner argues that the evidence against her was speculative. (Traverse at 21.) She stresses that she was never affirmatively identified as the woman in the Scion; points to the absence of evidence that she purchased the burner phone; maintains that the cell phone evidence was weak because the murder occurred in a less populated area where cell phone towers are spaced far apart;[29] and argues that the gun evidence only shows that a gun was available to her, not that she used it or provided it to the shooter. (*Id.* at 21-23.) Petitioner wants the Court to reweigh the evidence and draw different inferences from the jury. That is impermissible. *See Coleman,* 566 U.S. at 655 ("*Jackson* leaves juries broad discretion in deciding what inferences to draw from the evidence presented at trial, requiring only that jurors 'draw reasonable inferences from basic facts to ultimate facts'" (citation omitted)); *Cavazos*, 565 U.S. at 8 n.* ("reweighing of facts ... is precluded by *Jackson*").

Petitioner also notes that the jury was instructed with CALJIC No. 2.01 that if circumstantial evidence points to two interpretations, the jury must adopt the

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[29] Petitioner also argues that the phone evidence is speculative because phone expert Mancia testified that her phone's usage was not "normal" for Petitioner, which suggested that someone else was using her phone. (Traverse at 22.) This mischaracterizes the expert's testimony. Mancia testified that if someone else had been using Petitioner's phone, Mancia would expect to see "calls that are not normal to her behavior," such as calls to people she did not usually call. (4 RT 1270.) He did not testify that he saw such calls.

interpretation pointing to Petitioner's innocence. (Traverse at 23; *see* 2 CT 416; 5 RT 1809.) Petitioner is confusing the prosecution's burden of proof at trial and the judicial standard of review after conviction. In determining whether Petitioner was guilty, the jury was required to presume that she was innocent and to view the evidence in light of that presumption. After the jury convicted Petitioner, a reviewing court must presume that the jury resolved all conflicts in the evidence in favor of a finding of guilt. *See Jackson*, 443 U.S at 326. Possible innocent interpretations of the evidence do not undermine the validity of Petitioner's conviction. *See McDaniels v. Brown*, 558 U.S. 120, 132-33 (2010) (holding that reviewing court improperly relied on innocent explanations of incriminating evidence because *Jackson* requires evidence to be viewed in light most favorable to prosecution); *United States v. Nevils,* 598 F.3d 1158, 1169 (9th Cir. 2010) ("At this step of *Jackson*, we do not construe the evidence in the light most favorable to innocence, and therefore do not consider Nevils's argument that there is an equally plausible innocent explanation for [incriminating evidence].").

Viewing the evidence presented at trial in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that Petitioner was guilty of the first-degree murder of Romero, either as the shooter or as an aider and abettor of Romero's shooting by Pech. The Court of Appeal reasonably applied *Jackson* when it rejected Petitioner's claim.

Accordingly, Petitioner is not entitled to federal habeas relief on Ground Three.

**D. Ground Four: Ineffective Assistance of Counsel**

In Ground Four, Petitioner contends that defense counsel rendered ineffective assistance because he failed to investigate a defense, call witnesses, and communicate adequately with Petitioner. (FAP at 6.) As discussed above, the Court has also construed Ground Four to contain a claim that defense counsel was ineffective for failing to object to certain firearm evidence. Respondent argues that

Ground Four (as she construes it) is untimely and alternatively was reasonably denied by the state court. (Answer at 26-36.)

**1. Timeliness**

As discussed in connection with Ground Two, the statutory period for filing Petitioner's federal habeas claims expired on March 17, 2022, well after Petitioner constructively filed the original Petition on October 17, 2021, but Petitioner did not constructively file the FAP until June 3, 2022. Respondent contends that the ineffective assistance claims in Ground Four are untimely because Petitioner did not assert them in the original Petition and they do not relate back to the ineffective assistance claim in that Petition. (Answer at 26-27.)

The original Petition contained a claim for "ineffective assistance of counsel" without specifying counsel's deficiencies. (Pet. at 4.) In her opposition to Respondent's motion to dismiss, Petitioner contended that counsel was ineffective for failing to object to certain firearm evidence. (Dkt. No. 19 at 6.) That was the ineffective assistance claim Petitioner had exhausted on appeal, but there was no reference to counsel's failure to object in the original Petition or its attachments. Rather, Petitioner attached to the original Petition a state habeas petition filed in the California Court of Appeal, which asserted that defense counsel was ineffective because he failed to investigate, locate, and interview witnesses; failed to competently prepare Petitioner's defense; and did not adequately communicate with her. (Pet. at 14, 17-18.)

Respondent construes the ineffective assistance claim in the original Petition as directed solely at counsel's failure to object to firearm evidence and construes the ineffective assistance claims in the FAP as directed solely at counsel's failure to investigate, call witnesses, and communicate with Petitioner. (Answer at 26-27.) She argues that the ineffective assistance claims in the FAP rest on different facts and do not relate back to the ineffective assistance claim in the original Petition. (*Id.*)



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The Court has already concluded that the FAP asserted the failure-to-object ineffective assistance claim by referring to Appendix C, which contained the appellate brief raising that claim on direct appeal. *See* Section III, fn. 3. Petitioner's Traverse makes clear that she did not intend to drop the failure-to-object claim. (*See* Traverse at 26-29.) Respondent concedes that this claim is timely. (Answer at 26.)

As for the ineffective assistance claims challenging counsel's failure to investigate, call witnesses, and communicate with Petitioner, Respondent's timeliness argument is premised on the absence of these claims from the original Petition. Respondent fails to mention the state habeas brief attached to the Petition, which sets forth essentially the same ineffective assistance claims as the FAP. (*See* Pet. at 17-18.) In *Ross v. Williams*, 950 F.3d 1160 (9th Cir. 2020), the Ninth Circuit held that a habeas petition can support an amended petition's relation back if it identifies specific grounds for relief and an attachment to the petition provides greater detail about the supporting facts. *Id.* at 1167. Moreover, "a petition need not be pleaded with sufficient particularity to support relation back." *Id.* at 1169. In her original Petition, Petitioner asserted a conclusory ineffective assistance claim and attached a state habeas petition setting forth the same deficiencies by counsel that are the basis for Ground Four. Respondent has not briefed whether, viewed together with the attached state habeas petition, Petitioner's otherwise conclusory ineffective assistance claim in the original Petition may be viewed as arising out of the same core facts as Ground Four of the FAP.

Accordingly, Respondent has not met her burden of showing that Ground Four is time-barred. *See Day v. McDonough,* 547 U.S. 198, 205 (2006) (statute of limitations defense is not jurisdictional). The Court rejects her timeliness argument and will proceed to the merits.

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## 2. Merits: Applicable Law and Analysis

### *a. Applicable Law*

To establish a claim for ineffective assistance of counsel, Petitioner must prove: (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

An attorney's performance is deemed deficient if it is objectively unreasonable under prevailing professional norms. *Strickland*, 466 U.S. at 687-88. The Court, however, must review counsel's performance with "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

With respect to the prejudice component, a petitioner need only show whether, in the absence of counsel's particular errors, there is a "reasonable probability" that "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. In making that determination, the Court "must consider the totality of the evidence before the judge or jury." *Id.* at 695.

The Court may reject an ineffective assistance claim upon finding either that counsel's performance was reasonable or the claimed error was not prejudicial. *See Strickland*, 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim."); *Gentry v. Sinclair*, 705 F.3d 884, 899 (9th Cir. 2013) (noting that failure to meet either prong of *Strickland* is "fatal" to an ineffective assistance claim).

Where, as here, 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 (2009)). "The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable." *Id.* at 101.

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*b. Failure to Investigate, Call Witnesses, and Communicate*

Petitioner contends that defense counsel was ineffective for failing to "investigate a defen[s]e." (FAP at 6.) Defense counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Even so, "the duty to investigate and prepare a defense is not limitless." *Hendricks v. Calderon*, 70 F.3d 1032, 1040 (9th Cir. 1995) (internal quotation marks and citation omitted). Moreover, a deficient investigation results in prejudice only if further investigation would have revealed favorable evidence. *See id.* at 1042; *Ceja v. Stewart*, 97 F.3d 1246, 1255 (9th Cir. 1996).

Petitioner does not explain the nature of the defense that defense counsel should have investigated or identify investigatory avenues that would have yielded favorable information if pursued. *See Villafuerte v. Stewart*, 111 F.3d 616, 632 (9th Cir. 1997) (habeas petitioner who "presented no evidence concerning what [counsel] would have found had he investigated further, nor what lengthier preparation would have accomplished," did not show *Strickland* prejudice). In her Traverse, she cites *Alvord v. Wainwright*, F. Supp. 459, 465-66 (N.D. Fla. 1983), *affirmed in part and reversed in part,* 725 F.2d 1282 (11th Cir. 1984), a case involving a defendant charged with capital murder who had spent many years in mental institutions and had once been adjudicated not guilty by reason of insanity, but whose counsel did not investigate or present an insanity defense because the defendant strongly objected. (Traverse at 24.) *Alvord* has no relevance to Petitioner's case -- she does not contend that there were any grounds for an insanity defense and the record discloses none. If Petitioner is arguing that counsel should have investigated the witnesses, she faults him for not calling, her claim fails for the reasons set forth below.

Petitioner contends that defense counsel was ineffective for failing to call as witnesses his assistant Claudia Cisneros and Petitioner's friends Martha and Pedro Arellano and Domingo Coronado. (Traverse at 26; *see also* Dkt. No. 29-2 at 1.) In



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her Traverse, she states that the Arellanos and Domingo were threatened by the victim's mother, and that Cisneros stopped coming to court after she was followed by persons attending the proceedings as friends or relations of the victim. (Traverse at 26.) Petitioner states that the issue involving Cisneros was "solved" between the prosecutor and defense counsel and was never brought up in court. (*Id.*)

Petitioner has not submitted declarations or other evidence that these incidents of witness intimidation occurred. More importantly, evidence of such intimidation would not have aided Petitioner's defense absent a showing that these witnesses would have given testimony giving rise to a reasonable probability of a more favorable verdict. *See Strickland*, 466 U.S. at 694. Critically, Petitioner has not submitted declarations by these witnesses regarding the substance of the testimony they would have given. *See Dows v. Wood*, 211 F.3d 480, 486 (9th Cir. 2000) (rejecting ineffective assistance claim where petitioner did not present affidavit from alleged alibi witness demonstrating that witness would have provided testimony helpful to defense). In fact, Petitioner does not even describe their proposed testimony in the FAP, and in the Traverse she mentions only the alleged witness intimidation.

Claudia Cisneros was defense counsel's paralegal who assisted counsel in his communications with Petitioner. (2 RT 2A.) Petitioner describes Coronado as a friend (Traverse at 26), but does not say what relevant knowledge of the events he had, or what favorable testimony he could have given. Martha Arellano and her son Pedro Arellano testified for the prosecution. (2 RT 348-81.) Pedro testified that: Petitioner was a close family friend for over six years; Pedro was unaware that Edwin had any serious health problems; Pedro's mother co-signed a loan to purchase the Scion for Petitioner's daughter Tamara; in April 2015, Petitioner's daughter Scarlett texted Pedro to ask him to pick up the Scion because the family was leaving town due to a family emergency; a month later Pedro went to the Mancio residence and discovered that the family's dogs and farm animals had not been fed; and later he



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was contacted by law enforcement officers, who took possession of the Scion. (2 RT 349, 351, 353-54, 356, 360-63.) Pedro's testimony was helpful to the prosecution because it showed the haste with which the Mancio family left California and cast doubt on their story that they left because of Edwin's health problems.

Pedro's mother Martha testified that: she and Petitioner became friends after Petitioner sold a house to her; Martha cosigned a loan on the Scion the Mancios bought for Tamara; and during telephone conversations with Petitioner and Edwin after they left California, Edwin told Martha that he had liver cancer and Petitioner asked her for money for Edwin's treatment. (2 RT 366-67, 369, 372-73.) Given the nature of Pedro's and Martha's testimony, defense counsel's decision not to cross-examine them was not unreasonable. (2 RT 365, 381.) *See Dows*, 211 F.3d at 487 (counsel's tactical decisions "such as refraining from cross-examining a particular witness . . . are given great deference and must . . . meet only objectively reasonable standards.") Petitioner points to Martha's testimony that she was nervous (2 RT 376), and maintains that Martha was nervous because she and Pedro had been threatened by the victim's mother if they gave testimony favorable to Petitioner. (Traverse at 27.) In the absence of a declaration by Martha, it is wholly speculative that she would have so testified if asked, or, for that matter, that she had favorable testimony to give.

Petitioner further contends that defense counsel was ineffective for failing to communicate with her. (FAP at 6.) "[A]dequate consultation between attorney and client is an essential element of competent representation of a criminal defendant." *Correll v. Ryan,* 539 F.3d 938, 943 (9th Cir. 2008) (quoting *United States v. Tucker*, 716 F.2d 576, 581 (1983)). The amount of consultation depends on the facts of each case, but "should be sufficient to determine all legally relevant information known to the defendant." *Tucker*, 716 F.2d at 581–82. Once again, Petitioner's claim is conclusory because she provides no facts about the extent of the communications between her and counsel. *See James*, 24 F.3d at 26. Moreover, "[b]revity of consultation time, standing alone, does not support a claim of ineffective assistance



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of counsel." *Russell v. Borders*, No. 2:17-cv-02487-DMC, 2021 WL 616933, at *14 (E.D. Cal. Feb. 17, 2021) (citations omitted). Petitioner does not contend that she had information that she was unable to divulge to counsel. *See Tucker*, 716 F.2d at 581–82. The record shows that there was communication between Petitioner and defense counsel regarding her defense, as evidenced by counsel's statements to the court that Petitioner objected to his proposed strategy, which was to argue that the evidence pointed to Edwin, not Petitioner, as Romero's killer. (2 A3-A4.) Disagreements over trial strategy or tactics cannot be the basis for an ineffective assistance claim. *See People of Territory of Guam v. Santos,* 741 F.2d 1167, 1169 (9th Cir. 1984) ("tactical decision by counsel with which the defendant disagrees cannot form the basis of a claim of ineffective assistance of counsel").

Petitioner, therefore, has not shown that defense counsel's representation was deficient, nor has she shown a reasonable probability of a more favorable result at trial if defense counsel had conducted further investigation, called the four witnesses she identifies to the stand, and communicated with her more. *See Strickland*, 466 U.S. at 689, 694. Based on the Court's independent review of the record, the California Supreme Court's rejection of these ineffective assistance claims was not objectively unreasonable. *See Richter*, 562 U.S. at 101.

c. *Failure to Object to Firearm Evidence*

Petitioner contends that defense counsel was ineffective because he failed to object to evidence that she owned firearms. (FAP at 6; Dkt. No. 29-3 at 35-49; Traverse at 26-27.) She argues that evidence of firearms not used in the shooting was irrelevant, and that defense counsel should have objected to testimony that live shotgun shells were recovered at her house (4 RT 979), that she owned an AR-15 type rifle (4 RT 990), and that she was arrested when trying to buy the same type of rifle in Florida (4 RT 990, 1535-36).[30] (Traverse at 27, 30-31.)

[30] Petitioner makes some of these arguments in connection with Ground Five, her cumulative prejudice claim. (Traverse at 31-32.)



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Petitioner raised this claim on direct appeal. The Court of Appeal found that defense counsel had a tactical reason for failing to object to the firearm evidence because he used it to support the defense theory that Romero was shot by Petitioner's husband. (Lodg. No. 2 at 28-29.)

Under *Strickland,* Petitioner must overcome a strong presumption that defense counsel's failure to object was a reasonable tactical decision. *See* 466 U.S. at 689 (defendant must overcome presumption that challenged action "might be considered sound trial strategy"). Defense counsel's theory of defense –one that Petitioner was unhappy with (2 RT A3-A4) – was that the prosecution's evidence pointed to Edwin rather than Petitioner as Romero's killer because Edwin had a greater motive to kill Romero and had experience in shooting a 9-mm pistol. (5 RT 1888-89, 1896-97.) No evidence was presented regarding Petitioner's experience shooting guns, whereas Mancio's brother Delgado testified that he had seen Edwin shooting a bull with a 9-mm pistol. (2 RT 387-88.) On cross-examination, defense counsel elicited testimony from Detective Shonka that the shooting of Romero was "not the kind of marksmanship you would expect to find with somebody that only occasionally fired a pistol." (4 RT 1522.) During his closing argument, defense counsel argued that this testimony showed that Romero was shot by a shooter experienced in firing a 9-mm pistol. (5 RT 1896-97.) Defense counsel relied on this evidence, as well as on evidence that the guns at the Mancios' house were in Petitioner's name and that Edwin was present when Petitioner tried to purchase the same guns in Florida that she owned in California (4 RT 990, 1530, 1534-36), to argue that Edwin had Petitioner buy guns for him on account of background checks. (5 RT 1896.)

Given defense counsel's reliance on the evidence regarding Petitioner's possession and purchase of firearms to craft an argument pointing to Edwin as the shooter, his failure to object to this evidence can reasonably be viewed as a tactical



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decision entitled to deference. *See Strickland*, 466 U.S. at 689. At the very least, the Court of Appeal's rejection of Petitioner's claim cannot be viewed as an objectively unreasonable application of *Strickland*. *Richter*, 562 U.S. at 101.

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Accordingly, Ground Four does not warrant federal habeas relief.

**E. Ground Five: Cumulative Error**

In Ground Five, Petitioner contends that she is entitled to habeas relief on account of the cumulative effect of counsel's errors. (FAP at 6.) Respondent contends that Ground Five is untimely and in any event was reasonably rejected by the California Supreme Court. (Answer at 36-38.)

Respondent contends that the cumulative error claim in Ground Five does not relate back to the cumulative error claim in the original Petition because the claim in the original Petition did not encompass counsel's alleged failure to investigate a defense, call witnesses, and communicate with Petitioner. (Answer at 37.) The Court rejects Respondent's timeliness argument for the same reasons as her timeliness argument with respect to Ground Four. Moreover, Petitioner's cumulative error claim plainly fails on the merits. *See Day*, 547 U.S. at 205 (statute of limitations defense is not jurisdictional); *Van Buskirk v. Baldwin*, 265 F.3d 1080, 1083 (9th Cir. 2001) (district courts may proceed to merits of habeas petition without resolving potential time bar).

"Cumulative error applies where, although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant." *Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002) (internal quotation marks and citation omitted), overruled on other grounds by *Slack v. McDaniel*, 529 U.S. 473 (2000). Petitioner argues only the cumulative effect of counsel's errors as set forth in her ineffective assistance claims. Prejudice under *Strickland* may result from the cumulative impact of multiple deficiencies. *See Harris v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995); *see also*



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*Turner v. Duncan*, 158 F.3d 449, 457 (9th Cir. 1998) ("When an attorney has made a series of errors that prevents the proper presentation of a defense, it is appropriate to consider the cumulative impact of the errors in assessing prejudice.")

Unlike the counsel in *Harris*, whose performance was found to have been "deficient in eleven ways, eight of them undisputed," *Harris*, 64 F.3d at 1439, the Court has found no instance of constitutionally deficient performance by counsel. Whether considered separately or together, counsel's alleged errors do not undermine confidence in the verdict and do not establish prejudice. *See Strickland*, 466 U.S. at 694. Petitioner, therefore, has not shown that the state court unreasonably rejected her cumulative error claim.

Accordingly, habeas relief is not warranted on Ground Five.

**F. Ground Six: Restitution Fine and Fees**

In Ground Six, Petitioner contends that her due process rights were violated when the trial court imposed a restitution fine and fees without ascertaining her ability to pay. (FAP at 7.) Respondent contends that this claim is not cognizable on federal habeas review, is procedurally defaulted, and was reasonably rejected by the California Court of Appeal. (Answer at 38-45.)

The trial court ordered Petitioner to pay a $10,000 restitution fine, a $40 court security fee, and a $30 criminal conviction assessment. (3 CT 506.) On direct appeal, Petitioner contended that the imposition of the restitution fine and fees without determining her ability to pay violated state law and the federal Constitution. (LD 24.) The California Court of Appeal found that Petitioner had forfeited her challenge to the restitution fine because she did not object at the sentencing hearing. (LD 2 at 32-33.) It found that Petitioner had not forfeited her challenge to the $70 in assessments, but concluded that any error in not providing her with a failure-to-pay hearing was harmless because the record showed that she had the ability to pay the amount. (*Id.* at 34.)

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Petitioner's challenge to the restitution fine and assessments is not cognizable on federal habeas review.[31] Section 2254(a) permits a habeas petition to be entertained only on the ground that the petitioner is in custody in violation of the Constitution or laws or treaties of the United States, and "explicitly requires a nexus between the petitioner's claim and the unlawful nature of the custody." *Bailey v. Hill*, 599 F.3d 976, 980 (9th Cir. 2010). A prisoner's challenge to the monetary component of a sentence does not implicate the validity of her custody. *Id.* at 981. Thus, "§ 2254(a) does not confer jurisdiction over a state prisoner's in-custody challenge to a restitution order imposed as part of a criminal sentence." *Id.* at 982; *see also Rodriguez v. Cate*, 475 F. App'x 679, 679 (9th Cir. 2012) (district court properly dismissed petition because it "lacked jurisdiction to consider [petitioner's] claims that the restitution order imposed as part of his sentence violated his due process and Eighth Amendment rights").

Petitioner's ability to pay the restitution fine and fees is unrelated to her custody. Even if she succeeded in reducing her monetary liability, her custodial sentence would be unaffected. *See Bailey*, 599 F.3d at 981; *see also Ruiz v. Martel*, No. 1:09-cv-00939-SKO-HC, 2010 WL 2606210, at *2 (E.D. Cal. June 28, 2010) (dismissing petitioner's challenge to restitution order "imposed without a determination that Petitioner had the ability to pay the fine" for lack of jurisdiction under *Bailey*; noting that "any remedy fashioned by this Court would affect only a monetary obligation, and not Petitioner's custody"). Although Petitioner challenges her custody in her other claims in the FAP, she cannot piggyback on those claims to provide the requisite nexus to Ground Six, which challenges only the non-custodial component of her sentence. *Bailey,* 599 F.3d. at 981-82; *see Sanchez v. McDowell*, 648 F. Supp. 3d 1241, 1262 (S.D. Cal. 2023) ("Even here, where Sanchez is

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[31] Petitioner argues otherwise, citing *United States v. Studley*, 892 F.2d 518 (7th Cir. 1989). (Traverse at 34.) That case was a direct appeal of a federal conviction and has no bearing on the scope of federal habeas jurisdiction under § 2254.



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indisputably "in custody" and his Petition asserts grounds for relief over which the Court has jurisdiction, the Court nonetheless should not hear any challenge to the restitution order.")

Accordingly, Ground Six is not cognizable on federal habeas review and does not warrant federal habeas relief. [32]

### G. Evidentiary Hearing

Petitioner requests an evidentiary hearing on her ineffective assistance claim. (FAP at 6; Traverse at 11.) The United States Supreme Court has held that federal habeas review under 28 U.S.C. § 2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits." *Pinholster*, 563 U.S. at 181. "[A]n evidentiary hearing is pointless once the district court has determined that § 2254(d) precludes habeas relief." *Sully v. Ayers*, 725 F.3d 1057, 1075 (9th Cir. 2013). Moreover, an evidentiary hearing is not warranted when "the record refutes the applicant's factual allegations or otherwise precludes habeas relief." *Schriro v. Landrigan,* 550 U.S. 465, 474 (2007). Petitioner, therefore, is not entitled to an evidentiary hearing.

## VII. RECOMMENDATION

For the reasons discussed above, IT IS RECOMMENDED that the District Court issue an Order (1) accepting and adopting this Report and Recommendation; (2)) directing that Judgment be entered dismissing the Petition with prejudice.

DATED: June 4, 2024

/s/
ROZELLA A. OLIVER
UNITED STATES MAGISTRATE JUDGE

[32] In light of this conclusion, the Court will not consider Respondent's procedural default argument. *See Sanchez,* 648 F. Supp. 3d at 1262 n.9.



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**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 Local Civil Rule 72 and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.