

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

11 STEPHANIE N. ERENDS,

No. 2:12-cv-2603-CKD

12 Petitioner,

ORDER

13 v.

14 D.K. JOHNSON,

15 Respondent.

17 Petitioner, a state prisoner, is proceeding pro se with a petition for writ of habeas corpus
18 pursuant to 28 U.S.C. § 2254. Petitioner was convicted by a jury of first degree murder with a
19 lying-in-wait special circumstance and a deadly weapon enhancement. She claims that: 1) the
20 trial court erred in denying her request to modify a jury instruction regarding voluntary
21 manslaughter in violation of due process; 2) the trial court admitted an officer's opinion on the
22 veracity of petitioner's confession in violation of due process; 3) the prosecutor suppressed
23 toxicology reports that would have helped the defense in violation of due process; and 4) she
24 received ineffective assistance of counsel at the trial level because trial counsel failed to
25 investigate and present evidence of petitioner's diminished capacity violating her Sixth
26 Amendment right to assistance of counsel.¹ (ECF No. 20.) Respondent has filed an answer.

27
28 ¹ Petitioner asserted a fifth claim for relief—that the trial court ordered her to pay restitution
without taking into account her ability to pay. The court previously concluded that this claim “is

1 (ECF No. 31.) Upon careful consideration of the record and the applicable law, the court denies
2 the second amended petition.²

3 BACKGROUND

4 I. Facts

5 In affirming the judgment on appeal, the California Court of Appeal for the Third
6 Appellate District set forth the relevant factual background as follows:

7 Defendant and Alicia Ernst had been friends since high school. On
8 March 7, 2008, it was defendant's 25th birthday. Defendant left
9 home around 8:15 p.m. to celebrate with Ernst. Ernst and defendant
visited Ernst's boyfriend, Richard Hamman, around midnight,
leaving at 4:00 a.m.

10 Ernst's body was discovered by a Placer County road maintenance
11 worker off Old Walerga Road near Baseline Road on March 10,
12 2008. Her body was covered with trash, and an empty ammonia
13 bottle was at the scene. There was no insect activity on Ernst's
14 body, which was consistent with ammonia being poured over the
body. The ammonia bottle tested positive for blood. Also found at
the scene was a white plastic trash bag containing fresh blood,
gloves saturated with blood, a knife-like device with a four-inch
blade and a triangle-shaped area where the handle was broken off.

15 The Placer County forensic pathologist determined Ernst died in the
16 early morning hours of March 8, 2008. She sustained various sharp-
force injuries to the head and face, but the cause of death was
17 multiple sharp-force wounds to the neck. The neck wounds were
from the left to the right, and were consistent with having come
18 from a single-edged razor type of tool. There were also postmortem
wounds on Ernst's fingers that were consistent with someone trying
19 to shave off her fingerprints.

20 Ernst sustained limited defensive wounds. More defensive wounds
21 would be expected if she had been attacked from the side or front,
and her other wounds were consistent with an attack from the rear.
However, the pathologist could not conclusively determine the
22 direction of the attack unless he was present during the assault.

23 Around 5:00 a.m. on March 8, 2008, defendant knocked on the door
of Michelle and Paul White's house. Defendant, who had blood all

24 not cognizable on federal habeas review as it does not affect the fact or duration of petitioner's
25 sentence." (ECF No. 22, at 2 (citing Calderon v. Ashmus, 523 U.S. 740, 747 (1998); United
26 States v. Thiele, 314 F.3d 399, 400 (9th Cir. 2002).) As such, the court addresses claims one
through four of the Second Amended Petition.

27 ² The parties have consented to this court's jurisdiction pursuant to 28 U.S.C. § 636(c) and Local
28 Rule 302 (ECF Nos. 21 and 25).

1 over her hands, told the Whites that three men attacked her when
2 her car broke down. She did not want law enforcement called, but
3 asked to call her grandmother. Paul White later drove defendant to
her grandmother's house.

4 Michael Smith responded to a tow service call on Old Walerga
5 Road on March 8, 2008, at around 7:30 a.m. Defendant was there
6 with her grandmother; the car was tangled in barbed wire and under
7 an oak tree. Defendant said she and her girlfriend were run off the
8 road by another vehicle. This did not make sense to Smith given the
9 placement of defendant's car. Smith noticed blood on the driver's
10 side door as well as between the seat and center console.

11 Defendant was contacted by Placer County Sheriff's Detective
12 Christina Woo at around 9:10 p.m. on March 10, 2008. Defendant
13 told Detective Woo she went to a bar with Ernst on March 7, her
14 birthday. Ernst did not want to leave the bar, so defendant left Ernst
15 and went to other bars by herself. She went home for awhile before
16 going to a friend's house, where defendant left around 3:00 a.m.,
17 and was run off the road around 4:00 a.m. Defendant went to three
18 to four houses looking for a ride before the Whites opened their
19 door to her.

20 Defendant took Detective Woo and Detective Don Murchison to the
21 bars she allegedly visited, and to where her car got stuck. She
22 claimed another car ran her off the road, and a man came up and
23 grabbed her by the neck. He later "slipped away" when another car
24 drove past.

25 Told that Ernst's body was found in the same area, defendant
26 suggested it was a coincidence. She then denied killing Ernst and
27 demanded to be taken home. The detectives took defendant home
28 and arrested her after seeing her car.

29 Detectives Murchison and Woo interrogated defendant at the Placer
30 County Jail at 9:57 p.m. on March 11. After being read her
31 *Miranda*[N.1] rights, defendant said she wanted "to confess to
32 killing Alicia Ernst," and admitted slitting Ernst's throat with a
33 "single razor."

34 [N.1] *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d
35 694].

36 Defendant told the detectives she picked up Ernst and they did
37 some methamphetamine at Hamman's house, leaving at around 3:30
38 a.m. Instead of going home, defendant drove Ernst to the frontage
39 road. While Ernst was sitting in the front passenger seat, defendant
40 got in the back seat and said she was going to change her pants.
41 Defendant took a knife she had already placed in the back seat, and
42 used it to slit Ernst's throat. She then pulled Ernst out of the car and
43 cut off her fingerprints as much as she could. Once outside the car,
44 defendant poured ammonia over Ernst's body and covered it with
45 garbage. Defendant started to leave, but panicked and drove her car
46 into a bush. She later convinced Paul White to drive her home.

1 Defendant admitted buying the ammonia and the blade several
2 weeks before, intending to use them on Ernst. Defendant wanted to
3 kill Ernst for allegedly pouring “acid” down her throat while she
4 was sleeping six to seven months before the killing.

5 Defendant admitted her earlier story was false. She later helped the
6 detectives find the ammonia bottle and the weapon.

7 Detective Murchison testified that he thought defendant held back
8 some information in her confession. Although defendant claimed
9 she had not been to the murder scene before she killed Ernst,
defendant's boyfriend told Detective Murchison that he and
defendant had been to the area before. He also could not confirm
whether Ernst poured acid down defendant's throat. However,
Detective Murchison believed most of the confession was
corroborated by extrinsic evidence, such as bloodstains in
defendant's car.

10 A search of defendant's car found red stains on both the driver-and
11 passenger-side doors, along with gouges and scratches on the roof
12 and hood. There was blood on the steering wheel and the interior of
the car, including extensive saturated bloodstains in the lower left
quadrant of the passenger's seat, and two shoe prints were on the
interior windshield.

13 Defendant's boyfriend, Alexander Kapustin, was arrested on an
14 outstanding warrant when he tried to visit defendant in jail.
Kapustin had a newspaper clipping on defendant's case, along with
15 a note that he intended to pass to defendant. The note read, “Tell me
16 you don't [sic] do that because you still think I was mess-mess
around with her.” Kapustin testified that he fought with defendant
about whether he slept with Ernst, which he denied.

17 Hamman testified that defendant and Ernst knocked on his door on
18 the night of March 7, 2008. Hamman was dating Ernst at the time,
19 and once dated defendant. Defendant and Ernst asked Hamman if
he had any drugs. Hamman said “No,” and they left after 30
minutes. Ernst and defendant returned at around 1:30 or 2:00 a.m.
20 with methamphetamine, which they smoked in Hamman's garage.

21 Ernst and defendant teased and flirted with each other; at one point
22 defendant got on Ernst's lap. Later, the three watched an adult
23 movie, after which Ernst and Hamman went to the shower where
they had sex. Ernst told defendant she watched her have sex with
other men when they lived together. Defendant's demeanor did not
24 change after Ernst said this. Ernst and defendant left at 4:00 a.m.

25 Defendant testified that she had been friends with Ernst since they
26 were 13. On the night of the incident, defendant and Ernst went out
27 to celebrate defendant's birthday. After buying some gas and beers,
they went to Hamman's to buy some drugs. Hamman did not have
any drugs, but they hung out for awhile before driving to see one of
Ernst's friends, from whom Ernst bought methamphetamine. They
28 stayed at the friend's house for a few hours and smoked
methamphetamine.

1 The pair then returned to Hamman's house, where they hung out for
2 a few hours and smoked methamphetamine. The three watched an
3 adult video; at some point Ernst and Hamman took a shower. Ernst
4 started making rude remarks about defendant and pulled down one
5 of defendant's pant legs, exposing her underwear. Ernst said she had
6 seen defendant have sex with other people before; defendant looked
7 foul doing so, and slept with a lot of other people. This made
8 defendant "feel like crap," as it was defendant's birthday and Ernst
9 was supposed to be her friend. Ernst kept insulting defendant even
10 after defendant told her to stop.

11 Defendant then said she needed to get her keys from her
12 grandmother, and Ernst suggested she go with defendant. Ernst
13 seemed to feel bad for what she said, so defendant let Ernst come
14 with her. Since she was high, defendant did not want to get home
15 until her grandmother left for work, and she drove to an isolated
16 spot on Old Walerga Road to wait for about 20 minutes. Defendant
17 asked Ernst why she treated her that way; Ernst tried to laugh it off
18 and thought it was funny, which made defendant feel dirty.
19 Defendant told her to "shut up" and hit Ernst in the face.

20 Ernst got mad, and they started to fight. Defendant pulled Ernst's
21 sweatshirt hood over Ernst's head, reached into a storage area of the
22 driver's seat, grabbed a scraper, and pressed it onto Ernst. Ernst's
23 feet were over the dash as they struggled. Ernst tried to get
24 defendant off of her, and they fell out the passenger-side door.

25 Ernst stopped struggling at some point. Defendant slid the scraper
26 across Ernst's fingers, got ammonia from the back seat, and poured
27 the ammonia over Ernst's body. She put her gloves and the scraper
28 into a plastic bag. Defendant put garbage on top of Ernst's body and
tried to leave, but got stuck.

29 Defendant testified that when the detectives first spoke to her, they
30 questioned her about being attacked so she went along with the
31 story even though it was not true. Her confession was false; she felt
32 like she was blaming Ernst if she told the deputies the truth, and
33 defendant originally felt she deserved the death penalty.

34 Defendant claimed she kept the ammonia, trash bags, and rubber
35 gloves in her car because she cleaned houses once a month. She
36 purchased the scraper from Home Depot to scrape lettering off a
37 door at her work. Defendant admitted arguing with Kapustin about
38 sleeping with an Alicia, but later determined it was a different
39 woman than Ernst.

40 Ellen Kuykendall, a close friend of defendant's grandmother,
41 testified that defendant cleaned her house at times and would bring
42 ammonia and gloves. According to a coworker of defendant's, their
43 workplace purchased a new door and employees removed the door's
44 old lettering. She admitted there were tools on-site for the task and
45 did not recall a shaver being used.

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1 According to forensic psychologist Dr. Ari Kalechstein, defendant
2 suffered from methamphetamine addiction and a major depressive
3 disorder at the time of the incident, and was suffering from
4 posttraumatic stress disorder (PTSD). Giving a different version of
5 a traumatic event a few days after the event was consistent with
6 PTSD, and the person's ability to recall or be aware of their
7 surroundings and what transpired is affected.

8 On rebuttal, Detective Murchison testified that defendant's failure
9 to admit certain facts did not cause him to question her confession.
10 Holding back or not admitting information can happen during
11 questioning. Murchison had been trained to look at the totality of
12 the evidence when evaluating the veracity of a confession. There
13 were no injuries on defendant's face consistent with defendant's
14 testimony that Ernst grabbed her face with both hands. Also,
15 defendant's testimony regarding a struggle outside the car was
16 inconsistent with the staining found inside defendant's car.
17 Defendant's testimony had not changed his belief that her
18 confession was accurate.

19 People v. Erends, 2011 WL 2519208, at **1–4 (Cal. App. 3 Dist. June 16, 2011).

20 II. Procedural History

21 On December 9, 2009, following a jury trial in the Placer County Superior Court,
22 petitioner was found guilty of first-degree murder with a lying-in-wait special circumstance and a
23 deadly weapon enhancement. Erends, 2011 WL 2519208, at *1. Petitioner was ultimately
24 sentenced to life in prison without the possibility of parole plus one year. Id. On direct appeal,
25 the California Court of Appeal for the Third Appellate District affirmed the judgment. Id. at *8.
Petitioner filed a petition for review with the California Supreme Court, which was summarily
denied on September 14, 2011. (Resp't's Lod. Docs. 5, 6.)

26 On September 11, 2012, petitioner's petition for writ of habeas corpus, filed in the Placer
27 County Superior Court, was denied. (Resp't's Lod. Doc. 8.) Petitioner then initiated the instant
28 proceeding filing her initial federal habeas petition on September 26, 2012. (ECF No. 1.) She
then filed a petition for writ of habeas corpus with California Court of Appeal, which was denied
without comment or citation. (Resp't's Lod. Docs. 9, 10.)

29 On March 1, 2013, petitioner filed a motion to stay this proceeding so that she could
30 exhaust her claims in state court. (ECF No. 14.) The court granted this motion and stayed the
31 action. (ECF No. 17.) Petitioner filed a petition for writ of habeas corpus in the California
32 Supreme Court, which was denied without comment or citation. (Resp't's Lod. Docs. 11, 12.)

1 Petitioner then filed her second amended federal habeas petition. (ECF No. 20.) The court lifted
2 the stay and respondent filed an answer. (ECF No. 22, 31.)

3 ANALYSIS

4 I. AEDPA

5 The statutory limitations of federal courts' power to issue habeas corpus relief for persons
6 in state custody is provided by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective
7 Death Penalty Act of 1996 (AEDPA). The text of § 2254(d) states:

8 An application for a writ of habeas corpus on behalf of a person in
9 custody pursuant to the judgment of a State court shall not be
10 granted with respect to any claim that was adjudicated on the merits
11 in State court proceedings unless the adjudication of the claim-

12 (1) resulted in a decision that was contrary to, or involved
13 an unreasonable application of, clearly established Federal law, as
14 determined by the Supreme Court of the United States; or

15 (2) resulted in a decision that was based on an unreasonable
16 determination of the facts in light of the evidence presented in the
17 State court proceeding.

18 As a preliminary matter, the Supreme Court has recently held and reconfirmed "that §
19 2254(d) does not require a state court to give reasons before its decision can be deemed to have
20 been 'adjudicated on the merits.'" Harrington v. Richter, 131 S. Ct. 770, 785 (2011). Rather,
21 "when a federal claim has been presented to a state court and the state court has denied relief, it
22 may be presumed that the state court adjudicated the claim on the merits in the absence of any
23 indication or state-law procedural principles to the contrary." Id. at 784–785, citing Harris v.
24 Reed, 489 U.S. 255, 265 (1989) (presumption of a merits determination when it is unclear
25 whether a decision appearing to rest on federal grounds was decided on another basis). "The
26 presumption may be overcome when there is reason to think some other explanation for the state
27 court's decision is more likely." Id. at 785.

28 The Supreme Court has set forth the operative standard for federal habeas review of state
court decisions under AEDPA as follows: "For purposes of § 2254(d)(1), 'an unreasonable
application of federal law is different from an incorrect application of federal law.'" Harrington,
131 S. Ct. at 785, citing Williams v. Taylor, 529 U.S. 362, 410 (2000). "A state court's

1 determination that a claim lacks merit precludes federal habeas relief so long as ‘fairminded
2 jurists could disagree’ on the correctness of the state court’s decision.” Id. at 786, citing
3 Yarborough v. Alvarado, 541 U.S. 652, 664 (2004). Accordingly, “a habeas court must
4 determine what arguments or theories supported or . . . could have supported[] the state court’s
5 decision; and then it must ask whether it is possible fairminded jurists could disagree that those
6 arguments or theories are inconsistent with the holding in a prior decision of this Court.” Id.
7 “Evaluating whether a rule application was unreasonable requires considering the rule’s
8 specificity. The more general the rule, the more leeway courts have in reaching outcomes in
9 case-by-case determinations.” Id. Emphasizing the stringency of this standard, which “stops
10 short of imposing a complete bar of federal court relitigation of claims already rejected in state
11 court proceedings[,]” the Supreme Court has cautioned that “even a strong case for relief does not
12 mean the state court’s contrary conclusion was unreasonable.” Id., citing Lockyer v. Andrade,
13 538 U.S. 63, 75 (2003).

14 The court also finds that the same deference is paid to the factual determinations of state
15 courts. Under § 2254(d)(2), factual findings of the state courts are presumed to be correct subject
16 only to a review of the record which demonstrates that the factual finding(s) “resulted in a
17 decision that was based on an unreasonable determination of the facts in light of the evidence
18 presented in the state court proceeding.” It makes no sense to interpret “unreasonable” in §
19 2254(d)(2) in a manner different from that same word as it appears in § 2254(d)(1) – i.e., the
20 factual error must be so apparent that “fairminded jurists” examining the same record could not
21 abide by the state court factual determination. A petitioner must show clearly and convincingly
22 that the factual determination is unreasonable. See Rice v. Collins, 546 U.S. 333, 338 (2006).

23 The habeas corpus petitioner bears the burden of demonstrating the objectively
24 unreasonable nature of the state court decision in light of controlling Supreme Court authority.
25 Woodford v. Viscotti, 537 U.S. 19 (2002). Specifically, the petitioner “must show that the state
26 court’s ruling on the claim being presented in federal court was so lacking in justification that
27 there was an error well understood and comprehended in existing law beyond any possibility for
28 fairminded disagreement.” Harrington, 131 S. Ct. at 786–87. “Clearly established” law is law

1 that has been “squarely addressed” by the United States Supreme Court. Wright v. Van Patten,
2 552 U.S. 120, 125 (2008). Thus, extrapolations of settled law to unique situations will not qualify
3 as clearly established. See e.g., Carey v. Musladin, 549 U.S. 70, 76 (2006) (established law not
4 permitting state sponsored practices to inject bias into a criminal proceeding by compelling a
5 defendant to wear prison clothing or by unnecessary showing of uniformed guards does not
6 qualify as clearly established law when spectators’ conduct is the alleged cause of bias injection).
7 The established Supreme Court authority reviewed must be a pronouncement on constitutional
8 principles, or other controlling federal law, as opposed to a pronouncement of statutes or rules
9 binding only on federal courts. Early v. Packer, 537 U.S. 3, 9 (2002).

10 The state courts need not have cited to federal authority, or even have indicated awareness
11 of federal authority in arriving at their decision. Early, 537 U.S. at 8. Where the state courts have
12 not addressed the constitutional issue in dispute in any reasoned opinion, the federal court will
13 independently review the record in adjudication of that issue. “Independent review of the record
14 is not de novo review of the constitutional issue, but rather, the only method by which we can
15 determine whether a silent state court decision is objectively unreasonable.” Himes v. Thompson,
16 336 F.3d 848, 853 (9th Cir. 2003).

17 “When a state court rejects a federal claim without expressly addressing that claim, a
18 federal habeas court must presume that the federal claim was adjudicated on the merits – but that
19 presumption can in some limited circumstances be rebutted.” Johnson v. Williams, 133 S. Ct.
20 1088, 1096 (2013). “When the evidence leads very clearly to the conclusion that a federal claim
21 was inadvertently overlooked in state court, § 2254(d) entitles the prisoner to” de novo review of
22 the claim. Id. at 1097.

23 II. Petitioner’s Claims

24 A. Jury Instruction

25 Petitioner contends the trial court committed prejudicial instructional error when it denied
26 her request to modify the standard jury instruction regarding voluntary manslaughter, CALCRIM
27 No 570. Petitioner raised this claim on direct appeal and the California Court of Appeal rejected
28 petitioner’s claim reasoning as follows:

1 Defendant contends the trial court prejudicially erred in failing to
2 give a requested clarifying instruction on provocation. We disagree.

3 The trial court instructed the jury with the standard instruction on
4 voluntary manslaughter, CALCRIM No. 570, which reads, in
5 pertinent part: “A killing that would otherwise be murder is reduced
6 to voluntary manslaughter if the defendant killed someone because
7 of a sudden quarrel or in the heat of passion.” CALCRIM No. 570
8 further states, “It is not enough that the defendant was simply
9 provoked. The defendant is not allowed to set up her own standard
10 of conduct. In deciding whether the provocation was sufficient,
11 consider whether a person of average disposition in the same
12 situation and knowing the same facts, would have reacted from
13 passion rather than from judgment.”

14 Before and after the trial, defense counsel asked the court to modify
15 CALCRIM No. 570, based on the Bench Notes to CALCRIM No.
16 570 and *People v. Najera* (2006) 138 Cal.App.4th 212 (*Najera*), to
17 include language that the sufficient provocation for manslaughter is
18 not to kill but merely to act rashly and without deliberation. Asked
19 how he would change the instruction, defense counsel stated, “I
20 would just add that line that they put in the use notes, that an
21 average person need not be provoked to kill, but merely to act
22 [rashly] and without deliberation.” The trial court rejected the
23 suggested modification and instructed the jury with the unmodified
24 CALCRIM No. 570 (Dec.2008 rev.).

25 Defendant relies on the Authority subheading to CALCRIM No.
26 570, which states: “‘Average person’ Need Not Have Been
27 Provoked to Kill, Just to Act Rashly and Without Deliberation.
28 *People v. Najera* (2006) 138 Cal.App.4th 212, 223.” (Judicial
Council of Cal.Crim. Jury Instns. (2011) Authority to CALCRIM
No. 570, p. 354.) Admitting CALCRIM No. 570 “may be adequate
for most cases generally,” defendant asserts “the instruction’s focus
is misleading in regard to the concept of provocation which is not
directly related to killing but to the loss of objectively normal
mental control of an average person.” Since “provocation ‘to kill’
“was not the main part of the defense, defendant argues it “was
critical that the jurors understood that the provocation had only to
be sufficient to arouse that heat of passion mental state to a level
where the action of an ordinary person would be from passion
rather than reason.”

29 During argument on the motion at trial, the prosecutor sought
30 clarification, stating that his understanding of defense counsel’s
31 position was that based on statements from Ernst in the car, coupled
32 with the fight, there “was sufficient provocation for [defendant] to
33 then grab the razor and kill her[.]” Defense counsel replied, “No.
34 It’s sufficient provocation for her to act rationally from passion.
35 That’s why I want the language, because even you are misreading
36 what it says.” Defendant contends this exchange shows the
37 modified instruction was necessary to prevent the jury from
38 believing defendant had to have been provoked to kill before
39 finding sufficient provocation for voluntary manslaughter.

1 When a defendant contends an instruction is ambiguous or
2 potentially misleading, we must review the instructions as a whole
3 and determine ““whether there is a reasonable likelihood that the
4 jury has applied the challenged instruction in a way’ that violates
the [United States] Constitution.” (*Estelle v. McGuire* (1991) 502
U.S. 62, 72 [116 L.Ed.2d 385, 399]; *see also People v. Smithey*
(1999) 20 Cal.4th 936, 963.)

5 ““[H]eat of passion”” voluntary manslaughter requires proof of
6 provocation and heat of passion. (*People v. Lee* (1999) 20 Cal.4th
7 47, 59.) The provocation must be caused (or reasonably believed by
8 the defendant to have been caused) by the victim, and must be
9 “sufficiently provocative that it would cause an ordinary person of
average disposition to act rashly or without due deliberation and
reflection.” (*Ibid.*) If an “ordinarily reasonable person,” so
provoked, would have acted in this manner, there is legally
sufficient heat of passion to reduce murder to voluntary
manslaughter. (*Ibid.*)

10 *Najera* addressed a prosecutor's closing arguments containing
11 numerous incorrect statements of the law regarding voluntary
manslaughter. (*Najera, supra*, 138 Cal.App.4th at pp. 219–224.)
12 Among the erroneous arguments were the comments, ““Would a
13 reasonable person do what the defendant did?”” and ““[T]he
14 reasonable, prudent person standard ... [is] based on conduct, what a
15 reasonable person would do in a similar circumstance.”” (*Id.* at p.
223, italics omitted.) Such statements were incorrect because “[t]he
16 focus is on the provocation—the surrounding circumstances—and
whether it was sufficient to cause a reasonable person to act rashly.
How the killer responded to the provocation and the reasonableness
17 of the response is not relevant to sudden quarrel or heat of passion.”
(*Id.* at p. 223.)

18 CALCRIM No. 570 does not contain the gross misstatements of the
19 law addressed in *Najera*. Instead of focusing on defendant's acts,
20 CALCRIM No. 570 instructs the jury to consider whether a
21 reasonable person, “knowing the same facts would have reacted
from passion rather than from judgment.” This is a correct
22 statement of the law, and it is not reasonably likely that a jury
23 instructed in this manner would apply the instruction incorrectly.
The prosecutor's misstatement, made in the heat of argument, does
not mean that a jury would make the same mistake when instructed
with the unambiguous language of CALCRIM No. 570. It was not
error for the trial court to refuse to give the modified instruction
requested by defendant.

24 Erends, 2011 WL 2519208, at **4–6.

25 A challenge to a jury instruction solely as an error of state law does not state a claim
26 cognizable in a federal habeas corpus action. See Estelle v. McGuire, 502 U.S. 62, 71–72, 112 S.
27 Ct. 475, 116 L.Ed.2d 385 (1991) (habeas corpus is unavailable for alleged error in the
28 interpretation or application of state law); Gutierrez v. Griggs, 695 F.2d 1195, 1197 (9th Cir.

1 1983); Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985). The standard of review for a
2 federal habeas court “is limited to deciding whether a conviction violated the Constitution, laws,
3 or treaties of the United States.” Estelle, 502 U.S. at 62. In order for error in the state trial
4 proceedings to reach the level of a due process violation, the error had to be one involving
5 “fundamental fairness.” Id. at 73. The Supreme Court has defined the category of infractions that
6 violate fundamental fairness very narrowly. Id.

7 To that end, petitioner must show both a defect in the instructions and a “reasonable
8 likelihood” that the jury applied the instruction in a way that violates the Constitution, such as
9 relieving the state of its burden of proving every element beyond a reasonable doubt.
10 Waddington v. Sarausad, 555 U.S. 179, 190–91, 129 S. Ct. 823, 831, 172 L.Ed.2d 532 (2009).
11 Petitioner must show that the ailing instruction by itself so infected the entire trial that the
12 resulting conviction violates due process. Estelle, 502 U.S. at 72. Additionally, the instruction
13 may not be judged in artificial isolation, but must be considered in the context of the instructions
14 as a whole and the trial record. Id. The court must evaluate jury instructions in the context of the
15 overall charge to the jury as a component of the entire trial process. See United States v. Frady,
16 456 U.S. 152, 169, 102 S. Ct. 1584, 71 L.Ed.2d 816 (1982). Furthermore, even if it is determined
17 that the instruction violated the petitioner’s right to due process, a petitioner can only obtain relief
18 if the unconstitutional instruction had a substantial influence on the conviction and thereby
19 resulted in actual prejudice under Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S. Ct. 1710, 123
20 L.Ed.2d 353 (1993). See Hedgpeth v. Pulido, 555 U.S. 57, 61–62, 129 S. Ct. 530, 172 L.Ed.2d
21 388 (2008) (per curiam).

22 Petitioner repeats the arguments she made on her state court direct appeal here in her
23 federal petition. She contends the trial court should have modified CALCRIM 570 to clarify that
24 “sufficient provocation for manslaughter is not to kill but merely to act rashly and without
25 deliberation.” The trial court declined to modify the instruction because CALCRIM 570 as
26 written was not an inaccurate statement of the law. 5 RT 1467. Petitioner concedes that
27 CALCRIM No. 570 is not inaccurate but contends that it is misleading.

28 ///

1 Based on its analysis and interpretation of CALCRIM No. 570, People v. Najera, 139
2 Cal.App.4th 212 (2006), and People v. Lee, 20 Cal.4th 47, 59 (1999), the state appellate court
3 found that CALCRIM 570 is not ambiguous and is a correct statement of state law. “A state
4 court’s interpretation of state law, including one announced on direct appeal of the challenged
5 conviction, binds a federal court sitting in habeas corpus.” Bradshaw v. Richey, 546 U.S. 74, 76,
6 126 S. Ct. 602, 604 (2005). For petitioner to be entitled to relief, the jury instructions must be
7 defective in some way. Waddington, 555 U.S. at 190. The state court’s finding that CALCRIM
8 No. 570 is unambiguous was not objectively unreasonable. Accordingly, petitioner’s claim must
9 be denied.

10 B. Lay Witness Opinion

11 Petitioner contends the trial court committed prejudicial error in admitting the testimony
12 of Detective Murchison that offered an opinion as to the truth of petitioner’s confession.
13 Petitioner raised this claim on direct appeal and the state court of appeal concluded that the trial
14 court’s admission of Detective Murchison’s opinion was harmless error, reasoning as follows:

15 Defendant contends the trial court prejudicially erred in permitting
16 Detective Murchison to give opinion testimony on the veracity of
defendant’s confession. Finding the error harmless, we disagree.

17 During Detective Murchison’s rebuttal testimony, the prosecutor
18 asked whether defendant’s testimony was consistent with Ernst’s
injuries. Defendant objected, claiming lack of foundation, which the
trial court overruled. Murchison started to testify that regarding the
totality of the evidence concerning Ernst’s injuries, “I still just don’t
understand how,” when the trial court stopped him and said, “Let’s
be mindful that he’s not the expert here.” The prosecutor then
moved to another line of questioning.

21 A little later, the prosecutor elicited from Detective Murchison that
22 defendant’s testimony presented information about the attack which
he had not heard before. The prosecutor next asked: “And does
what she said at trial change your opinion that, based on the
evidence, her confession statement to you was accurate.” Defense
counsel objected, as the question “calls for his conclusion as to her
truthfulness. That’s for the jury to decide.” The trial court overruled
the objection, finding the jury would determine whether defendant
was truthful, but Murchison could still give his opinion. Murchison
then answered, “No, it has not changed.”

27 Defendant asserts Detective Murchison’s answer was inadmissible
28 opinion evidence. Characterizing the question and answer as
“argumentative and irrelevant,” defendant concludes the testimony

1 was “extremely prejudicial because they were addressed to a jury of
2 citizens as the word of a public official elicited properly by another
3 public official ... and with the apparent approval of the judge
h[er]self.”

4 “Lay opinion about the veracity of particular statements by another
5 is inadmissible on that issue.” (*People v. Melton* (1988) 44 Cal.3d
6 713, 744.) There are several reasons for this rule. “With limited
7 exceptions, the fact finder, not the witnesses, must draw the
8 ultimate inferences from the evidence. Qualified experts may
9 express opinions on issues beyond common understanding
10 [citations], but lay views on veracity do not meet the standards for
11 admission of expert testimony. A lay witness is occasionally
12 permitted to express an ultimate opinion based on his perception,
but only where ‘helpful to a clear understanding of his testimony’
[citation], i.e., where the concrete observations on which the
opinion is based cannot otherwise be conveyed. [Citations.] Finally,
a lay opinion about the veracity of particular statements does not
constitute properly founded character or reputation evidence
[citation], nor does it bear on any of the other matters listed by
statute as most commonly affecting credibility [citation]. Thus,
such an opinion has no ‘tendency in reason’ to disprove the veracity
of the statements.” (*Ibid.*)

13 As the Supreme Court has observed, “a police officer's opinion
14 regarding the truthfulness of a suspect's confession is generally
15 deemed inadmissible.” (*People v. Anderson* (1990) 52 Cal.3d 453,
16 478.) Detective Murchison was not an expert on the veracity of
17 confessions, and it was error for the trial court to allow him to give
18 opinion testimony on whether defendant's confession was truthful.
19 However, the admission of such testimony does not mandate
reversal unless defendant can show it is reasonably probable she
would have obtained a more favorable outcome had her objection
been sustained. (*People v. Melton, supra*, 44 Cal.3d at pp. 744–745
[applying harmless error test of *People v. Watson* (1956) 46 Cal.2d
818, 836 to improper question calling for lay opinion testimony
about the veracity of another witness].)

20 During the People's case-in-chief, Detective Murchison testified,
21 without any objection from defendant, that he thought defendant's
22 confession was largely truthful based on numerous corroborating
23 facts such as her detailed description of the murder weapon, her
24 placing the victim in the front seat, and the location of Ernst's body.
Defendant's failure to object to this testimony forfeits any
contention that it was improperly admitted. (*People v. Anderson,*
supra, 52 Cal.3d at p. 478.) Any prejudice from the improper
opinion testimony on rebuttal is diminished by this earlier
testimony.

25 The case against defendant was overwhelming. Defendant's
26 confession was corroborated by substantial physical evidence,
27 including the considerable amount of blood in the car and the back
seat in particular. The lack of defensive wounds on Ernst and the
28 nature of her neck wounds strongly support defendant's confession
that she attacked Ernst from behind and slit her throat. By contrast,

1 defendant's claim of a mutual struggle that spilled out of the car is
2 inconsistent with the lack of defensive wounds, the extensive
3 wounding on Ernst's neck, and the amount and placement of
4 bloodstains in defendant's car. Her testimony could not readily
5 explain why the unusual murder weapon was in her car on the night
of the murder. Defendant's explanation, that it was used to help
remove lettering from a door at work, was inconsistent with the
coworker's testimony that their employer provided the tools to
remove the lettering from the door.

6 The error here consisted of a one-sentence answer by Detective
7 Murchison, that defendant's testimony did not change his
8 previously stated opinion that her confession was truthful. In light
9 of the overwhelming evidence of defendant's guilt and the previous
opinion testimony admitted without objection, it is not reasonably
likely that the jury would have reached a different result had the
trial court sustained defendant's objection.

10 Erends, 2011 WL 2519208, at **6–8.

11 Generally, the admissibility of evidence is a matter of state law, and is not reviewable in a
12 federal habeas corpus proceeding. Estelle, 502 U.S. at 68, 112 S. Ct. 475, 116 L.Ed.2d 385;
13 Middleton, 768 F.2d at 1085; Henry v. Kernan, 177 F.3d 1152, 1159 (9th Cir.1999) (admission of
14 evidence in a state trial is not subject to federal habeas review unless it violates a specific
15 constitutional right). However, there can be habeas relief for the admission of prejudicial
16 evidence if the admission was fundamentally unfair and resulted in a denial of due process.
17 Estelle, 502 U.S. at 72–73; Pulley v. Harris, 465 U.S. 37, 41, 104 S. Ct. 871, 79 L.Ed.2d 29
18 (1984); Walters v. Maas, 45 F.3d 1355, 1357 (9th Cir.1995); Jeffries v. Blodgett, 5 F.3d 1180,
19 1192 (9th Cir.1993), cert. denied, 510 U.S. 1191, 114 S. Ct. 1294, 127 L.Ed.2d 647 (1994);
20 Gordon v. Duran, 895 F.2d 610, 613 (9th Cir.1990). The failure to comply with state rules of
21 evidence alone is neither a necessary nor a sufficient basis for granting federal habeas relief on
22 due process grounds. Jammal v. Van de Kamp, 926 F.2d 918, 919–920 (9th Cir. 1991).

23 A state court's evidentiary ruling—even if erroneous—is grounds for federal habeas relief
24 only if it renders the state proceedings so fundamentally unfair as to violate due process. Holley
25 v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009); Jammal v. Van de Kamp, 926 F.2d 918, 919
26 (9th Cir. 1991). Even so, as the Ninth Circuit has observed:

27 The Supreme Court has made very few rulings regarding the
28 admission of evidence as a violation of due process. Although the
Court has been clear that a writ should be issued when

1 constitutional errors have rendered the trial fundamentally unfair
2 (citation omitted), it has not yet made a clear ruling that admission
3 of irrelevant or overtly prejudicial evidence constitutes a due
process violation sufficient to warrant issuance of the writ.

4 Holley, 568 F.3d at 1101. Therefore, “under AEDPA, even clearly erroneous admissions of
5 evidence that render a trial fundamentally unfair may not permit the grant of federal habeas
6 corpus relief if not forbidden by ‘clearly established Federal law,’ as laid out by the Supreme
7 Court.” Id. On the basis of these authorities, the state court’s rejection of petitioner’s due process
8 claim here does not support federal habeas relief under AEDPA because the admission of
9 Detective Murchison’s opinion regarding the trustworthiness of petitioner’s confession did not
10 violate any clearly established federal law. See id. Accordingly, this claim must be denied.

11 C. Brady Claim

12 Petitioner contends the prosecution suppressed toxicology reports that would have helped
13 her defense. In particular, petitioner contends the prosecution withheld blood test results that
14 show she was under the influence of drugs and other medication when she killed Ernst. Petitioner
15 raised this claim in a state habeas petition to the superior court. Resp’t’s Lod. Doc. 7. The Placer
16 Superior Court, as more fully discussed below, denied related claims but did not expressly
17 address petitioner’s Brady claim. Resp’t’s Lod. Doc. 8. Under Johnson v. Williams, 133 S. Ct.
18 1088, the court will presume that petitioner’s Brady claim was adjudicated on the merits, as
19 petitioner has made no effort to rebut that presumption. See Johnson, 133 S. Ct. at 1096–97.

20 The Supreme Court has found the Due Process Clause of the Fourteenth Amendment
21 requires that, upon request, a criminal defendant be provided by the prosecution with all evidence
22 in their possession which is material to guilt or innocence. Brady v. Maryland, 373 U.S. 83, 87,
23 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963). Evidence is material if there is a reasonable probability
24 that, had the evidence been disclosed to the defense, the result of the proceedings would have
25 been different. U.S. v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L.Ed.2d 481 (1985). To
26 succeed on a Brady claim, a petitioner must establish that the undisclosed evidence was: (1)
27 favorable to the accused, either as exculpatory or impeachment evidence, (2) suppressed by the
28 prosecution, either willfully or inadvertently, and (3) material, so that prejudice to the defense

1 resulted from its suppression. Strickler v. Greene, 527 U.S. 263, 281–82, 119 S. Ct. 1936, 144
2 L.Ed.2d 286 (1999). The reviewing court examines the withheld evidence individually and
3 cumulatively. See Kyles v. Witley, 514 U.S. 419, 436–37 & n. 10, 115 S. Ct. 1555, 131 L.Ed.2d
4 490.

5 The accused has suffered prejudice only if the suppression undermines confidence in the
6 outcome of the trial. Benn v. Lambert, 283 F.3d 1040, 1053 (9th Cir. 2002) (citing Bagley, 473
7 U.S. at 676). The mere possibility that an item of undisclosed information might have helped the
8 defense, or might have affected the outcome of the trial, does not establish materiality in the
9 constitutional sense. Barker v. Fleming, 423 F.3d 1085, 1099 (9th Cir. 2005). However, the
10 petitioner need not show that he would more likely than not have been acquitted had the evidence
11 been disclosed. Kyles, 514 U.S. at 434–35. Rather, the touchstone of the inquiry is whether
12 petitioner received a fair trial that resulted in a verdict “worthy of confidence.” Id. at 434.

13 Petitioner contends the toxicology report conducted on blood samples she provided the
14 day she was booked in county jail show the presence of drugs and other medication. To the
15 contrary, pursuant to a stipulation the parties agreed as follows: “It is stipulated that Defendant’s
16 blood was taken upon arrest on 3/11/08. A subsequent test for the presence of drugs came back
17 negative.” 1 CT 229. Because the toxicology report is not favorable to petitioner’s defense, her
18 Brady claim fails.

19 **D. Ineffective Assistance of Counsel**

20 Petitioner also contends counsel was ineffective because trial counsel failed to investigate
21 and present evidence of her diminished capacity. She raised this claim in a state court habeas
22 petition to the Placer County Superior Court³, which denied her petition as follows:

23 Following a jury trial, defendant Stephanie Nicole Erends was
24 convicted of first degree murder (Pen. Code, § 187) with a lying-in-
25 wait special circumstance (*id.*, § 190.2, subd. (a)(15)) and a deadly
26 weapon enhancement (*id.*, § 12022, subd. (b)(1)). The trial court
initially sentenced defendant to a state prison term of 25 years to
life plus one year, later correcting the sentence to life without the
possibility of parole plus one year. On appeal, the petitioner

27
28 ³ The Placer County Superior Court’s opinion on petitioner’s state habeas petition is the last
reasoned decision on this issue. See Respt’s’ Lod. Docs. 8, 10, 12.

1 claimed that there was instructional error and inadmissible opinion
2 evidence at trial. The conviction was affirmed by the appellate
3 court on July 16, 2011. On August 29, 2012, the petitioner filed the
instant petition for writ of habeas corpus in the Superior Court.

4 In her petition, petitioner claims, in summary, that her trial counsel
5 was ineffective for not pursuing or investigating the effect of drug
6 ingestion. She claims that she was suffering from “delusions” and
7 was not “competent” to stand trial and her trial counsel did not
8 investigate or present her condition at trial.

9 However, other than making bare assertions in her pleadings, the
10 petitions [sic] has attached no documentary or other evidence to
11 support her claim that she was mentally incompetent. She lists the
12 names of “witnesses” she claims could testify to her mental
13 condition, but she did not attach any sworn declarations of the
14 witnesses to her petition. No psychological reports or assessments
15 of petition [sic] are attached.

16 Because a petition for a writ of habeas corpus seeks to collaterally
17 attack a presumptively final criminal judgment, the petitioner bears
18 a heavy burden initially to plead sufficient grounds for relief, and
19 then later to prove them. To satisfy the initial burden of pleading
20 adequate grounds for relief, an application for habeas corpus must
21 be made by petition, and [“][i]f the imprisonment is alleged to be
22 illegal, the petition must also state in what the alleged illegality
23 consists. The petition should both (i) state with particularity the
24 facts on which relief is sought, and (ii) include copies of reasonably
25 available documentary evidence supporting the claim, including
26 pertinent portions of trial transcripts and affidavits or declarations.
27 Conclusory allegations made without any explanation of the basis
28 for the allegations do not warrant relief, let alone an evidentiary
hearing.”] (People v. Duval (1995) 9 Cal. 4th 464, at p. 474 [])[.]
Vague or conclusory allegations without factual support are
insufficient. (In re Swain (1949) 34 Cal.2d 300, 304).

In this case, the Court finds that the Petitioner’s bare assertions of
mental disease and ineffective assistance of counsel are
unsupported conclusory allegations. In addition, the issue of
ineffective assistance of counsel was not raised on appeal to the
appellate court.

Accordingly, the petition for writ of habeas corpus [is] denied.

(Resp’t’s Lod Doc. 8.)

The test for demonstrating ineffective assistance of counsel is set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). First, a petitioner must show that, considering all the circumstances, counsel’s performance fell below an objective standard of reasonableness. Strickland, 466 U.S. at 688. To this end, the petitioner must identify the acts or omissions that are alleged not to have been the result of reasonable professional judgment. Id. at

1 690. The federal court must then determine whether in light of all the circumstances, the
2 identified acts or omissions were outside the wide range of professionally competent assistance.
3 Id. “We strongly presume that counsel’s conduct was within the wide range of reasonable
4 assistance, and that he exercised acceptable professional judgment in all significant decisions
5 made.” Hughes v. Borg, 898 F.2d 695, 702 (9th Cir.1990), citing Strickland at 466 U.S. at 689.

6 Second, a petitioner must affirmatively prove prejudice. Strickland, 466 U.S. at 693.
7 Prejudice is found where “there is a reasonable probability that, but for counsel’s unprofessional
8 errors, the result of the proceeding would have been different. A reasonable probability is a
9 probability sufficient to undermine confidence in the outcome.” Id. “That requires a
10 ‘substantial,’ not just ‘conceivable,’ likelihood of a different result.” Cullen v. Pinholster, 131 S.
11 Ct. 1388, 1403, 179 L.Ed.2d 557 (2011) quoting Richter, 562 U.S., at ----, 131 S. Ct., at 791.

12 The Supreme Court has emphasized the importance of giving deference to trial counsel’s
13 decisions, especially in the AEDPA context:

14 In Strickland we said that “[j]udicial scrutiny of a counsel’s
15 performance must be highly deferential” and that “every effort
16 [must] be made to eliminate the distorting effects of hindsight, to
17 reconstruct the circumstances of counsel’s challenged conduct, and
18 to evaluate the conduct from counsel’s perspective at the time.” 466
19 U.S., at 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 []. Thus, even when a
20 court is presented with an ineffective-assistance claim not subject to
21 § 2254(d)(1) deference, a [petitioner] must overcome the
22 “presumption that, under the circumstances, the challenged action
23 ‘might be considered sound trial strategy.’” *Ibid.* (quoting Michel
24 *v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83[]
25 (1955)).

26 For [petitioner] to succeed, however, he must do more than show
27 that he would have satisfied Strickland’s test if his claim were being
28 analyzed in the first instance, because under § 2254(d)(1), it is not
enough to convince a federal habeas court that, in its independent
judgment, the state-court decision applied Strickland incorrectly.
See Williams, *supra*, at 411, 323 U.S. 471, 65 S.Ct. 363, 89 L.Ed.
398[]. Rather, he must show that the []Court of Appeals applied
Strickland to the facts of his case in an objectively unreasonable
manner.

29
30 Bell v. Cone, 535 U.S. 685, 698–699, 122 S. Ct. 1843, 1852, 152 L.Ed.2d 914 (2002).

31 Petitioner contends that trial counsel failed to fully investigate and present evidence of her
32 diminished capacity. She asserts that trial counsel should have employed a different psychologist

1 than the one used at trial because the one used was not able to perform a complete evaluation on
2 her. She also states that she had diminished mental capacity and mental health issues which
3 should have been presented to the court. Petitioner also names potential witnesses who counsel
4 should have contacted and did not.

5 As an initial matter and as noted by the Placer Superior Court, none of these asserted
6 derelictions of duty occurred at the appellate level and none were raised on direct appeal.
7 Resp't's Lod. Doc. 8. Further, petitioner's claim fails because she did not set forth what a
8 different psychologist might have said, or what additional time with Dr. Ari Kalechstein, the
9 psychologist who evaluated petitioner and testified on her behalf, might have provided. Dr.
10 Kalechstein stated that he interviewed petitioner on two separate days for a total of eight to ten
11 hours. 5 RT 1327. He also testified that he reviewed records related to petitioner's case which
12 included crime reports, police interviews with petitioner, letters prepared by petitioner and a
13 toxicology screen of Alicia Ernst. Id. He testified that he believed petitioner was under the
14 influence of methamphetamine when she killed Alicia Ernst. 5 RT 1348. Despite having limited
15 time with petitioner, Dr. Kalechstein testified that he believed he had sufficient information and
16 time with petitioner to form the opinions he made. 5 RT 1364. Contrary to petitioner's
17 assertions that Dr. Kalechstein could not provide a diagnosis and that trial counsel failed to
18 present her mental health issues to the court, Dr. Kalechstein opined that petitioner suffered from
19 major depressive disorder and posttraumatic stress disorder and generally testified regarding the
20 effects of methamphetamine use, major depressive disorder and posttraumatic stress disorder. 5
21 RT 1329–46, 1353, 1357.

22 Further, petitioner failed to explain what the witnesses who were housed with her in
23 county jail would have said regarding her mental health issues. She did not attach any
24 declarations shedding light on this information. The state superior court reasonably concluded
25 that petitioner's ineffective assistance of counsel claim was based on unsubstantiated, conclusory
26 allegations. Accordingly, the state court's determination of petitioner's ineffective assistance of
27 counsel claim was not an unreasonable application of Strickland. This claim must be denied.
28 ///

1 III. Certificate of Appealability

2 Pursuant to Rule 11 of the Federal Rules Governing Section 2254 Cases, this court must issue
3 or deny a certificate of appealability when it enters a final order adverse to the applicant. A
4 certificate of appealability may issue only “if the applicant has made a substantial showing of the
5 denial of a constitution right.” 28 U.S.C. § 2253(c)(2). For the reasons set forth in this Order, a
6 substantial showing of the denial of a constitutional right has not been made in this case.

7 Accordingly, IT IS HEREBY ORDERED that:

8 1. The second amended petition for writ of habeas corpus (ECF No. 20) is denied;
9 2. This case be closed; and
10 3. The court declines to issue the certificate of appealability referenced in 28 U.S.C. §
11 2253.

12 Dated: January 22, 2015

Carolyn K. Delaney

13 CAROLYN K. DELANEY
14 UNITED STATES MAGISTRATE JUDGE

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