No. _____

IN THE

Supreme Court of the United States

JOSHUA VILLALOBOS,

Petitioner,

v.

ATTORNEY GENERAL FOR THE STATE OF ARIZONA;
DAVID SHINN, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Appointed under the Criminal Justice Act, 18 U.S.C. § 3006A(d)(7)

QUESTION PRESENTED

Petitioner Joshua Villalobos was convicted largely on the unchallenged testimony of a medical examiner, Dr. Alex Zhang, who concluded that the victim suffered fatal internal injuries during the hours before her death, when Petitioner was alone with her. Dr. Zhang's testimony was the "linchpin" of the prosecution's case, as the state habeas court concluded. Despite the damning nature of this testimony, Petitioner's trial counsel failed to present readily available expert testimony establishing that many of the victim's injuries, including the fatal ones, were weeks old, and that there was no evidence of new injury in the twenty-four hours before her death. Furthermore, expert evidence would have explained the "cascade" of effects from a much older injury, which were consistent with evidence that the victim had been losing appetite, energy, and a concerning amount of weight over the months preceding her death. The parties agree, and the state court found, that trial counsel performed deficiently in failing to present this available testimony.

The question presented to this Court is: Whether the Ninth Circuit's conclusion that the state court reasonably applied this Court's precedents in finding a lack of prejudice—in a case where damning forensic testimony could have been but was not effectively challenged—conflicts with the decisions of this Court and other circuits.

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Joshua Villalobos petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

JUDGMENT BELOW

The judgment below is unreported and is included in Petitioner's Appendix ("App.") as Appendix B. It is also available at 2024 WL 838700.

JURISDICTION

On February 28, 2024, the Ninth Circuit Court of Appeals issued an unpublished decision denying habeas relief. (App. B.) A timely petition for rehearing was denied on July 10, 2024. (App. A) This Court granted one 60-day extension of time, to and including December 9, 2024, in No. 24A320. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amend. VI

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

U.S. Constitution, Amend. XIV

"No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Title 28 U.S.C. § 2254(d)

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

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

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

STATEMENT OF THE CASE

A. Procedural History

1. State court

Petitioner was convicted in Arizona of child abuse and first-degree murder, and sentenced to death. (1-ER-141; 2-ER-216-17.)[1] The judgment was affirmed on direct appeal. *State v. Villalobos*, 225 Ariz. 74 (2010).

Petitioner filed a state habeas petition before the Maricopa County Superior Court (hereinafter "the PCR court"). (*See* 2-ER-223-51 (selected exhibits to supplemental petition).) The PCR court held an evidentiary hearing. Ultimately, it denied Petitioner's guilt-phase claims but vacated his death sentence. (1-ER-86-99; 4-ER-959-60.) The

[1] "ER" refers to the excerpts of record filed with the Ninth Circuit Court of Appeals as docket number 17 in case number 22-15213.

Arizona Supreme Court summarily denied the petition for review. (1-ER-66.) At the penalty-phase retrial, the jury voted for life. (2-ER-154.)

2. Federal court

After the district court denied Petitioner's federal habeas petition, the Ninth Circuit Court of Appeals issued a certificate of appealability on a single issue: "whether trial counsel provided ineffective assistance of counsel by failing to present expert testimony from a forensic pathologist." (App. C at 1.) After briefing and oral argument, the Ninth Circuit affirmed the denial of habeas relief in a 2-1 decision. (App. B at 1-9.)

According to the majority—Judges Daniel A. Bress and Anthony D. Johnstone—the PCR court's decision was neither contrary to nor an unreasonable application of clearly established federal law under 28 U.S.C. § 2254(d)(1), and it did not involve an unreasonable determination of facts under § 2254(d)(2). (Appx. B at 2-9.)

Judge Barry T. Moskowitz, in partial dissent, would have granted relief. In his view, the PCR court's opinion was contrary to *Strickland*:

> Although the court recited the correct standard, it applied a tougher standard in its analysis. The PCR court improperly conditioned relief upon Villalobos showing that a defense pathologist would have "definitively established" that someone else caused the fatal injury. [Citations.] This is a much higher standard than, and is directly contrary to, Strickland's "reasonable probability" standard. . . .

(App. B at 18-19.)

Judge Moskowitz also found that "the PCR court's finding that [trial counsel's] failure did not prejudice the outcome of the trial was an objectively unreasonable application of *Strickland* . . . ." (App. B at 14.) He explained, "The evidence of guilt relied

heavily on Dr. Zhang's estimate of the fatal injury occurring at most four hours before Ashley's death. That is the very fact that Dr. Ophoven and Dr. Trepeta would have refuted." (*Id.* at 16.) Judge Moskowitz also noted that both experts had impeccable credentials and no reason to favor the defense. (*Id.*)

Finally, Judge Moskowitz found that the PCR court's decision was based on an unreasonable determination of facts under § 2254(d)(2)—specifically, the PCR court's finding that "Dr. Trepeta and Dr. Ophoven conceded that a closed fist strike could have caused the fatal injury" was contradicted by the evidence and resulted from the PCR court taking the experts' testimony out of context. (App. B at 21-22.) In fact, both experts consistently maintained that there was *no* medical evidence that Petitioner's admitted punch caused the fatal injury. (*Id.* at 22-24.)

The dissent concluded:

> The failure to call a pathologist to refute Dr. Zhang's opinion was a *catastrophic failure of the defense counsel* that rendered Villalobos' trial unfair and undermines confidence in the verdict . . . . According to the testimony of Dr. Trepeta and Dr. Ophoven, *Villalobos will spend the rest of his life in prison for a murder he may not have committed.* I am very cognizant of the deferential standard that we apply under § 2254(d). [Citation.] This is one of those rare cases where the state court was objectively unreasonable in applying Strickland and made an unreasonable determination of a crucial material fact on which the court relied in holding there was no prejudice. *There was absolutely prejudice, and Villalobos is entitled to a writ of habeas corpus and a new trial.*

(App. B at 24-25 (emphasis added).)

B. Factual Background

1. Evidence at trial

a. Overview of non-medical evidence

At the time of the offense, Petitioner was living with his girlfriend, Linda Annette Verdugo, their toddler, Anyssa, and Verdugo's five-year-old daughter, Ashley Molina. (6-ER-1484.) Ashley could be a willful child; Verdugo sometimes had to grab Ashley's arms to keep her from running off. (6-ER-1545-46.) Petitioner sometimes spoke harshly to Ashley in disciplining her. (6-ER-1511-16.) Several times in the months before her death, too, adults around Ashley noticed bruises on her face or body. Once, she told her aunt that her mother had caused a bruise. (8-ER-2004.) In addition, Petitioner admitted to Verdugo that he had once grabbed Ashley's face, bruising it, after she opened the apartment door in the middle of the night. (6-ER-1526.) He also admitted once spanking Ashley, causing a bruise on her buttocks. (6-ER-1531.) The month before Ashley's death, her mother noticed a large bruise on her back, which Petitioner and Ashley attributed to a fall in the shower. (6-ER-1551-52.)

The day before Ashley's death, Petitioner was taking care of Ashley and Anyssa while Verdugo was at work. (6-ER-1578; 3-ER-583.) Around 5:00 p.m. that evening, a neighbor heard jostling and banging, as though someone was hitting the walls. (8-ER-2058.)

Petitioner and the children picked Verdugo up for her 8 p.m. "lunch" break. (6-ER-1582-83.) Ashley was tired and did not want to eat, and she complained that her stomach hurt. (6-ER-1679-82.) In fact, she had been suffering from a reduced appetite and complaining that her stomach hurt since the previous month. (6-ER-1540, 1582-83.)

After Verdugo's lunch break, Petitioner and the children returned to the apartment. As they sat watching TV, Ashley said again that she was tired, and she appeared to be falling asleep. (3-ER-587-88.) In the car on the way to pick Verdugo up from work at 1:00 a.m., Ashley became unresponsive and appeared to stop breathing. (3-ER-645.) Petitioner stopped the car and started pushing on Ashley's stomach and trying to perform CPR. (3-ER-645-46.) She vomited and started breathing again. (*Id.*) When Verdugo asked about the smell of vomit, Petitioner told her he had been sick. (6-ER-1585.) The reason he did not take Ashley to the hospital was because he was scared. (3-ER-646-47.)

When the family arrived home, Verdugo carried the sleeping Anyssa inside, while Petitioner carried Anyssa. (6-ER-1588.) The next morning, Verdugo woke up to hear Petitioner screaming that Ashley was not breathing. (6-ER-1591.) Ashley's body was cold; she was not breathing. (6-ER-1591-92.) After dropping Anyssa off at Petitioner's sister's house, Petitioner and Verdugo drove Ashley to the hospital. (6-ER-1595-97.)

Petitioner was interrogated for hours. At one point, detectives warned him not to fall asleep. (3-ER-649.) When pressed by detectives to admit that he had hit Ashley the evening before she died, he confessed that he had hit her in the stomach after she hit and kicked her younger sister. (3-ER-634-42.) He cried "the majority of the time" waiting at the hospital prior to his interrogation (6-ER-1435; see also 6-ER-1451-52) and was also emotional during questioning (3-ER-636-37).

b. Medical examiner's testimony

At trial, the medical examiner, Dr. Zhang, opined that the cause of Ashley's death was blunt force trauma to the abdomen. (8-ER-2169.) The fatal injuries were lacerations to the liver and mesentery, which occurred less than four hours before death. (8-ER-2170.) Both of these lacerations, according to Dr. Zhang, were new, acute injuries "superimposed" over older injuries which had occurred weeks or months before the victim's death in the same location. (8-ER-2146-47, 2151-52.) Other, nonfatal injuries were older. (8-ER-21543, 2156-57, 2163.)

Dr. Zhang admitted on cross-examination that his original estimate for when the fatal injuries occurred had been twelve hours—i.e., significantly longer than the four hours he estimated at trial. He claimed that he revised the estimates downward in light of new developments in the scientific literature. (8-ER-2223-25; 9-ER-184.)

The defense did not present testimony from a forensic pathologist concerning the nature and timing of Ashley's injuries.

2. Postconviction evidentiary hearing

Three medical experts testified at the PCR evidentiary hearing in state court: Dr. Richard Trepeta, an expert that trial counsel obtained funding for but never used; Dr. Janice Ophoven, the defense's primary PCR expert; and Dr. Philip Keen, the prosecution's PCR expert.

a. Dr. Trepeta

Dr. Trepeta was retained by the defense prior to trial. After reviewing Dr. Zhang's report and slides, Dr. Trepeta told Petitioner's original lead trial counsel, Daniel Raynak, that "a great deal" of the victim's injuries "were days to weeks to possibly months old,"

with none that he could date to less than 24 hours. (3-ER-671.) He told Raynak that "a lot of the injuries, major injuries, which were inside the abdomen, they were all accompanied by changes which were clearly days to weeks old." (*Id.*) After Raynak withdrew from representation, Petitioner's defense team had no further contact with Dr. Trepeta.

b. Dr. Ophoven

Dr. Janice Ophoven, a forensic pathologist with significant training and experience evaluating injuries in children (2-ER-272-83), testified for the defense at the PCR hearing. She agreed with Dr. Zhang that Ashley died from complications of blunt force trauma to the abdomen (3-ER-700), which could have been a single blow from an adult (3-ER-733), but she was definitive about the fact that the fatal injuries were *weeks old*—i.e., they were not inflicted the day before Ashley's death. (*See* 3-ER-700-01, 722-23.)

Dr. Ophoven did not see *any* evidence of a new injury, including blunt force trauma to the abdomen, occurring within 24 hours of death. (3-ER-737-39.) She saw no evidence of any fresh bleeding or any fresh tear in tissues. (3-ER-708-10.) The color of the blood Dr. Zhang collected from the victim's abdomen was dark, black—the color of blood found in children weeks after abdominal injury. (3-ER-708-10.) Dr. Ophoven was emphatic in her rejection of Dr. Zhang's theory that the fatal injuries were new injuries "superimposed" over old ones. (3-ER-737.) The liver cells themselves were necrotic—i.e., that is, dying. (3-ER-705, 722.) Scar tissue was beginning to form. (3-ER-722.) Dr. Zhang's conclusions that the liver and mesentery lacerations occurred less than four hours before the victim's death were, according to Dr. Ophoven, "absolutely inconsistent with basic pathology." (*Id.*) These fatal injuries, again, were weeks old. (*Id.*)

As additional support for her conclusion that the fatal injury was weeks old, Dr. Ophoven pointed to the victim's aspiration pneumonia, which is a "chemical pneumonia" developing after a period of time. (3-ER-713.) In addition, weeks-old abdominal injuries can cause behavior differences, including reduced activity, loss of appetite, and weight loss, all of which the victim exhibited in the weeks or months before she died. (3-ER-702.) Dr. Ophoven testified that a six-pound weight loss over three months, which Ashley experienced, is "striking" in a four-year-old. (*Id.*)

c. Dr. Keen

Dr. Keen, who was Dr. Zhang's former boss, testified on behalf of the prosecution at the evidentiary hearing. (4-ER-772-75.) He estimated that the fatal injuries to Ashley's mesentery and liver occurred "hours to days" before her death. (4-ER-794.) He explained that the estimate was "rather difficult" (*id.*) and was based in part on the tissue changes revealed by the slides and in part on the blood loss; he tried to "take all of them into account" (4-ER-811). However, he disagreed with Dr. Zhang's four-hour estimate for the liver and mesentery injuries. (4-ER-799.) His own best estimate was six to twelve hours before death. (*Id.*)

REASONS FOR GRANTING THE WRIT

C. The Ninth Circuit's Decision Finding the State Court's No-Prejudice Determination Reasonable Conflicts with This Court's Precedents and the Decisions of Other Circuits.

This Court has clearly established that a petitioner need only show a reasonable likelihood of a different outcome in order to demonstrate that his trial counsel's deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Applying this test, other circuits have repeatedly found prejudicially ineffective assistance of counsel where, as here, the defense failed to challenge the prosecution's medical examiner or forensic pathologist's conclusions. This is so even under AEDPA's difficult standard. *See, e.g.*, *Dunn v. Neal*, 44 F.4th 696 (7th Cir. 2022) (finding IAC under AEDPA where trial counsel failed to present evidence calling into question cause of death); *Dunn v. Jess*, 981 F.3d 582, 696 (7th Cir. 2020) (same); *Rivas v. Fischer*, 780 F.3d 529, 547 (2d Cir. 2015) (finding IAC under AEDPA where trial counsel, among other deficiencies, failed to consult independent forensic pathologist, who would have confirmed that medical examiner's "revised findings were not scientifically reliable"); *Thomas v. Clements*, 789 F.3d 760 (7th Cir. 2015) (under AEDPA, finding IAC where trial counsel failed to consult with pathologist to challenge state's theory); *cf. Elmore v. Ozmint*, 661 F.3d 783 (4th Cir. 2011) (finding IAC under AEDPA due to defense counsel's "blind acceptance of the State's forensic evidence").

In conflict with *Strickland*'s test for prejudice as well as the above-described decisions of other circuits, the Ninth Circuit below held that the state court's no-prejudice finding was a reasonable application of federal law clearly established by this Court. (App. B at 4-6.) In doing so, the Ninth Circuit misapplied this Court's standard by implicitly applying a rule that *Strickland* prejudice cannot be shown absent definitive proof of innocence. And the Ninth Circuit's decision conflicts with the decisions of the Seventh, Second, and Fourth Circuits, as well. (*See supra*.)

If trial counsel had retained a medical expert, counsel could have effectively challenged Dr. Zhang's conclusions, effectively cross-examined him, and provided a viable defense to the murder charge despite Petitioner's admission to striking Ashley.

Critically, the jury would have heard one or more highly qualified experts disagree with many of Dr. Zhang's key conclusions, including—but certainly not limited to—his critical testimony that the fatal injury occurred during the time Petitioner was alone with Ashley the evening before her death. This would have altered the entire course of the trial, making it likely—not just reasonably likely—that Petitioner would not have been convicted of murder.

Among other things, the defense pathologists, and Dr. Ophoven in particular, disagreed with Dr. Zhang on the following critical points:

- The timing of the fatal injuries.
- Whether any evidence supported a conclusion that new internal injuries were "superimposed" on older injuries.
- Whether there was any "pattern injury" consistent with a fist.
- Whether a blow to the lower abdomen, in the location of the supposed pattern injury could have caused the fatal internal injuries.
- Whether the victim's large number of bruises were related to a blood-clotting disorder.
- Whether any new scientific literature in the four years justified Dr. Zhang's decision to reduce his initial estimate from twelve hours to four.
- Whether the victim suffered from aspiration pneumonia, which develops only over a period of time.

If trial counsel had retained and presented the evidence of an expert like Dr. Ophoven, the jury would have learned that, despite Petitioner's admission to having hit Ashley the night before she died, there was *no* evidence of any new internal injury

occurring within twenty-four hours of Ashley's death. (3-ER-737.) Dr. Ophoven would have explained to the jury that Ashley died due to long-developing complications from a *weeks-old* blunt force trauma injury to the abdomen. (3-ER-700-01.) It is reasonably likely that if the jury had heard the defense expert's compelling rebuttal to Dr. Zhang's dubious conclusions, it would have harbored significant doubt about whether Petitioner's actions caused Ashley's death.

The circumstantial evidence of guilt unrelated to the pathologist's testimony cannot Petitioner's showing of prejudice. Primarily, that circumstantial evidence consisted of Petitioner admitting that he hit Ashley the evening before her death. But there were strong indications that her health had been deteriorating dangerously well before that time. She had suffered from a reduced appetite for months. (6-ER-1540.) She complained of stomach pain in December, weeks before her death. (6-ER-1582-83.) And she had lost six pounds in just three months—a striking percentage of her 32-pound body weight. (*See* 3-ER-701-03; 8-ER-2111.) The defense evidence missing from Petitioner's trial as a result of defense counsel's failure—e.g., evidence that Ashley's fatal injuries were weeks old—would have been especially convincing in light of these facts. Furthermore, Dr. Ophoven was adamant that the fatal injuries were weeks old—i.e., that an injury inflicted the day before Ashley's death could not have caused her death. The jury could have found that Petitioner struck Ashley on that day and still very easily harbored a doubt about what caused the weeks-old injuries that killed her.

In the PCR court's own words, Dr. Zhang was "the linchpin of the State's case." (1-ER-80.) Its importance is also clear from the prosecution's closing arguments. At least *fifteen times* during closing, the prosecutor used Dr. Zhang's testimony that the fatal

injury was inflicted four hours before Ashley's death to place Petitioner alone with Ashley at the time the fatal injury occurred. (*See* 2-ER-234-40.) These arguments were absolutely essential to the prosecution's case. (*See* 10-ER-2612 ("Ashley has spoken to you through her body *and through Dr. Zhang*.") (emphasis added).) And if defense counsel had performed effectively, Petitioner could have rebutted each one.

The Ninth Circuit's decision deferring to the state court's no-prejudice finding is an outlier. It is inconsistent with this Court's rule—i.e., that prejudice requires only a reasonable likelihood of a different outcome, not proof of innocence beyond any possible doubt— and it conflicts with the decisions of other circuit courts considering trial counsel's failures relating to forensic evidence. This Court should grant the petition for writ of certiorari.

D. This Case Presents an Appropriate Vehicle for this Court to Reaffirm that *Strickland* Prejudice Requires Only a Reasonable Likelihood of a Different Outcome.

The ineffective assistance of counsel claim underlying this petition was developed and fully exhausted in state court after an evidentiary hearing. The parties agree, and the state court found, that trial counsel performed deficiently at Petitioner's capital trial. (*See* App. B at 2.) Only the question of prejudice remains, and there is no allegation of procedural default.

The claim was properly presented to the federal district court, and the Ninth Circuit granted a certificate of appealability. (App. C.) The Ninth Circuit's 2-1 decision includes a vigorous dissent from a judge who felt affirming the denial of the habeas petition resulted in a miscarriage of justice. (App. B at 10-25.)

There are no impediments to this Court's review, and this case is an appropriate vehicle through which the Court can clarify the standard for *Strickland* prejudice and bring the circuit courts into accord with respect to applying AEDPA deference to state-court no-prejudice determinations in cases involving counsel's failure to challenge forensic evidence at trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DATED: December 9, 2024

By: 

ELIZABETH RICHARDSON-ROYER
Attorney-at-Law

Attorney for Petitioner
**Counsel of Record*

APPENDIX

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FILED

JUL 10 2024

MOLLY C. DWYER, CLERK
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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSHUA IDLEFONSO VILLALOBOS, Petitioner-Appellant, v. ATTORNEY GENERAL FOR THE STATE OF ARIZONA; DAVID SHINN, Director, Respondents-Appellees.	No. 22-15213 D.C. No. 2:17-cv-00633-DJH District of Arizona, Phoenix ORDER

Before: BRESS and JOHNSTONE, Circuit Judges, and MOSKOWITZ,* District Judge.

Judges Bress and Johnstone voted to deny the petition for rehearing en banc. Judge Moskowitz recommended granting the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc, Dkt. No. 65, is DENIED.

* The Honorable Barry Ted Moskowitz, United States District Judge for the Southern District of California, sitting by designation.

NOT FOR PUBLICATION

FILED

FEB 28 2024

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSHUA IDLEFONSO VILLALOBOS, Petitioner-Appellant, v. ATTORNEY GENERAL FOR THE STATE OF ARIZONA; DAVID SHINN, Director, Respondents-Appellees.	No. 22-15213 D.C. No. 2:17-cv-00633-DJH MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Diane J. Humetewa, District Judge, Presiding

Argued and Submitted December 8, 2023
San Francisco, California

Before: BRESS and JOHNSTONE, Circuit Judges, and MOSKOWITZ,** District Judge.
Partial Dissent and Partial Concurrence by Judge MOSKOWITZ.

Joshua Villalobos appeals the denial of his petition for habeas relief under 28 U.S.C. § 2254. Villalobos was convicted in Arizona state court of child abuse and first-degree murder under Arizona's felony murder statute in the death of a five-

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

** The Honorable Barry Ted Moskowitz, United States District Judge for the Southern District of California, sitting by designation.

year-old girl, Ashley. Villalobos argues that his trial counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), for failing to offer a defense pathologist at trial to counter the testimony of the State's medical examiner. The state court found, and the Attorney General does not dispute, that trial counsel was deficient. The only issue is whether Villalobos was prejudiced under *Strickland*.

We review the district court's denial of a § 2254 petition de novo. *Bolin v. Davis*, 13 F.4th 797, 804 (9th Cir. 2021). Villalobos's petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). When, as here, a claim was adjudicated on the merits in state court proceedings, we may not disturb the state court's decision unless it is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or unless it is "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). We assume the parties' familiarity with the facts. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we affirm.

1. The state court's *Strickland* determination was not contrary to or an unreasonable application of Supreme Court precedent under § 2254(d)(1). *See Price v. Vincent*, 538 U.S. 634, 639 (2003). *First*, the state court did not apply a heightened prejudice standard in assessing Villalobos's *Strickland* claim. The state court repeatedly articulated the proper *Strickland* standard and adhered to *Strickland* in

concluding that Villalobos "did not demonstrate a 'reasonable probability' that the factfinder would have had a reasonable doubt respecting guilt." The state court's occasional omission of the "reasonable probability" language is best understood as a shorthand reference to *Strickland*, not a misunderstanding of the governing law. Our colleague's fine dissent focuses on these isolated lines in the state court's lengthy decision, but because "we can read the [state court's] decision to comport with clearly established federal law, we must do so" under AEDPA. *Mann v. Ryan*, 828 F.3d 1143, 1158 (9th Cir. 2016) (en banc).[1]

Second, in rejecting Villalobos's *Strickland* claim, the state court appropriately considered the testimony of Dr. Keen, the State's expert in post-conviction proceedings, as part of assessing how the prosecution would have responded to a newly proffered defense expert's testimony. Villalobos has not identified Supreme Court precedent that would call the state court's approach into question. If anything, the state court's reasoning was consistent with the Supreme Court's command to "consider the totality of the evidence," *Strickland*, 466 U.S. at 695, including "*all* the relevant evidence that the jury would have had before it if [Villalobos] had pursued the different path," both "the good and the bad," *Wong v.*

[1] The dissent's disagreement with us on this point leads it to apply de novo review rather than AEDPA's deferential standards. Although the dissent discusses this legal point second in its analysis, it is apparent that the dissent's earlier reasoning is likewise conducted under de novo review.

Belmontes, 558 U.S. 15, 20, 26 (2009) (emphasis in original).

The dissent and Villalobos rely on *Hardy v. Chappell*, 849 F.3d 803 (9th Cir. 2016). But *Hardy* does not change matters. In *Hardy*, on de novo review, we held only that a court cannot "invent arguments that the prosecution could have made if it had known its theory of the case would be disproved" or "presume the State would have altered the entire theory of its case in response or been successful doing so." *Id.* at 823–24. Here, the state court did not "invent" arguments for the prosecution or "presume" a new theory of the case—instead, it relied on the actual evidence before it as required by the Supreme Court's decision in *Wong*. Dr. Keen's testimony merely reinforced the theory the State presented at trial.

Third, the state court's *Strickland* prejudice determination was not "objectively unreasonable." *Bell v. Cone*, 535 U.S. 685, 699 (2002). The state court had a reasonable basis for finding a lack of prejudice under *Strickland*, citing "overwhelming evidence supporting the finding of guilt." Under Arizona's felony murder statute, a person commits first-degree murder if he "commits or attempts to commit . . . child abuse under § 13-3623, subsection A, paragraph 1 . . . and in the course of and in furtherance of the offense . . . , the person . . . causes the death of any person." A.R.S. § 13-1105. Causation is satisfied "if the 'crime helped produce the death and . . . the death would not have happened without the crime.'" *State v. Bennett*, 146 P.3d 63, 68 (Ariz. 2006) (en banc) (alteration in original).

Villalobos admitted to punching Ashley the night she died while her mother, Linda Verdugo, was at work and when no other adult was present. One of the defense pathologists, Dr. Trepeta, conceded that such an admission "could be useful in narrowing down the time frame of when an injury occurred." The other defense pathologist, Dr. Ophoven, testified that there was no evidence of a fatal injury on the day of Ashley's death but did appear to concede she could not rule out whether Villalobos's blow that evening could have been a "fatal trigger" resulting in Ashley's death. Both experts further conceded that Ashley's fatal injury could have been caused by a single "close fisted punch" or "close fisted blow" from an adult. In addition, Villalobos demonstrated consciousness of seriously harming Ashley by checking to see if Ashley was still breathing on the way to pick up Verdugo, lying to Verdugo about Ashley having vomited in the car, expressing early on that he would be blamed for Ashley's death, and initially failing to disclose his abuse of Ashley to investigators.

Under these circumstances, it was not objectively unreasonable for the state court to find there was not a reasonable probability that the result of the proceeding would have been different absent counsel's deficient performance, namely, that the jury would not have concluded that Villalobos "either initiated—or continued—a chain of events that culminated in the child's death." The dissent has reached a different conclusion, but it has done so only after applying de novo review rather

than AEDPA's deferential standards. The Supreme Court has instructed that "an *unreasonable* application of federal law is different from an *incorrect* or *erroneous* application of federal law." *Williams v. Taylor*, 529 U.S. 362, 412 (2000) (emphases in original). So "[a] state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself," *Harrington v. Richter*, 562 U.S. 86, 101 (2011), and "even a strong case for relief does not mean that the state court's contrary conclusion was unreasonable," *id.* at 102.

2. The state court's prejudice ruling was not based on an unreasonable determination of the facts under § 2254(d)(2). Section 2254(d)(2) imposes a "highly deferential standard" that "demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)). Villalobos has the burden to rebut the state court's factual findings "by clear and convincing evidence." *Burt v. Titlow*, 571 U.S. 12, 18 (2013) (quoting 28 U.S.C. § 2254(e)(1)). Thus, "a state-court factual determination 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).

Villalobos has not met these standards. The state court did not ignore key testimony. It instead acknowledged the testimony of Dr. Ophoven that Villalobos

claims was ignored. Nothing in the state court's decision suggests a failure to consider the experts' full testimony. *See Miller-El v. Cockrell*, 537 U.S. 322, 347 (2003) ("[A] state court need not make detailed findings addressing all the evidence before it.").

The state court also did not base its decision on facts not in the record. The state court noted that Villalobos "admitted striking the victim with a closed fist during the early evening hours, at around 5 p.m." This was a reasonable inference from Villalobos's interviews with investigators and the fact that a neighbor heard a loud noise around the same time that evening. Likewise, the state court reasonably inferred that Dr. Zhang testified about medical evidence related to the closed fist injury, since Dr. Zhang testified that Ashley's injury could have been caused by a closed fist punch.

Villalobos also argues that the state court unreasonably found that "Dr. Trepeta and Dr. Ophoven[] caution that 24 hours is the closest that the timing of the injuries can be established," when only Dr. Trepeta testified to this fact. But the state court otherwise demonstrated its awareness of these experts' differing testimonies. Further, the state court's *Strickland* decision was not "based on" this factual determination. 28 U.S.C. § 2254(d)(2); *see Dickens v. Ryan*, 740 F.3d 1302, 1316 (9th Cir. 2014) (holding that the state court "did not 'base' its decision on an unreasonable determination of the facts" when the facts in question were "not

necessary" to the court's overall finding).

The dissent further argues that the state court "erred when it relied on an unreasonable determination of facts: that Dr. Trepeta and Dr. Ophoven conceded that a closed fist strike could have caused the fatal injury." Villalobos does not present this as a § 2254(d)(2) challenge to the state court's factual findings. In any event, the state court made a reasonable factual finding based on the following exchanges:

> [State]: And you agree that a close fisted punch from an adult could have caused the fatal injury; is that correct?
>
> [Dr. Trepeta]: Yes, certainly in the possibilities.
>
> [State]: Setting aside questions of timing, is it your opinion that a single blow from an adult, a close fisted blow could have caused these injuries to Ms. Molina?
>
> [Dr. Ophoven]: Yes.

From this record, the state court could reasonably find that both experts conceded that a closed fist injury could have caused Ashley's death. The state court did not, as the dissent suggests, make a further factual finding that the experts also conceded that Villalobos's punch that evening caused the fatal internal injuries. And as discussed above, the state court was not objectively unreasonable in determining, based on the totality of its factual findings, that the defense pathologists failed to

refute that Villalobos's actions at least contributed to Ashley's death.[2]

AFFIRMED.

[2] We deny Villalobos's request to expand the certificate of appealability to encompass an uncertified claim about the alleged ineffective assistance of appellate counsel because Villalobos has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El*, 537 U.S. at 327.

Villalobos v. Attorney General, No. 22-15213

MOSKOWITZ, District Judge, dissenting in part and concurring in part:

I concur and agree with the majority in not expanding the certificate of appealability to include the claim of ineffective assistance of appellate counsel for not raising the lesser included offense argument. However, I disagree with the majority as to the prejudice ruling, as the Maricopa County Superior Court ("the PCR court") both unreasonably applied the prejudice prong of *Strickland* and relied on an unreasonable determination of facts.

Joshua Villalobos and his partner, Linda Verdugo, brought the lifeless body of Ashley, Verdugo's five-year-old daughter, to a hospital at approximately 7:30 a.m. on January 4, 2004. Ashley was unwell during the days leading up to her death, and her body was covered with over one hundred bruises. Villalobos had been violent with Ashley in the past, and during police interrogation, Villalobos admitted to hitting her with his closed fist the evening before her death. Verdugo also admitted that she could have caused some of the bruising on Ashley's arms.

During the trial, the prosecution presented the testimony of Dr. Alex Zhang, the medical examiner who performed Ashley's autopsy. Dr. Zhang testified that the fatal injury was blunt force trauma to the abdomen which occurred within 4 hours of death. During this period, Villalobos was the only adult with Ashley. Although original defense counsel had contacted Dr. Richard Trepeta, a

pathologist, Villalobos' trial counsel did not call any medical expert to contradict this testimony or assist in the cross-examination of Dr. Zhang.

Villalobos was convicted in Arizona state court of first-degree felony murder and child abuse. Villalobos sought post-conviction relief ("PCR"), arguing ineffective assistance of trial counsel for failure to retain a pathologist to contradict Dr. Zhang's opinions, among other things. At an evidentiary hearing before the PCR court, Villalobos presented the testimony of Doctors Richard Trepeta and Janice Ophoven. Dr. Trepeta testified that none of Ashley's injuries were inflicted within 24 hours of her death, and that many of them were anywhere from days to months old. Dr. Ophoven also testified that there was no evidence of a new injury within 24 hours of Ashley's death, and that it was more likely that the fatal injury occurred as much as two weeks before her death. Additionally, she testified that it was impossible for a punch at contusion H to have caused Ashley's death, as Dr. Zhang testified.

After the evidentiary hearing, the PCR court noted that "the linchpin of the defense was weakening the opinion of the medical examiner," and the trial counsel was deficient for not calling a pathologist. Nevertheless, the PCR court denied

relief, finding no prejudice. The PCR court[1] summarized the basis for its denial as follows:

> [T]he Court concludes that (i) a pathologist would have contradicted Dr. Zhang's testimony, in part; (ii) a pathologist could have been of assistance in cross-examination (but was not critical); and – most importantly – (iii) a pathologist would not have definitively established that 'someone other than defendant inflicted the fatal injury.'

(1-ER-69.) The PCR court explained:

> [A] second pathologist would not have refuted certain key trial evidence: that defendant was alone in the apartment with the two children during the early evening hours; that during that time the defendant struck the victim with a closed fist; that the blow caused a shortness of breath; that the child refused to eat at dinner time, and later appeared somewhat lethargic, to the extent that defendant attempted to confirm that she was still breathing; that the child vomited on defendant and that he misattributed the resulting odor to himself when questioned by the child's mother; that an abdominal injury could have contributed to, or resulted in, the child's death; and that defendant either initiated – or continued – a chain of events that culminated in the child's death. Even with a defense pathologist's testimony, the guilty verdict would not change.
>
> The Court finds that given the overwhelming evidence supporting the finding of guilt, additional testimony from a defense pathologist would not have changed the jury's verdict. To find otherwise would be speculation by the Court.

(1-ER-87–88.)

[1] Since the PCR court's decision was the last reasoned state court decision, we apply the deferential review under section 2254(d) to that decision. *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005) ("When more than one state court has adjudicated a claim, we analyze the last reasoned decision.").

On federal habeas corpus review, the district court denied relief. We review the district court's decision to deny the petition for a writ of habeas corpus *de novo*. *Rhoades v. Henry*, 638 F.3d 1027, 1034 (9th Cir. 2011). We also review ineffective assistance of counsel claims *de novo*. *Beardslee v. Woodford*, 358 F.3d 560, 569 (9th Cir. 2004). Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), we must affirm the denial of habeas relief unless the PCR court was objectively unreasonable in its application of *Strickland v. Washington*, 466 U.S. 668 (1984), or its decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *See* 28 U.S.C. § 2254(d).

If there was an unreasonable application of *Strickland* or unreasonable fact-finding, then the standard of deference does not apply and instead, a *de novo* standard of review applies. *Frantz v. Hazey*, 533 F.3d 724, 735–37 (9th Cir. 2008) (en banc) (holding once a petitioner has satisfied the provisions of AEDPA, the court must determine whether there has been a constitutional violation, applying a *de novo* review standard); *Hardy v. Chappell*, 849 F.3d 803, 819–20 (9th Cir. 2016) (explaining that because the state court employed a standard of review "contrary to" clearly established federal law under § 2254(d)(1), "this Court may analyze Hardy's constitutional claim de novo pursuant to § 2254(a).") (citing *Frantz*, 533 F.3d at 735–37); *Panetti v. Quarterman*, 551 U.S. 930, 948 (2007)

(explaining that when § 2254(d)(1) is satisfied, a court may review a petition "unencumbered by the deference AEDPA normally requires").

Under *Strickland*, a claim of ineffective assistance of counsel has two components: (1) "the defendant must show that counsel's performance was deficient"; and (2) "the defendant must show that the deficient performance prejudiced the defense." 466 U.S. at 687. "With regard to the required showing of prejudice, the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 669.

Here, the parties do not dispute that the PCR court correctly found Villalobos' trial counsel performed deficiently by failing to retain a pathologist to challenge Dr. Zhang's testimony. However, the PCR court's finding that this failure did not prejudice the outcome of the trial was an objectively unreasonable application of *Strickland* and based on an unreasonable determination of fact.

First, it was objectively unreasonable for the PCR court to find no prejudice because there is a reasonable probability that trial counsel's failure to retain a pathologist was "sufficient to undermine confidence in the outcome" of the trial. *Id.* at 694. To satisfy the prejudice standard, under the second *Strickland* prong, a petitioner must "show that there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." *Id.* This standard requires a "'substantial,' not just 'conceivable,' likelihood of a different result." *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (quoting *Harrington v. Richter*, 562 U.S. 86, 112 (2011)). This standard is met where "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins v. Smith*, 539 U.S. 510, 537 (2003); *see Sanders v. Davis*, 23 F.4th 966, 993 (9th Cir. 2022) (evaluating whether there was a reasonable probability that one juror would have changed their mind).

Here, had Dr. Trepeta and Dr. Ophoven testified at trial, at least one juror would have had a reasonable doubt, and that is all that is required for prejudice. The PCR court conceded that "[t]his [getting Dr. Trepeta's report] is critical because the linchpin of the defense is weakening the opinion of the medical examiner," Dr. Zhang. (1-ER-79.) In its prejudice analysis, the PCR court noted that expert pathologist testimony could have rebutted Dr. Zhang's testimony:

> Expert testimony could have eliminated the State's theory that - based on Dr. Zhang's timing of the injuries - two incidents occurred that evening: a closed fist injury and then a beating. Expanding the timeframe during which the injuries occurred could also have served to implicate another, the child's mother, in contributing to the bruising found on the child.

(1-ER-86.) Despite acknowledging the significance that a defense expert would have had in this trial, the PCR court still found no prejudice because, in part, "[n]onetheless, all of the PCR experts conceded that a closed fist injury would

have been sufficient to cause the death of the child." (*Id.*) This reasoning is based on an unreasonable determination of fact, as discussed below. Regardless, it is also insufficient to overcome the reasonable probability that at least one juror would have changed their finding of guilt if a defense expert had testified.

The evidence of guilt relied heavily on Dr. Zhang's estimate of the fatal injury occurring at most four hours before Ashley's death. That is the very fact that Dr. Ophoven and Dr. Trepeta would have refuted. Dr. Ophoven has impeccable credentials and 40 years of experience in child injury pathology. She has no bias and no reason to favor the defense. Her testimony about the timing of the fatal injury being as much as two weeks before Ashley's death, the fact that there was no evidence of a new injury within 24 hours of death, the fact that contusion H did not show a fist mark as Dr. Zhang testified, and the fact that it was anatomically impossible for a punch at contusion H to result in the fatal injuries opens the door to reasonable doubt that Villalobos inflicted the fatal injury the night before Ashley's death and someone other than Villalobos could have caused her death.

Similarly, Dr. Trepeta, also a pathologist with excellent credentials and no bias or reason to favor the defense, said that "a great deal" of the victim's injuries "were days to weeks to possibly months old," with none that he could date to less than 24 hours. (3-ER-671.) He insisted that according to the medical and

scientific evidence, the narrowest estimate he could give for any of Ashley's injuries would be within forty-eight hours of death.

This would have reasonably convinced at least one juror that there was a reasonable doubt as to whether the punch by Villalobos that day caused or contributed to Ashley's death. The failure to call Dr. Trepeta and Dr. Ophoven essentially left Villalobos without any defense and undermines confidence in the verdict. *See Cannedy v. Adams*, 706 F.3d 1148, 1164 (9th Cir. 2013), *amended on denial of reh'g*, 733 F.3d 794 (July 16, 2013) (finding an unreasonable application of the *Strickland* prejudice standard where counsel failed to introduce a message which "would have been the cornerstone of Petitioner's case" and "would have provided critical corroboration for Defendant's testimony and would have severely undermined the prosecution's case."). The adversary system only works if both sides are effectively represented. There was a reasonable probability of at least a hung jury if the defense would have presented Dr. Trepeta and Dr. Ophoven. Certainly, the *Strickland* prejudice standard is met here because there is no confidence in a verdict where the defense counsel failed to mount an available defense to the prosecution's most important evidence, Dr. Zhang's unchallenged testimony that the fatal blow occurred while Villalobos was the only adult with Ashley.

Second, the PCR court used a higher standard than *Strickland* in its prejudice analysis. Under *Strickland*, the court must ask "whether there is a reasonable probability that, absent the errors [by counsel], the factfinder would have had a reasonable doubt respecting guilt." 466 U.S. at 695. A reasonable probability is one "sufficient to undermine confidence in the outcome." *Id.* at 693–94. However, *Strickland's* standard does not mean a petitioner must demonstrate "that counsel's actions more likely than not altered the outcome." *Harrington*, 562 U.S. at 112 (citing *Strickland*, 466 U.S. at 693) (internal quotation marks omitted).

This different outcome could be a hung jury where just one juror had a reasonable doubt. *See Wiggins*, 539 U.S. at 537 (finding prejudice where "there is a reasonable probability that at least one juror would have struck a different balance"); *Wharton v. Chappell*, 765 F.3d 953, 978–79 (9th Cir. 2014) ("Moreover, we have emphasized that relief must be granted ' "even in the face of ... strong aggravating evidence" ... "if we cannot conclude with confidence that the jury would unanimously have" ' reached the same decision, had it heard the evidence that competent counsel would have presented.") (internal citations omitted).

This was not the standard the PCR court applied. Although the court recited the correct standard, it applied a tougher standard in its analysis. The PCR court improperly conditioned relief upon Villalobos showing that a defense pathologist

would have "definitively established" that someone else caused the fatal injury. (*See* 1-ER-69 ("a pathologist would not have definitively established that 'someone other than defendant inflicted the fatal injury.'"); 1-ER-88 ("Even with a defense pathologist's testimony, the guilty verdict would not change."); id. ("[A]dditional testimony from a defense pathologist would not have changed the jury's verdict.").)

This is a much higher standard than, and is directly contrary to, *Strickland's* "reasonable probability" standard. 466 U.S. at 697 (explaining that an outcome determinative test "imposes a heavier burden on defendants than the tests laid down today."); *see Hardy*, 849 F.3d at 819–20 ("Hardy's petition satisfies the 'contrary to' clause of § 2254(d)(1) because the California Supreme Court employed a standard of review which was significantly harsher than the clearly established test from *Strickland*.") (internal citation omitted). As such, the PCR court's application was an unreasonable application of and contrary to *Strickland*, and simply reciting the proper standard does not cure the error. *Hardy*, 849 F.3d at 819–20 (holding the state court "applied a standard contrary to clearly established federal law" even though it had also recited the correct standard).

Accordingly, the deferential standard under § 2254(d) does not apply, and we must apply a *de novo* standard of review to the issue of prejudice. *Frantz*, 533 F.3d at 735–37; *Hardy*, 849 F.3d at 819–20. For the reasons discussed above,

there is a reasonable probability of at least a hung jury and that trial counsel's failure to retain a pathologist was "sufficient to undermine confidence in the outcome" of the trial. *Strickland*, 466 U.S. at 694.

Third, it was error for the PCR court to consider Dr. Keen's testimony in its prejudice analysis. While it is true that the court must consider the totality of the evidence in determining prejudice, *id.* at 695–96, that only includes the evidence presented at trial and the evidence counsel unreasonably failed to admit. "*Strickland* does not permit the court to reimagine the entire trial. We must leave undisturbed the prosecution's case. . . we may not invent arguments the prosecution could have made if it had known its theory of the case would be disproved." *Hardy*, 849 F.3d at 823; *see Strickland*, 466 U.S. at 695–96.

Here, the PCR court included Dr. Keen's testimony in its prejudice analysis. This evidence improperly strengthened the prosecution's case, making it more difficult for Villalobos to show prejudice than required by established federal law. (*See, e.g.*, 1-ER-87 ("Dr. Keen addressed and discounted Dr. Ophoven's hypotheses of alternative scenarios resulting in death."); 4-ER-801, 804, 806–08 (Dr. Keen disputed several of Dr. Ophoven's conclusions).) An analysis including only the totality of evidence at trial and the missing defense testimony could have reasonably led to a different outcome.

But even considering Dr. Keen's testimony, it ultimately helps the defense because he disagreed with Dr. Zhang's four-hour opinion. Dr. Keen's best estimate was that the fatal injury occurred six to twelve hours before Ashley's death. Among other things, Dr. Keen also disagreed with Dr. Zhang regarding the timing of Contusion H, the purported "pattern" injury. Dr. Keen testified that the narrowest possible estimate for Contusion H was sometime within forty-eight hours, and that anything less than that was just "guessing." (4-ER-783–84.)

Finally, the PCR court also erred when it relied on an unreasonable determination of facts: that Dr. Trepeta and Dr. Ophoven conceded that a closed fist strike could have caused the fatal injury. A federal court may grant habeas relief where the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). It is not sufficient for the state court's application of clearly established law to be merely "incorrect or erroneous"; it "must be objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). If there was an unreasonable application of *Strickland* or unreasonable fact-finding, then the standard of deference does not apply and instead, a *de novo* standard of review applies. *See Frantz*, 533 F.3d at 735–37; *Hardy*, 849 F.3d at 819–20. "A state court's decision is based on unreasonable determination of the facts under § 2254(d)(2) if the state court's findings are 'unsupported by sufficient evidence,' if

the 'process employed by the state court is defective,' or 'if no finding was made by the state court at all.'" *Hernandez v. Holland*, 750 F.3d 843, 857 (9th Cir. 2014).

Here, the PCR court made the factual determination that the defense experts conceded that a closed fist strike could have caused the fatal injury and relied on that determination in its conclusion that trial counsel's deficiency did not prejudice the outcome. After explaining the significance that a defense expert would have had by "[e]xpanding the timeframe during which the injuries occurred[, which] could also have served to implicate another," the PCR court still concluded the absence of this evidence was not prejudicial because, inter alia, "[n]onetheless, all of the PCR experts conceded that a closed fist injury would have been sufficient to cause the death of the child." (1-ER-86.)

This determination was not supported by sufficient evidence. The PCR court stated that all of the PCR experts agreed that a closed fist strike could have caused the fatal injury, but the court took Dr. Ophoven's and Dr. Trepeta's testimony out of context. In fact, notwithstanding repeated cross-examination, Dr. Ophoven maintained her ground that there was no medical evidence that Villalobos' punch caused the fatal injury:

> **Q.** So isn't it true that you can't rule out that an additional assault could have been that fatal trigger?
> **A.** I can't rule -- I wasn't there. I mean that's obvious. But I have no evidence that there was a fatal assault that caused new fatal damage

> to the child in terms of bleeding, laceration, new damage to her internal organs that was superimposed on the older damage she already had.
> **Q.** That's not withstanding the admissions that the defendant made?
> **A.** No, I understand. I took that into account that he said he did something to the child. It's just there's no fresh blood. There's no fresh laceration. There's no fresh holes in her organs and so forth.
> **Q.** In your opinion there is just no medical way to tell whether there was any injury superimposed on an older injury; is that fair?
> **A.** I think what I can say is that there's no evidence to support that theory.
> **Q.** But you can't rule it out?
> **A.** There's no evidence to support that theory. So I think the legal issue falls somewhere else.
> **Q.** So you can't rule it in or out, is that fair to say?
> **A.** As a forensic pathologist I can't say there's any evidence that there is fresh blunt force trauma to her belly.

(3-ER-737–38.) Similarly, Dr. Trepeta testified:

> **Q.** And the fatal injuries internally in the abdomen, was there any evidence in the abdomen itself that indicated to you there was a recent or fatal injury within hours, we're talking within 12 hours of the actual death?
> **A.** No, ma'am. The fatal injuries most likely involve either the liver, the bowel, or the mesentery and all those areas show changes which were days old. There was ongoing hemorrhage and ongoing inflammation, but that doesn't necessarily mean that that was from the last few hours. It's associated with injuries, which were clearly days old and injuries over time can evolve. As an example, if you injured a blood vessel in someone's abdomen and their bowel and it shut off the blood supply to the bowel, it takes 48 hours for the bowel to then necrose to the point where it was perforated. So an injury inflicted at one point in time may show additional changes 24, 36, 48, a week later by what happens. But the sites that were most likely due or caused the death also changes which were at least days old.

(3-ER-676–77.)

> **Q.** Dr. Trepeta, from the actual autopsy and the slides and the tissue and everything you looked at, if there even was a hit that day is there

> any actual evidence in those slides that says this has to be a new injury?
> **A.** No. The one on H, again, I could narrow it down to less than 48.
> **Q.** Even if there was some information that the child had been hit within 8, 12 hours of the injury that doesn't mean that was the fatal injury that caused the internal organ damage?
> **A.** Correct. It's the internal organ damage that show changes that were days old. The injury had been inflicted to that site four, five, a week, possibly two weeks on the outside or beforehand.
> **Q.** And those internal injuries, what we've talked about, this liver, mesentery, colon, that was the actual cause of her death?
> **A.** That's where I believe the blood came from that produced her death, yes, ma'am.

(3-ER-689.)

> **Q.** And you differ from Dr. Zhang as in you're saying this time frame is much more wide open past 48 hours probably into weeks for the fatal injury?
>
> **A.** Well, the areas where the fatal injuries are all have changes which are days to possibly weeks old.

(3-ER-690.)

Even though Dr. Trepeta and Dr. Ophoven never conceded that Villalobos' punch could have caused the fatal injury, the PCR court unreasonably assumed that they had and made this factual finding a basis for its decision. The court then proceeded to rely on this erroneous determination to conclude the operative issue—that there was no prejudice from the omission of defense expert testimony—whereas Dr. Trepeta's and Dr. Ophoven's testimony support the opposite conclusion.

The failure to call a pathologist to refute Dr. Zhang's opinion was a catastrophic failure of the defense counsel that rendered Villalobos' trial unfair and

undermines confidence in the verdict. There was essentially no defense to the most important prosecution evidence. According to the testimony of Dr. Trepeta and Dr. Ophoven, Villalobos will spend the rest of his life in prison for a murder he may not have committed. I am very cognizant of the deferential standard that we apply under § 2254(d). *See Woodford v. Visciotti*, 537 U.S. 19, 27 (2002) (section 2254(d)(1) "authorizes federal-court intervention only when a state-court decision is objectively unreasonable."). This is one of those rare cases where the state court was objectively unreasonable in applying *Strickland* and made an unreasonable determination of a crucial material fact on which the court relied in holding there was no prejudice. There was absolutely prejudice, and Villalobos is entitled to a writ of habeas corpus and a new trial. Accordingly, I respectfully dissent.

FILED

SEP 30 2022

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSHUA IDLEFONSO VILLALOBOS, Petitioner-Appellant, v. ATTORNEY GENERAL FOR THE STATE OF ARIZONA; DAVID SHINN, Director, Respondents-Appellees.	No. 22-15213 D.C. No. 2:17-cv-00633-DJH District of Arizona, Phoenix ORDER

Before: CLIFTON, Circuit Judge.

Appellant's motion for leave to file an oversized request for a certificate of appealability (Docket Entry No. 7) is granted. The request for a certificate of appealability (Docket Entry No. 8) is granted with respect to the following issue: whether trial counsel provided ineffective assistance of counsel by failing to present expert testimony from a forensic pathologist. *See* 28 U.S.C. § 2253(c)(3); *see also* 9th Cir. R. 22-1(e).

The district court revoked appellant's in forma pauperis status not due to lack of indigency, but because it determined that appellant did not make a substantial showing of a denial of a constitutional right. Because we conclude that appellant has met the substantive certificate of appealability standard, *see* 28

U.S.C. § 2253(c)(3), appellant is granted leave to proceed in forma pauperis on appeal. The Clerk will update the docket.

The opening brief is due December 21, 2022; the answering brief is due January 20, 2023; the optional reply brief is due within 21 days after service of the answering brief. If appellant files a motion to proceed in forma pauperis, the briefing schedule will be set upon disposition of the motion.

The Clerk will serve on appellant a copy of the "After Opening a Case - Counseled Cases" document.

If David Shinn is no longer the appropriate appellee in this case, counsel for appellee must notify this court by letter of the appropriate substitute party within 21 days of the filing date of this order. *See* Fed. R. App. P. 43(c).

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
12/19/2014 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT

12/17/2014

HON. ROLAND J. STEINLE

CLERK OF THE COURT
A. Chee
Deputy

STATE OF ARIZONA

LACEY ALEXANDRA STOVER GARD
JASON BYARD EASTERDAY

v.

JOSHUA IDLEFONSO VILLALOBOS (001)

LAWRENCE S MATTHEW
ALICIA MARIE DOMINGUEZ

CAPITAL CASE MANAGER
VICTIM WITNESS DIV-AG-CCC

RULING
(POST-EVIDENTIARY HEARING /PCR MATTER/CAPITAL CASE)

After reviewing the post-conviction relief pleadings, the Court issued a ruling granting the defendant an evidentiary hearing as to four claims: two relating to guilt phase issues, Claim 1 (retention of pathologist/IAC trial counsel) and Claim 2 (lesser-included offense/IAC appellate counsel); and two relating to penalty phase issues, Claim 1 (erroneous records as basis of experts' opinions/IAC trial counsel) and Claim 5 (erroneous records disclosed to expert/IAC trial counsel). ME dated 8/20/2013.

The parties resolved penalty phase claims 1 and 5 by stipulation. Joint Memorandum and Stipulation to Vacate Death Sentence and Order a New Penalty Phase and Court Order dated 2/27/2014. In accordance with the parties' stipulation, the Court vacated the death sentence and granted defendant a new penalty phase trial. Order dated 2/28/2014.

The remaining guilt phase claims proceeded to Evidentiary Hearing on July 14 -15, 2014, The parties filed simultaneous closing briefs on September 19, 2014, followed by Oral Argument on December 10, 2014. The Court has reviewed the claims, the evidence, related portions of the record, and the arguments of counsel.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2004-005523-001 DT 12/17/2014

In the two remaining claims, Defendant alleged that he was denied his 6th Amendment right to effective assistance of counsel, at trial and on appeal. In Guilt Phase Claim 1, defendant alleged ineffective assistance for trial counsel's failure to retain a pathologist; in Guilt Phase Claim 2, defendant alleged ineffective assistance of appellate counsel for failing to raise as an issue the trial court's denial of a lesser-included offense instruction.

I. Guilt Phase Claim Claim 1:
IAC Trial Counsel -- Pathologist

Defendant claims that trial counsel's[1] failure to hire a pathologist to challenge the State's evidence as presented by the medical examiner ("ME") and to assist with cross-examination of the ME constituted ineffective assistance. Specifically, defendant now claims that:

> i. At trial, a pathologist "would have flat-out contradicted Dr. Zhang's testimony, and revealed gaping flaws in Dr. Zhang's conclusions";
>
> ii. At trial, a pathologist "was critical to assist in an effective cross-examination of Dr. Zhang" about external bruises on the victim, aspiration pneumonia, and symptoms of chronic/longstanding trauma;" and
>
> iii. At trial, a pathologist "would have provided a definitive defense that someone other than defendant inflicted the fatal injury."

Supplemental Petition for Post-Conviction Relief at pp. 18-23.

[1] Trial counsel: The Office of the Legal Advocate (OLA), Ken Everett, was initially assigned, but withdrew on 2/17/2004; thereafter, The Office of Contract Counsel (OCC) appointed Dan Raynak as first chair counsel (Raynak withdrew 3/7/2007) and Rod Carter, 2nd chair; upon Raynak's withdrawal, Carter became first chair as of 3/8/2007 with Stephen Duncan as second chair. These dates are incorporated into the Case Timeline below:

1/3/2004 Homicide
1/13/2004 Notice of Supervening Indictment
2/13/2004 Notice of Intent to Seek the Death Penalty
2/17/2004 ME: OLA (Ken Everett) withdrawal granted
Thereafter, the Office of Contract Counsel (OCC) appointed **Dan Raynak** first chair and **Rod Carter** second chair
9/8/2005 State's Amended Notice of Intent to Seek the Death Penalty (NIDP)
3/7/2007 lead counsel **Raynak** withdrew
3/8/2007 **Carter** became first chair, with **Stephen Duncan** as second chair.
3/8/2008 – 4/14/2008 Trial [2/11/2008 – 3/26/2008 Guilt Phase (Verdict filed 3/31); 3/31/2008-4/1/2008 Aggravation Phase (Verdict filed 4/2); 4/2/2008-4/14/2008 Penalty Phase (Verdict 4/15)]

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For the reasons stated below, the Court concludes that (i) a pathologist would have contradicted Dr. Zhang's testimony, in part; (ii) a pathologist could have been of assistance in cross-examination (but was not critical); and – most importantly – (iii) a pathologist would not have definitively established that "someone other than defendant inflicted the fatal injury."

A. Background

After being left in the defendant's care, the four-year-old child/victim exhibited certain symptoms over the course of the evening and was pronounced dead when taken to the hospital the next morning. At trial it was established that the victim's mother worked from 4 pm to 1 am, with a lunch break around 8 pm. The defendant looked after the child and her younger half-sister during mother's work hours. The defendant admitted striking the victim with a closed fist during the early evening hours, at around 5 pm. The child did not eat during the evening lunch break. On the drive to pick up the mother after her shift, the defendant told a detective that the child was somewhat weak; that he was concerned that she was having difficulty breathing and pushed on her stomach; that the child vomited; that when mom asked about the smell he said that he was the one who had been sick; and that he carried the child from the car to the apartment and put her to bed. Medical testimony established that the child was in rigor by 7 or 8 am the next day and that the child likely died 5-8 hours earlier.

Based upon the Medical Examiner ("ME"), Dr. Zhang's, trial testimony, the State argued that the defendant struck the victim with a closed fist before her mother's dinner hour (rupturing/tearing her mesentery, which resulted in her eventual death), and then beat her sometime between the dinner break and her mother getting off work (resulting in substantial visible bruising). Dr. Zhang testified about medical evidence related to the closed fist injury; he also testified that the timing of certain bruising could be established "within a reasonable degree of medical certainty," such that the additional injuries coincided with the post-dinner break time period when the defendant was essentially alone with the victim.

Defendant claims that but for Dr. Zhang's testimony, the jury would not have found him guilty of felony murder and of child abuse.

B. PCR EH Testimony

Witnesses with medical expertise who testified at the PCR Evidentiary Hearing included Dr. Trepeta and Dr. Ophoven on behalf of the defendant, and Dr. Keen on behalf of the State.

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Dr. Richard Trepeta, M.D., has a specialty in pathology. PCR Exhibits 1, 2: CV, report. He did not review the reports of Dr. Ophoven or Dr. Keen; his report is the same as it would have been had he prepared a report for trial.

Dr. Trepeta recalled that he told Raynak "…basically what I told the initial two attorneys, that a great deal of the injuries in this case to the child were days to weeks to possibly months old and there were none that I could absolutely say were less than 24 hours. I could date some of the injuries to less than 48, but to say they were 24, 12, or 6 just wasn't possible and that a lot of the injuries, major injuries, which were in the inside the abdomen, they were all accompanied by changes which were clearly days to weeks old." RT 7/14/2014 at 8.

He testified that "[o]nly a video of the event would disclose whether the injury was less than four hours old:

> Q: You cannot tell by the pathology, the medical science, that's been provided by the medical examiner?
> A: No, especially because those injuries are all associated with changes that are days old. Somebody would have to reinjure exactly the same site that was reinjured days or weeks earlier and cause a new injury on top of that, but the appearance would be just the same as if that old injury showed evolution with additional hemorrhage. There's no way to say an additional injury was inflicted. There's no specific change that goes along with this is 4 hours or 6 hours or 8 hours.

RT 7/14/2014 at 15.

On cross-examination, he acknowledged that in his current report, Exhibit 2, he wrote, "After careful examination of these materials I concur with the findings described by Dr. Zhang." RT 7/14/2014 at 22-23. He specifically agreed with the finding that "a closed fist punch from an adult could have caused the fatal injury." RT 7/14/2014 at 23. He agreed "that an admission from a person admitting to punching [the child] in the abdomen the day before she was pronounced dead at the hospital could be useful in narrowing down the time frame of when an injury occurred[.]" RT 7/14/2014 at 25-26.

Redirect refocused on the medical evidence, from which the doctor could not confirm the presence of a new injury or narrow the time period. Dr. Trepeta does not disagree with Dr. Zhang's findings in the slides regarding the injuries and damage to the child's body, but disagrees with the interpretation of the significance of the information.

Dr. Janice Ophoven, is a forensic pathologist "with special training and [forty years of] experience in injuries in children." RT 7/14/2014 at 34. PCR Exhibits 6, 7 and 8: CV, preliminary report affidavit. In connection with the ME's findings, she stated that, "…When I was referencing my difference of opinion with Dr. Zhang I was specifically referencing my

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difference of opinion regarding the age or the injuries that he was discussing of the organs inside the body..." RT 7/14/2014 at 36.

When asked about the cause of the victim's death, Dr. Ophoven opined, "[She] died from complications of blunt force trauma to the abdomen." RT 7/14/2014 at 37. "[When we talk about complications, w]e talk about long-term damage to the liver, to the back of the abdomen, to the pancreas, to the colon specifically, that resulted in inflammation and eventually disruption of the integrity of the colon with leakage of material such that she collapsed and went into shock and died. [And to a reasonable degree of medical certainty, t]he fatal injury that caused this damage occurred weeks prior to the cardiac arrest and death." RT 7/14/2014 at 37-38.

Dr. Ophoven saw no evidence of a new intentional inflicted injury within 24 hours of the child's death, such as evidence of fresh bleeding, fresh tear, fresh tissue damage that's separate from the old injury. RT 7/14/2014 at 46. Rather, the child "...had an injury and in essence was on track to death if she didn't get proper treatment and intervention." 7/14/2014 at 60. Specifically, the doctor stated:

> Q: Is there any evidence that that hit [by defendant] caused the fatal injury in this case?
> A: No, I don't have evidence that there was a fatal injury that resulted in her deterioration on that day.

RT 7/14/2014 at 66.

However, on cross-examination, Dr. Ophoven agreed that:

> Q: Setting aside questions of timing, is it your opinion that a single blow from an adult, a close fisted blow could have caused these injuries to [the victim]?
> A: Yes....I'm not saying it was a single blow. I'm saying it could have been.

RT 7/14/2014 at 70.

Dr. Ophoven cautioned that "two different agendas got in the way of the facts." RT 7/14/2014 at 77-78. The Court believes that she was referring to the competing agenda of the defendant and the co-defendant, each attempting to diminish his/her responsibility for the child's death. The doctor identified how her expertise might have assisted trial counsel in its pretrial preparation and at trial. RT 7/14/2014 at 64-67.

Dr. Philip Keen is a self-employed forensic pathology consultant. Resume at Exhibit 43. He has testified many times as an expert in pathology and, in this case, reviewed the materials listed in Exhibit 45. This included Dr. Zhang's report and work. Because he hired Dr. Zhang, he is familiar with Dr. Zhang's background, which included a residency in pediatric pathology. In connection with this case, Dr. Keen wrote a letter summarizing his work and drafted a report. PCR Exhibits 21 (letter date 5/9/2014) and 44.

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Dr. Keen discussed the half-life of a neutrophil, and how knowing the half-life provided assistance establishing the time of injury. RT 7/14/2014 at 113. ("…But half life of a neutrophil is thought to be about twelve and a half hours…if you actually label the cells and you measure the full life span of the cell while it's in the bone marrow before it's circulating blood, before it's to the site of the inflammation and the time at the inflammation, it's probably a little bit longer than that and may actually go up to five point four days as a half-life. We're not measuring the birth of the cell. We're measuring the action of the cell because we're looking at a cell at the site where it's doing its work. I have for years used approximately twelve hours as the point where we begin to see some break-up of the nucleus.").

He agreed with Dr. Zhang's findings differing only in some of the wording regarding injury patterns. RT 7/14/2014 at 115-116; *see* Exhibit 47 (full ME's file and autopsy report). He and Dr. Zhang differ from Dr. Ophoven; they identified a "semi-patterned contusion, meaning that they are mimicking the object that impacts the abdomen. It is consistent with that which you would expect to see from a doubled up fist striking the abdominal wall at least once, possibly twice." RT 7/14/2014 at 118; *see* Exhibits 61 and 62. Dr. Keen placed the time of injury at less than 72 hours, and the closest time as less than 48 hours.

Dr. Keen identified internal injuries. The "…extra peritoneal hemorrhage, where the whole body is encircled with a dissecting hemorrhage around the lining of the peritoneal and the lining of the abdominal activity..." consisted of clotted and unclotted blood. The unclotted blood appeared more consistent with fresh than with dissolved clots, and "is probably less than about 12 hours prior to death." RT 7/14/2014 at 121-122. The source, over time, was the tearing of a ligament in the liver and a tear in the mesentery. RT 7/14/2014 at 122. He identified other injuries that were older: to the child's lungs, 3 days; rib fracture, broken in the past and healing; and bruising that occurred over period of time.

Dr. Keen addressed and discounted Dr. Ophoven's hypotheses of alternative causes of death: the absence of indicators of active bacterial infection (RT 7/14/2014 at 137-138); dehydration (some), malnutrition (probably not) (RT 7/14/2014 at 138-140); aspiration pneumonia (RT 7/14/2014 at 140-141); discounted disseminated intravascular coagulopathy (DIC) based on bleeding pattern and inability to test postmortem (RT 7/14/2014 at 141-144); and the color of the child's blood indicated fresh bleed (RT 7/14/2014 at 144-146).

On cross-examination, Dr. Keen agreed that he had not included in his report that his estimate of the time interval between injury and death at twelve hours was also based on blood loss and tissue changes at the injury sites. "You can only go so far with the blood loss and you can only go so far with the tissue changes. I'm trying to take all of them into account…" RT 7/14/2014 at 147.

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Dr. Keen agreed that his 12 hour time period differed from Dr. Zhang's estimate of "less than four hours." RT 7/14/2014 at 155-156. He agreed that as to external bruising his timeframes were longer than Dr. Zhang's (e.g., A-less than a day/4-72 hours vs. less than 4 hours; B-72 hours or older vs. 4 hours; C-3 days or more vs. less than 4 hours; D- 12-18 hours vs. less than 12 hours; E-several days vs. less than 4 hours). At 156-160. Dr. Keen agreed with what Dr. Zhang found in the slides but not his conclusions for what he saw on the slides as to "those particular bruises." RT 7/14/2014 at 160.

Dr. Keen was firm in his opinion about the cause of death: "She doesn't have another cause of death. This child has some cerebral edema. She has the aspiration changes, but has this bleeding injury is what's causing her death. It seems pretty obvious." RT 7/14/2014 at 169. Critical to his opinion of the time of the injury was the child's refusal to eat at the 8:00 lunch hour; her lack of appetite that morning might "bump [the] timeline back a little bit…" but remained "within my 12 hour time frame." RT 7/14/2014 at 176; 181-182.

As did Dr. Ophoven, Dr. Keen agreed that generally attorneys may not be aware of the medical aspects of a case, and that he can provide medical expertise to help attorneys understand a case and prepare for trial. RT 7/14/2014 at 176.

On redirect, Dr. Keen stated that he was unable to determine whether there were two separate events to the liver. The mesentery, however,"…probably is more than one event because it has reparative changes. The child did not survive, in my opinion, long enough to repair this episode to the extent it's repairing the mesentery following a repetitive injury." RT 7/14/2014 at 180. In his opinion, neither aspiration pneumonia nor terminal obstruction with aspiration led to her death; nor did pneumonia.

Witnesses at the evidentiary hearing also included trial counsel Daniel Raynak, Rodrick Carter, and Stephen Duncan.

Daniel Raynak, a criminal attorney who began practicing in 1985, acted as lead counsel upon withdrawal of the Legal Advocate in February 2004. Raynak was lead counsel from almost the beginning of the case in 2004 through March 2007. ME 2/17/2004; *see* ME 3/3/2004 (identifies Raynak and Carter as counsel for defendant, notwithstanding the lack of either an entry of appearance or a formal appointment in iCIS).

Raynak initiated a request for an independent pathologist (1) to determine the cause of death and (2) to determine the existence of previous injuries. See PCR Exhibits 25, 26: expenditure request; letter; both dated 6/28/2004. Although he secured funding for expert services, correspondence suggests that the expert, Dr. Trepeta, was awaiting additional

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information from counsel and that Dr. Trepeta never provided counsel with a written report of his findings and conclusions.

Raynak's practice would have been to discuss Dr. Trepeta and the reasons for retaining him – as well as the preparation of the report – with co-counsel, Rod Carter. RT 7/15/2015 at 10. Raynak had no recollection of "telling Mr. Carter that Dr. Trepeta would not be helpful to the case," and would have had no reason to make such a statement. RT 7/15/2014 at 13-14.

Raynak testified that the defendant's admission to striking the child did not eliminate the defense need for a pathologist because of (1) the defendant's age; (2) his education; (3) the lengthy questioning by law enforcement that was arguably coercive; and (4) the defendant's admission did not mean that "that was the blow that caused the death of the child." RT 7/15/2014 at 11-12.

On cross-examination, Raynak acknowledged that he believed that a plea agreement was in his client's best interest because defendant "fully confessed to the crime." During the PCR hearing, Raynak denied that defendant had made a "full confession" until the State confronted him with a previous interview [Exhibit 92 at 7, lines 4-5] in which he stated, "…our client had fully confessed to the crime, so our hope was to try to resolve the case…To me that was very damning evidence":

Q: The fact that [defendant] admitted to striking the child was damning evidence?
A: Absolutely.

RT 7/15/2014 at 17-18.

Thereafter, Mr. Raynak was asked to concede that the child "…died from the injuries that [defendant] admitted to causing." Raynak initially acknowledged only that "she died from injuries." However, when confronted with the earlier interview he revised his statement to "…the child died from the *injury* that my client admitted to…causing the *injury*…My recollection is one blow to the stomach…" RT 7/15/2014 at 18-19 [*injury* rather than "injuries"]; see Exhibit 92 at 7, lines 16-19.

He believes that "I may have received some information potentially from co-defendant's counsel that they had hired someone, and I don't think they were going to use him. So I thought it might be helpful to us because they didn't want to use him…but I'm not 100 percent certain on that." RT 7/15/2014 at 23.

On redirect, he emphatically stated that "…I had talked to Dr. Trepeta, and he was certainly going to be useful for the defense. That's why I kept on pushing to get the report." RT 7/15/2014 at 25.

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Rod Carter, appointed by the Office of Contract Counsel, acted as second chair from March 2004- March 2007, when he took the lead chair upon Raynak's withdrawal. See PCR Exhibit 95: billing statements. This was his first capital case. He was lead counsel from March 2007, through the trial that lasted from March 8through April 14, 2008.

Carter does not recall ever talking with Dr. Trepeta. RT 7/15/2014 at 37. He does recall talking with "Mr. Raynak or someone [maybe the co-defendant's attorney, Chad Shell]…I thought it was Dan [Raynak]…My recollection is that Dr. Trepeta would not be beneficial to [defendant]….I believed it wasn't going to be beneficial to [defendant] so I didn't pursue." RT 7/15/2014 at 38-40.

He had no reason, other than the conversations, for not retaining a pathologist: he had not received medical training, and he had no strategic reason for not consulting or retaining a pathologist. RT 7/15/2014 at 40. He had twin strategies of implicating someone other than defendant as the person who inflicted the fatal blow and seeking a lesser included jury instruction on child abuse to avoid child abuse as a predicate felony. He agreed "that a pathologist may have been able to determine if the [defendant] punched [the child] on the night in question and whether or not that would have been a fatal blow." RT 7/15/2014 at 42-43.

On cross-examination Carter agreed that defendant's confession was not helpful to the defendant's case, and that arguing "recklessness" permitted the defense to incorporate the admission into the defense. In building his strategy, Carter relied on someone's statement that "Dr. Trepeta was not going to be helpful [to the defense]." RT 7/15/2014 at 43-44. Carter agreed that he and Raynak pursued a plea agreement "because the chances of prevailing at trial were slim," and that all the statements made by defendant were "very damaging," including that the defendant was with the little girl so the police would think it was the defendant who had injured her. RT 7/15/2014 at 45.

Carter agreed that during trial he attempted to highlight inconsistencies in Dr. Zhang's opinion, and to show that the ME had changed his testimony from a longer period to a shorter period "where defendant may not have been the only person who had contact with the little girl…" RT 7/15/2014 at 46.

On redirect Carter agreed that he could highlight changes in Dr. Zhang's testimony but could not delve into the reasons for the change. RT 7/15/2014 at 47. Nor did he have information about the "fatal injury possibly being inflicted days or even weeks prior to the date that the State claimed it took place." RT 7/15/2014 at 48.

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Stephen Duncan was appointed to serve as second chair, upon Carter's appointment as first chair in March 2007. Although he had experience in child death cases, this was his first capital case.

Duncan had no independent recollection of the strategy of the case. His review of a pleading requesting a lesser-included instruction suggested to him that one defense was "to seek a lesser-included offense for the child abuse. His review of a January 15, 2014 interview (page 8, lines 2-5) refreshed his memory that a second defense "was the dating of the bruising…and whether or not our client was present with her at the time." RT 7/15/2014 at 65-66. He had no recollection about discussions with Carter about retaining a pathologist nor any recollection about a strategic reason for not using a pathologist. RT 7/15/2014 at 68.

On cross-examination Duncan agreed that he would have reviewed all the material at the time, to help discuss general strategies with Carter. He does not recall the substance of any of the strategy conversations. RT 7/15/2014 at 69.

The final witness at the evidentiary hearing was **Natman Schaye**, who opined on the reasonableness of trial counsel's assistance in light of prevailing professional norms in the community. Schaye serves as Senior Trial Counsel for the Arizona Capital Representation Project, and has represented death penalty clients since 1984. Over the State's objection, he offered testimony as an IAC "*Strickland*" expert on behalf of the defendant. The Court notes that, although Schaye has extensive capital representation experience, his actual trial experience is limited. Nonetheless, the Court found his testimony to be of assistance.

Schaye testified that particularly in a capital case a number of experts may be necessary. At the guilt phase, it is "necessary to consult with experts in that field, unless by some chance there is somebody on the defense team who has that expertise…in almost every case it's necessary to look outside to consult with an expert and to determine the accuracy of the State's evidence and whether retaining an expert to challenge, and potentially testify, is appropriate." RT 7/15/2014 at 78-79. Based on his review of the materials and observation of PCR EH testimony, Schaye addressed the performance of defense counsel individually:

(Daniel Raynak) "Raynak's acts fell below the prevailing professional norms with regard to failing to retain a pathologist. Raynak retained a pathologist, apparently, Dr. Trepeta, but he failed to follow up. There was a two-year period where he, apparently, knew what Dr. Trepeta's opinion was, or at least to some extent what his opinion was, and that it would be favorable, but he failed to follow through, meet with Trepeta, obtain a report specifically regarding the case.

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"... all Mr. Raynak had was a general idea of what Dr. Trepeta would say and that it would be helpful to (defendant]. And, clearly, from my review of the materials, it would have been helpful...

"But he, Mr. Raynak, didn't follow through. Didn't develop evidence that would have been useful in attempting to settle the case or in preparing for trial."
RT 7/15/2014 at 80.

(Rodrick Carter) "Mr. Carter, by his own admission, completely dropped the ball and didn't follow up with Dr. Trepeta...and it is an odd situation where second chair moves to first chair. It certainly would have been appropriate for him to seek a new expert [or] to follow up with Dr. Trepeta, but he didn't do either.

"...some cases there are many possible [nuances]. There is just no question in this case that a strong medical expert was extremely important and that would be obvious to anybody taking any kind of look at the case...

"...And you know this is evidenced, in part, by the fact that Mr. Carter interviewed Dr. -- I'm sorry, the State's medical expert after the trial started....

"...His openings and closings make it clear that he wanted to pursue the timing and pursue recklessness as opposed to intent as his defenses, but he didn't have his own expert either to testify or to assist him in cross-examining the State's expert."
RT 7/15/2014 at 80-81.

On redirect, Schaye testified that Chad Shell's knowledge does not aid Carter at time of trial. Somebody else's interview of Dr. Zhang might be helpful, but falls short of what a reasonable lawyer would have done. Nor is it of assistance if Dr. Zhang's opinion changes between the time of the first interview and the time of the trial.
RT 7/15/2014 at 92.

(Stephen Duncan) "...Mr. Duncan fell into the same sort of not doing anything with regard to Dr. Trepeta or another medical examiner in just not preparing."
RT 7/15/2014 at 81.

On cross-examination Schaye acknowledged that he has represented one capital defendant through trial and sentencing. RT 7/15/2014 at 90. Although this suggests to the Court a lack of familiarity with what may occur during the "heat of trial," the issue in this case relates primarily to pretrial decision-making.

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C. Ineffective assistance of counsel during the guilt phase of the trial

The Sixth Amendment to the United States Constitution guarantees a defendant the right to the effective assistance of counsel at trial. Defendant alleges that his appointed counsel provided ineffective assistance.

***1. Strickland*'s "Deficient Performance" Prong**

To establish ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that he was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Deficient performance is established when "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. In determining deficiency, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689. This presumption of reasonableness means that not only does the court "give the attorneys the benefit of the doubt," it must also "affirmatively entertain the range of possible 'reasons [defense] counsel may have had for proceeding as they did.'" *Cullen v. Pinholster*, 131 S. Ct. 1388, 1407 (2011).

Our Arizona Supreme Court has adopted the *Strickland* test, stating:

> To determine whether [defense] counsel was ineffective, a two-pronged test is applied: 1) was counsel's performance deficient? *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227, *cert. denied*, 471 U.S. 1143, 105 S.Ct. 2689 (1985); and 2) was defendant prejudiced by his attorney's deficient performance? *State v. Lee*, 142 Ariz. 210, 213–14, 689 P.2d 153, 156–57 (1984). This test complies with the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

State v. Fisher, 152 Ariz. 116, 118, 730 P.2d 825, 827 (1986).

> First, defendant must show that trial counsel's performance fell below an objective standard of reasonably effective assistance under prevailing professional norms. *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2065. In evaluating trial counsel's conduct, we consider all circumstances, with a strong presumption that the conduct falls within a wide range of reasonable professional assistance. *Id.*
>
> Second, ...

State v. Valdez, 167 Ariz. 328, 330, 806 P.2d 1376, 1378 (1991).

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The defendant has the burden of proving his allegations by a preponderance of the evidence. Rule 32.8(c), Arizona Rules of Criminal Procedure.

Trial counsels' failure to secure the assistance of his requested, and funded, expert and a written report constituted deficient performance.

Counsel is entitled to a presumption that the calling, or not calling, a witness is within the realm of strategic decisions. However, counsels' collective PCR testimony and the evidence adduced at the PCR hearing successfully refuted this presumption. Counsel denied that they had made a strategic decision not to hire, pursue a report from, or consult with a pathologist to address and challenge the MEs conclusions. Counsels' files disclosed no evidence that they had made a reasonable investigation in support of any strategic decision.

Based on PCR evidence in this case, the Court finds the following facts and concludes that the facts support its determination that at the pretrial stage, each attorney's conduct was deficient and the team's performance, cumulatively, was deficient:

Early in the case, attorney Daniel Raynak ("Raynak") obtained funding for an expert on the issues of cause of death and timing of the injuries. Two years later, Raynak and the team had not received a report and the defense was mired in a squabble with the expert on whether the expert had actually received the necessary document. This is critical because the linchpin of the defense was weakening the opinion of the medical examiner. Without a report, little could happen – and little happened in fact. After two years Raynak withdrew and Rod Carter ("Carter") was elevated to first chair.

It is important to note that Raynak testified that, before the defendant's trial, he had never handled a child death; neither had Carter. Neither had any experience or expertise in child abuse/death cases. Both lawyers admit that under those circumstances it was necessary to consult with an expert in order to adequately prepare for trial. Supporting the attorneys' PCR testimony, the expert testified that he could have assisted the lawyers at trial in understanding the medical testimony preparing for trial, framing questions for the State's ME, and testifying on behalf of the defendant.

It is also important to note that Raynak claims to have briefed the team about the doctor's opinions. Carter sent a letter indicating he was waiting for the report of the expert and would disclose the report when he received it. This letter underscores the fact that Carter knew of the expert's involvement and the lack of a report. In March of 2007, upon Raynak's withdrawal, Carter was appointed lead counsel and did absolutely nothing to follow up with the expert who reportedly had been retained. Carter neither consulted with the expert nor even called to talk with him.

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In March of 2008, in the interval between jury selection and opening statements, Carter conducted an interview with the medical examiner, Dr. Zhang. During the interview, Carter discovered that Dr. Zhang had compressed the time line during which injury had occurred from 12 hours to 4 hours. The time-compression placed responsibility for the injuries squarely on the defendant, who was the only adult present during the now-compressed timeframe. There is no explanation why Carter waited until after jury selection to interview the linchpin of the State's case.

Stephen Duncan ("Duncan") testified that he came onto the case three years after it began and a year before trial and there was nothing to do. He testified he did a comprehensive review of the case file yet was completely unaware of the problems with the expert and the lack of any report.

In conclusion, after 4 years of pretrial preparation, and 3 ½ years after initially retaining the expert, the lawyers had no written report and had had only a few brief conversations with their expert. No lawyer offered a tactical or strategic reason for not following through. Overall, the lawyers' testimony was vague, inconsistent and at times contradictory. None proffered any memorandum to the file in support of their actions or decisions, but relied, instead, on cover correspondence.

Trial counsel Raynak may have made a strategic decision regarding Dr. Trepeta, but that conclusion was not supported by evidence adduced at the Evidentiary Hearing.

Successor counsel Carter recalled that Raynak (he thought; and/or co-defendant's counsel, Chad Shell, who did not testify at the PCR hearing), indicated that the expert testimony of Dr. Trepeta would not be helpful to the defendant. Had Raynak, as lead counsel, made a strategic decision regarding the expert, it would have been reasonable for successor counsel to rely on Raynak's conclusion; the trial court settlement judge identified Raynak as among the most experienced criminal defense counsel, along with Carter and Storrs who had also evaluated case.

The Court finds that it would have been reasonable for successor counsel, Carter, to rely on Raynak's verbalizations, had Raynak made a strategic decision regarding the expert; thereafter, Carter's interview of Dr. Zhang and discovery of the compressed timeframe, his cross-examination of Dr. Zhang, his use of Dr. Zhang's previous deposition for impeachment, and his closing in which he emphasizes the discrepancies, could have supported a finding of effective assistance and would have supported the conclusion that Carter's performance was not deficient.

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However, at the 2014 PCR hearing, Raynak emphatically denied making such a statement (that the expert "would not be helpful"), or ever reaching such a conclusion, and also denied that he made a strategic decision not to call an expert.

Notwithstanding his denials, however, certain of Raynak's actions and statements between 2005-2007 indicate that -- despite his 2014 testimony – Raynak may have made a strategic decision, and was skirting the issue for strategic reasons at trial in 2004-2007 (such as, to keep the State off-balance before trial; to keep the State from preparing rebuttal to any expert the defense called; to keep from having to disclose what may have been an inculpatory report to the State) and at the PCR in 2014 (perhaps to avoid the death penalty).

Those actions suggesting Raynak made a strategic decision at trial include:

In January 2005 Raynak deferred to co-defendant's counsel, Chad Shell, to handle a hearing involving the expert (Dr. Trepeta) at which Shell clarified the key determination to be made by the expert, "…If I told you the issue in this case is the age of the injuries…" Later in the same hearing, Raynak himself represented to the trial court that were his expert, Dr. Trepeta, to agree with the opinion of the medical examiner, the defense would have to "cut a deal." PCR Response, Exhibit I: RT 1/14/2005 at 19, 33.

Six months later, in June 2005, Raynak represented to the trial court that he would contact the defendant's attorney to see if he could provide his expert's [Dr. Trepeta's] opinion, "to see if we needed [a medical expert] or not." PCR Response, Exhibit K: RT 6/17/2005 at 4.

And then, nine months later at a settlement conference held on March 23, 2006, Raynak strenuously pressed his client's family, and his client, to accept a plea ("cut a deal") that would have taken the death penalty off the table.

In support of a resolution. the settlement judge, Criminal Presiding Judge O'Toole, emphasized that Raynak was among the most experienced counsel, as were Carter and Storrs, and concurred in the ME's assessment of the defendant's culpability and Raynak's belief in the likelihood of defendant's being convicted based on the evidence.

Additionally, the State, which presumably assessed the relative culpability of both the defendant and the co-defendant in light of the ME's and Dr. Trepeta's opinions, offered a plea to the co-defendant (before the timeframe became compressed) suggests that the State's evaluation of the relative culpability supports a conclusion that expert opinion would not have been helpful. The prosecutor did not testify at the PCR hearing.

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Also suggesting the strategic nature of the decision not to secure a written report (despite Raynak's claim to various judges that his expert was being recalcitrant and that counsel was actively seeking a report), was Raynak's action in August 2006 in vacating an OSC hearing set by the case management judge, Judge Steinle. Although the judge ordered the defense expert, Dr. Trepeta, either to provide a written report by August 28, 2006 or to appear on that date for a deposition, the expert did not author a report, and Raynak himself reportedly vacated the OSC having neither secured a report nor conducted a deposition:

> On August 9, 2006 Raynak again complained, "…and I still haven't gotten his report. And I don't know what else to do other than if the Court wants to enter an order that he produce the report…" The State concurred in the request to "…have this Court assist with orders so we can get Dr. Trepeta to do his work so that the State can firm up any rebuttal evidence as well." Raynak indicated that was "fine with the defense," representing that "I've talked to him several times." PCR Response, Exhibit T: 8/9/2006 at 7, 9, 12.
>
> "As a result, the Court ordered that Dr. Trepeta submit a report and/or a copy of his entire case file to Defendant's counsel on or before August 28, 2006. The Court further ordered that if Dr. Trepeta were to fail to do so, an Order to Show Cause or deposition regarding Dr. Trepeta would be held on August 28, 2006. The Court thereby attempted to facilitate the production of a report from Dr. Trepeta…No hearing was held on that date; State's counsel was later advised that the hearing was vacated upon the request of Defendant's counsel as the hearing was no longer needed…." *See* State's Response filed 12/8/2006, to [Defendant's] Motion to Continue filed 11/17/2006.

Thereafter, having failed to take advantage of the opportunity afforded by the then-vacated OSC, Raynak continued to complain that his expert had not filed a report.

Two months after vacating the OSC hearing, in October 2006, Raynak represented to the case management judge that he had "talked to the [expert, Dr. Trepeta] multiple times, personally wrote him multiple letters…" and blamed Dr. Trepeta for failing to write a report; "…his excuse was he had put away the notes and didn't have the coroner's report and never made a request for it and that was supposedly why he, you know…". Exhibit U: RT 10/23/2006 at 3-4. Addressing the ongoing defense claim that the expert had not provided a report, the State observed, "In regard to Dr. Trepeta, he was originally obtained by co-defendant's counsel and gave an opinion to co-defendant's counsel. And that was strictly inculpatory to counsel. I noticed Mr. Raynak spoke to that counsel in the hallway, so he said he would be forced to testify against this defendant

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should that occur…So the issue regarding Dr. Trepeta is not one that is a matter only of not having a report." Raynak protested that "He said something opposite. It's exculpatory." Thereafter, the court observed that the lack of a report might suggest that "…he's telling both sides what they want to hear and doesn't want to commit to either side…" Exhibit U: RT 10/23/2006 at 7-8.

In his November 2006 Motion to Continue the trial, put before the newly-assigned trial judge, counsel continued to insist, "Defense counsel never received a reply back from the forensic expert regarding evaluation of the age of the bruising and thus needs to obtain a new expert. This particular expert promised a report for several months, then later claimed he could no longer put together a report for lack of information. The expert than failed to compile a report if he was provided with the needed information…" Motion to Continue, filed 11/17/2006.

In December 2006 the State observed that "…defense now seems to be in a situation where they are going to have to select a new expert. We need to see whether we need to do rebuttal…Dr. Trepeta has been very problematic." And, despite his claimed need for an expert, Raynak in January affirms that the defense had listed no experts in the guilt phase and emphasized, "We never listed experts in the guilt phase." Oral Argument on State's Motion for Sanctions, 1/12/2007.

In his March 2007 Motion to Withdraw, Raynak assessed his case, emphasized the strength of the State's case and stated that the defendant "…needs a new attorney to review all aspects of this case and then give the Defendant his or her perspective, possibly saving the Defendant from a sentence of death." Motion to Withdraw, filed 3/1/2007.

And in June of 2008, after defendant's trial concluded, in a Sentencing Memorandum filed in the co-defendant's case codefendant's attorney Chad Shell summed up his understanding of Dr. Trepeta's report and represented:

> "Prior to interviewing Dr. Zhang, defense counsel retained Dr. Richard Trepeta to review the evidence and give opinions. Dr. Trepeta told counsel that there were 3 events causing the injuries to Ashley. First, there was an injury to Ashley's liver that occurred approximately one week prior to her death. Second, there was bruising on Ashley's back and upper buttocks that occurred approximately 3 days before her death. Dr. Trepeta stated this injury could have been caused accidentally. Finally, the rest of the injuries occurred within 6 to 24 hours of her death…"

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Sentencing Memoranda and Correspondence 6/11/2008 at 4.

The latter conclusion, that the injuries were within 24 hours of her death, and perhaps as few as 6, comports with Dr. Keen's PCR testimony; the defense PCR experts agreed on the 24-hour timeframe, agreed it was "possible" that injury occurred within a shorter timeframe, but found a lack of medical evidence supporting that conclusion.

In contrast, PCR testimony undermined the presumption of strategy and established that Raynak initially secured authorization and funding for an expert, and then had little or no subsequent contact with the expert, failed to provide materials requested by the expert, and made no strategic decision regarding the expert; Raynak simply failed to follow through. Further, the documents produced at the PCR hearing supported this conclusion. The fact that neither Raynak nor the State proffered notes, contemporaneous memos to the file, witnesses, or other evidence; undercut the presumption that Raynak made a strategic decision.

For the reasons stated in its ruling, the Court finds that trial counsel Raynak's performance was deficient. Thus, the reliance of successor counsel on Raynak's actions was not reasonable.

The Court finds that trial counsels' failure to utilize the assistance of a requested and funded expert, to assist pretrial and at trial, and their failure to secure a written report from the expert, constituted deficient performance. The Court makes this finding specifically with respect to the actions trial counsel collectively: Mr. Raynak, Mr. Carter, and Mr. Duncan.

2. Strickland's "Prejudice" Prong

In addition to showing deficient performance, a defendant must also establish prejudice. To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Under this standard, the court asks "whether it is 'reasonably likely' the result would have been different." *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 792 (2011) (quoting *Strickland*, 466 U.S. at 696). That is, only when "[t]he likelihood of a different result [is] substantial, not just conceivable," *id.*, has the defendant met *Strickland*'s demand that defense errors were "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 787–88 (quoting *Strickland*, 466 U.S. at 687). "The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt…." *Strickland*, 466 U.S. at 695.

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Arizona, too, recognizes the need to satisfy the second prong of *Strickland*, and requires:

> ....Second, trial counsel's performance must have prejudiced defendant's case. *Id.* at 692, 104 S.Ct. at 2067. Defendant must show that, ***but for trial counsel's error,*** there is a "reasonable probability" that the result would have been different. *Id.* at 694, 104 S.Ct. at 2068. Reasonable probability is "probability sufficient to undermine confidence in the outcome." *Id.* When a defendant challenges a conviction, the inquiry is whether, absent the errors, there is a "reasonable probability that ... the fact finder would have had reasonable doubt [as to] defendant's guilt." *Id.* at 695, 104 S.Ct. at 2068–69.

State v. Valdez, 167 Ariz. 328, 330, 806 P.2d 1376, 1378 (1991).

> In only a few cases can it be said that counsel did an absolutely perfect job at trial. In most cases, one could find something that counsel could have done better. The fact that counsel might have performed better at trial does not rise to adverse effect. The negative impact must be substantial although it need not have caused defendant's conviction. Whether an adverse effect has had a substantially negative impact must be determined on a case by case basis.

State v. Jenkins, 148 Ariz. 463, 467, 715 P.2d 716, 720 (1986).

The defendant's IAC claim hinges on the Court's analysis of the second prong of *Strickland*, whether the defendant suffered prejudice as a result of counsels' deficient performance. The defendant bears the burden of proving the allegations of fact by clear and convincing evidence Rule 32.8(c), Arizona Rules of Criminal Procedure. Strickland elaborates:

> Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069 (1984).

> An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. *United States v. Morrison*, 449 U.S. 361, 364–365, 101 S.Ct. 665, 667–668 (1981). The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding.

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Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

Strickland v. Washington, 466 U.S. 668, 691-92, 104 S. Ct. 2052, 2066-67 (1984).

Although PCR counsel made a compelling argument that evidence presented (or not presented), and factual determinations made, during the guilt phase may mitigate in favor of leniency, and thus prejudice occurred, the Court is not persuaded. The Court notes that the defendant has been granted a new sentencing hearing; other than the prohibition against presenting "residual doubt evidence," at the resentencing the defendant will be permitted to present mitigating circumstances, which include "… any aspect of the defendant's character, propensities or record and any of the circumstances of the offense.." including those enumerated. A.R.S. § 13-751(G).

Defendant did not demonstrate a "reasonable probability" that the factfinder would have had a reasonable doubt respecting guilt.

At trial, the prosecutor argued that, based on Dr. Zhang's timing of the bruising and the defendant's admission to hitting the child, two incidents occurred: the first before the 8 pm lunch, by defendant striking the child with a closed fist; the second, after the 8 pm lunch, a beating administered by the defendant. Other than the victim and her younger half-sister, the defendant was the only one present.

Expert testimony could have eliminated the State's theory that – based on Dr. Zhang's timing of the injuries – two incidents occurred that evening: a closed fist injury and then a beating. Expanding the timeframe during which the injuries occurred could also have served to implicate another, the child's mother, in contributing to the bruising found on the child. Nonetheless, all of the PCR experts conceded that a closed fist injury would have been sufficient to cause the death of the child.

PCR Testimony demonstrated that the testifying experts do not necessarily dispute Dr. Zhang's findings; what the experts, Dr. Trepeta, Dr. Ophoven and even the State's expert, Dr. Keen, disagree on is the interpretation of those findings. At trial Dr. Zhang determined that much of the bruising, and the mesentery injury, occurred within 4-6 hours of the victim's death. With rigor at 8 am, and death likely occurring 5-8 hours earlier (between midnight and 3 am), the estimated time of injury would be between 6 and 11 pm – squarely within the timeframe that only the defendant could be the perpetrator, as the mother/codefendant was at work. The defense PCR experts, Dr. Trepeta and Dr. Ophoven, caution that 24 hours is the closest that the timing of the injuries can be established, expanding the time period to include an entire additional day.

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The State's PCR expert, Dr. Keen, relied on the presence of neutrophils coupled with his experience observing the half-life of a neutrophil, approximately twelve hours, to establish that the fatal injury to the mesentery occurred "probably less than twelve hours prior to death." PCR RT 7/14/2014 at 121-122. The twelve hour estimate, between time of injury and death, was further based on blood loss and tissue changes at the injury sites. PCR RT 7/14/2014 at 147 ("You can only go so far with blood loss and you can only go so far with tissue changes. I'm trying to take all of them into account…"). This opinion places the time of injury (less than 12 hours before the midnight to 3 am time of death) at the earliest between noon and 3 pm.

The PCR experts focused on the timing of the injury. Dr. Keen, the State's sole expert, opined that an abdominal injury occurred within 48-72 hours of the child's death. Dr. Ophoven found no "… evidence that there was a fatal injury that resulted in her deterioration on that day." PCR RT 7/14/2014 at70. Dr. Trepeta acknowledged the absence of medical evidence "to narrow the time period to less than 48 hours." PCR TR 7/14/2014 at 15. Dr. Trepeta conceded that "only a video of the event would disclose whether the injury was less than four hours old." PCR RT 7/14/2014 at 15.

Defendant's admission to hitting the child with a closed fist in the early evening hours while mother was at work provides assistance with the timing. All of the PCR experts were directed to defendant's admission that he hit the child with a closed fist. Dr. Trepeta agreed "that an admission from a person admitting to punching [the child] in the abdomen the day before she was pronounced dead at the hospital could be useful in narrowing down the time frame of when an injury occurred…" PCR RT 7/14/2014 at 25-26). Dr. Ophoven, who found no "…evidence that there was a fatal injury that resulted in her deterioration on that day," conceded on cross-examination that "[s]etting aside questions of timing, it 'could have been' a single blow from an adult, a close-fisted blow, could have caused these injuries to the victim." PCR RT 7/14/2014 at70 ("Yes…I'm not saying it was a single blow. I'm saying it could have been.").

Dr. Keen addressed and discounted Dr. Ophoven's hypotheses of alternative scenarios resulting in death. PCR RT 7/14/2014 at137-146. Dr. Keen stated, "[The victim] doesn't have another cause of death. This child has some cerebral edema. She has the aspiration changes, but has this bleeding injury is what's causing her death…" PCR RT 7/14/2014 at169. Critical to his timing of the injury was the child's refusal to eat at the 8 pm lunch hour, which could be bumped "closer to one end or another of [my twelve hour timeframe]" based on the child's lack of appetite earlier in the day and to account for the aspirations. PCR RT 7/14/2014 at182.

The Court finds that a second pathologist would not have refuted certain key trial evidence: that defendant was alone in the apartment with the two children during the early

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evening hours; that during that time the defendant struck the victim with a closed fist; that the blow caused a shortness of breath; that the child refused to eat at dinner time, and later appeared somewhat lethargic; to the extent that defendant attempted to confirm that she was still breathing; that the child vomited on defendant and that he mis-attributed the resulting odor to himself when questioned by the child's mother; that an abdominal injury could have contributed to, or resulted in, the child's death; and that defendant either initiated – or continued – a chain of events that culminated in the child's death. Even with a defense pathologist's testimony, the guilty verdict would not change.

The Court finds that given the overwhelming evidence supporting the finding of guilt. additional testimony from a defense pathologist would not have changed the jury's verdict. To find otherwise would be speculation by the Court.

The Court finds that the defendant has not established the second *Strickland* prong and has failed to prove that counsel's deficient performance resulted in prejudice. Thus, the defendant's claim of ineffective assistance of trial counsel at the guilt phase fails.

II. Guilt Phase Claim Claim 2:
IAC Appellate Counsel-- Lesser-included Instruction

Defendant claims that appellate counsel's[2] failure to argue on appeal that the trial court committed reversible error when it denied defendant's request for lesser-included instructions regarding the child abuse charge constituted ineffective assistance. Petition at 26-33. Counsel's trial strategy relied on the ability to show that defendant acted recklessly, rather than intentionally or knowingly. The defendant's trial strategy was to challenge the defendant's state of mind and the defendant's awareness (knowledge) of the injury and the child's need for treatment.

With regard to ineffective assistance of appellate counsel, a colorable claim is one that, if true, might have changed the outcome. *State v. Febles*, 210 Ariz. 589, 595, 115 P.3d 629, 635 (App. 2005). The defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the outcome of the appeal would have been different. *State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995). Appellate counsel is not ineffective for selecting some issues and rejecting others. Once the issues have been narrowed and presented, appellate counsel's waiver of other possible issues binds the defendant. *Id.*

For the reasons stated below, the Court finds that appellate counsel made a reasonable strategic decision not to pursue the claim on appeal.

[2] Appellate counsel: Kerrie Droban.

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A. Background
1. PCR Hearing

Witnesses at the evidentiary hearing on this issue included Kerrie Droban and Natman Schaye. Appellate counsel, Ms. Droban, testified that she had considered and determined not to appeal the properly-preserved denial of defendant's request for a lesser-included instruction. She provided contemporaneous notes identifying both the issue and her analysis. Mr. Schaye, the defense IAC/*Strickland* expert, testified that "there was certainly evidence in the record form which one could find that [the defendant] recklessly caused the injury and that a lesser-included instruction was supported." RT 7/15/2014 at 82. Specifically, each testified, as follows:

Kerrie Droban was the appointed appellate attorney for defendant. She referred to her written notes, prepared during the course of her evaluation of the trial record. Her notes indicate that she considered and rejected an argument relating to the failure to give a lesser-included instruction. PCR Exhibits 35, 36. RT 7/15/2014 at 56.

She testified to her analysis of the preserved claim. First, case law holds that felony murder does not have a lesser-included offense. Second, her review of the facts of the case did not support either a reckless or negligent lesser-included instruction. The defendant's admission to striking the child with a closed fist suggested that act was not reflexive; telling the child's mother that he, rather than the child, had vomited seemed an attempt to cover up and mitigated against a claim of negligence or recklessness (consciousness of guilt); blaming the girlfriend (inconsistent defenses); and not having to defend against failure to protect/failure to render aid suggested that the defendant's act of hitting the child was not a mistake. RT 7/15/2014 at 56-57.

Although Droban acknowledged that there was not a strategic reason "for not raising the issue, other than what [she had] stated today," she added, "... at the time I reviewed the issue, and I believed I made the right decision...I think this was a difficult case, and I think that...I raised the issues that I believed had merit." RT 7/15/2014 at 62-63.

Natman Schaye works as Senior Trial Counsel for the Arizona Capital Representation Project, and has represented death penalty clients since 1984. Schaye opined as an IAC expert. He disagreed with Droban's analysis and conclusions point-by-point, including noting that she may have left "more than 5,000 words on the table," which the Court finds unpersuasive. (*See* RT 7/15/2014 at 88).

Schaye testified to his belief that the record indicates "...that a lesser-included instruction was supported." RT 7/15/2014 at 82. He also believes that *State v. Wall*, 212 Ariz. 1, 128 P.3d 148 (2006) supports a lesser-included instruction. *Wall* holds that, where supported by

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the facts, a requested lesser-included instruction is required even where defendant asserts an "all or nothing" defense.

2. Trial Background

The defendant was charged with felony murder, based on the predicate offense of child abuse, and with a separate count of child abuse. Trial counsel sought a lesser-included instruction in connection with the child abuse allegation. In connection with its request, trial counsel made its record:

In a written motion preceding the guilt phase jury instructions and closing argument, trial counsel stated defendant's position both in writing and in oral argument:

> ...the defense has taken the stance that the above testimony[3] [4] and questions by the jury[5] demonstrate that Joshua may not have acted intentionally or knowingly but recklessly or with criminal negligence. Because of the above evidence, the Arizona Supreme Court requires that the Jury be given the opportunity to decide if Joshua acted intentionally, knowingly, recklessly or with criminal negligence. This is a question for the Jury. It would be fundamental error to prevent the defendant's ability to present his defense. *Corona, Id.* [*State v. Corona,* 188 Ariz. 85, 89, 932 P.2d 1356, 1360 (App.Div.1 1987).][defendant also cited *State v. Wall,* 212 Ariz. 1, 3, 126 P.3d 148, 150 (2006).

First Supplemental Request for Jury Instructions (filed 3/24/2008) at 5; EXH. AA: RT 3/25/2008 at 3-5.

The State's Memorandum of Law re: Lesser Included-Offenses of Felony Murder (3/19/2008 at 2-3.) correctly notes that there is no lesser-included "'homicide offense of the

[3] This Court infers that counsel was referring to trial testimony from Dr. Zhang and Dr. Molina that had the child received medical treatment for her injuries she would have survived; Dr. Sullivan confirmed that blunt force trauma to the abdomen might not result in bruising; Dr. Sullivan testified to the training and experience required to diagnose internal injuries;

[4] This Court infers that counsel was referring to the defendant's statements, including that: He had no idea something was ruptured in the child's stomach; his action was a response to the victim's hitting her younger sibling; he did not mean to punch her hard enough to kill her; had he intended to kill her he would have fled to Mexico; he tried to administer CPR; what happened was not intentional; he panicked...

[5] This Court infers that counsel was referring to the following Juror questions: "Even without bruising being present how would a parent in general know that abdominal pain is serious?" and "If the child complains about pain but can't be specific about the location of the pain do you immediately take the child to the ER?"

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crime of felony murder and failure to instruct thereon does not constitute error.' *State v. Celaya*, 135 Ariz. 248, 255, 660 P.2d 849 (1983)," and then continues:

> ...*See also State v. Lopez*, 174 Ariz. 131, 847 P.2d 1078 (1993) (holding that the trial court committed no error in refusing to give lesser included homicide offenses in a felony murder case where the predicate felony was Child Abuse); *State v. Dickens*, 187 Ariz. 1, 926 Pl2d 468 (1996) (holding that "this court has long held there are no lesser included offenses to felony murder"); *State v. Lemke*, 213 Ariz. 232, 141 P.3d 407 (2007) (holding that "[t]here are no lesser-included offenses of felony murder).

In its ruling following argument about "lesser included" jury instructions, including as to felony murder and "negligent" or "reckless" child abuse instructions, the trial court ruled:

> ...The case law is clear. In research that I did I found -- the most recent case I found is *State versus Bocharski*, B-O-C-H-A-R-S-K-I, which is found at 22 P.3d 43, 200 Ariz. 50. It's a 2001 case which clearly holds, and it is black letter law, that it is improper to instruct the jury on a lesser included on a first degree murder case, that there is no basis for including a lesser included offense. So the current state of the law seems to me is clear that a lesser included offense is not permitted sanctioned by the Court. I'm not going to give it.
>
> And as I indicated before when we talked in chambers, to argue recklessly it seems to me is to allow the defendant to try and take advantage of his own continuing misdeeds by not allowing the child or not bringing the child to the hospital as a basis to somehow try and mitigate his wrongdoing which was according to the evidence in which the jury could find that he was the causal factor in this child's death by his physical – by hitting the child, by the blunt force trauma which as the medical examiner stated was the cause of death.
>
> It seems to me what you're trying to argue, as I stated before, Ms. Stevens stated today, is a backdoor effort to try and get in some kind of lesser included offense by using the recklessly instruction which I don't think applies here. This is not a superseding event cause. That's -- it seems to me also nature of the argument that you're making. I don't think that superseding intervening cause will apply in this case because it is his own continuing actions that have resulted in the case being brought before the jury.
>
> I don't think he can take advantage of his continuing misdeeds to try and backdoor a lesser included offense or a lesser charge and therefore I am denying your proposed jury instruction.

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State's PCR Response, EXH. AA: RT 3/25/2008 at 6-8.

B. Felony Murder Count: Felony murder has no lesser-included offenses

The defendant was charged with felony murder, with child abuse as the predicate offense. He sought a lesser-included offense of homicide. State's Response, PCR EXH. AA: RT 3/25/2008 at 3. The trial court determined that defendant was making a "back door effort" to create a non-existent lesser-included offense of felony murder, citing *State v. Bocharski,* 200 Ariz. 50, 59, 22 P.3d 43, 51 (2001) ("felony murder…has no lesser included offenses").

Initially, the Court notes that child abuse is an appropriate predicate for a felony murder charge:

> We emphasize that nothing in this opinion should be read as suggesting that child abuse may not still be a predicate felony for felony murder. If a person intentionally *injures* a child, he is guilty of child abuse under A.R.S. § 13–3623(B)(1); if that injury results in the death of the child it becomes a first degree *felony* murder pursuant to A.R.S. § 13–1105(A)(2). *See State v. Lopez,* 174 Ariz. 131, 141–43, 847 P.2d 1078, 1088–90 (1992), *cert. denied,* 510 U.S. 894, 114 S.Ct. 258 (1993). Although felony murder is first degree murder, it is arrived at differently than premeditated murder. The first degree murder statute, A.R.S. § 13–1105(A)(1), not the child abuse statute, applies when a person intentionally *kills* a child victim.

State v. Styers, 177 Ariz. 104, 110-11, 865 P.2d 765, 771-72 (1993).

The trial court properly instructed the jury on felony murder with a child abuse predicate. For a jury to convict defendant of felony murder, the jury must first determine that defendant committed or attempted to commit child abuse; that defendant, "…under circumstances likely to produce death or serious physical injury, intentionally or knowingly caused [the child] to suffer physical injury." Final Jury Instructions filed 4/2/2008 at 8. The trial court instructed on the definitions of "intentionally" and "knowingly."

As correctly noted by the trial court, in Arizona felony murder has no lesser-included offenses:

> It is well established that no lesser included offense to felony murder exists because the *mens rea* necessary to satisfy the premeditation element of first degree murder is supplied by the specific intent required for the felony. *State v. Arias,* 131 Ariz. at 443–44, 641 P.2d at 1287–88; *see State v. Celaya,* 135 Ariz. at 255, 660 P.2d at 856. Where no lesser included offense exists, it is not error to refuse the instruction. *Spaziano v. Florida,* 468 U.S. at 455, 104 S.Ct. at 3160; *State v. Arias,* 131 Ariz. at 445, 641 P.2d at 1288.

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State v. LaGrand, 153 Ariz. 21, 30, 734 P.2d 563, 572 (1987). *See State v. Jackson*, 186 Ariz. 20, 27, 918 P.2d 1038, 1045 (1996) (Of course, there is no lesser included offense to felony murder. *State v. Landrigan*, 176 Ariz. 1, 5, 859 P.2d 111, 115 (1993), *cert. denied*, 510 U.S. 927, 114 S.Ct. 334 (1993)). *See also State v. Lopez*, 174 Ariz. 131, 142-43, 847 P.2d 1078, 1089-90 (1992) (convictions for child abuse and felony-murder predicated on child abuse affirmed; State elected to argue felony-murder and to forego premeditated murder argument; child abuse does not merge into homicide predicated on felony murder).

Thus, the trial court did not err when it declined to give a lesser-included instruction as to felony murder, nor was appellate counsel's performance deficient for failing to raise the issue on appeal.

C. Child Abuse Count: Reckless/negligent child abuse instruction[6]

Immediately following the trial court's oral denial of its request, Defendant clarified that, in addition to a lesser included instruction on felony murder, he was also requesting lesser included instructions as to the predicate offense of child abuse; the trial court confirmed its understanding of the additional request and affirmed its denial of the requested "lesser-included" instructions. State's PCR Response, EXH. AA: RT 3/25/2008 at 8.

1. The trial court did not err in failing to give a lesser-included instruction

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[6]The trial court instructed:

"Intentionally" or "with intent to" means, with respect to a result or to a conduct described by statute defining an offense, that a person's objective is to cause that result or engage in that conduct.
"Knowingly" means, with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware of believes that his or her conduct is of that nature or that the circumstance exists. It does not require any knowledge of the unlawfulness of the act or omission.

Final Jury Instructions [guilt phase] filed 4/2/2008.

~~The trial court declined to instruct:~~

RAJI 1.0510(c). "Recklessly" means that a defendant is aware of and consciously disregards a substantial and unjustifiable risk that conduct will result in serious physical injury. The risk must be of such nature and degree that disregarding it is a gross deviation from what a reasonable person would do in the situation."
The notes under the RAJI indicate that this instruction is not necessary in cases of manslaughter or second degree murder [lesser-includeds of premeditated murder] "because 'recklessly' has been incorporated in the instructions defining those crimes.
RAJI 1.0510(d). "Criminal negligence" means, with respect to a result or a circumstance described by a statute defining an offense, that a person fails to perceive a substantial and justifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

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Trial counsel had adopted three-prong trial strategy, leading to his request for the lesser-included instruction. Counsel's trial strategy relied on demonstrating (1) that defendant acted recklessly, rather than intentionally or knowingly. The trial court, when considering how to instruct the jury, considered the evidence presented. Evidence before the trial court included, in addition to defendant's admission that he struck the child in the stomach on this occasion with a closed fist; that the child lost her breath; evidence that he had bruised the child on previous occasions; that he delayed contacting emergency personnel out of fear; and that he did not mean to kill the child. Given the number of injuries previously sustained by the child victim and the time period over which they would have occurred, the record demonstrates that defendant's actions evidenced a pattern of behavior over time, rather than merely "reckless" or "negligent" aberrant behavior on a single occasion. Further, the delay in seeking treatment despite ensuing symptoms (lost her breath; complained of being "tired and tired and tired;" seemed not to be breathing; squeezing stomach led to vomiting) coupled with his seeming-awareness of – but denial of – the child's need for treatment (not calling fire department or going to hospital because he was "scared;" telling mother that he, rather than the child, had vomited) suggest intentional or knowing conduct rather than reckless or negligent behavior.

Counsel's trial strategy also included (2) eliciting testimony about the difficulty in determining the extent of an abdominal injury, such that any failure to immediately seek medical treatment might be viewed by the jury as either "reckless" or "negligent," rather than "intentional" or "knowing." The final, single blow was struck by defendant's closed fist, and whether considered alone or cumulatively with previous injuries inflicted by defendant or others, caused sufficient blunt force trauma that – with the passage of time over the course of that evening and without medical treatment – resulted in the death of the child. Although defendant relied on the apparent difficulty in diagnosing life-threatening abdominal injuries, arguing that difficulty as the reason for any delay in seeking medical treatment from which the child might have recovered, defendant fails to recognize that – by striking the child with a closed fist he inflicted the blunt force trauma that the ME concluded resulted in her death.

Counsel's trial strategy also included (3) shifting the blame to his co-defendant.[7] Although defendant attempted to shift the blame to another, in doing so he failed to recognize

[7] **II. Whether the *Enmund–Tison* Finding Was Proper.**
2021 A person convicted of felony murder is only eligible for a death sentence if he killed, attempted to kill, or intended that a killing take place, *Enmund v. Florida*, 458 U.S. 782, 797, 102 S.Ct. 3368, 3376 (1982), or was a major participant in the felony and acted with reckless disregard for human life. *Tison v. Arizona*, 481 U.S. 137, 157–58, 107 S.Ct. 1676, 1688 (1987). Defendant alleges that Angela Gray had a higher duty of care to Rachel than defendant and, therefore, she was responsible for Rachel's death by not taking Rachel to the hospital. Based on this assertion, he argues he is not responsible for Rachel's death, and, therefore, the *Enmund–Tison* finding must fail. Nothing in law or logic supports the proposition that only one person can bear responsibility for a child's death. Indeed, in this case, the mother was also charged with murder and child abuse, and her trial was severed from

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that he alone inflicted the blow that led, ultimately, to the child's death. As the trial judge observed, defendant's closed fist began the chain of events that led to the child's death; there was no superseding event – merely the cumulative effect of the blow on a child who had previously sustained injuries at the hands of defendant, and perhaps others.

The trial court concluded that, in addition to attempting to "back-door" a non-existent lesser-include offense to felony murder, defendant was improperly attempting to use his "continuing misdeeds" in failing to obtain medical treatment for injuries he caused to the victim to escape a murder conviction The trial court determined that the child abuse charge did not warrant a lesser-included instruction based on reckless or negligent acts. *See* Exhibit AA.

A jury instruction must be given upon request if supported by the evidence. Ariz.R.Crim.P. 23.3; *State v. Detrich*, 178 Ariz. 380, 383, 873 P.2d 1302, 1305 (1994). Defendant claims that his assertion that his action, in striking the child with a closed fist, was reflexive supports his requested "recklessly/criminally negligent" instructions. The Court disagrees. The record demonstrated that the defendant had injured the child on at least three previous occasions; that one incident involved physically shaking the child; that on other occasions his actions resulted in bruising to her face, buttocks and arms. Defendant's actions on the previous occasions suggest that his conduct on this occasion was intentional and/or knowing, even if the result – the child's death – was not.

As determined by the Supreme Court on direct appeal in this defendant's case:

> Calling into question defendant's claim that he had acted reflexively rather than intentionally, other acts evidence was presented, showing that shortly before the January 2004 death defendant had violently shaken the child in October 2003; admitted bruising her face and buttocks in November 2003; admitted bruising her face in December 2003;

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defendant's. We emphatically reject defendant's suggestion that a parent's guilt exonerates a non-parent, much as did the court of appeals in *Smith. See State v. Billy Don Smith*, 188 Ariz. 263, 935 P.2d 841 (App.1996).
In *State v. Bolton*, 182 Ariz. 290, 896 P.2d 830 (1995), we held that, based on the jury instructions, the jurors had found beyond a reasonable doubt that the defendant killed the victim. *Id.* at 315, 896 P.2d at 855. That finding satisfied *Enmund. Id.* Similarly, in this case, the jury's verdict on Count II (direct physical injury to Rachel) and Count V (felony murder) required a finding beyond a reasonable doubt that defendant killed Rachel. The medical examiner testified that Rachel's death was caused by peritonitis after the rupture of her small intestine was left untreated. The jury convicted defendant of causing the rupture of Rachel's small intestine, the specific injury that led to her death (Count II). This supports a death eligible finding under *Enmund.* In addition, defendant is also clearly death eligible under *Tison,* as he was not only a major participant in the underlying felonies, but was the sole participant in the assault of Rachel, and he obviously acted with reckless disregard toward human life.

State v. Jones, 188 Ariz. 388, 399, 937 P.2d 310, 321 (1997).

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and admitted bruising her arms in the weeks before her death. *Id.* This established his mental state, and also served to rebut his claim that he did not intend to hurt the child but had, instead, hit her as a "reflex," as well as to rebut his claim that her mother caused the injuries. *Villalobos,* 225 Ariz. at 80, 235 P.3d at 233; *see* Appendix F: Interview of defendant, at 143-144, 147, 148, 157.

The evidence adduced at trial supported defendant's statement that he had hit the child with a closed fist. Defendant does not deny inflicting the final blow, which the State's expert characterized as the fatal blow. Nor does defendant deny failing to secure treatment for the child; treatment which, according to the expert and the examining doctor at the hospital, had it been secured, likely would have prevented the child's death.

We review a court's ruling on a jury instruction for an abuse of discretion. *State v. Dann,* 220 Ariz. 351, ¶ 51, 207 P.3d 604, 616–17 (2009). The court should reject instructions that misstate the law or would be misleading or confusing to the jury; "the test is whether the instructions adequately set forth the law applicable to the case." *State v. Rodriguez,* 192 Ariz. 58, ¶ 16, 961 P.2d 1006, 1009–10 (1998). Further, "in evaluating the jury instructions, we consider the instructions in context and in conjunction with the closing arguments of counsel." *State v. Johnson,* 205 Ariz. 413, ¶ 11, 72 P.3d 343, 347 (App.2003).

State v. Lizardi, 234 Ariz. 501, 503, 323 P.3d 1152, 1154 (Ct. App.1 2014).

A lesser-included offense instruction is not required in every case; it is appropriate only if the facts support giving the instruction. *See State v. Wall,* 212 Ariz. 1, 4, ¶ 17, 126 P.3d 148, 151 (2006). To determine whether sufficient evidence existed to require a lesser-included offense instruction, the court must examine "whether the jury could rationally fail to find the distinguishing element of the greater offense." *State v. Detrich,* 178 Ariz. 380, 383, 873 P.2d 1302, 1305 (quoting *State v. Noriega,* 142 Ariz. 474, 481, 690 P.2d 775, 782 (1984), *overruled on other grounds, State v. Burge,* 167 Ariz. 25, 804 P.2d 754 (1990)). Thus, a lesser-included offense instruction is required if the jury could "find (a) that the State failed to prove an element of the greater offense and (b) that the evidence is sufficient to support a conviction on the lesser offense." *Wall,* 212 Ariz. at 4, ¶ 18, 126 P.3d at 151 (citing *State v. Caldera,* 141 Ariz. 634, 636–37, 688 P.2d 642, 644–45 (1984)).

State v. Bearup, 221 Ariz. 163, 168, 211 P.3d 684, 689 (2009).

The trial court is in the best position to determine whether evidence supports giving of a lesser included instruction. The trial court determined that the evidence presented did not

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support a lesser-included instruction. The trial court instructed, and the jury found, first degree felony murder and child abuse.[8] There is no indication that the jury failed to follow the court's instructions in reaching its verdict. The jury, by convicting defendant of felony murder, necessarily found that Defendant's action was not merely reckless, nor was it negligent.[9][10] The jury, by its verdict convicting defendant of felony murder with a predicate offense of child abuse, concluded that Defendant's course of conduct and actions were intentional or knowing.

The trial court rested its decision on case law holding that felony murder has no lesser-included offenses coupled with the lack of evidence for a finding that defendant had acted in a reckless or negligent manner. The Arizona Supreme Court, had it been asked to consider whether the trial court's denial of defendant's request for lesser included instruction was error, would have reviewed trial court's ruling for an abuse of discretion; the Supreme Court would have concluded that the trial court did not abuse its discretion. Thus, the issue was meritless.

Failure to raise a meritless issue on appeal does not constitute deficient performance by appellate counsel. Thus, the trial court did not err when it declined to give a lesser-included instruction as to the child abuse count, nor was appellate counsel's performance deficient for failing to raise the issue on appeal.

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[8] First Degree Felony Murder
The crime of first degree felony murder requires proof that:
The defendant committed or attempted to commit child abuse and in the course and furtherance of the offense of child abuse caused the death of Ashley Molina.
Child Abuse
The crime of child abuse requires proof that the defendant, under circumstances likely to produce death or serious physical injury, intentionally or knowingly caused Ashley Molina to suffer physical injury.
Final Jury Instructions filed 4/2/2008 at 7-8.

[9] A defendant may not be sentenced to death under the Eighth Amendment unless he "kill[s], attempt[s] to kill, or intend[s] that a killing will take place or that lethal force will be employed," *Enmund v. Florida*, 458 U.S. 782, 797, 102 S.Ct. 3368 (1982), or is a major participant in a crime and acts with reckless indifference to human life, *Tison v. Arizona*, 481 U.S. 137, 158, 107 S.Ct. 1676 (1987). The trial court in this case did not ask the jury to make an *Enmund/Tison* finding. *See* A.R.S. § 13–752(P) (2010) (requiring jury to make all factual determinations required by the "Constitution of the United States or this state to impose a death penalty"). Villalobos did not request an *Enmund/Tison* finding below, nor does he raise this as an issue on appeal. In any event, the evidence below overwhelmingly established that Villalobos was the actual killer.
State v. Villalobos, 225 Ariz. 74, 83 FN5, 235 P.3d 227, 236 (2010).

[10] Homicide is murder if the death results from the perpetration or attempted perpetration of one of the specific offenses listed in A.R.S. s 13—452. The specific intent for the felony, in this instance burglary, supplies the necessary element of malice or premeditation. *State v. Howes*, 109 Ariz. 255, 508 P.2d 331 (1973).
State v. Ferrari, 112 Ariz. 324, 328, 541 P.2d 921, 925 (1975).

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2. Even were it deemed error for the trial court to decline to give a lesser included instruction, defendant suffered no prejudice.

Further, the "reckless/negligent" jury instruction would not have changed the result. Three additional jury instructions, neither requested nor given but which would have been proper had the trial court permitted a "negligent/reckless" instruction, support this conclusion.

The instructions would have responded to defendant's three-pronged defense and clarified (1) what the jury could consider in ascertaining defendant's state of mind; (2) that any pre-existing injuries would not serve to diminish defendant's criminal responsibility; and (3) that to find defendant not guilty the jury would have to determine that the other party's act was the sole proximate cause of the child's death. *See* RAJI Standard Criminal 17 – Voluntary act and *State v. Lara*, 183 Ariz. 233, 234-35, 902 P.2d 1337, 1338-39 (1995); RAJI 2.03.02 – Causation Instruction – Pre-existing Physical Condition ("When a person causes injury to another, the consequences are not excused, nor is the criminal responsibility for the resulting death lessened, by the pre-existing condition of the person killed."); and RAJI 2.03.03 – Causation (Multiple Actors) ("The unlawful act of two or more people may combine to cause the death of another. If the unlawful act of the other person was the sole proximate cause of death, the defendant's conduct was not a proximate cause of the death. If you find that the defendant's conduct was not a proximate cause of the death, you must find the defendant not guilty").

Under the facts of this case, where an already-injured child died within hours of being struck by a blow inflicted by defendant who was the only adult present – even if the new injury merely exacerbated previously-sustained injuries inflicted by another – the result of the trial would not have changed had the requested lesser-included instructions been given. Thus, there is no prejudice.

The Court finds that had the Supreme Court been asked to review the trial court's denial of a lesser-included instruction, it would have reviewed the decision for an abuse of discretion and would have upheld the denial.

The Court concludes that appellate counsel Droban did not commit *Strickland* error in failing to raise the "lesser-included" issue either as to felony murder count or the substantive child abuse count.

Accordingly, based on the above,

IT IS THEREFORE ORDERED denying the defendant's Petition for Post-Conviction Relief as to both guilt phase claims, Claims I and II.

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IT IS FURTHER ORDERED affirming the Court's Order dated February 28, 2014, in which the defendant was granted a new penalty phase trial.

The Court will set an Informal Conference in order to expedite the proceedings to discuss [any post-trial motions; assignment and qualification of penalty phase counsel; setting the penalty phase for trial; who will handle the penalty phase retrial] for 1/8/2015 at 10:30 a.m. before Judge Joseph Welty, which the defendant need not be present. Rule 32.7. Arizona Rules of Criminal Procedure.

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.