IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Joshua Idlefonso Villalobos, Petitioner, v. Charles L. Ryan, Attorney General of the State of Arizona, Respondents.	No. CV 17-00633 PHX DJH (CDB) **REPORT AND RECOMMENDATION**

TO THE HONORABLE DIANE J. HUMETEWA:

Petitioner Joshua Villalobos, then proceeding *pro se*, filed a petition seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on March 2, 2017, challenging his convictions for first degree felony murder and child abuse. (ECF No. 1). Villalobos was appointed counsel to represent him in this matter. (ECF No. 24). Respondents answered the petition on July 5, 2017 (ECF Nos. 11-21), and Villalobos docketed a reply in support of his habeas petition on April 27, 2020. (ECF No. 63).

I. Background

The Arizona Supreme Court summarized Villalobos' initial state criminal proceedings and the testimony presented at trial as follows:

> Villalobos lived with Annette Verdugo, five-year-old Ashley Molina (Verdugo's daughter), and the couple's two-year-old daughter. On January 3, 2004, Villalobos and the children picked Verdugo up at work and took her to dinner. Ashley did not eat and complained about stomach pains. Villalobos and the children again picked Verdugo up from work after her shift ended in

the early morning of January 4. When Verdugo noted an odd smell, Villalobos claimed he had vomited in the car.

When they arrived home, Villalobos carried Ashley upstairs and put her to bed. At approximately 7 a.m., Villalobos told Verdugo that Ashley was unresponsive. Ashley's body was cold and hard. Villalobos told Verdugo "they're going to think it's me, I was the only one with her."

After some delay, Villalobos and Verdugo took Ashley to the hospital. The emergency room physician recognized immediately that Ashley was dead; she found "somewhere between 150 to 200 bruises" on Ashley's body. After Villalobos told the physician that the bruises were from a fall in the shower, Phoenix police were summoned.

Villalobos was taken to the police station and given Miranda warnings. Villalobos denied hitting Ashley, and a detective asked him to take a polygraph examination. Villalobos agreed. During the examination, Villalobos initially denied injuring Ashley. When the polygrapher accused him of lying, Villalobos admitted that he had punched Ashley.

After the polygraph, a second detective resumed the interrogation. Villalobos admitted that, before Verdugo's dinner break, he had grabbed Ashley by the arm and hit her several times with a closed fist. Villalobos also said that Ashley had passed out in the car and then vomited on him while he was picking Verdugo up from work.

The medical examiner who conducted the autopsy later concluded that Ashley had died of blunt force trauma to the abdomen. He opined that Ashley could have survived for no more than four hours after the fatal injuries and had died between five and eight hours before being taken to the hospital. The autopsy also revealed other internal injuries that predated the fatal injuries.

A grand jury indicted Villalobos for child abuse and first-degree murder. Verdugo was indicted for second degree murder and child abuse. She later pleaded guilty to attempted child abuse and testified at Villalobos's trial.

A superior court jury found Villalobos guilty on both counts. During the aggravation phase of the trial, the jury found three aggravating circumstances: the offense was committed in an especially heinous, cruel, or depraved manner []; Villalobos committed the offense while on release from the state department of corrections []; and the victim was a child under the age of fifteen []. After the penalty phase, the jury concluded that any mitigating circumstances were not sufficiently substantial to call for leniency and death was the appropriate sentence.

State v. Villalobos, 225 Ariz. 74, 77-78 (2010) (en banc).

Villalobos appealed his conviction and sentence, asserting the trial court abused its discretion and erred in the admission of evidence; the trial court erred by denying a motion to suppress; prosecutorial misconduct; sentencing error; and that Arizona's death penalty statute was facially vague and overbroad in violation of the Eighth and Fourteenth Amendments with regard to the aggravating factor of whether a murder is "especially cruel." (ECF No. 12-4 at 4). The Arizona Supreme Court affirmed Villalobos' convictions and sentence in an opinion issued July 1, 2010. *Villalobos*, 225 Ariz. at 85. The United States Supreme Court denied certiorari. *Villalobos v. Arizona*, 562 U.S. 1141 (2011).

Villalobos sought a state writ of habeas corpus, asserting he was denied the effective assistance of trial counsel at the guilt, aggravation, and sentencing phases of his criminal proceedings. (ECF No. 14-6 at 7-12; ECF No. 15; ECF No. 15-1).[1] He further alleged he was denied the effective assistance of appellate counsel. (ECF No. 14-6 at 13). Villalobos also asserted a claim of juror misconduct, and argued both the death penalty itself and a sentence of death by lethal injection constituted cruel and unusual punishment. (ECF No. 14-6 at 14-16). Additionally, Villalobos argued Arizona's capital sentencing scheme denied defendants the benefit of proportionality review, in violation of the Eighth and Fourteenth Amendments. (ECF No. 14-6 at 16).

On August 20, 2013, the state habeas trial court, which was not the convicting court, concluded an evidentiary hearing was warranted with regard to four of Villalobos' claims of ineffective assistance of counsel: (1) his claim that counsel was ineffective at the trial phase for failing to retain a pathologist to assist with cross-examination of the medical examiner; (2) his claims of ineffective assistance at the penalty phase, i.e., that "erroneous records" supplied by counsel formed the basis of expert witness's opinions; and (3) that "erroneous records" supplied by counsel were disclosed to expert witnesses;" and (4) his allegation that appellate counsel was ineffective for failing to assert trial court error with regard to instructing the jury on lesser-included offenses. (ECF No. 18-2 at 5-10; ECF

[1] The first 67 pages of Villalobos' supplemental Rule 32 pleading at ECF No. 15 is duplicated at ECF No. 15-1, and the remainder of the pleading is at ECF No. 16.

No. 19 at 12). The habeas trial court found Villalobos' claim of prosecutorial misconduct waived by his failure to raise the claim on appeal, and found his other claims without merit. (ECF No. 18-2 at 3-10). The court noted, with regard to several claims of ineffective assistance of counsel, that even if the alleged errors constituted deficient performance, Villalobos was unable to establish prejudice arising from the alleged errors because of the weight of the evidence against him. (ECF No. 18-2 at 5-10).

On February 27, 2014, the parties stipulated to vacate the death sentence and conduct a new penalty proceeding, mooting Villalobos' state habeas claims regarding his sentence. (ECF No. 19 at 12). In July of 2014 the state habeas trial court conducted an evidentiary hearing on Villalobos' claims regarding ineffective assistance of counsel at the guilt phase of his criminal proceedings and ineffective assistance of appellate counsel. (ECF No. 19 at 3-9).

In an order issued December 17, 2014, the state trial court concluded defense counsels' failure to utilize the assistance of a requested and funded pathology expert, and counsels' failure to secure a written report from the expert, constituted deficient performance. (ECF No. 19 at 29). However, the court further determined that, "given the overwhelming evidence supporting the finding of guilt, additional testimony from a defense pathologist would not have changed the jury's verdict." (ECF No. 19 at 33). With regard to Villalobos' claim that appellate counsel was ineffective for failing to assert the trial court erred by denying a lesser-included offense instruction, the habeas court determined counsel was not ineffective, i.e., the decision to not pursue the claim on appeal was a reasonable strategic choice because the claim was not likely to succeed. (ECF No. 19 at 33-42).[2] Villalobos sought review of this decision by the Arizona Supreme Court, which summarily denied review on September 22, 2015. (ECF No. 20-3).

[2] The state habeas court noted the trial court's discussion regarding the applicable law and denial of the lesser-included offense instruction. (ECF No. 19 at 37). The habeas court concluded the trial court's denial of the instruction was correct because Villalobos was charged with felony murder, with child abuse as the underlying offense, and the state appellate courts had squarely concluded "in Arizona felony murder has no lesser-included offenses." (ECF No. 19 at 37-38).

As noted *supra*, on February 27, 2014 Villalobos and the State filed a joint memorandum and stipulation to vacate the death sentence,[3] and the state trial court ordered another penalty hearing. (ECF No. 18-5). At the conclusion of second penalty hearing, which began August 1, 2016, the jury found Villalobos should be sentenced to a term of natural life imprisonment, and this sentence was imposed. (ECF No. 20-4 at 2; ECF No. 20-5 at 2).

II. Claim for Federal Habeas Relief

Villalobos asserts the following claims for federal habeas relief:

1. His trial counsel was ineffective for failing to hire a pathologist who, he asserts, "would have proven that I did not cause the fatal injury," and to facilitate prosecution of the medical examiner. (ECF No. 1 at 6).

2. He was denied the effective assistance of appellate counsel because, "even though my trial lawyers asked for and were denied a lesser-included instruction for reckless child abuse [counsel] did not raise this issue on appeal. If the jury had . . . returned a verdict of reckless child abuse the felony murder charge would have gone away." (ECF No. 1 at 7).

3. He was denied the effective assistance of appellate counsel because counsel "did not raise the issue that I was denied my 6th Amendment right to cross-examine my co-defendant Verdugo about bias and a motive to lie." (ECF No. 1 at 8).

4. Both trial and appellate counsel's cumulative errors resulted in the violation of his right to the effective assistance of counsel. (ECF No. 1 at 9).

III. Analysis

A. Standard of Review

1. The Anti-Terrorism and Effective Death Penalty Act ("AEDPA")

The Court may not grant a writ of habeas corpus to a prisoner on a claim adjudicated on the merits in state court unless the state court's decision denying the claim was "contrary to, or involved an unreasonable application of, clearly established Federal law, as

[3] The parties agreed the death sentence relied on mistaken information regarding Villalobos' mental health. (ECF No. 18-4).

determined by the Supreme Court of the United States," or "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Harrington v. Richter*, 562 U.S. 86, 98 (2011), *quoting* 28 U.S.C. § 2254(d). *See also Lafler v. Cooper*, 566 U.S. 166, 172-73 (2012). A state court decision is contrary to federal law if it applied a rule contradicting the governing law established by United States Supreme Court opinions, or if it reaches a different result from that of the Supreme Court on a set of materially indistinguishable facts. *See, e.g., Brown v. Payton*, 544 U.S. 133, 141 (2005); *Yarborough v. Alvarado*, 541 U.S. 652, 663 (2004). If habeas relief depends upon the resolution of "an open question" in Supreme Court jurisprudence, § 2254(d)(1) precludes relief. *See, e.g., Carey v. Musladin*, 549 U.S. 70, 77 (2006). Although only Supreme Court authority is binding on the federal habeas court, circuit precedent may be "persuasive" in determining what law is clearly established and whether a state court applied that law unreasonably. *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003), *overruled on other grounds by Lockyer v. Andrade*, 538 U.S. 63 (2003).

When the last state court to deny a claim later presented in a federal habeas petition is unexplained, the Court must "look through" that decision to the last reasoned decision on the issue, and presume the higher court adopted that reasoning when determining if the state courts' decision denying relief was an unreasonable application of federal law. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1194-95 (2018). The state court's decision constitutes an unreasonable application of clearly established federal law only if it is objectively unreasonable. *See, e.g., Renico v. Lett*, 559 U.S. 766, 773 (2010); *Runningeagle v. Ryan*, 686 F.3d 758, 785 (9th Cir. 2012). An unreasonable application of federal law is different from an incorrect one. *See Harrington*, 562 U.S. at 101. "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Id.*

Factual findings of a state court are presumed to be correct and can be reversed by a federal habeas court only when the federal court is presented with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *Wood v. Allen*, 558 U.S. 290, 293 (2010); *Miller-El*

v. Cockrell, 537 U.S. 322, 340 (2003). And the "presumption of correctness is equally applicable when a state appellate court, as opposed to a state trial court, makes the finding of fact." *Sumner v. Mata*, 455 U.S. 591, 593 (1982). *See also Bragg v. Galaza*, 242 F.3d 1082, 1087 (9th Cir. 2001). Furthermore, the United States Supreme Court has held that, with regard to claims adjudicated on the merits in the state courts, "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 180-81 (2011).

> The Supreme Court has noted on several occasions that the rules governing state court findings of fact in the former § 2254(d) applied only to a state court's determination of "historic fact" as opposed to a "mixed determination of law and fact that requires the application of legal principles to the historical facts." *Cuyler v. Sullivan*, 446 U.S. 335, [342] (1980). AEDPA appears to maintain this distinction, using essentially the same language. *Compare* 28 U.S.C. § 2254(d)(1) (2003) (using the words "determination of a factual issue"), *with* 28 U.S.C. § 2254(d) (1995) (using the words "determination of the facts"). Thus, we have held that, like its predecessor, former § 2254(d), the reach of the presumption of correctness in new § 2254(e)(1) is restricted to pure questions of historical fact. State decisions applying law to facts are governed by § 2254(d)(1); however, factual findings underlying the state court's conclusion on the mixed issue are accorded a presumption of correctness.

Lambert v. Blodgett, 393 F.3d 943, 976 (9th Cir. 2004).

2. The *Strickland* Standard

To establish he was denied the effective assistance of counsel a habeas petitioner must show his attorney's performance was deficient and that the deficiency prejudiced the outcome of his criminal proceedings. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The petitioner must overcome the strong presumption that counsel's conduct was within the range of reasonable professional assistance required of attorneys in that circumstance. *See id.* at 687. Counsel's performance will be held constitutionally deficient only if the habeas petitioner proves counsel's actions "fell below an objective standard of reasonableness," as measured by "prevailing professional norms." *Id.* at 688. *See also Cheney v. Washington*, 614 F.3d 987, 994-95 (9th Cir. 2010). To establish prejudice, the

petitioner must demonstrate "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. *See also, e.g., Harrington*, 562 U.S. at 788. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The question for a reviewing court applying *Strickland* under section 2254(d) is whether there is a "reasonable argument that counsel satisfied *Strickland*'s deferential standard . . ." *Harrington*, 562 U.S. at 788. Relief is warranted only if no reasonable jurist could disagree that the state court erred in its application of the *Strickland* analysis. *See See Cullen v. Pinholster*, 563 U.S. 170, 188 (2011); *Murray v. Schriro*, 746 F.3d 418, 465-66 (9th Cir. 2014).

Additionally, on federal habeas review a *Strickland* claim adjudicated on the merits by a state court is reviewed under a "highly deferential" or "doubly deferential" standard. *Atwood v. Ryan*, 870 F.3d 1033, 1057 (9th Cir. 2017); *Visciotti v. Martel*, 862 F.3d 749, 770 (9th Cir. 2016). The "highly deferential" standard of review "'requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" *Visciotti*, 862 F.3d at 770, *quoting Strickland*, 466 U.S. at 689. The "doubly deferential" standard of review requires the habeas court applying *Strickland* to determine whether there is a "*reasonable argument* that counsel satisfied *Strickland*'s deferential standard . . ." *Harrington*, 562 U.S. at 788 (emphasis added). Even if the Court could conclude on de novo review that the petitioner might satisfy both prongs of the *Strickland* test, the "AEDPA requires that a federal court find the state court's contrary conclusion" "*objectively unreasonable* before granting habeas relief." *Woods v. Sinclair*, 764 F.3d 1109, 1132 (9th Cir. 2014) (emphasis added). "Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington*, 562 U.S. at 105.

A petitioner bears the burden of demonstrating counsel's choices regarding the presentation of his defense constituted deficient performance and were prejudicial. *See Matylinsky v. Budge*, 577 F.3d 1083, 1091 (9th Cir. 2009); *Rego v. Sherman*, 704 F. App'x 634, 638 (9th Cir. 2017); *Lazo v. Clark*, 387 F. App'x 754, 755 (9th Cir. 2010). A petitioner's speculation that counsel failed to adequately investigate a potential line of defense or failed to present particular testimony rarely creates a "reasonable probability" that a different result would have occurred absent the purportedly deficient representation. *Strickland*, 466 U.S. at 694. Counsel's choice of a sound defense strategy, and any decisions made regarding the implementation of that strategy, are "virtually unchallengeable." *Id.* at 690. *See also Ayala v. Chappell*, 829 F.3d 1081, 1103 (9th Cir. 2016). It is well settled that "counsel's tactical decisions at trial . . . are given great deference and must similarly meet only objectively reasonable standards." *Elmore v. Sinclair*, 799 F.3d 1238, 1250 (9th Cir. 2015). *See also Reynoso v. Giurbino*, 462 F.3d 1099, 1112 (9th Cir. 2006). Specifically, the decision to forgo the use of specific witness testimony is a matter of strategy within trial counsel's discretion. *Matylinsky*, 577 F.3d at 1092; *Raley v. Ylst*, 470 F.3d 792, 802 (9th Cir. 2006).

With regard to claims of ineffective assistance of counsel, issues of counsel's performance and any resulting prejudice are mixed questions of law and fact, the resolution of which by the state court is not entitled to presumption of correctness by a federal habeas court. *See Strickland*, 466 U.S. at 698. Consequently, a federal court reviewing a state court conclusion on a mixed issue involving questions both of fact and law, such as a *Strickland* claim, must first separate the legal conclusions from the underlying factual determinations *Lambert*, 393 F.3d at 978. "Fact-finding underlying the state court's decision is accorded the full deference of §§ 2254(d)(2) and (e)(1), while the state court's conclusion as to the ultimate legal issue—or the application of federal law to the factual findings—is reviewed per § 2254(d)(1)," when ascertaining whether the state court's denial of a *Strickland* claim was contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent. *Id.*

B. Villalobos' claims for relief

1. Ineffective assistance of counsel — expert witness

Villalobos argues his trial counsel was ineffective for failing to retain a defense pathologist, who he asserts would have proved that he "did not cause the fatal injury. . ." (ECF No. 1 at 6). He also contends the retention of a pathologist would have allowed counsel to "properly cross-examine the prosecutor's doctor when he changed his opinion" as to the time the blow that caused the victim's death was inflicted. (*Id.*).[4]

After discussing the testimony presented at trial and the testimony presented at the post-conviction evidentiary hearing, the state habeas trial court found and concluded that "[t]rial counsels' failure to secure the assistance of his requested, and funded, expert and a written report constituted deficient performance," primarily because defense "[c]ounsel 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 [sic] conclusions." (ECF No. 19-3 at 14. *See also* ECF No. 19-3 at 19). However, the state habeas court concluded that Villalobos had failed to meet his burden of demonstrating a "'reasonable probability' that the factfinder would have had a reasonable doubt respecting guilt," because Villalobos admitted that he struck the victim with a closed fist on the evening preceding the victim's death, and "all of the PCR experts conceded that a closed fist injury would have been sufficient to cause the death of the child." (ECF No. 19-3 at 21). The court noted that, although the experts agreed there was an absence of conclusive medical evidence to narrow the time of the fatal injury, "Defendant's admission to hitting the child with a closed fist in

[4] Villalobos argues in his Reply that the State pathologist's "timing estimate" of the injuries that caused the victim's death, "and many of his other conclusions," "were unsupported by the evidence." (ECF No. 63 at 11). For this conclusion Villalobos relies on testimony presented by his experts at the state habeas evidentiary hearing, including that of a "renowned expert in pediatric pathology," Dr. Ophoven, who opined the fatal injuries were "*weeks old*." (*Id.*). Villalobos notes the expert "testified that there was *no evidence* of any new injury occurring within 24 hours of Ashley's death." (*Id.*). This overlooks Villalobos' confession, which is compelling evidence that at some point between 8 p.m. and 12 p.m. on the night before the victim's death he punched the victim in the stomach with a closed fist; all of the state habeas experts, including Dr. Ophoven, allowed this action could have caused the victim's death. (ECF No. 19-3 at 21-22).

the early evening hours while mother was at work provides assistance with the timing," and that when each expert was "directed to defendant's admission that he hit the child with a closed fist," they conceded that the admitted blow with a closed fist at the time Villalobos said he struck the victim was consistent with the medical evidence and explained both the cause of death and time of death. (ECF No. 19-3 at 22).

The state habeas court concluded:

> . . . 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 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.

(ECF No. 19-3 at 22-23). The Arizona Supreme Court summarily denied review.

The denial of relief on this claim was not an unreasonable application of *Strickland*. When considering whether a habeas petitioner was prejudiced by his counsel's alleged errors, "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. When answering this question, the federal habeas court must necessarily consider the strength of the case against the petitioner. *See Wainwright v. Sykes*, 433 U.S. 72, 91 (1977); *Djerf v. Ryan*, 931 F.3d 870, 883 (9th Cir. 2019); *Allen v. Woodford*, 395 F.3d 979, 999 (9th Cir. 2005) ("even if counsel's conduct was arguably deficient, in light of the overwhelming evidence of guilt, [the petitioner] cannot establish prejudice"); *Johnson v. Baldwin*, 114 F.3d 835, 839-40 (9th Cir. 1997). A thorough review of the entire trial

transcript, including the video recording of Villalobos' confession (which was played for the jury), establishes the substantial weight of the evidence supporting the jury's verdict. Given the weight of the evidence against Villalobos, there is no reasonable probability that, but for the error regarding acquisition of a defense pathologist, the factfinder would have had a reasonable doubt respecting guilt.

2. Ineffective assistance of counsel — jury instruction

In his second claim for relief Villalobos asserts his appellate counsel was ineffective for failing to assert the trial court erred by denying him a jury instruction on the lesser-included offense of reckless child abuse; he maintains the jury would have found him guilty of the lesser-included offense, which in turn would not support a conviction for felony murder. (ECF No. 1 at 7).

The state habeas court denied relief on this claim, correctly stating that to prevail on such a claim the defendant was required to demonstrate a "reasonable probability that but for counsel's deficient performance, the outcome of the appeal would have been different," and that "[a]ppellate counsel is not ineffective for selecting some issues and rejecting others . . ." (ECF No. 19-3 at 23). The court concluded "appellate counsel made a reasonable strategic decision not to pursue the claim on appeal." (*Id.*).

The trial court denied a lesser-included offense instruction, noting Villalobos had been charged with felony murder, with child abuse as the predicate offense, and that pursuant to state law there was no "lesser included offense" to felony murder. The state habeas court cited the conclusive state opinions supporting the conclusion that "in Arizona felony murder has no lesser-included offenses," and determined "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." (ECF No. 19-3 at 27-28). The habeas trial court delineated the absence of evidence to support that the commission of child abuse was "reckless" or "criminally negligent" rather than intentional, noting the testimony that Villalobos had previously injured the child, that he delayed seeking medical care, and that he did not slap or swat the victim but instead struck her with

a closed fist. (ECF No. 19-3 at 30). The court also noted the jury had been correctly instructed as to 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." (ECF No. 19-3 at 32 & n.8).

The habeas court concluded:

> 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 [with respect to the allegation of child abuse] 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 [the] 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.

(ECF No. 19-3 at 32). The court concluded: "Failure to raise a meritless issue on appeal does not constitute deficient performance by appellate counsel. . . ." (*Id.*).

To succeed on a claim of ineffective assistance of appellate counsel,

> . . . the petitioner [must] demonstrate that counsel acted unreasonably in failing to discover and brief a merit-worthy issue. *Smith*, 528 U.S. at 285; *Wildman v. Johnson*, 261 F.3d 832, 841-42 (9th Cir. 2001). Second, the petitioner must show prejudice, which in this context means that the petitioner must demonstrate a reasonable probability that, but for appellate counsel's failure to raise the issue, the petitioner would have prevailed in his appeal.

Moormann v. Ryan, 628 F.3d 1102, 1106 (9th Cir. 2010). Appellate counsel "need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." *Smith v. Robbins*, 528 U.S. 259, 288 (2000).

> . . . In many instances, appellate counsel will fail to raise an issue because she foresees little or no likelihood of success on that issue; indeed, the weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy. . . . Appellate counsel will therefore frequently remain above an objective standard of competence (prong one) and have caused [their] client no prejudice (prong two) for the same reason—because [they] declined to raise a weak issue.

Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (citations and footnotes omitted), *quoted in Hurles v. Ryan*, 188 F. Supp. 3d 907, 922 (D. Ariz. 2016). Accordingly, to establish prejudice from appellate counsel's alleged deficient performance a habeas petitioner must demonstrate the issue counsel failed to raise was "stronger" than the issues counsel did raise. *Smith*, 528 U.S. at 288.

The state habeas court determined, after thoroughly analyzing the trial court's legal reasoning in denying the requested lesser-included offense instruction, that pursuant to state law the instruction was not warranted. The state court's interpretation of its own law is entitled to deference. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) ("state courts are the ultimate expositors of state law."); *Horton v. Mayle*, 408 F.3d 570, 576 (9th Cir. 2005); *Mendez v. Small*, 298 F.3d 1154, 1158 (9th Cir. 2002) ("A state court has the last word on the interpretation of state law"). A state court's interpretation of state law "binds a federal court sitting in habeas corpus." *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005). That the state trial court did not err in denying the instruction is a matter of state law entitled to a presumption of correctness by a federal habeas court. *Id. See also Maquiz v. Hedgpeth*, 907 F.3d 1212, 1218 (9th Cir. 2018); *Woods*, 764 F.3d at 1136. The state trial court's discussion of the merits of this claim of ineffective assistance of appellate counsel and the Arizona Supreme Court's denial of review on this claim establishes that, had appellate counsel asserted the trial court erred by denying the lesser-included offense instruction, Villalobos would not have prevailed in his appeal. Appellate counsel's performance is not deficient nor prejudicial for failing to raise a claim which is unlikely to succeed. *See Zapien v. Davis*, 849 F.3d 787, 796 (9th Cir. 2015); *Jones v. Ryan*, 691 F.3d 1093, 1101 (9th Cir. 2012). Accordingly, because Villalobos is unable to establish prejudice arising from this alleged deficiency by appellate counsel, the state court's denial of the claim was not an unreasonable application of *Strickland* or *Robbins*, and Villalobos in not entitled to federal habeas relief on this claim.

3. Ineffective assistance of counsel — cross-examination of co-defendant

In his third claim for federal habeas relief Villalobos maintains his appellate counsel was ineffective for failing to assert that he was denied the right to cross-examine his co-defendant, Ms. Verdugo, about her bias and any motive to lie in her testimony. Villalobos argues: "The trial court's limitations on cross-examination [of Verdugo] denied Villalobos his federal constitutional rights to confrontation and due process," noting "[a] criminal defendant has the right to cross-examine witnesses against him to reveal their motivations and biases." (ECF No. 63 at 4).[5]

Villalobos raised this claim in his Rule 32 action, and the habeas trial court concluded, without taking additional evidence, that the claim was with was without merit. The habeas court found and concluded:

> Co-defendant Verdugo was charged with one count of child abuse and one count of second degree murder. The State dismissed the second degree murder charge and a year later, Verdugo pled guilty to attempted child abuse, a Class 3 felony with the option of prison or probation left to the court's discretion.
>
> Defendant, relying on *State v. Ramos*, 108 Ariz. 36, 39 [] (1972), claims that his cross-examination of Ms. Verdugo was erroneously restricted because he was not allowed to question her about the second degree murder charge. In ruling on the State's motion in limine to preclude defendant from cross-examining Ms. Verdugo regarding the dismissed second degree murder charge, the trial court found that dismissal of that charge was not part of the plea negotiations. In *Ramos*, the defendant was not permitted to cross-examine a witness about any arrest related to the same crime, and had no opportunity to explore bias, prejudice, hostility or credibility. Here, the trial court permitted cross-examination as to the child abuse charge, the underlying facts and Ms. Verdugo's plea agreement. The jurors were aware of the charges, aware of Ms. Verdugo's admission of culpability, aware of her interest as a mother and a culpable party, and were in a position to evaluate her credibility and any potential self-interest. The trial court complied with *Ramos*.

[5] Defense counsel chose not to cross-examine Verdugo, instead he called her as a witness during the defense's case. (ECF No. 60-4 at 121). Elsewhere in the Reply Villalobos uses the term "question," rather than "cross-examine," when discussing this claim. (ECF No. 63 at 12).

> In addition, even assuming the trial court erred, the error was harmless. Defendant had admitted that he punched the victim in the stomach with a closed fist and this blunt force trauma was corroborated by the ME. The child died within hours. Whether the death resulted solely from the punch or from cumulative abuse inflicted by defendant and another, defendant's culpability was established, irrespective of Ms. Verdugo's testimony, involvement and credibility. . . . appellate counsel was not deficient for failing to raise a meritless claim.

(ECF No. 18-2 at 5).

The state court's denial of this claim was not an unreasonable application of *Strickland* nor *Robbins* because appellate counsel's failure to raise this claim was neither deficient performance nor prejudicial. Despite the trial court's limitation of questioning of Ms. Verdugo to exclude testimony that she had originally been charged with second-degree murder, the issue of Ms. Verdugo's credibility and any motivation for potentially falsifying her testimony was thoroughly explored for the jury. Defense counsel elicited testimony from Ms. Verdugo that she was originally "charged with a class two felony;" she had been charged with "class three" felony child abuse; she served three months in jail prior to entering a plea agreement; she pled guilty to a charge of failure to protect her child; the plea agreement lessened her exposure at sentencing from a maximum of 15 years' imprisonment; and that, even if she ultimately received a sentence of probation it would be lifetime probation and she would have to serve a year in jail. (ECF No. 60-11 at 27-29). Ms. Verdugo agreed with defense counsel's statement that: "If you were convicted of the class two child abuse that you were originally charged with you would not be eligible for probation." (ECF No. 60-11 at 30). Defense counsel questioned Ms. Verdugo extensively regarding the exact terms of her plea agreement with regard to her cooperation in the prosecution of Villalobos. (ECF No. 60-11 at 30-35). Additionally, defense counsel elicited testimony from Ms. Verdugo that, during questioning about her daughter's death, she told detectives she had lied to them on a prior occasion: "You recall telling detective or Mr. Clifford that – the question was: Are you a liar? and you said I lie sometimes. . . . Do you recall that?" Ms. Verdugo responded: "I have lied, not like if things — how can I explain

it to you?" (ECF No. 60-11 at 37-38). Counsel stated: "And you already indicated that you told him that I lie to protect myself; is that right?" and she responded: "On one occasion, yes." (ECF No. 60-11 at 38).[6] Counsel also elicited testimony that, when Ms. Verdugo was initially questioned by police immediately after her daughter's death, she lied to the officers about the origin of bruises found on her daughter's back. (ECF No. 60-11 at 39-44).

The state court's denial of this claim was not an unreasonable application of the controlling federal law because Villalobos is unable to establish prejudice arising from his appellate counsel's failure to present this claim on appeal. The claim was not likely to prevail on appeal and appellate counsel's performance is neither deficient nor prejudicial for failing to raise a non-meritorious claim.

4. Ineffective assistance of counsel — cumulative error

Villalobos argues "all of the mistakes" made by his trial and appellate counsel constituted cumulative error, in violation of his Sixth Amendment right to the effective assistance of counsel. (ECF No. 1 at 9). In his initial pro se § 2254 petition Villalobos asserts:

> Because of all of the mistakes made by my trial and appeal lawyers, it should have been presumed I suffered prejudice. The rule 32 Judge found my trial lawyers were deficient. My 6th Amendment right to effective assistance of trial and appeals counsel was violated because of the amount of mistakes made by my lawyers.
>
> The rule 32 Judge found my trial lawyers were deficient but he did not find I suffered prejudice which in my own personal opinion you cannot have one without the other. Besides how can the Judge make this determination for 12 respected jurors? I did suffer prejudice because my trial lawyers failed to get a pathologist to dispute the states medical examiner's testimony and tell the jury that the fatal injury did not happen during the time Ashley was with me. . . .

[6] Several years before the incident in question Ms. Verdugo had been implicated in Villalobos' prior drug trafficking crimes. Per the ruling on a motion in limine she was precluded from mentioning during Villalobos' trial in this matter that, during the investigation of the drug trafficking crimes, she had lied to law enforcement to avoid implicating herself. The trial court held that allowing that testimony would improperly reveal to the jury that Villalobos had previously been convicted of those drug trafficking crimes. (*See* ECF No. 60-12 at 11-16).

(ECF No. 1 at 9). In his counseled Reply, Villalobos asserts: "The Cumulative Prejudicial Effect of the Combined Failures of Trial and Appellate Counsel Deprived Villalobos of His Right to the Effective Assistance of Counsel." (ECF No. 63 at 5).

In his Rule 32 action Villalobos asserted he was denied his right to the effective assistance of trial counsel at the guilt, aggravation, and sentencing phases of his criminal proceedings. (ECF No. 14-6 at 7-12; ECF No. 15; ECF No. 15-1). He further alleged he was denied his right to the effective assistance of appellate counsel. (ECF No. 14-6 at 13). Through counsel, Villalobos alleged his "Trial Counsels' and/or Appellate Counsel's Multiple Errors, When Viewed Cumulatively, Leave No Doubt that Joshua Suffered Prejudice," citing *Harris v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995), *Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978), and *Strickland*. (ECF No. 15 at 43-44). Counsel argued: "Controlling jurisprudence requires the court to consider any claims of ineffective assistance of counsel, raised under the Sixth Amendment to the United States Constitution, cumulatively. [citing *Strickland*]." (ECF No. 15 at 43-44). However, post-conviction counsel then appeared to argue that trial and/or appellate counsel's multiple errors factored into the assessment of whether the errors could be cumulated to establish deficient performance, rather than whether the cumulative errors were prejudicial:

> Here, the cumulative errors clearly drop counsel's performance far below any established standard of competence:
> 1. Counsel failed to investigate the state's forensic evidence, which was vital to proving Joshua's guilt;
> 2. Counsel failed to retain a pathologist to dispute the medical examiner's conclusions and findings, and challenge the medical examiner's testimony;
> 3. Counsel failed to consult with a pathologist to assist in the development of an appropriate and strong defense;
> 4. Appellate counsel failed to appeal the issue of the court's rulings denying lesser included offenses;
> 5. Appellate counsel failed to appeal the issue of the court's ruling denying cross examination of [Ms. Verdugo's] murder charge;
> 6. Alternatively, Trial Counsel failed to preserve vital issues for appeal.

(ECF No. 15 at 44).[7]

In his Reply in this matter, Villalobos argues, with regard to trial counsel's failure to retain an expert pathologist for the defense, "the state court considered the prejudice resulting from trial counsel's failure to retain a pathologist in a vacuum," and that "although the state court paid lip service to the correct standard [], "the court made clear that it was conditioning relief upon Villalobos showing that a defense pathologist would have 'definitively established'" his innocence. (ECF No. 63 at 38). He contends the state habeas court applied a "much higher standard" for finding prejudice than "*Strickland*'s 'reasonable likelihood' standard." (*Id.*). Villalobos argues: "the state [habeas trial] court's piecemeal prejudice analysis was contrary to the clearly established rule that the effect of counsel's failures be considered cumulatively. The Supreme Court has left no question that prejudice must be 'considered collectively, not item-by-item.' *Kyles v. Whitley*, 514 U.S. 419, 436 (1995) . . ." (ECF No. 63 at 38-75).

Villalobos fails to establish that the state habeas court's denial of his claim that his trial and appellate counsels' cumulative errors violated his Sixth Amendment rights was clearly contrary to or an unreasonable application of clearly controlling Supreme Court precedent. *Kyles* is not "clearly controlling" precedent from the Supreme Court establishing that a defendant's counsel's errors must be considered cumulatively to determine whether the defendant was prejudiced by counsel's unconstitutionally deficient

[7] Villalobos' post-conviction counsel then discussed the merits of some, but not all, specific claims of ineffective assistance of counsel during the penalty phase, i.e., whether each error constituted deficient performance and was prejudicial. (ECF No. 15 at 46-68; ECF No. 16 at 2-13). Counsel then argued that, with regard to the penalty phase, defense counsel's performance was deficient and prejudicial (*inter alia*, focusing on the failure to investigate and present mitigation, but also discussing a failure to present evidence regarding future dangerousness, noting counsel did not obtain the correct prison records and asserting counsel failed to prepare the defense expert on mental health mitigation). (ECF No. 16 at 14-49). Counsel then argued that, even if each act of deficient performance was not "sufficiently prejudicial," the cumulative impact of counsel's deficiencies rendered the death sentence "not worthy of confidence," in violation of Villalobos' right to due process of law, and again asserted that claims of ineffective assistance of counsel in violation of the Sixth Amendment "must be examined cumulatively for purposes of evaluating the Strickland prejudice prong." (ECF No. 16 at 49). Because these claims all involved the first penalty proceeding, the claims were mooted by the vacatur of the death penalty and Villalobos' subsequent resentencing.

performance, such that they were denied their Sixth Amendment right to the effective assistance of counsel. In *Kyles*, the Supreme Court determined that the cumulative effect of the suppression of multiple pieces of evidence by the prosecution must be considered when determining if evidence was "material," in the context of a claim pursuant to *Brady v. Maryland*. *See* 514 U.S. at 437-38. The *Kyles* court does not mention defense counsel's performance, or any Sixth Amendment claim, in its decision.

Nor do the other Supreme Court cases cited by Villalobos, i.e., *Rompilla* and *Wiggins*, establish the rule of federal law he asserts the state habeas court failed to follow. The Supreme Court does not use the term "cumulative" anywhere in its decision in *Rompilla v. Beard*, 545 U.S. 374, 390-91 (2005), which is also not on point. In *Rompilla*, the Supreme Court determined defense counsel's performance was unconstitutionally deficient because counsel failed to properly investigate a capital defendant's prior convictions in order to rebut the state's use of the defendant's prior conviction for rape and assault to show a propensity for violence at sentencing. 545 U.S. at 384-85. Because the state court did not find this error constituted deficient performance, the Supreme Court's evaluation of prejudice was de novo, and it concluded that this single "lapse" was prejudicial because, had counsel looked in the record of the prior conviction counsel would have discovered additional evidence of mitigation. *Id.* at 390-91 ("The accumulated entries would have destroyed the benign conception of Rompilla's upbringing and mental capacity defense counsel had formed from talking with Rompilla himself and some of his family members, and from the reports of the mental health experts. With this information, counsel would have become skeptical of the impression given by the five family members and would unquestionably have gone further to build a mitigation case."). *Rompilla* is not factually similar to the instant matter and does not establish the clear rule Villalobos asserts the state habeas court failed to follow.

The Supreme Court's decision in *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) did not establish a rule that all of counsel's errors, even those found non-prejudicial under *Strickland*, must be evaluated cumulatively to determine whether all of the errors resulted

in prejudice to the defendant. In *Wiggins*, the Supreme Court found defense counsel's failure to expand their investigation of the defendant's life for mitigation, beyond the presentence investigation report, fell short of the prevailing professional standards. *See* 539 U.S. at 523-34. On de novo review of the issue of prejudice, the Supreme Court concluded there was a reasonable probability that, had counsel adequately investigated the defendant's past history, the totality of the available mitigation evidence would have outweighed the evidence in aggravation of the defendant's sentence. *Id.* at 535, 537. The Supreme Court did not discuss cumulative errors by counsel, but instead considered the cumulative effect of one error, i.e., that counsel failed to muster all the available evidence of mitigation.

"Clearly established" federal law consists of the holdings of the United States Supreme Court which existed at the time the petitioner's state court conviction became final. *See Williams v. Taylor*, 529 U.S. 362, 412 (2000); *Harrington*, 562 U.S. at 102, *citing Renico*, 559 U.S. at 778-79; *Musladin*, 549 U.S. at 76-77. Habeas relief cannot be granted if the Supreme Court has not "broken sufficient legal ground" on the constitutional principle advanced by the petitioner, even if lower federal courts have decided the issue. *Williams*, 529 U.S. at 381. *See also Musladin*, 549 U.S. at 77.

At the time of Villalobos' conviction there was no clearly established Supreme Court law on this issue. *See* Ruth A. Moyer, *To Err Is Human; to Cumulate, Judicious: The Need for U.S. Supreme Court Guidance on Whether Federal Habeas Courts Reviewing State Convictions May Cumulatively Assess* Strickland *Errors*, 61 DRAKE L. REV. 447, 475 (2013) ("the Supreme Court has not yet rendered cumulative analysis of an attorney's errors to determine *Strickland* prejudice as clearly established federal law.");[8] Michael C. McLaughlin, *It Adds Up: Ineffective Assistance of Counsel and the Cumulative Deficiency Doctrine*, 30 GA. ST. U. L. REV. 859, 879 (Spring 2014) (calling for the Supreme Court to

[8] Some of the cases cited in Moyer appear to address cumulative error from disparate constitutional claims, in violation of the defendant's right to due process, rather than cumulative error from disparate instances of counsel's deficient performance, in violation of the Sixth Amendment right to the effective assistance of counsel.

resolve this issue). The Circuit Courts of Appeal are themselves not of one mind as to the rule put forth by Villalobos, i.e., whether a proper assessment of prejudice arising from defense counsel's errors requires the state court to assess *all* of counsel's alleged errors when determining if the outcome of the criminal proceedings is not worthy of confidence. The federal Circuit Courts of Appeal are not in agreement as to whether federal courts in § 2254 actions may cumulatively assess an attorney's errors in determining whether there is *Strickland* prejudice. The majority of the federal appellate courts—the First, Second, Third, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits[9]—have answered this question affirmatively, while the Fourth and Eighth Circuits[10] have held that federal courts in § 2254 actions may not cumulatively assess an attorney's errors in determining whether there is

[9] *Dugas v. Coplan*, 428 F.3d 317, 335 (1st Cir. 2005) ("*Strickland* clearly allows the court to consider the cumulative effect of counsel's errors in determining whether a defendant was prejudiced." (internal quotation marks omitted)); *Lindstadt v. Keane*, 239 F.3d 191, 199 (2d Cir. 2001); *McNeil v. Cuyler*, 782 F.2d 443, 451 (3d Cir. 1986) ("Upon reviewing the cumulative effect of these actions and omissions . . . we do not think there is a 'reasonable probability' that without them, the result of the trial would have been different."); *Richards v. Quarterman*, 566 F.3d 553, 571-72 (5th Cir. 2009) (basing its decision on "review of the record and consider[ation of] the cumulative effect of [counsel's] inadequate performance"); *United States v. Dado*, 759 F.3d 550, 563 (6th Cir. 2014) ("In addition, the court must consider the cumulative effect of the alleged errors, since [e]rrors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair." (internal quotations omitted)); *Sussman v. Jenkins*, 636 F.3d 329, 360-61 (7th Cir. 2011) ("Here, however, we are not faced with a single error by counsel and, therefore, must consider the cumulative impact of this error when combined with counsel's failure to secure a pretrial ruling on the evidence related to the prior false accusations of sexual abuse."); *Sanders v. Ryder*, 342 F.3d 991, 1000-01 (9th Cir. 2003) ("When we examine whether trial counsel gave effective assistance, we examine all aspects of the counsel's performance at different stages, from pretrial proceedings through trial and sentencing. Separate errors by counsel at trial and at sentencing should be analyzed together to see whether their cumulative effect deprived the defendant of his right to effective assistance." (citations omitted)); *Cargle v. Mullin*, 317 F.3d 1196, 1206-07 (10th Cir. 2003) ("Thus, such claims should be included in the cumulative-error calculus if they have been individually denied for insufficient prejudice." (citation and internal quotation marks omitted)).

[10] *Fisher v. Angelone*, 163 F.3d 835, 852, 852 n.9 (4th Cir. 1998) (stating that "[t]o the extent this Court has not specifically stated that ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively, we do so now"); *United States v. Robinson*, 301 F.3d 923, 925 n.3 (8th Cir. 2002) (recognizing "the numerosity of the alleged deficiencies does not demonstrate by itself the necessity for habeas relief," and noting the Eighth Circuit's rejection of the cumulative error doctrine).

Strickland prejudice. *See* Brian R. Means, *Cumulative Error,* FEDERAL HABEAS MANUAL § 13:4 (May 2021 Update) ("Presently, circuit courts are split over whether federal courts in § 2254 actions may cumulatively assess an attorney's errors in determining whether there is *Strickland* prejudice"). Accordingly, in cases governed by 28 U.S.C. § 2254(d), a habeas court may not look to cumulative prejudice from multiple instances of deficient performance by counsel to reject a state court's decision on the merits of a *Strickland* claim. *See id.* ("What this means is that *there is no clearly established Supreme Court precedent requiring states to consider cumulative prejudice based on multiple constitutional errors*." (emphasis in original)).[11]

Villalobos has failed to cite any holding by the United States Supreme Court that the requisite prejudice to prove a violation of the Sixth Amendment right to the effective assistance of counsel may be established by the cumulative impact of multiple deficiencies, even where *Strickland* prejudice cannot be established with respect to any particular deficiency. Although there is Ninth Circuit authority for the cumulative prejudice proposition in the context of ineffective assistance claims, *see, e.g.*, *Pizzuto v. Arave*, 385 F.3d 1247, 1260 (9th Cir. 2004); *Harris v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995); *Mak*

[11] Means also cites *Forrest v. Florida Department of Corrections*, 342 F. App'x 560, 564-65 (11th Cir. 2009) ("The Supreme Court has not directly addressed the applicability of the cumulative error doctrine in the context of an ineffective assistance of counsel claim."); *Williams v. Anderson*, 460 F.3d 789, 816 (6th Cir. 2006) ("[C]umulative error claims are not cognizable on habeas because the Supreme Court has not spoken on this issue."); *Middleton v. Roper*, 455 F.3d 838, 851 (8th Cir. 2006); *Gillard v. Mitchell*, 445 F.3d 883, 898 (6th Cir. 2006) (observing that the Supreme Court had not held that distinct constitutional claims can be cumulated to grant habeas relief, and holding that, accordingly, the state court's rejection of the claim was not contrary to or an unreasonable application of clearly established Supreme Court precedent); *Derden v. McNeel*, 978 F.2d 1453, 1456 (5th Cir. 1992) ("That the constitutionality of a state criminal trial can be compromised by a series of events none of which individually violated a defendant's constitutional rights seems a difficult theoretical proposition and is one to which the Supreme Court has not directly spoken."). *See also Littlejohn v. Trammell*, 704 F.3d 817, 869 n.29 (10th Cir. 2013) (noting a divergence between circuit courts on the issue of cumulative error, including prejudice from allegedly constitutionally deficient performance of petitioner's counsel); *Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996) ("Neither cumulative effect of trial errors nor cumulative effect of attorney errors are grounds for habeas relief.").

v. Blodgett, 970 F.2d 614, 622 (9th Cir. 1992); *Fitzharris*, 586 F.2d at 1333, none of these Ninth Circuit cases cite adequate Supreme Court authority in support of this proposition.

As stated *supra*, the "clearly established Federal law" that controls federal habeas review of state court decisions consists of holdings (as opposed to dicta) of Supreme Court decisions "as of the time of the relevant state-court decision." Since Villalobos has failed to cite and the magistrate judge has not located any Supreme Court holding on point, the Court has no basis for finding that the state habeas trial court's rejection of Villalobos' cumulative error claim was either contrary to or involved an unreasonable application of clearly established Supreme Court law for purposes of § 2254(d)(1). *See Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009) (holding "it is not 'an unreasonable application of clearly established Federal law' for a state court to decline to apply a specific legal rule that has not been squarely established by this Court"); *Wright v. Van Patten*, 552 U.S. 120, 126 (2008) ("Because our cases give no clear answer to the question presented, let alone one in [the petitioner's] favor, it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law." (internal quotation marks omitted)); *Musladin*, 549 U.S. at 77 ("Given the lack of holdings from this Court regarding" the claim, "it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.'") (alterations in original)); *Brewer v. Hall*, 378 F.3d 952, 955 (9th Cir. 2004) ("If no Supreme Court precedent creates clearly established federal law relating to the legal issue the habeas petitioner raised in state court, the state court's decision cannot be contrary to or an unreasonable application of clearly established federal law.").

Additionally, the state court's determination regarding prejudice from counsel's alleged errors was not an unreasonable application of *Strickland* under the "doubly deferential" standard applicable under § 2254, because it was unlikely that any of counsel's deficiencies were prejudicial given the fact that the jury was provided a video recording of Villalobos confessing that, within the time all of the experts agreed the blow ultimately causing the child's death occurred, he struck the child in the stomach with a closed fist. *See Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002); *Jackson v. Calderon*, 211 F.3d 1148,

1161 (9th Cir. 2000) (holding that, even when cumulated, any failures of trial counsel did not create a reasonable probability that, but for the cumulative effect of the errors, the result would have been different given the state's persuasive case and evidence of guilt).

Accordingly, Villalobos is not entitled to relief from his conviction based on his claim of cumulative error. Even considering, cumulatively, all of the errors of counsel identified by the state habeas court as constituting deficient performance but found individually harmless, the weight of the evidence against Villalobos balanced against these errors does not warrant the conclusion of a "reasonable probability" that, but for those errors, the jury would have returned a verdict of not guilty. The combined effect of any errors did not render the defense far less persuasive that it would have been absent the errors, particularly given Villalobos' confession. The only true issue in this matter was whether Villalobos' punching the victim on the evening before her death was reckless or intentional, a question answered by the extensive evidence that she had been physically abused over a period of weeks preceding her death, the evidence that Villalobos attempted to hide the victim's injuries from her mother, and that Villalobos delayed seeking medical care for the victim.

Having thoroughly reviewed the entire trial transcript in this matter, including the videos of Villalobos' initial denial of culpability and then his confession to punching the victim with a closed fist several hours prior to her demise; the testimony of the emergency room physicians, the medical experts, and the investigating detectives; and the testimony of Ms. Verdugo, her mother, and Villalobos' sister; and having also reviewed the record on appeal and the record of the state habeas proceedings, including the testimony of the experts who testified at the state habeas evidentiary hearing, Villalobos is unable to establish any reasonable probability that, absent any of counsel's alleged errors, taken individually or cumulatively, the jury would have returned a not guilty verdict.

III. Conclusion.

The state courts' application of *Strickland* to Villalobos' claims of ineffective assistance of trial and appellate counsel was not unreasonable. Accordingly,

IT IS RECOMMENDED that Mr. Villalobos' petition seeking a writ of habeas corpus be **denied.**

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the District Court's judgment.

Pursuant to Rule 72(b), Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. Thereafter, the parties have fourteen (14) days within which to file a response to the objections. Pursuant to Rule 7.2, Local Rules of Civil Procedure for the United States District Court for the District of Arizona, objections to the Report and Recommendation may not exceed seventeen (17) pages in length.

Failure to timely file objections to any factual or legal determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo appellate consideration of the issues. *See United States v. Reyna–Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). Failure to timely file objections to any factual or legal determinations of the Magistrate Judge will constitute a waiver of a party's right to appellate review of the findings of fact and conclusions of law in an order or judgment entered pursuant to the recommendation of the Magistrate Judge.

Pursuant to 28 U.S.C. foll. § 2254, R. 11, the District Court must "issue or deny a certificate of appealability when it enters a final order adverse to the applicant." The undersigned recommends that, should the Report and Recommendation be adopted and, should Villalobos seek a certificate of appealability, a certificate of appealability should be denied because he has not made a substantial showing of the denial of a constitutional right.

Dated this 19th day of May, 2021.

Camille D. Bibles
United States Magistrate Judge