Exhibit 1

NOT FOR PUBLICATION

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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 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.

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U.S. COURT OF APPEALS

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.