NO. 07- 071483 MAY 27 2008

In the Supreme Court of the United States

DEBORAH L. PATRICK, *Warden, Petitioner,*

v.

SHIRLEY REE SMITH, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy State Solicitor General
*KRISTOFER JORSTAD
Deputy Attorney General
**Counsel of Record*
300 South Spring Street, Suite 1702
Los Angeles, California 90013
Telephone: (213) 897-2275
Fax: (213) 897-6496
Counsel for Petitioner

QUESTION PRESENTED

In a state trial of respondent for causing the death of an infant, prosecution and defense experts disagreed on whether there was sufficient evidence that the baby died from shaking. The jury convicted respondent. In federal habeas corpus proceedings, the Ninth Circuit Court of Appeals held that there was insufficient evidence to support the state criminal conviction, and that the state appellate court had unreasonably applied *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979), in upholding it.

This Court vacated the Ninth Circuit decision and remanded the case for further consideration in light of *Carey* v. *Musladin*, 127 S. Ct. 649 (2006). On remand, the Ninth Circuit reinstated its earlier opinion, concluding that its analysis was "unaffected by *Musladin*."

The question presented is:

Did the Ninth Circuit on remand exceed its authority under the deferential standard for habeas corpus review in 28 U.S.C. § 2254(d) by reinstating its opinion granting relief on an insufficient-evidence claim based on accepting the testimony of defense experts on cause of death over the contrary opinions of prosecution experts?

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF APPENDICES (continued)

TABLE OF APPENDICES (continued)

PETITION FOR WRIT OF CERTIORARI

Deborah L. Patrick, Warden, California Department of Corrections and Rehabilitation, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit reinstated its original decision granting habeas corpus relief to respondent following her criminal conviction for the "shaken baby" death of seven-week-old Etzel Glass, after this Court granted the Warden's previous petition for certiorari, vacated that decision, and remanded "for further consideration in light of *Carey* v. *Musladin*, 127 S. Ct. 649 (2006)." *Patrick* v. *Smith*, 127 S. Ct. 2126, 167 L. Ed. 2d 861 (2007).

OPINIONS AND JUDGMENTS BELOW

The post-remand order of the Ninth Circuit reinstating its original judgment and opinion is reported at 508 F.3d 1256 (9th Cir. 2007). The Ninth Circuit's order denying the petition for panel and en banc rehearing is reported at 519 F.3d 900 (9th Cir. 2008).

The original opinion of the Ninth Circuit reversing the judgment of the district court and remanding with instructions to grant respondent's petition for writ of habeas corpus is reported at 437 F.3d 884 (9th Cir. 2006). The order denying the Warden's petition for rehearing and suggestion for rehearing en banc is reported at 453 F.3d 1203 (9th Cir. 2006). The judgment of the district court denying habeas corpus relief is unreported. The opinion of the California Court of Appeal affirming the judgment, and the California Supreme Court's order denying discretionary review, are unpublished. Each of these orders and opinions is reproduced in the Appendix to this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code provides, in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

JURISDICTION

The post-remand opinion of the Ninth Circuit was filed on December 4, 2007. Pet. App. H. The denial of the Warden's petition for panel and en banc rehearing was filed on February 27, 2008. Pet. App. I. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. State Criminal Proceedings

Respondent was charged with inflicting corporal injury that caused the death of her infant grandson, Etzel. (See Cal. Penal Code § 273ab). At the trial the prosecution produced evidence that on November 29, 1996, respondent, her daughter Tomeka and seven-week-old Etzel were staying at the home of respondent's sister. When his mother put him to sleep at about 11:30 p.m., Etzel appeared healthy. During the night, respondent brought Etzel to his mother, who was asleep in another room. He was quiet and limp, and there was orange-colored mucous coming from his nose. At the direction of 911 operators,

Etzel's mother attempted CPR. But when paramedics arrived at 3:36 a.m., Etzel was not breathing and had no pulse. The baby was pronounced dead at the hospital.

Respondent seemed apprehensive to the firefighter who first arrived at the scene. At first, respondent told her daughter that Etzel had fallen off the sofa earlier in the night and that she had picked him up and rocked him to sleep. One week later, however, respondent told a social worker that, when she woke up after 3 a.m. and checked Etzel, he did not respond to her touch. When she picked him up, she said, his head "flopped back." Respondent explained to the social worker that, at that point, she gave Etzel "a little shake, a jostle" to awaken him. Respondent demonstrated the shaking as a smooth rather than jerky motion. But, respondent said, Etzel still failed to respond. When the social worker asked what happened next, respondent said, "Oh, my God. Did I do it? Did I do it? Oh, my God." At that, her daughter turned to respondent and said, "If it wasn't for you, this wouldn't have happened." Respondent did not reply.

In a later interview with police, respondent stated that, when she woke up after 3 a.m., she noticed that Etzel's diaper needed changing. She said she picked Etzel up and saw that he had vomit around his mouth and that his head was "flopped back." Etzel was not breathing and did not move. Respondent told the police that she "shook" Etzel, but then corrected herself to say that she had "twisted" him back and forth to try to get a response. In her interview with the police, respondent denied telling the social worker that she had "shaken" Etzel.

Three Board-certified prosecution experts[1/] rendered

---

1. In California, a physician is Board-certified after practicing a certain number of years in the field of specialty which the given Board regulates, passing written tests administered by the experts of

opinions, based on the autopsy findings of recent trauma, that Etzel had died from violent shaking characteristic of Shaken Baby Syndrome.[2] They found physical evidence of recent trauma to the brain, including bleeding at the top of the brain caused by tearing of blood vessels in that area. In the absence of any external injury to the head that otherwise could account for such trauma, the prosecution experts concluded that a rotational or whiplash-like shaking caused the tearing and bleeding.

The prosecution experts also testified that the shaking was so violent that Etzel's death occurred very quickly, closing down his circulation so that some other potential effects of the trauma, such as swelling in the brain tissue, did not have time to develop. Their diagnosis of Shaken Baby Syndrome was based on the injuries identified during the autopsy.

Dr. Stephanie Erlich, who at the time of the autopsy was Board-certified in anatomic pathology, clinical pathology and neuropathology, testified that death by the shaking characteristic of Shaken Baby Syndrome can occur in three main ways. First, the shaking can cause a massive subdural hemorrhage so that the bleeding will eventually build up enough pressure to damage the brain stem. Second, the shaking can cause massive swelling of the brain, which can result in compression of the brain stem. And third, the shaking can cause direct trauma to the vital centers of the brain which control the functioning of the heart and breathing, leading to a very rapid death. In Dr. Erlich's opinion, Etzel's death was caused by the third

---

the Board, and successfully sitting for an oral examination by a group of Board-certified specialists.

2. Shaken Baby Syndrome is also known as Shaken Infant Syndrome or SIS, and is the term used in this petition to avoid confusion with Sudden Infant Death Syndrome or SIDS.

process: he was shaken so violently that the vital centers of his brain were directly damaged, causing his heart and breathing to shut down.

Dr. Erlich found several independent signs of recent trauma during the autopsy on Etzel's body: fresh blood, measuring one or two tablespoons, on the top of the brain; a fresh blood clot between the hemispheres of the brain; recent hemorrhaging around the optic nerves; a small quantity of fresh subarachnoid blood; and a small bruise and recent abrasion at the lower-back part of the infant's head. These indicators, together with the absence of evidence of hemorrhaging or swelling and the absence of evidence of any external injury that might have caused death, supported Dr. Erlich's conclusion that the infant was violently shaken, which resulted in a very rapid death.

Dr. Erlich also testified that although retinal bleeding is found in seventy-five to eighty percent of Shaken Baby Syndrome cases, its absence in this case did not rule out her diagnosis. When asked about other possible causes of death, Dr. Erlich testified that Etzel's injuries could not have been caused by improperly administered CPR, or a fall from a couch to a carpeted floor, or smothering.

Dr. Eugene Carpenter, the supervisor who participated in the autopsy and was Board-certified in forensic, anatomic and clinical pathology, also testified that death by violent shaking can be caused in three ways: massive bleeding that can crush the brain stem, massive swelling of the brain, or a sudden violent shaking that destroys the vital centers in the brain and results in rapid death. Dr. Carpenter also opined that Etzel's death was caused by the third process, and he also identified the observable physical evidence supporting his opinion. He found that the bleeding at the top of the brain was caused by tearing of the blood vessels in that area. There was no evidence of any external trauma that could have caused this tearing.

In the absence of such evidence, and in conjunction with the other evidence of internal injury to the brain, Dr. Carpenter found that the bleeding on top of the infant's brain was caused by violent shaking, resembling "a whiplash action of the head on top of the body with the back of the head slamming into the back and the front of the chin slamming into the chest repeatedly so that the vessels on top of the brain tore."

In addition, the subdural blood, the subarachnoid blood, and the blood around the optic nerves together showed "violent trauma to the head sufficient to cause the death of the infant." He added that the bruise and abrasion at the back of Etzel's head had "very probably" occurred during the shaking, indicating that the head collided with a hard, rough surface. Based on these observable findings, Dr. Carpenter testified that the shaking that caused Etzel's death was "so violent that it destroy[ed] the vital centers in the brain" and led to "a quick death."

Dr. Carpenter also considered other possible causes of death, and found that none of them accounted for the trauma seen in the autopsy. He ruled out death from Sudden Infant Death Syndrome because of the presence of internal trauma, the abrasion of the back of Etzel's head, and the bruise underneath the abrasion. If a child's death is due to Sudden Infant Death Syndrome, there are no such signs of trauma. Dr. Carpenter also testified that, although retinal hemorrhages are often seen in the bodies of victims of Shaken Baby Syndrome, and none were found in the autopsy of Etzel, Shaken Baby Syndrome was not thereby ruled out.

Dr. David Chadwick, Board-certified in pediatrics and the author of scholarly articles on distinguishing childhood death by falls from death by abusive injury, also opined that Etzel had died from injuries characteristic of Shaken Baby Syndrome. He agreed that the evidence observable

on autopsy showed that the shaking caused direct trauma to the vital centers of the brain, causing rapid death. He also testified that "old" trauma found during the autopsy had not been the cause of Etzel's death because there was no sign of the necessary specific pathology to link it to the infant's death. In particular, there was no evidence that an old injury had "re-bled."

In her defense case, respondent presented two doctors to challenge the opinions of the prosecution's three experts. Dr. William Goldie, who was not Board-certified, opined that the cause of Etzel's death was Sudden Infant Death Syndrome. He testified that death characterized by Shaken Baby Syndrome can be due to only two possible causes, either massive swelling of the brain or massive bleeding to the brain. Since neither was detected in Etzel, Dr. Goldie ruled out Shaken Baby Syndrome. In Dr. Goldie's opinion, there was no evidence at all that Etzel's death was due to trauma.

Dr. Richard Siegler, who was Board-certified only in anatomic pathology, did not agree with Dr. Goldie that the death was due to Sudden Infant Death Syndrome. Instead, he agreed with the prosecution experts that the death indeed was caused by traumatic brain injury. But he opined that the death resulted from an injury that had occurred prior to the night of Etzel's death that had "re-bled," despite the absence of hemorrhaging or swelling during the autopsy. Dr. Siegler ruled out Shaken Baby Syndrome because of the absence of retinal hemorrhaging. On cross-examination, however, Dr. Siegler acknowledged that retinal hemorrhaging was not found in all shaken-baby cases.

Contrary to the prosecution experts, Dr. Siegler opined that death by Shaken Baby Syndrome can be caused in only two ways, either by massive bleeding or massive swelling. He disagreed with the prosecution experts'

opinion that the death had been caused by direct, recent damage to the brain. In his opinion, the prosecution experts' testimony regarding the cause of death was "a fantasy." Although he acknowledged on cross-examination that the prosecution experts' opinion as to cause of death was "possible," he testified that there was "no way to confirm it or deny it."

Respondent was found guilty as charged. The court sentenced her to prison for a term of 15 years to life.

On direct review, the California Court of Appeal rejected respondent's claim that the evidence of cause of death was insufficient as a matter of constitutional law under *People* v. *Bolin*, 18 Cal. 4th 297, 331, 75 Cal. Rptr. 2d 412 (1998) (applying the *Jackson* standard). In response to this claim, the state court presented a lengthy and meticulously detailed summary of the trial evidence, with special emphasis on the testimony of the expert witnesses for both sides. Pet. App. A at 6a-13a. The court concluded that the

> expert opinion evidence we have summarized was conflicting. It was for the jury to resolve the conflicts. The credited evidence was substantial and sufficient to support the jury's conclusion that Etzel died from shaken baby syndrome. The conviction is supported by substantial evidence.

Pet. App. a 13a. The California Supreme Court denied discretionary review. Pet. App. B.

2. Federal Habeas Corpus Proceedings

Respondent filed a petition for writ of habeas corpus in the United States District Court for the Central District of California. She again claimed that her conviction violated due process because the evidence of the cause of death was constitutionally insufficient. The magistrate judge also presented a careful summary of the evidence in what he termed "this tragic case." Applying the deferential review

standard of 28 U.S.C. § 2254(d)(1), the magistrate judge recommended that the claim be denied with prejudice because the California Court of Appeal's rejection of respondent's claim had been neither contrary to, nor an unreasonable application of, this Court's precedents of *Jackson*, 443 U.S. at 324, and *Wright* v. *West*, 505 U.S. 277, 296-97 (1995).

The magistrate judge determined that the California appellate court reasonably found sufficient evidence based on several factors: respondent was alone with the child at the time of his death; respondent admitted that she shook Etzel when he appeared to be unconscious; three medical experts testified that Etzel died of Shaken Baby Syndrome; and, at least once, respondent made statements that could be interpreted as admissions of guilt.

Although the magistrate judge expressed the belief that this "was not the typical shaken baby case," he concluded that

> it is not for this Court in a habeas proceeding to re-examine the medical evidence and determine which evidence the jury should have accepted and which it should have rejected. . . . The jury was presented with the medical evidence–both the evidence from the prosecution's three doctors that Etzel died from being shaken and the evidence from Petitioner's two doctors that the evidence did not establish that Etzel died from being shaken. The jury, apparently, accepted the testimony of the prosecution's experts and rejected the testimony of Petitioner's. This Court is not at liberty to substitute its judgment in place of the jury's based on Petitioner's argument that her version of what happened should have been accepted by the jury.

Pet. App. 38a-39a. The district court adopted the magistrate judge's recommendation. Pet. App. D and E.

In a published decision, a Ninth Circuit panel reversed and ordered the District Court to grant the writ. The panel held that the California Court of Appeal had unreasonably applied the *Jackson* test. The panel asserted that the prosecution witnesses had not identified Etzel's death as occurring in the "usual manner" of Shaken Baby Syndrome deaths. The panel expressed the view that visible physical evidence in the form of torn brain stem tissue was necessary to a finding of Shaken Baby Syndrome and that, because no such physical evidence was found in the autopsy, "there simply was no evidence to permit an expert conclusion one way or the other" regarding cause of death. The panel disregarded the testimony of the three prosecution experts that evidence of brain-stem tearing was not and could not be seen. Asserting that there was "no other evidence supporting death by violent shaking," the panel concluded that "no rational trier of fact" could have found that respondent was responsible for Etzel's death. Pet. App. F.; *Smith* v. *Mitchell*, 437 F. 3d at 888-90.

The Ninth Circuit denied the Warden's petition for panel and en banc re-hearing, but five judges dissented. Their dissenting opinion, authored by Judge Bea, observed that

> the prosecution's experts based their opinions on the evidence of recent trauma to Etzel's brain, and explained how a rapid death would result in brain-stem tearing that could not be seen. When the defense's experts disputed the validity of this hypothesis, it was for the jury to resolve the conflicting opinions.

Pet. App. G; *Smith* v. *Mitchell*, 453 F.3d at 1203 (Bea, J., dissenting from denial of rehearing en banc). In a careful review of the record, the dissenters concluded that the prosecution experts had based their finding that violent shaking killed Etzel on the presence of evidence of recent

trauma *other* than brain stem tearing. In other words, the "physicians called by the prosecution reached their conclusion *despite* the lack of visible shearing, not because of it, and explained why." Pet. App. G; *Smith* v. *Mitchell*, 453 F.3d at 1206. The dissent concluded that the panel's "rejection of qualified expert opinions distorts *Jackson* and contravenes AEDPA's required deference. . . ." Pet. App. G; *Smith* v. *Mitchell*, 453 F.3d at 1208.

In her first petition for writ of certiorari, the Warden asserted that the Ninth Circuit re-weighed the evidence and substituted its own resolution of the conflict between the prosecution and defense expert witnesses for that of the jury. In so doing, the petition argued, the Ninth Circuit overlooked settled rules of constitutional sufficiency review of conflicting expert opinions. More basically, however, the Warden also contended that the Ninth Circuit failed to accord the state court adjudication of the claim, especially the state court conclusion that this was a conlict-of-the-evidence case rather than a "no-evidence" case, the deference required by 28 U.S.C. § 2254(d)(1).

This Court granted the petition, vacated the judgment of the Ninth Circuit, and remanded the case for reconsideration in light of *Musladin*. On remand, the Ninth Circuit determined that its original decision was "unaffected by *Musladin*," and reinstated that decision unchanged. The Ninth Circuit panel held that the *Jackson*, test, unlike *Musladin*, required application of a broad, general principle, and that

> there are an infinite number of potential factual scenarios in which the evidence may be insufficient to meet constitutional standards. Each scenario theoretically could be construed artfully to constitute a class of one. If there is to be any federal habeas review of constitutional sufficiency of the evidence as required by *Jackson*, however, section 2254(d)(1)

> cannot be interpreted to require a Supreme Court decision to be factually identical to the case in issue before habeas can be granted on the ground of unreasonable application of Supreme Court precedent. The Supreme Court does not interpret AEDPA in such a constrained manner.

Pet. App. H.; *Smith* v. *Patrick*, 508 F.3d at 1259.

Based on this understanding of the meaning of the *Musladin* remand order and the operation of § 2254(d)(1), the Ninth Circuit again rejected the state appellate court determination that the issue of the cause of death in this case presented only a conflict of expert opinion. In place of that state court finding, the Ninth Circuit adhered to its original conclusion that in this case there was *no* evidence that violent shaking was the cause of death, not merely that there was a conflict of expert opinion on whether such shaking caused the death. *Id.* at 1258; *see also* Pet. App. I; *Smith* v. *Patrick*, 519 F.3d at 900.

REASONS FOR GRANTING THE PETITION

I.

THE NINTH CIRCUIT FAILED TO APPLY *MUSLADIN* AS REQUIRED BY THIS COURT'S REMAND ORDER

This Court's remand order required the Ninth Circuit to reconsider its decision to grant habeas relief in light of *Musladin*. The Ninth Circuit responded by declaring that this case was unaffected by *Musladin*. *Smith* v. *Patrick*, 508 F.3d 1256 (9th Cir. 2007). In so doing, the Ninth Circuit erred. *Musladin* is ultimately a case about deference to state court adjudications involving a rule of general application, and this Court's Instruction to apply it compelled additional deference to the state court adjudication.

In *Musladin*, this Court clarified and reaffirmed the limited role and authority of federal courts under § 2254(d), reversing the Ninth Circuit's grant of habeas relief in that case because "[n]o holding of this Court" compelled the California Court of Appeal to grant relief on the state prisoner's claim of spectator misconduct. *Id.* at 654. In *Schriro* v. *Landrigan*, 127 S. Ct. 1933 (2007), and *Wright* v. *Van Patten*, 128 S. Ct. 743 (2008) (per curiam), this Court cast further light on the "clearly established law" principle set forth in § 2254(d) as articulated in *Musladin*, and applied the principle to ineffective-counsel claims. In each of these cases, this Court reversed the circuit court's grant of habeas relief because none of its decisions had addressed the specific type of attorney conduct that the prisoner had challenged in state court.

As *Van Patten* made clear, a federal habeas court cannot avoid *Musladin* by declaring, as the Ninth Circuit did here, that *Jackson's* general doctrine of constitutional sufficiency review is "clearly established" law, and then use such a sweeping general principle to conduct what is in effect a de novo review. More precisely, *Musladin* teaches that the Ninth Circuit's use of *Jackson* to construct or, in effect, to apply a special rule for resolving conflicts in expert testimony is impermissible. This Court has never "squarely addressed," let alone held, that a jury's resolution of a conflict between experts can be second-guessed and overturned by an appellate court, to say nothing of a federal habeas court applying § 2254(d). Since no opinion of this Court gives a "clear answer" to the question, "it cannot be said that the state court unreasonably applied clearly established Federal law." *Van Patten*, 128 S. Ct. at 747.

The *Jackson* sufficiency principle is a general one, as is the ineffective-counsel rule of *Strickland* v. *Washington*, 466 U.S. 668 (1984) applied in *Van Patten* and *Landrigan*.

But general rules require federal habeas courts to accord *more* deference to state court adjudications, not less. This principle was enunciated in *Yarborough* v. *Alvarado*, 541 U.S. 652 (2004), when this court explained that

> the range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.

Id. at 664. In other words, broad general principles such as those formulated in *Strickland* or *Jackson* permit a wider range of outcomes in state court applications of those rules, and make it more, not less, likely that the state court adjudication should stand. The leeway this Court defined in *Alvarado* protects state court resolutions of federal constitutional claims. It does not authorize more expansive federal habeas review of those adjudications.

The state appellate court found that the issue of cause of death in this case was litigated on the basis of a direct conflict between expert witnesses for each side. That was an objectively reasonable interpretation of the record. By finding that there was *no* evidence of cause of death, the Ninth Circuit failed to accord the state adjudication the deference it was due.

The Ninth Circuit's reinstated decision thus failed to adhere to this Court's remand order and transgressed the

strict limitations on habeas corpus relief imposed by § 2254(d), especially in light of *Musladin*, *Landrigan*, and *Van Patten*. Like the Seventh Circuit in *Van Patten*, the Ninth Circuit misapprehended the import of the remand order to reconsider the grant of habeas relief, and exceeded its limited authority under § 2254(d). Thus, as in *Van Patten*, this Court's intercession is required.

II.

THE NINTH CIRCUIT ERRED TWICE BY FAILING TO DEFER TO THE JURY AND THE STATE COURT DETERMINATION

Here, the Ninth Circuit violated a basic rule of review of a jury's resolution of disputes between witnesses, established long before AEDPA in *Jackson* v. *Virginia* and in other state and federal precedents. And it disregarded once again AEDPA's separate and additional limitations on federal review of state convictions.

This case involved a straightforward dispute among experts on the key issue of cause of death. The defense experts insisted that a diagnosis of Shaken Baby Syndrome could not be made in the absence of evidence, visible on autopsy, of brain stem shearing. The prosecution experts disagreed, and explained the basis for their opinion. The jury believed the prosecution experts. But in its application of *Jackson*, 443 U.S. at 324, the Ninth Circuit overrode the jury's decision crediting the testimony of those experts. Indeed, the Ninth Circuit held that it was not only erroneous but "objectively unreasonable" for the state appellate court to find that a rational finder of fact might have *disbelieved* the opinion of the defense experts on the critical issue of cause of death. In other words—even in a posture in which the federal court's review should be *doubly deferential*, see p. 19, *post*—the Ninth Circuit rejected the jury's finding and the state

appellate court's adjudication as unreasonable.

As Judge Bea pointed out in his dissent, these two basic analytical errors have a compound effect. As for the first error, the dissent correctly observed:

> Our court simply accepts the defense theory and rejects the prosecution's evidence. The jury was perfectly able to do just that. But when our court does it, it steps over the line dividing the province of the jury from that of the court.

Pet. App. G; *Smith* v. *Mitchell*, 453 F.3d at 1203 (Bea, J., dissenting from denial of rehearing en banc).

It is the second error that gives this case important added significance. As the dissent also explained:

> This decision would be bad enough were we reviewing a district court's judgment. But here, it is doubly bad for we are reviewing a state court decision under the Antiterrorism and Effective Death Penalty Act ("AEDPA") [footnote omitted] which severely restricts the scope of our review, and mandates that "we apply the standards of *Jackson* with an additional layer of deference." *Juan H.* v. *Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005), *cert. den.*, 126 S. Ct. 1142, 163 L. Ed. 2d 1000 (2006).

Id. Certiorari should be granted to correct these two fundamental errors in order to prevent this "doubly bad" decision from being used as precedent, and to clarify the limits of federal habeas review of rules of general application.

1. The Ninth Circuit failed to accord the deference due to the jury's determination.

When a defendant claims that the evidence produced at trial is constitutionally insufficient to sustain the conviction, the familiar standard of review is whether any rational trier of fact could have found that the essential elements of

the crime were proved beyond a reasonable doubt. *Jackson*, 443 U.S. at 319. The leading principles of the *Jackson* test were summarized in *Wright* v. *West*:

> In *Jackson*, we emphasized repeatedly the deference owed to the trier of fact, and, correspondingly, the sharply limited nature of constitutional sufficiency review. We said that "*all of the evidence* is to be considered in the light most favorable to the prosecution," 443 U.S. at 319 (emphasis in original); that the prosecution need not affirmatively "rule out every hypothesis except that of guilt," *id.*, at 326; and that a reviewing court "faced with a record of historical facts that supports conflicting inferences must presume–even if it does not affirmatively appear in the record–that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution[.]"

West, 505 U.S. at 318-19 (plurality op.).

Even if this case had been decided on *de novo* review before the enactment of AEDPA, the Ninth Circuit's decision would have been erroneous. The Ninth Circuit violated the most basic aspect of *Jackson* review, embodied in the familiar substantial evidence test when it re-weighed the conflicting expert testimony and substituted its view that the defense experts were more persuasive than the prosecution experts for the jury's contrary view. *See Glasser* v. *United States*, 315 U.S. 60, 79 (1942); *People* v. *Johnson*, 26 Cal. 3d 557, 576-77, 162 Cal. Rptr. 431 (1980).

The substantial evidence rule, and the deference that it mandates, applies to judicial review of a jury's resolution of conflicts in expert witness opinion testimony. In *Moore* v. *Duckworth*, 443 U.S. 713 (1979), for example, this Court considered a challenge to the sufficiency of evidence to prove sanity in a case in which the prosecution relied upon

lay witnesses alone, and did not produce any expert testimony to rebut the defendant's expert opinion testimony. The Court observed that Indiana law provided that sanity may be established by either expert or lay testimony, and found that

> [t]he state appellate court, in an opinion thoroughly discussing the record evidence and the petitioner's sufficiency challenge, concluded that the lay evidence in this case could have been credited by the jury, and it held that the State's evidence was fully sufficient to support a jury finding beyond a reasonable doubt that the petitioner was sane at the time of the killing.

Id. at 714. In other words, the state jury's decision to completely reject the only expert opinion testimony in a case, and to choose instead to credit lay evidence, is entitled to deference under *Jackson*. So, too, in this case, the jury's choice to believe the expert testimony of the prosecution experts on cause of death is entitled to deference under *Jackson*.

2. The Ninth Circuit failed to accord the deference due to the state court adjudication.

Under *Jackson* itself, federal review of a state conviction for sufficiency of evidence is deferential under the "any rational factfinder" standard. Under AEDPA, a federal habeas court's review of a state court's adjudication of a sufficiency claim must also be deferential, and the court may grant relief under 28 U.S.C. § 2254(d)(1) only if the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The existence of this second layer of protection for state court adjudications

means that a federal habeas court's review of a state court's adjudication of a *Jackson* sufficiency claim under AEDPA demands additional insulation, such as that which this Court has already found applicable in the review of ineffective assistance claims. Thus, in *Yarborough* v. *Gentry*, 540 U.S. 1, 4 (2003), this Court held that judicial review of a defense attorney's performance is "highly deferential—and *doubly deferential* when it is conducted through the lens of federal habeas." The same degree of double deference necessarily applies in the review of a state court's resolution of sufficiency claims.

Although apparently acknowledging the additional layer of deference imposed by AEDPA, the panel decision in this case fails to afford the appropriate level of deference. Instead, the decision appears to repeat the error this Court identified in *Rice* v. *Collins*, 546 U.S. 333 (2006). There, although this Court found that the Ninth Circuit had "recited the proper standard of review," the Ninth Circuit panel ignored that standard and then substituted its own evaluation of witness credibility for the conclusions of the state fact-finder. *Id.* at 337. In correcting this error, this Court explained that "[the] panel majority's attempt to use a set of debatable inferences to set aside the conclusion reached by the state court does not satisfy AEDPA's requirements for granting a writ of habeas corpus." *Id.* at 342. In so doing, this Court emphasized, the court of appeals overstepped "settled rules that limit its role and authority" in AEDPA cases. *Id.* at 335.

Here, the California Court of Appeal's treatment of conflicting expert-opinion testimony under the general *Jackson* standard fell well within the matrix of the sufficiency-of-evidence jurisprudence of this Court, see pages 16-18, *ante*, and of other federal and state courts. *See Yarborough* v. *Alvarado*, 541 U.S. at 663-65. Simply put, the strong consensus among both federal and state

courts is that habeas courts are not empowered to make their own assessment of which experts are more persuasive or credible, or which expert hypothesis seems more apt or accurate.

The Second Circuit, reviewing a case in which prosecution and defense experts gave directly conflicting testimony concerning time of death, emphasized that the "jury was free to credit the expert testimony of the prosecution's witness" and to discount the defense evidence. *Knapp* v. *Leonardo*, 46 F.3d 170, 178 (2d Cir. 1994). Similarly, the Fourth Circuit recognizes that a court applying *Jackson* does not have the option of re-weighing the evidence to determine which expert was correct, but must view the evidence in the light most favorable to the judgment. *United States* v. *Boynton*, 63 F.3d 337, 346 (4th Cir. 1995) (where prosecution and defense experts conflicted regarding agricultural practice, evidence was viewed in light most favorable to conviction).

In *Aucoin* v. *Jones*, 759 F.2d 449, 450 (5th Cir. 1985), the Fifth Circuit demonstrated its correct and reasonable understanding that, under *Jackson*, a reviewing court on habeas cannot second-guess the properly admitted conclusions of an expert witness believed by the jury. *Aucoin* dismissed the petitioner's claim as follows:

> [P]etitioner contends that because of evidence that she was on drugs at the time that she murdered her young daughter, the evidence could not have been sufficient to permit a proper finding that she was capable of forming the requisite specific intent to kill. A psychiatric expert testified, however, that in his professional opinion she was capable of forming that intent despite her drugged condition. *There it ends.*

Id. at 450 (emphasis added).

Another case from the Fifth Circuit engaged in a similar

analysis. In *Weeks* v. *Scott*, 55 F.3d 1059 (5th Cir. 1995), a defendant contended that insufficient evidence supported his conviction for attempted murder, because a "mountain" of evidence contradicted the opinions of multiple prosecution experts that the H.I.V. virus could be spread by saliva. *Weeks* noted that "differences in opinion go to the weight of the evidence, not to its admissibility, and such disputes are within the province of the jury to resolve." *Id.* at 1063. Thus, applying *Jackson*, *Weeks* concluded that although the defense "made a mighty effort to discredit the State's experts, the jury still chose to believe their testimony. We are not in a position to disturb its conclusions." *Id.* at 1064.

The recognition is the same in Sixth Circuit. *Brewer* v. *Overberg*, 624 F.2d 51, 53 (6th Cir. 1980) (sufficient evidence for murder conviction where conflicting expert testimony regarding accidental firing of gun was viewed in light most favorable to the state in conjunction with other evidence); see also *Harding* v. *Bock*, 107 Fed. Appx. 471, 477 (6th Cir. 2004) (due process not violated by jury crediting testimony of prosecution expert witnesses regarding cause of death where all experts had the opportunity to present medical data supporting their conclusions). The Seventh Circuit also abides by this settled principle of review. *United States* v. *Bramlet*, 820 F.2d 821, 854 (7th Cir. 1987) (given directly conflicting expert testimony on sanity, the jury could have properly credited the government's experts while discounting defendant's experts). The Eighth Circuit adhered to the same principle in another case where competing experts disagreed as to time of death. *Miller* v. *Leapley*, 34 F.3d 582, 586 (8th Cir. 1994).

The Tenth Circuit agrees. *United States* v. *Oliver*, 278 F.3d 1035, 1043 (10th Cir. 2001) (conflicting expert testimony is "solely within the provice of the jury" to weigh and resolve). The Eleventh Circuit formulates the

principle governing the review of a jury's resolution of an expert conflict as a credibility determination: "Where there is conflicting testimony by expert witnesses, as here, discounting the testimony of one expert constitutes a credibility determination, a finding of fact." *Bottoson* v. *Moore*, 234 F.3d 526, 534 (11th Cir. 2000). The District of Columbia Circuit has similarly recognized that the resolution of conflicting expert opinion is a question of fact for the jury. *Strickland* v. *United States*, 316 F.2d 656, 656 (D.C. Cir. 1963). Some thirty years ago, the Ninth Circuit, too, held that it was up to the jury to resolve the conflict when defense and prosecution experts disagreed. *United States* v. *Segna*, 555 F.2d 226, 230 (9th Cir. 1977), *citing Glasser* v. *United States*, 315 U.S. at 80.

Settled California law holds that the determination of whether to credit expert testimony, and how, and to what degree, is within the exclusive province of the jury. *See People* v. *Ledesma*, 39 Cal. 4th 641, 47 Cal. Rptr. 3d 326 (2006); *People* v. *Marshall*, 15 Cal. 4th 1, 31-32, 61 Cal. Rptr. 2d 84 (1997); *People* v. *Wolff*, 61 Cal. 2d 795, 40 Cal. Rptr. 271 (1964); *People* v. *Poe*, 74 Cal. App.4th 826, 831, 88 Cal. Rptr. 2d 437 (1999). Indeed, this approach has been codified in Section 1127b of the California Penal Code, which directs trial courts to issue the following instruction to juries in criminal trials:

> Duly qualified experts may give their opinions on questions in controversy at a trial. To assist the jury in deciding such questions, the jury may consider the opinion with the reasons stated therefor, if any, by the expert who gives the opinion. The jury is not bound to accept the opinion of any expert as conclusive, but should give to it the weight to which they shall find it to be entitled. The jury may, however, disregard any such opinion if it shall be found by them to be

unreasonable.

Other state courts approach *Jackson* review of expert witness conflicts in the same way. For example, in *State* v. *Trask*, 234 Mont. 380, 764 P.2d 1264, 1267 (1988), the Montana Supreme Court applied the principle that "the interpretation of an expert witness's opinion and the amount of weight given to that opinion compared to the other evidence presented is within the province of the trier of fact." *Id.* In accordance with *Jackson*, *Trask* looked to the other, non-expert opinion evidence credited by the jury and held that sufficient evidence of the "purposefully or knowingly" element of the crime supported the verdict. *Id.*; see also *Mickens* v. *State*, 277 Ga. 627, 629, 593 S.E.2d 350, 352-53 (2004) (conflicting expert testimony on cause of fire to be resolved by jury); *State* v. *Sosa*, 921 S.2d 94, 100 (La. 2006) (same); *Riner* v. *Commonwealth*, 286 Va. 296, 329-30, 601 S.E.2d 555, 574 (2004) (same).

These cases demonstrate that California's treatment of sufficiency review of expert testimony can hardly be condemned as unreasonable under § 2254(d). On the contrary, these cases demonstrate that it is the Ninth Circuit's approach to reviewing conflicting expert-opinion testimony that is anomalous. And, as reflected in the district court's denial of relief, the state appellate court's opinion was reasonable in this case too. The prosecution experts testified that Etzel's death was due to the violent shaking characteristic of Shaken Baby Syndrome. Their opinion was carefully buttressed by the physical evidence they observed on autopsy, and they squarely controverted the opinions of the defense experts. When considered in combination with the additional non-expert evidence that respondent was alone with Etzel when he died, that she admitted that she shook him when he was unconscious, and that she provided inconsistent and incriminating accounts of her conduct on the night of the death, the evidence

rationally supported the verdict, and it was not "objectively unreasonable" for the state court to conclude so under *Jackson's* deferential standard of review. Even assuming that this was a close case, the AEDPA requires that the state court's resolution of the sufficiency claim be regarded as conclusive unless it is "objectively unreasonable." That cannot be said here.

As this Court has repeatedly emphasized, the purpose of AEDPA's habeas corpus reforms was to place "more, rather than fewer, limits on the power of federal court" to grant habeas corpus relief. *Miller-el* v. *Cockrell*, 537 U.S. 322, 337 (2003); *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003); *Duncan* v. *Walker*, 533 U.S. 167, 178 (2001). In enacting AEDPA, Congress reformed review of state court adjudications to make it even more deferential than before. The Ninth Circuit's opinion fails to demonstrate a deferential AEDPA review of the state appellate court's deferential *Jackson* review of the jury's resolution of a dispute between experts. On the contrary, based on a cold record, with no opportunity to observe and compare the demeanor and persuasiveness of the testimony of the competing experts, the panel re-weighed the evidence and substituted its own judgment for that of the California jury that accepted the explanation of the prosecution experts. The panel went further and also substituted its own judgment for that of the California appellate court that accepted the jury's decision to credit the testimony of the prosecution witnesses on the issue of cause of death as substantial evidence supporting the judgment of conviction.

As Judge Bea urged in the dissent from the denial of en banc rehearing, and as the Warden contended in the first petition, neither of these errors, considered separately, should stand uncorrected. When they appear together, however, especially after this Court remanded the case for

reconsideration and the Ninth Circuit reiterated its first opinion unchanged, this Court should grant the petition and consider the case on the merits.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: May 27, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California

DANE R. GILLETTE
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

DONALD E. DE NICOLA
Deputy State Solicitor General

*KRISTOFER JORSTAD
Deputy Attorney General
*Counsel of Record

Counsel for Petitioner

LA2004FA0042