No.

In the Supreme Court of the United States

JAVIER CAVAZOS, *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

KAMALA D. HARRIS
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
LAWRENCE M. DANIELS
Supervising Deputy Attorney General
Counsel of Record
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2288
Fax: (213) 897-6496
E-mail: Larry.Daniels@doj.ca.gov
Counsel for Petitioner

QUESTION PRESENTED

In respondent's state trial for causing the death of an infant, prosecution and defense experts disagreed on whether the baby died from shaking. After the jury convicted respondent, the Ninth Circuit Court of Appeals in federal habeas corpus proceedings held that there was insufficient evidence to support the 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 decision and remanded the case for further consideration in light of *Carey* v. *Musladin*, 549 U.S. 70 (2006). On remand, the Ninth Circuit reinstated its earlier opinion as "unaffected by *Musladin*." This Court again vacated the Ninth Circuit judgment and remanded for further consideration in light of *McDaniel* v. *Brown*, 130 S. Ct. 665 (2010), which had also reversed a Ninth Circuit grant of habeas relief where expert opinion testimony was in conflict. On remand, the Ninth Circuit again reinstated its earlier opinion, finding "that nothing in *Brown* is inconsistent with our prior decision or our method of reaching it."

The question presented is:

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

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PETITION FOR WRIT OF CERTIORARI

Javier Cavazos, Acting Warden, Central California Women's Facility, 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 had granted the Warden's previous two petitions for certiorari, vacated the decisions granting relief, and remanded for further consideration in light of *Carey* v. *Musladin*, 549 U.S. 70 (2006), and *McDaniel* v. *Brown*, 558 U.S. ___, 130 S. Ct. 665 (2010), respectively. *Patrick* v. *Smith*, 550 U.S. 915 (2007); *Patrick* v. *Smith*, 130 S. Ct. 1134 (2010).

OPINIONS AND JUDGMENTS BELOW

The second post-remand order of the Ninth Circuit reinstating its original judgment and opinion is reported at 624 F.3d 1235 (9th Cir. 2010). The Ninth Circuit's order denying the petition for panel and en banc rehearing is unreported.

The first 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, as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), 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 October 29, 2010. App. B; *Smith* v. *Mitchell*, 624 F.3d 1235 (9th Cir. 2010). The denial of the Warden's petition for panel and en banc rehearing was filed on December 10, 2010. App. A. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. *State Criminal Proceedings*

Respondent Smith was charged with inflicting corporal injury that caused the death of her seven-week-old grandson, Etzel. (See Cal. Penal Code § 273ab). At her trial, the prosecution produced evidence that, on November 29, 1996, respondent, her daughter Tomeka, and Etzel were staying at the home of respondent's sister. When Etzel's mother put him to sleep at about 11:30 p.m., he appeared healthy. During the night, respondent brought Etzel to his mother, who was asleep in another room. He was quiet and limp, and mucous was 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 had not responded 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, respondent's daughter turned to her 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 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.

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

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.

One of the prosecution's expert witnesses, 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 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 in a way that 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.

A second prosecution expert, Dr. Eugene Carpenter—a 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 opined that Etzel's death had been 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. Also, 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 but 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.

Finally, 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 had resulted from an injury occurring 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* v. *Virginia* 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. App. K at 80-86. 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.

App. K at 86. The California Supreme Court denied discretionary review. App. J.

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 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.

App. I at 64. The district court adopted the magistrate judge's recommendation. App. G, H.

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 explaining why evidence of brain-stem tearing was not and could not be seen under these circumstances. 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. App. F; *Smith* v. *Mitchell*, 437 F.3d at 888-90.

The Ninth Circuit denied the Warden's petition for panel and en banc rehearing, 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.

App. E at 37; *Smith* v. *Mitchell*, 453 F.3d at 1208 (Bea, J., dissenting from denial of rehearing en banc). In a careful review of the record, the dissenters reasoned 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. Said differently, the "physicians called by the prosecution reached their conclusion *despite* the lack of visible shearing, not because of it, and explained why." App. E at 34; *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 . . . ." App. E at 37; *Smith* v. *Mitchell*, 453 F.3d at 1208.

In her first petition for writ of certiorari, the Warden asserted that the Ninth Circuit had impermissibly reweighed 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 had overlooked settled rules of constitutional sufficiency review of conflicting expert opinions. More basically, however, the Warden also contended that the Ninth Circuit had failed to accord the state court adjudication of the claim, especially the state court conclusion that this was a conflict-of-the-evidence case rather than a "no-evidence" case, the deference required by 28 U.S.C. § 2254(d)(1).

This Court granted certiorari, vacated the judgment of the Ninth Circuit, and remanded the case for reconsideration (GVR) in light of *Carey* v.

Musladin. There, this Court "held that a state court had not '"unreasonabl[y] appli[ed] clearly established Federal law"' when it declined to apply our precedent concerning state-sponsored courtroom practices to a case involving spectator conduct at trial . . . ." *Knowles* v. *Mirzayance*, 129 S. Ct. 1411, 1418 (2009) (*quoting Musladin*, 549 U.S. at 76-77).

On remand, the Ninth Circuit determined that its original decision was "unaffected by *Musladin*," and reinstated that decision unchanged. The Ninth Circuit panel asserted that *Jackson*, unlike the Court's precedent applied in *Musladin*, required application of a broad, general principle. App. D at 20-22; *Smith* v. *Patrick*, 508 F.3d at 1259. Based on this asserted 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. App. D at 25; *Smith* v. *Patrick*, 508 F.3d at 1261; *see also* App. C at 13-15; *Smith* v. *Patrick*, 519 F.3d at 900-01.

Respondent again filed a petition for writ of certiorari, and this Court again granted, vacated, and remanded for further consideration, this time in light of *McDaniel* v. *Brown*, 130 S. Ct. 665. *Brown* involved a situation in which the Ninth Circuit had granted habeas relief for insufficiency of the evidence based on its evaluation that the prosecution expert trial testimony should be discounted in favor of the defense expert trial testimony. This Court held that

this was impermissible under *Jackson* and under the deferential federal habeas standard of 28 U.S.C. § 2254(d). *Brown*, 130 S. Ct. at 672-74.

On remand, the Ninth Circuit again reinstated its original opinion unchanged. App. B at 7-12; *Smith* v. *Mitchell*, 624 F.3d at 1236-40. This time, it said that, unlike in *Brown*, there was no "powerful" or "convincing" evidence of guilt and "no conflict in the evidence of the historical facts" in this case. The panel concluded that *Brown* "does not cast doubt on the correctness of our decision, of which we remain convinced."

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT FAILED TO PROPERLY APPLY *BROWN* AS REQUIRED BY THIS COURT'S SECOND REMAND ORDER

In *Knowles* v. *Mirzayance*, 129 S. Ct. 1411 (2009), and *Wright* v. *Van Patten*, 128 S. Ct. 743 (2008) (per curiam), after the Ninth and Seventh Circuits had reaffirmed their decisions granting habeas relief after GVRs, this Court again took up the cases and reversed for failure to hew to AEDPA's strict requirements for granting relief. By summarily reversing in *Van Patten*, and unanimously reversing in *Musladin*, this Court strongly indicated it will not tolerate a circuit court's refusal to treat a GVR order as "a cautious and deferential alternative to summary reversal in cases whose precedential significance does not merit our plenary review." *Lawrence* v. *Chater*, 516 U.S. 163, 168 (1996). Yet even after two GVRs in this case, the Ninth Circuit has persisted in its erroneous view of AEDPA and of this Court's sufficiency-of-evidence precedents.

Indeed, the latest intervening development, the *McDaniel* v. *Brown* decision, has but one clear application to this case. This Court in *Brown* held that the Ninth Circuit, under the deferential standards for constitutional sufficiency and federal habeas review, had "made an egregious error" by finding that the evidence was constitutionally insufficient to support the conviction because a defense expert's DNA testimony so undermined the prosecution's expert DNA testimony that the prosecution's expert testimony should be disregarded. *McDaniel* v. *Brown*, 130 S. Ct. at 673-74. In light of *Brown*'s instruction, the Ninth Circuit should have reconsidered and reversed its finding that the defense forensic experts' opinion in this case trumped the prosecution forensic experts' opinion that baby Etzel had died from Shaken Baby Syndrome.

A simple application of *Brown* shows that habeas relief must be denied under 28 U.S.C. § 2254(d). In *Brown*, the Nevada federal habeas petitioner was convicted of rape. At trial, the prosecution submitted evidence from a DNA expert, Renee Romero, showing that the petitioner's DNA matched the DNA recovered from semen found on the victim's underwear. *Brown*, 130 S. Ct. at 667-69. After the Nevada state courts denied appellate and post-conviction relief, the petitioner filed a federal habeas petition arguing that the Nevada Supreme Court's decision had been contrary to, and an unreasonable application of, *Jackson* v. *Virginia*. *Brown*, 130 S. Ct. at 669. The petitioner relied on a report (the Mueller Report)—prepared by a new DNA expert and never presented at trial—that concluded that the prosecution's DNA testimony was "inaccurate and unreliable" and rendered the evidence insufficient to convict him. *Id*. at 669.

The district court in *Brown* granted habeas relief on his *Jackson* claim, and the Ninth Circuit affirmed. *Brown*, 130 S. Ct. at 669-70. The Ninth Circuit found that the prosecution expert's DNA testimony was so "unreliable and misleading" that it should be excluded, and that, absent this testimony, it was objectively unreasonable for the state court to deny the sufficiency claim. *Id*. at 670.

This Court reversed. It began its analysis by noting that even the petitioner had now agreed that it was error "for the District Court to admit the Mueller Report for the purpose of evaluating his *Jackson* claim." Under *Jackson*, a court must only "'determine whether the jury acted in a rational manner in returning a guilty verdict based on the evidence before it, not whether improper evidence violated due process' . . . ." *Brown*, 130 S. Ct. at 672.

More pertinent to this case, this Court in *Brown* also held in the alternative that, even if the Mueller Report could be considered in evaluating the petitioner's *Jackson* claim, "the court made an egregious error in concluding the Nevada Supreme Court's rejection of respondent's insufficiency-of-the-evidence claim 'involved an unreasonable application of . . . clearly established Federal law.'" *Brown*, 130 S. Ct. at 672 (*citing* 28 U.S.C. § 2254(d)(1)). As this Court explained, "Mueller's claim that Romero used faulty assumptions and underestimated the probability of a DNA match between brothers indicates that two experts do not agree with one another, not that Romero's estimates were unreliable." *Id*. at 673. By selecting the defense expert's conclusion over the prosecution expert's conclusion, however, the Ninth Circuit had "departed from the deferential review that *Jackson* and

§ 2254(d)(1) demand." *Brown*, 130 S. Ct. at 673. As the Court put it:

> A federal habeas court can only set aside a state-court decision as "an unreasonable application of . . . clearly established Federal law," 28 U.S.C. § 2254(d)(1), if the state court's application of that law is "objectively unreasonable," *Williams v. Taylor*, 529 U.S. 362, 409 (2000). And *Jackson* requires a reviewing court to review the evidence "in the light most favorable to the prosecution." 443 U.S., at 319. Expressed more fully, this means 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." *Id.*, at 326; see also *Schlup v. Delo*, 513 U.S. 298, 330 (1995) ("The *Jackson* standard . . . looks to whether there is sufficient evidence which, if credited, could support the conviction."). The Court of Appeals acknowledged that it must review the evidence in the light most favorable to the prosecution, but the court's recitation of inconsistencies in the testimony shows it failed to do that.

Id. at 673 (internal parallel citations omitted).

This case, similarly, presented a straightforward contest of experts on the key issue of cause of death. The jury believed the prosecution experts. But, in violation of *Brown*, 130 S. Ct. at 672-73, the Ninth Circuit directly overrode the jury's decision crediting the testimony of those experts. Indeed, the panel 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, in a posture in which the federal court's review should be *doubly deferential* because both *Jackson* and AEDPA require it, the judges rejected the jury's finding and the state appellate court's adjudication as unreasonable.

The Ninth Circuit here sought to distinguish *Brown* on the ground that there was no "powerful" or "convincing" evidence of guilt and "no conflict in the evidence of the historical facts" in this case. App. B at 7-10; *Smith* v. *Mitchell*, 624 F.3d at 1237-39. But its reasoning is flawed in two main respects. First, the circuit court's requirement that there be "powerful" or "convincing" evidence to support a conviction vastly overstates the constitutional threshold of "substantial evidence" to support a conviction on sufficiency review, particularly considering the double deference to state court *Jackson* determinations under 28 U.S.C. § 2254(d). Tellingly, the court's language confirms that it impermissibly substituted its own judgment for that of the jury in this case.

Second, the Ninth Circuit incorrectly narrowed this Court's prohibition against resolving disputed facts on sufficiency review in favor of the defendant to a "conflict in the evidence of the historical facts" (App. B at 10; *Smith* v. *Mitchell*, 624 F.3d at 1239) to the exclusion of "a record of historical facts that supports conflicting inferences" (*Brown*, 130 S. Ct. at 673 (*quoting Jackson*, 443 U.S. at 326)). Critically, *Brown* requires that the conflicting reasonable *inferences* made by the prosecution experts and ultimately the jury must also be given deference. In ruling on a sufficiency claim, a reviewing court, let alone a federal habeas court, may not simply draw

whatever inferences it would like even from undisputed evidence. In any event, respondent's inconsistent statements, including about whether she told the social worker that she shook Etzel, did require the jury to resolve conflicts of historical fact, and did require the federal court to respect and take heed of these findings.

This Court's GVR under *Brown* appears to have been an implied directive for the Ninth Circuit to correct its analysis of this case. But like the circuit courts in *Van Patten* and *Mirzayance*, the Ninth Circuit misapprehended the import of the remand orders to reconsider the grant of habeas relief, and exceeded its limited authority under § 2254(d). Thus, as in *Van Patten* and *Mirzayance*, this Court's intercession is required.

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

The Ninth Circuit once again violated a basic rule of reviewing a jury's resolution of disputes between witnesses established long before AEDPA in *Jackson* v. *Virginia*. And it once again disrespected AEDPA's separate and additional limitations on federal review of state convictions that this Court emphasized in a sufficiency context in *McDaniel* v. *Brown*. Thus, the Ninth Circuit's "analysis illustrates a lack of deference to the state court's determination and an improper intervention in state criminal processes, contrary to the purpose and mandate of AEDPA and to the now well-settled meaning and function of habeas corpus in the federal system." *Harrington* v. *Richter*, 131 S. Ct. 770, 787 (2011).

When a convicted 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. This Court has "emphasized repeatedly the deference owed to the trier of fact, and, correspondingly, the sharply limited nature of constitutional sufficiency review." *Wright* v. *West*, 505 U.S. at 296 (plurality opinion). "Expressed more fully, this means 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.'" *Brown*, 130 S. Ct. at 673 (*quoting Jackson*, 443 U.S. at 319).

Under AEDPA, a federal habeas court's review of a state court's adjudication 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." In other words, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington* v. *Richter*, 131 S. Ct. at 786-87. 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 deferential adjudication of a *Jackson* sufficiency claim demands even more insulation. *Brown*, 130 S. Ct. at 674.

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 reweighed 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. As in *Brown*, the Ninth Circuit "acknowledged that it must review the evidence in the light most favorable to the prosecution, but the court's recitation of inconsistencies in the testimony shows it failed to do that." *Brown*, 130 S. Ct. at 673. Moreover, as in *Brown*, and as reflected in the district court's denial of relief, the state appellate court's opinion was reasonable in this case too. *Id.*

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 if this were a close case, AEDPA still would require that the state court's resolution of the sufficiency claim be regarded as conclusive unless it is "objectively unreasonable." It was hardly "unreasonable" here.

The Ninth Circuit's decision hinges on its assertion that this was not a case of a conflict in the evidence, but rather that there was *no* evidence that the infant's death was caused by violent shaking. App. B at 12; App. F at 50-51; *Smith* v. *Mitchell*, 624 F.3d at 1237; *Smith* v. *Mitchell*, 437 F.3d at 889-90. But this is simply not true. Although the Ninth Circuit asserted that the prosecution experts did not rely on any physical evidence in the infant's brain to support their conclusion, the record in fact demonstrates that "what provided the basis for the doctors' opinions was the evidence of recent trauma to Etzel's brain: (1) the subdural hemorrhaging; (2) the subarachnoid hemorrhaging; (3) the hemorrhaging around the optic nerves; (4) the blood clot between the hemispheres of Etzel's brain; and (5) the bruise and abrasion at the lower back of Etzel's head." *Smith*, 453 F.3d at 1206 (Bea, J., dissenting from denial of rehearing en banc). The prosecution experts' opinions were also justified by their well-explained rejection of the alternative theories of death. Smith's inculpatory statements and changing stories further supported the jury's conclusion that she caused Etzel's death.

At bottom, the Ninth Circuit simply preferred the opinions of the defense experts to those of the prosecution experts. The defense expert testimony that a brain stem injury and eye hemorrhaging must always be physically detectable to support a finding of Shaken Baby Syndrome created a conflict that, under *Brown*, could only be resolved by the jury, and that, under AEDPA, should not have upset the conviction. 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 Ninth Circuit panel reevaluated 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 urged by five appellate judges in the dissent from the denial of en banc rehearing, and as the Warden contended in the first two petitions, neither of these errors, considered separately, should stand uncorrected. Especially after this Court twice remanded the case for reconsideration and the Ninth Circuit twice reiterated its first opinion unchanged, this Court should grant the petition, consider the case on the merits, and reverse.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted

KAMALA D. HARRIS
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

LAWRENCE M. DANIELS
Supervising Deputy Attorney General
Counsel of Record
Counsel for Petitioner

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