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I. BACKGROUND

A. Facts¹

The state court recited the following facts, and petitioner has not offered any clear and convincing evidence to rebut the presumption that these facts are correct:

Bridgette Alvarez and her daughter Alexis were often homeless. In August 2003, Alvarez gave temporary guardianship of her daughter to Heredia, a man who lived (with his wife and two young children) next door to her father. On the afternoon of October 23, 2003, Alexis suffered severe injuries while she was at home with Heredia and his children. She was transported to Kaiser Hospital in Vallejo and then to Children’s Hospital in Oakland, but she died of her injuries the following day.

A felony complaint was filed against Heredia on October 29, 2003, and, after a preliminary hearing, he was charged with murder (Pen. Code, § 187, subd. (a)) and assault on a child under age eight causing death (Pen. Code, § 273ab). The matter proceeded to a trial, but the jury could not reach a verdict on either count. Heredia’s second jury trial commenced on June 30, 2005.

The state court then recited the following outline of the prosecutions’ case:

Alvarez testified that Stacey Jolly, a friend of hers, first suggested that she give custody of Alexis to someone else. She then spoke with Heredia on the phone two or three times, and he agreed to take Alexis. Alvarez had often seen Heredia with his children, and she believed he was a good father to them. No mention was made about whether Heredia’s wife would help care for the girl.

Several witnesses testified that Alexis was a normal child and not especially clumsy. She was potty-trained, and she always preferred to take baths instead of showers. Alvarez said the child refused to take showers because she did not like the water hitting her in the face. Alvarez and Alexis stayed at the home of Alvarez’s friend Dana Bidou the night before Alexis went to live with Heredia. Bidou saw Alexis in her underwear before her mother bathed her that night, and she observed no bruising or other marks on the child. Alvarez’s sister saw Alexis the next day, i.e., the day she left to live with Heredia, and she also noticed no marks or bruises on the child’s body. Alvarez and her sister last saw Alexis in the middle of September. The child was asleep in Heredia’s truck, and her hair had been shaved off. Alvarez did not notice any marks on the girl, but Alexis was wearing long sleeves and pants. Alexis appeared sad and cried some.

¹ Pursuant to 28 U.S.C. § 2254(e)(1), “. . . a determination of a factual issue made by a State court shall be presumed to be correct.” Petitioner bears the burden of rebutting this presumption by clear and convincing evidence. See id. These facts are, therefore, drawn from the state court’s opinion(s), lodged in this court. Petitioner may also be referred to as “defendant.”

1 About a month after Alexis had moved into Heredia's home, she
2 stayed with his sister-on-law, Quinn Steadman, for two weeks while
3 Heredia and his wife took a trip to Florida. Steadman became concerned
4 because Alexis's physical well-being seemed to be deteriorating, and she
5 called Child Protective Services (CPS) to seek help. Alexis's mental state
6 was different from that of any other child Steadman had seen or cared for.
7 She could not remember Steadman's name or how to perform daily
8 functions such as routines for personal hygiene. Steadman noticed Alexis
9 was clumsy "at times" and urinated erratically – sometimes holding her
10 urine all day, sometimes urinating several times throughout the day.
11 Alexis also behaved strangely with food, consuming her meals rapidly as if
12 there would not be another opportunity to eat. She bruised easily, and
13 Steadman noticed several bruises on her body and significant redness in
14 her crotch area. Weeks earlier, shortly after Alexis was placed in
15 Heredia's care, Steadman had observed burn marks on the girl's ankles.
16 Alexis had also suffered a broken nose, and Heredia told Steadman it
17 happened because Alexis fell while taking a shower. However, Steadman
18 bathed Alexis and confirmed that the child was terrified of showers.
19 Steadman told CPS about the broken nose and bruising she saw on
20 Alexis's legs and back and a knot Alexis had on the back of her head.
21 Although Heredia had told Steadman that Alexis was clumsy, the child did
22 not fall or have any accidents while in Steadman's care. Although
23 Steadman told CPS she thought Heredia's family was physically abusing
24 Alexis, she testified that she said this because she believed it was the only
25 way to get CPS involved. She believed Alexis needed professional help,
26 and she wanted to do whatever was necessary to get the child taken away
from her sister and Heredia because, given problems the couple was going
through, she did not think they could give Alexis that help.

15 Around 3:30 in the afternoon on October 23, 2003, Heredia's next-
16 door neighbor Earl Grimm was home alone when he heard the sound of a
17 child crying. After about five to seven seconds of crying, Grimm heard a
18 loud crash like a heavy glass or a vase breaking, followed by a single
19 scream and then silence. Concerned, Grimm looked out his window up
20 and down the street, but he saw no one outside. Around 4:15 p.m.,
21 paramedics arrived at Heredia's house in response to a 911 call. Heredia
22 and two young children were there, and Alexis was lying on the floor, flat
23 on her back and motionless. She was not responsive to any stimulation,
24 was not breathing, and had no pulse. A paramedic started CPR and
25 brought Alexis into the ambulance. Heredia asked where they were taking
26 Alexis but asked no other questions and did not accompany the
paramedics to the hospital.

22 Dr. Harold Farber, a pediatrics expert who treated Alexis at Kaiser
23 Hospital, testified that she arrived with multiple bruises on her scalp, ears,
24 nose, buttock and thighs, which are not typical areas of child bruising. Her
25 pupils were fixed and non-reactive, indicating she had a severe brain
26 injury. After Alexis was resuscitated, the medical staff prepared her for
immediate helicopter transport to the neurosurgical center at Children's
Hospital in Oakland. Based on his experience in dealing with cases of
suspected child abuse, Dr. Farber testified Alexis's injuries appeared
consistent with "non-accidental trauma."

1 Dr. Thomas Reid treated Alexis when she arrived at the intensive
2 care unit of Children's Hospital. When Alexis arrived at Children's, she
3 had unstable blood pressure, could not breathe on her own, and was on life
4 support. Dr. Reid could not detect any sign of brain function in her. He
5 recorded bruises on both sides of her forehead, a bruise between her right
6 eye and ear, a bruise on her right upper eyelid, several small bruises inside
7 and outside her left ear, bruises on the outside of both thighs, and a
8 squishy lump the size of a silver dollar above her right ear. Dr. Reid
9 explained that blunt force trauma occurs when the head is hit with
10 something solid, like a fist or baseball bat, that does not penetrate the skin.
11 The impact causes the brain to swell, and this swelling ultimately leads to
12 death. A CT scan performed on Alexis's brain demonstrated that she had
13 such swelling, and swelling was consistent with her other symptoms on
14 examination. Alexis was given the diuretic drug mannitol in an effort to
15 reduce the brain swelling. However, Dr. Reid did not expect Alexis to
16 survive because, as a result of the swelling, she had no detectable brain
17 function. He had no doubt that Alexis had been inflicted with head trauma
18 and no doubt that the head trauma was caused by child abuse. Analysis of
19 Alexis's blood indicated that she had an abnormality in blood coagulation
20 (known as "DIC") that could cause excessive bruising, but Dr. Reid
21 explained this condition is very common after a severe injury. Although
22 DIC can have other causes, it is a condition induced indirectly by trauma,
23 and Dr. Reid attributed the DIC observed in Alexis to her head injury.

24 Dr. James Crawford, a pediatrician specializing in child abuse, also
25 examined Alexis while she was at Children's Hospital. He documented
26 extensive bruising in the same areas described by Dr. Reid and a large area
of swelling on the scalp. Dr. Crawford testified these were not "normal
scrapes and bruises" such as one might see on any four-year-old.
Accidental lesions typically occur on the front of the body and over body
areas like the elbows, knees, and shins. The amount of bruising on Alexis
was "clearly far in excess of anything that's normal," and the lesions on
her head and buttocks were particularly indicative of physical assault. Dr.
Crawford had no doubt in his mind that Alexis had been severely beaten.
Moreover, the presence of a bruise indicates a relatively recent injury,
because bruises typically last only a week, or slightly longer. Like Dr.
Reid, Dr. Crawford explained that DIC is caused by a catastrophic injury
or trauma to the body. However, Crawford noted that Alexis's blood
coagulation studies at Children's did not suggest she had DIC, and he did
not believe the extensive bruising on her body was caused or heightened
by DIC. He testified that Alexis died from a traumatic brain injury, which
was evidenced by cerebral edema (i.e., brain swelling) and the bleeding
that was present between her brain and skull.

Forensic pathologist Arnold Josselson performed an autopsy on
Alexis's body on October 24, 2003. Dr. Josselson noted the presence of
numerous bruises of varying ages, and he testified that such bruising was
"almost always due to child abuse" and could not have occurred from a
fall off of a bed. The area above Alexis's right ear appeared grossly
swollen, and Dr. Josselson found widespread bleeding between the scalp
and skull, indicating "a rather marked blunt force injury applied to the
head." Inside the skull, there was another large hemorrhage in the area
between the brain and the dura (i.e., the membrane that covers the brain),

1 and additional small areas of hemorrhage were found on the surface of the
2 brain itself. Dr. Josselson testified that all of these findings were
3 consistent with blunt force head injury, and he concluded this was the
4 cause of Alexis's death. Dr. Josselson explained that children who suffer
5 head injuries of this type usually die as a result of brain swelling, and such
6 swelling was documented in films taken when Alexis was admitted to
7 Children's Hospital. Although the brain was not swollen at the time of
8 autopsy, Dr. Josselson believed there were two reasons why. First, while
9 treating Alexis, doctors administered the drug mannitol, which reduces
10 brain swelling. Second, the swelling in Alexis's brain caused a
11 compression of the pituitary gland and led her to develop diabetes
12 insipidus, something Dr. Josselson observed often happens in children.
13 When the pituitary gland is squeezed from the brain swelling, it stops
14 producing a hormone that causes the body to retain water. Without this
15 hormone, the patient loses a high volume of water through urination, and
16 hospital records indicate this is what happened to Alexis. Dr. Josselson
17 found no injury to the neck upon examination. He did not remove the
18 spinal cord because the CT scan showed the neck to be normal and there
19 was no clinical indication of a neck injury. Dr. Josselson testified that a
20 fall from a bed could not have caused all of Alexis's injuries, and the vast
21 majority of forensic pathologists agree that a child cannot die from a fall
22 from a bed. Police officers determined the bedroom where Alexis was
23 injured was carpeted, and the top of the bed measured two feet three
24 inches from the floor.

25 Detective Philip Silva of the Vallejo Police Department spoke with
26 Heredia about the incident on October 23, 2003. Heredia said there had
been an accident and Alexis had fallen off a bed. The only other people at
home were Heredia and his two children, ages four and three; Heredia's
wife was at work when the injury happened. Heredia explained that his
son was ill and he had stayed home from work for the past four days to
take care of the children. When asked if he had ever hit Alexis, Heredia
said he had spanked her on the bottom with a belt two nights earlier as
punishment because she urinated while at the dinner table. He said the
child had problems with potty training and frequently had accidents.
Heredia stated that he used a belt "on a fairly regular basis" for discipline,
but he admitted he got "carried away" during this recent spanking. When
he was shown photographs and asked about the bruising and marks on
Alexis's head and body, Heredia either denied that the bruises were
present, saying he could not see them, or claimed Alexis already had them
when she came to live with him. Although he denied slapping or punching
Alexis in the head, Heredia admitted he once "popped her" in the mouth
when she said a bad word. Heredia said he also used the belt to discipline
his own children, but Detective Silva saw no signs of bruising or abuse on
them.

Heredia told the police that on the afternoon of October 23, 2003,
the children were bouncing on the bed and he went into the bedroom to
make them stop. He said he picked up his son and set him down on the
ground and then reached to pick up his daughter. As he did so, Alexis was
bouncing across the bed. Heredia said he was playing with his daughter
and did not actually see Alexis fall, but when he looked he saw Alexis
lying on her back with her head facing a dresser. Her eyes were open and

1 she did not appear to be breathing. Heredia said it “looked like she was
2 gasping,” and he thought she was playing. When he realized the child was
3 unconscious, he carried her into the living room. Then he called his wife
4 and 911 and also started CPR on the girl. Heredia said he believed Alexis
5 had hit her head on the dresser or windowsill, but the police found no
6 dents or markings on these areas indicating this happened. Heredia told
7 the police Alexis was a very clumsy child and had injured herself several
8 times in his home. For example, once Alexis was taking a shower, and
9 after Heredia had left the room she slipped and fell flat on her face,
10 injuring her nose. Other times, she tripped and fell in the garage and on
11 the front brick steps. Heredia also told the officers Alexis had several
12 injuries when he got her from her mother, including extensive bruising and
13 burn marks on her ankles, and she also had lice in her hair. He showed the
14 officers a bill for her treatment and said Alexis needed medical attention
15 because she had been abused by her mother and was “not all there.”

9 The court then outlined the defense case:

10 Stacey Jolly saw Alvarez and Alexis frequently during the spring
11 and summer of 2003. Once, near the end of July 2003, Jolley saw Alexis
12 crying hysterically. When Jolley asked what was wrong, Alexis showed
13 her marks she had across her bottom, lower back, and upper thighs.

14 Alvarez’s stepmother, Yolanda Wieggers, testified that Alvarez had
15 a poor reputation for honesty and she believed Alvarez was a compulsive
16 liar. Wieggers noticed Alexis was clumsy at times, but she thought it was
17 due to Alexis’s young age and she believed Alexis was a bright child.
18 Alexis had very pale skin that showed bruises intensely, but Wieggers did
19 not see any bruising on the child in August 2003, before she left to live
20 with Heredia.

21 The defense also presented expert testimony from Dr. Janice
22 Ophoven, a pediatric and forensic pathologist with the medical examiner’s
23 office of St. Louis County in Minnesota. Dr. Ophoven testified that the
24 slides she received from Dr. Josselson’s autopsy were inadequate.
25 Although there were sections of abnormal scalp and abnormal dura, slides
26 of brain tissue itself were normal. In Dr. Ophoven’s opinion, the finding
of normal brain tissue was inconsistent with the conclusion that Alexis
died from brain damage due to blunt force trauma. In a death induced by
head trauma, she would expect to see physical damage to the brain tissue
itself. She testified that the drug mannitol could not erase all traces of
swelling; even if mannitol caused a temporary reduction in swelling, she
explained, one would still see damage to areas of the brain where
herniation had occurred. Mannitol would cause a temporary reduction in
swelling, but “as long as there’s circulation to the brain, the water is going
to go back.” Based on Heredia’s description to the police about how
Alexis appeared after she fell from the bed, Dr. Ophoven said she would
have investigated both head trauma and the possibility of an injury to the
upper spinal cord. There was a normal CT scan of the cervical spine in
this case, but Dr. Ophoven thought the scan was incomplete and noted CT
scans are not necessarily able to diagnose the type of spinal cord injury
Alexis may have sustained. Given the autopsy finding of a normal brain,
Dr. Ophoven would have investigated whether the cause of death was

1 injury to the cervical spine instead of brain damage. However, she
2 conceded that whichever was the actual mechanism of death (i.e., cervical
3 spine injury or brain damage), the event that caused the blunt force trauma
4 to Alexis's head is what killed her. She also agreed there was no doubt
5 Alexis had suffered abusive injuries to her body.

6 Neuropathology expert Roscoe Atkinson also testified that the
7 autopsy findings did not support a conclusion that Alexis died of a blunt
8 force head injury. Although the subdural hematoma indicated she suffered
9 some type of head trauma, it was not extensive enough to have caused her
10 death. If she had suffered a blow to the head so strong that she died as a
11 result of brain swelling Dr. Atkinson would expect to find herniation in the
12 brain at autopsy, yet there was no evidence of it in this case. Moreover,
13 because the effect of mannitol only lasts for four hours, it could not be
14 responsible for the normal brain size observed at autopsy. Atkinson also
15 consulted with a radiologist and believed the CT scan taken at Children's
16 Hospital did not show extensive cerebral edema. An injury to the cervical
17 spine, however, could cause a person to stop breathing and Dr. Atkinson
18 testified children's spinal cords are especially delicate. Assuming that
19 Alexis injured herself in falling from a bed to a carpeted floor, Atkinson
20 believed the autopsy findings and CT scans in this case would support a
21 diagnosis of injury to the cervical spine.

22 **B. Procedural History**

23 The state court recited the following procedural history:

24 On July 18, 2005, the jury found Heredia guilty of second degree
25 murder and assault on a child causing death. . . . The trial court denied
26 probation and sentenced Heredia to 25 years to life imprisonment on the
charge of assault causing death, with an additional sentence of 15 years to
life imposed for the murder charge but stayed. . . . The court also ordered
restitution of \$10,000. . . and ordered victim restitution of \$3,031.28.

27 The California Supreme Court declined direct review on March 12, 2008.

28 Petitioner filed a state habeas petition in the Solano County Superior Court. In
29 denying relief, the court stated:

30 The Court has read and considered the petition for writ of habeas
31 corpus filed in the above-entitled matter on May 28, 2009, by Aaron
32 Heredia (Petitioner), an inmate at Mule Creek State Prison. Petitioner
33 asks the Court to review the facts of his 2006 conviction in case
34 VCR170257. Petitioner was convicted of murder and assault on a child
35 resulting in death, violation of Penal Code §§ 187 and 273ab. He feels
36 that the victim's anemia may explain the bruising on the victim, which the
prosecution used at trial as evidence of child abuse. He also wants the
Court to review whether the hospital's emergency use of the drug mannitol
caused the victim's death. Doctors at Oakland Children's Hospital used
mannitol to reduce the trauma-induced brain swelling of the victim.

1 Lastly, he alleges that his trial attorney committed ineffective assistance of
2 counsel by not moving promptly to preserve the victim's body for autopsy,
not using the anemia or mannitol as a defense, and by not removing a
3 police officer from the jury.

4 Petitioner has failed to state a prima facie case for relief. (*People*
5 *v. Duvall* (1995) 9 Cal.4th 464). Concerning his request for the Court to
6 review his case, he must first state facts and legal theories entitling him to
7 relief. He merely presents an alternative explanation of the facts which
8 supposes that he is not guilty. The Court has no power to set aside the jury
findings of guilty absent legal grounds. Also, Petitioner has not shown
that his trial counsel's representation fell below an objective standard of
reasonableness under prevailing professional norms, and that any deficient
performance was prejudicial. (citation omitted). Petitioner does not show
that a more favorable outcome of his case was reasonably probable had his
trial attorney taken any of the actions he asserts.

9 The California Court of Appeal denied habeas relief on September 10, 2009, and the California
10 Supreme Court did likewise on March 10, 2010.

11 12 **II. STANDARDS OF REVIEW**

13 Because this action was filed after April 26, 1996, the provisions of the
14 Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") are presumptively
15 applicable. See Lindh v. Murphy, 521 U.S. 320, 336 (1997); Calderon v. United States Dist. Ct.
16 (Beeler), 128 F.3d 1283, 1287 (9th Cir. 1997), cert. denied, 522 U.S. 1099 (1998). The AEDPA
17 does not, however, apply in all circumstances. When it is clear that a state court has not reached
18 the merits of a petitioner's claim, because it was not raised in state court or because the court
19 denied it on procedural grounds, the AEDPA deference scheme does not apply and a federal
20 habeas court must review the claim de novo. See Pirtle v. Morgan, 313 F.3d 1160 (9th Cir.
21 2002) (holding that the AEDPA did not apply where Washington Supreme Court refused to reach
22 petitioner's claim under its "re-litigation rule"); see also Killian v. Poole, 282 F.3d 1204, 1208
23 (9th Cir. 2002) (holding that, where state court denied petitioner an evidentiary hearing on
24 perjury claim, AEDPA did not apply because evidence of the perjury was adduced only at the
25 evidentiary hearing in federal court); Appel v. Horn, 250 F.3d 203, 210 (3d Cir.2001) (reviewing
26 petition de novo where state court had issued a ruling on the merits of a related claim, but not the

1 claim alleged by petitioner). When the state court does not reach the merits of a claim,
2 “concerns about comity and federalism . . . do not exist.” Pirtle, 313 F. 3d at 1167.

3 Where AEDPA is applicable, federal habeas relief under 28 U.S.C. § 2254(d) is
4 not available for any claim decided on the merits in state court proceedings unless the state
5 court’s adjudication of the claim:

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

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

12 Under § 2254(d)(1), federal habeas relief is available only where the state court’s decision is
13 “contrary to” or represents an “unreasonable application of” clearly established law. Under both
14 standards, “clearly established law” means those holdings of the United States Supreme Court as
15 of the time of the relevant state court decision. See Carey v. Musladin, 549 U.S. 70, 74 (2006)
16 (citing Williams, 529 U.S. at 412) . “What matters are the holdings of the Supreme Court, not
17 the holdings of lower federal courts.” Plumlee v. Masto, 512 F.3d 1204 (9th Cir. 2008) (en
18 banc). Supreme Court precedent is not clearly established law, and therefore federal habeas
19 relief is unavailable, unless it “squarely addresses” an issue. See Moses v. Payne, 555 F.3d 742,
20 753-54 (9th Cir. 2009) (citing Wright v. Van Patten, 552 U.S. 120, 28 S. Ct. 743, 746 (2008)).
21 For federal law to be clearly established, the Supreme Court must provide a “categorical answer”
22 to the question before the state court. See id.; see also Carey, 549 U.S. at 76-77 (holding that a
23 state court’s decision that a defendant was not prejudiced by spectators’ conduct at trial was not
24 contrary to, or an unreasonable application of, the Supreme Court’s test for determining prejudice
25 created by state conduct at trial because the Court had never applied the test to spectators’
26 conduct). Circuit court precedent may not be used to fill open questions in the Supreme Court’s
27 holdings. See Carey, 549 U.S. at 74.

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1 In Williams v. Taylor, 529 U.S. 362 (2000) (O'Connor, J., concurring, garnering a
2 majority of the Court), the United States Supreme Court explained these different standards. A
3 state court decision is “contrary to” Supreme Court precedent if it is opposite to that reached by
4 the Supreme Court on the same question of law, or if the state court decides the case differently
5 than the Supreme Court has on a set of materially indistinguishable facts. See id. at 405. A state
6 court decision is also “contrary to” established law if it applies a rule which contradicts the
7 governing law set forth in Supreme Court cases. See id. In sum, the petitioner must demonstrate
8 that Supreme Court precedent requires a contrary outcome because the state court applied the
9 wrong legal rules. Thus, a state court decision applying the correct legal rule from Supreme
10 Court cases to the facts of a particular case is not reviewed under the “contrary to” standard. See
11 id. at 406. If a state court decision is “contrary to” clearly established law, it is reviewed to
12 determine first whether it resulted in constitutional error. See Benn v. Lambert, 283 F.3d 1040,
13 1052 n.6 (9th Cir. 2002). If so, the next question is whether such error was structural, in which
14 case federal habeas relief is warranted. See id. If the error was not structural, the final question
15 is whether the error had a substantial and injurious effect on the verdict, or was harmless. See id.

16 State court decisions are reviewed under the far more deferential “unreasonable
17 application of” standard where it identifies the correct legal rule from Supreme Court cases, but
18 unreasonably applies the rule to the facts of a particular case. See Wiggins v. Smith, 539 U.S.
19 510, 520 (2003). While declining to rule on the issue, the Supreme Court in Williams, suggested
20 that federal habeas relief may be available under this standard where the state court either
21 unreasonably extends a legal principle to a new context where it should not apply, or
22 unreasonably refuses to extend that principle to a new context where it should apply. See
23 Williams, 529 U.S. at 408-09. The Supreme Court has, however, made it clear that a state court
24 decision is not an “unreasonable application of” controlling law simply because it is an erroneous
25 or incorrect application of federal law. See id. at 410; see also Lockyer v. Andrade, 538 U.S. 63,
26 75-76 (2003). An “unreasonable application of” controlling law cannot necessarily be found

1 **A. Motion to Preserve the Victim's Body**

2 Addressing this claim on direct appeal, the California Court of Appeal stated:

3 Heredia filed an in limine motion to dismiss the case pursuant to
4 *California v. Trombetta* (1984) 467 U.S. 479, due to the prosecution's
5 failure to preserve Alexis's body for testing by defense experts. An
6 autopsy was performed on October 24, 2003, the afternoon of Alexis's
7 death. According to the motion, on November 3, 7, and 10, defense
8 counsel asked the prosecutor assigned to the case to preserve the remains
9 for examination by a forensic pathologist to be retained by the defense.
10 On November 10, 2003, the Solano County Coroner advised defense
11 counsel that the child's body had been taken to a mortuary. A supervisor
12 at the mortuary informed counsel that the remains were scheduled to be
13 disposed of on November 12 or 13, but the mortuary would preserve them
14 if the district attorney requested. The assigned deputy district attorney
15 declined to do so, noting that the brain and eyes and several tissue samples
16 had been preserved for defense examination, and Alexis's body was
17 cremated on November 12, 2003. Based on the opinions of a retained
18 pathologist, Dr. Ophoven, Heredia argued Alexis's lungs and spinal cord
19 had exculpatory value that should have been apparent at the time of
20 autopsy, and the prosecution therefore had a duty to preserve this evidence
21 for defense examination. The trial court denied the motion, concluding the
22 exculpatory value of the body was not readily apparent; instead, the
23 defense motion presented "basically a battle of the experts on the issue of
24 cause of death." The court also found there was no proof of bad faith by
25 the district attorney in failing to preserve the body. Heredia challenges
26 these rulings on appeal.

16 The court then outlined the law concerning preservation of evidence. Under California v.
17 Trombetta, 467 U.S. 479, 488 (1984), the government has a duty to preserve evidence that might
18 be expected to play a significant role in a suspect's defense. For the duty to be triggered, the
19 evidence must possess a readily apparent exculpatory value and be of such a nature that the
20 defendant would be unable to obtain comparable evidence by other reasonably available means.
21 See id. at 489. Where the defense argument is that the evidence could have been subjected to
22 additional tests, the results of which might have exonerated the defendant, the defendant must
23 show bad faith on the part of the government. See Arizona v. Youngblood, 488 U.S. 51, 57

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1 (1988). The California Court of Appeal continued as follows:

2 Substantial evidence supports the trial court’s finding that the
3 exculpatory value of Alexis’s spinal cord and lungs was not apparent
4 before her body was cremated. Alexis had no signs of brain activity when
5 she arrived at Children’s Hospital, and all of the physicians who treated
6 her believed she had suffered a massive brain injury. The medical
7 examiner found indications of blunt force head trauma during the autopsy
8 and concurred with the treating doctors’ conclusion that the child died
9 from a brain injury. The examiner noted, “there was no clinical suspicion
10 of any neck injury,” and a CT scan showed no evidence of an injury to the
11 spinal cord. Given the consistent opinions of the treating doctors and
12 medical examiner that Alexis died of a head injury, the exculpatory value
of other parts of her body was not so apparent that due process required

13 the state to preserve them. Due process does not require the prosecution
14 “to gather and collect everything which, with fortuitous foresight, might
15 prove useful to the defense.” (citation omitted). Moreover, although the
16 second prong of *Trombetta* may have been met, in that bodily remains are
17 “of such a nature that the defendant would be unable to obtain comparable
18 evidence by other reasonably available means,” (citation omitted), this fact
19 is immaterial because “*Trombetta*’s two-prong test of materiality is in the
20 conjunctive not the disjunctive, and both prongs must be met before an
21 item can be classified as “constitutionally material.” (citation omitted).
At most, the physical evidence sought by the defense was
potentially useful, in that “if could have been subjected to tests, the results
of which might have exonerated the defendant.” (citation omitted).
Again, however, substantial evidence supports the trial court’s finding that
the prosecution acted in good faith. Although defense counsel repeatedly
requested that the body be preserved, it appears from the record that
counsel had not yet retained a pathologist to examine the body when these
requests were made. Nor did Heredia seek a court order to preserve the
remains until he could retain such an expert. . . . The prosecutor assured
defense counsel that the brain and eyes and tissue samples preserved from
the body would provide adequate material for examination by a defense
pathologist. The defense did not request that specific other materials be
preserved, and at the time – before defense experts pointed out possible
causes of death other than brain injury – there was no reason for the
prosecutor to think preservation of additional body parts was necessary.
Accordingly, there was no due process violation, and the trial court
properly denied Heredia’s motion to dismiss.

22 Petitioner concedes that “the remains were only potentially exculpatory” and
23 argues under Youngblood that the state court’s conclusion that the prosecutor did not act in bad
24 faith is not supported by the record. In support of this argument, petitioner states: “It seems
25 apparent that the district attorney . . . made no attempt to confer with Dr. Josselson or determine
26 if a fair sampling of the remains existed.” Petitioner, however, cites no support in the record for

1 this argument. In order to show bad faith under the facts of this case, petitioner must demonstrate
2 that the prosecutor failed to request that the mortuary preserve the victim's body in order to
3 prevent disclosure of evidence favorable to the defense. See Phillips v. Woodford, 267 F.3d 966,
4 986 (9th Cir. 2001). As respondent notes, the relevant inquiry focuses on the prosecutor's
5 knowledge of the potentially exculpatory value of the evidence at the time it was destroyed.
6 See Youngblood, 488 U.S. at 56.

7 At issue in this case is the victim's spinal cord, which petitioner contends could
8 have been examined for evidence to support his theory that Alexis' death was caused by an
9 accidental fall. Dr. Josselson, however, found no injury to the neck upon examination, and he
10 did not remove the spinal cord because the CT scan showed the neck to be normal and there was
11 no clinical indication of a neck injury consistent with an accidental fall. In deciding what to do
12 with the victim's remains, the record reflects that the prosecutor in fact preserved portions of the
13 body which evidence at the time suggested were related to the cause of death. Again, no
14 evidence available to the prosecutor at the time indicated spinal cord trauma as the cause of
15 death. Further, at the time the body was destroyed, petitioner's counsel had not retained any
16 medical experts who could have examined the remains. Rather than indicating that the
17 prosecutor declined counsel's request to preserve the remains in order to prevent exculpatory
18 evidence from coming to light, the record shows that the prosecutor acted in good faith based on
19 the evidence available at the time, which did not point to the spinal cord.

20 Even if there is constitutional error, non-structural errors may be considered
21 harmless. See Hedgpeth v. Pulido, 129 S.Ct. 530, 532 (2008) (per curiam) (citing Chapman v.
22 California, 386 U.S. 18 (1967)). Constitutional errors fall into one of two categories – trial errors
23 or structural errors. See Brecht v. Abrahamson, 507 U.S. 619, 629 (1993). Trial error “occur[s]
24 during the presentation of the case to the jury” and “may . . . be quantitatively assessed in the
25 context of other evidence presented in order to determine” its effect on the trial. Arizona v.
26 Fulminante, 499 U.S. 279, 307-08 (1991). Structural errors, on the other end of the spectrum,

1 relate to trial mechanism and infect the entire trial process. See id. at 309-10. Denial of the right
2 to counsel is an example of a structural error. See Brecht, 507 U.S. at 629-30 (citing Gideon v.
3 Wainwright, 372 U.S. 335 (1963)). Improperly impeaching a defendant based on his silence
4 after receiving Miranda warnings, however, is a trial error. See Brecht, 507 U.S. 629 (citing
5 Doyle v. Ohio, 426 U.S. 610 (1976)). Structural errors to which the harmless error analysis does
6 not apply are the “exception and not the rule” See Rose v. Clark, 478 U.S. 570, 578 (1986).

7 In Chapman, a case before the Supreme Court on direct review, the Court held
8 that “before a [non-structural] constitutional error can be held harmless, the court must be able to
9 declare a belief that it was harmless beyond a reasonable doubt.” 386 U.S. at 24. A different
10 harmless error standard applies to cases on collateral review. In Brecht, the Court stated that
11 applying the Chapman standard on collateral review “undermines the States’ interest in finality
12 and infringes upon their sovereignty over criminal matters.” 507 U.S. at 637. The Court also
13 noted that the Chapman standard is at odds with the historic meaning of habeas corpus – which is
14 meant to afford relief only to those who have been grievously wronged – because it would
15 require relief where there is only a reasonable possibility that a constitutional error contributed to
16 the verdict. See id. Therefore, in habeas cases, the standard applied in Kotteakos v. United
17 States, 328 U.S. 750 (1946), governs harmless error analysis for non-structural constitutional
18 errors. See Brecht, 507 U.S. at 637. Under this standard, relief is available where non-structural
19 error occurs only where such error “had a substantial and injurious effect or influence in
20 determining the jury’s verdict.” Kotteakos, 328 U.S. at 776.

21 Here, the alleged error is non-structural in that it pertains to the preservation of
22 evidence. In addition, because this is a case on collateral review, the “substantial and injurious
23 effect” standard applies. Under this standard, the court finds any error to be harmless.
24 Specifically, petitioner has not demonstrated that the alleged error had a substantial and injurious
25 effect on the outcome of the trial. While petitioner contends that his experts would have testified
26 that spinal cord injury was the cause of death had they been able to examine the spinal cord, such

1 evidence is only speculative because it was impossible for the defense experts to know what the
2 spinal cord would show. Opposing this speculative evidence, the prosecution expert opinions all
3 pointed to petitioner's guilt. Further, even had the spinal cord been preserved and examined by
4 defense experts, and had the results of those examinations suggested a spinal cord injury as the
5 cause of death, the jury would still have been presented with the prosecution experts who
6 concluded that petitioner caused Alexis' death. At best, the case would have turned to a battle of
7 the experts, and there is no indication in the record that, had such a battle occurred, the jury
8 would likely have found in favor of petitioner. In other words, the jury could still have rejected
9 petitioner's theory in favor of the prosecution's theory, and petitioner has not demonstrated that
10 there was any substantial likelihood that the jury would not have done so had the evidence been
11 preserved and examined by his experts.

12 In sum, the court concludes that no error occurred because petitioner has not met
13 his burden of showing that the prosecutor acted in bad faith and, even if error occurred, it was
14 harmless.

15 **B. Ineffective Assistance of Counsel**

16 The Sixth Amendment guarantees the effective assistance of counsel. The United
17 States Supreme Court set forth the test for demonstrating ineffective assistance of counsel in
18 Strickland v. Washington, 466 U.S. 668 (1984). First, a petitioner must show that, considering
19 all the circumstances, counsel's performance fell below an objective standard of reasonableness.
20 See id. at 688. To this end, petitioner must identify the acts or omissions that are alleged not to
21 have been the result of reasonable professional judgment. See id. at 690. The federal court must
22 then determine whether, in light of all the circumstances, the identified acts or omissions were
23 outside the wide range of professional competent assistance. See id. In making this
24 determination, however, there is a strong presumption "that counsel's conduct was within the
25 wide range of reasonable assistance, and that he exercised acceptable professional judgment in all
26 significant decisions made." Hughes v. Borg, 898 F.2d 695, 702 (9th Cir. 1990) (citing

1 Strickland, 466 U.S. at 689).

2 Second, a petitioner must affirmatively prove prejudice. See Strickland, 466 U.S.
3 at 693. Prejudice is found where “there is a reasonable probability that, but for counsel’s
4 unprofessional errors, the result of the proceeding would have been different.” Id. at 694. A
5 reasonable probability is “a probability sufficient to undermine confidence in the outcome.” Id.;
6 see also Laboa v. Calderon, 224 F.3d 972, 981 (9th Cir. 2000). A reviewing court “need not
7 determine whether counsel’s performance was deficient before examining the prejudice suffered
8 by the defendant as a result of the alleged deficiencies . . . If it is easier to dispose of an
9 ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be
10 followed.” Pizzuto v. Arave, 280 F.3d 949, 955 (9th Cir. 2002) (quoting Strickland, 466 U.S. at
11 697).

12 As discussed above, any error which occurred with respect to destruction of
13 Alexis’ body was harmless. Similarly, any deficient performance on the part of counsel in failing
14 to make a formal motion to preserve the body did not result in prejudice because petitioner cannot
15 demonstrate that, had counsel made a formal motion the motion would have been granted or, even
16 had it been granted, that there is a reasonable probability of a different outcome. Ultimately, had
17 the motion been granted and the evidence preserved and examined by defense experts, the jury
18 would still have been free to reject such testimony in favor of the prosecution experts.

19 Moreover, the court agrees with respondent that counsel’s performance was not
20 deficient in the first place. Here, counsel made the tactical decision to seek preservation of
21 Alexis’ body through informal channels. Petitioner has not shown that this decision to seek
22 informal relief as opposed to formal relief via a motion was unreasonable. Further, given that
23 petitioner concedes that the exculpatory nature of the evidence was not readily apparent, and
24 because there is no evidence that the prosecutor acted in bad faith based on what was known at the
25 time the body was cremated, it is unlikely that any formal motion to preserve Alexis’ body would
26 have been granted.

1 In sum, the court finds that counsel's performance was not deficient and, even if it
2 was, no prejudice occurred.

3
4 **IV. CONCLUSION**

5 Based on the foregoing, the undersigned recommends that petitioner's amended
6 petition for a writ of habeas corpus (Doc. 42) be denied.

7 These findings and recommendations are submitted to the United States District
8 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days
9 after being served with these findings and recommendations, any party may file written objections
10 with the court. Responses to objections shall be filed within 14 days after service of objections.
11 Failure to file objections within the specified time may waive the right to appeal. See Martinez v.
12 Ylst, 951 F.2d 1153 (9th Cir. 1991).

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14 DATED: February 13, 2013

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16 **CRAIG M. KELLISON**
17 UNITED STATES MAGISTRATE JUDGE
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