UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 21-1169

DEWAYNE A. DUNN,
Petitioner-Appellee,

v.

RON NEAL,
Warden, Indiana State Prison,
Respondent-Appellant.

Appeal from the United States District Court
for the Northern District of Indiana, South Bend Division.
No. 3:18-cv-178
The Honorable Philip P. Simon, Judge.

BRIEF AND REQUIRED SHORT APPENDIX OF RESPONDENT-APPELLANT RON NEAL

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JURISDICTIONAL STATEMENT

Petitioner-Appellee Dewayne Dunn filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Northern District of Indiana. The district court issued an order granting a conditional writ of habeas corpus on December 23, 2020, and the clerk entered final judgment on December 29, 2020 (R.S.A.[1] 1, 34). On January 28, 2021, Respondent-Appellant Ron Neal ("the State") filed a notice of appeal (R.[2] 35). This Court has jurisdiction to review the district court's final decision under 28 U.S.C. §§ 1291, 2253.

STATEMENT OF THE ISSUE

Whether the state court reasonably determined that Dunn's trial counsel was not ineffective.

STATEMENT OF THE CASE

The State appeals the district court's decision to grant Dunn, a convicted murderer, a conditional writ of habeas corpus.

A. Dunn kills Angel Torres.

In 2008, Dunn lived with his long-time girlfriend, Letha Sims, two of her sons, and two dogs in an apartment next door to Angel Torres, who was known to his friends as "Ching Ching" (Tr.[3] 495, 502–03). Their doors were accessible from a

[1] "R.S.A." refers to the Required Short Appendix.

[2] "R." refers to documents on the district court's docket.

[3] "Tr." refers to the trial transcript.

deck that was approximately six feet above a concrete parking pad (Tr. 454–56; St. Ex.[4] 9). Letha and Torres had sex that year (Tr. 508–09).

While Dunn took a dog for a walk on the night of September 3, Letha went next door to drink alcohol with Torres (Tr. 511–12). When Dunn returned, he fought with Letha on the deck (Tr. 357–58, 362–64, 376–77). He threw her halfway down the stairs and then dragged her back up (Tr. 357, 371). Torres came outside, but Dunn knocked him back inside (Tr. 363). Dunn eventually entered his apartment; Letha returned to Torres's (Tr. 517, 601).

Dunn did not stay in his apartment for long (Tr. 601). He went back outside and kicked open Torres's door (Tr. 519, 566, 568, 582–83, 709–10, 742–43, 769–70, 775, 777). Torres grabbed a baseball bat, and the men struggled over it on the deck (Tr. 519–20, 542, 545, 566, 583, 601–04). Letha's son Jamar, who went by "Willie," watched from the screen door (Tr. 602–03). When Torres fell off the deck, Willie yelled to his brother, "He just pushed Ching Ching downstairs" (Tr. 610–11; *see also* Tr. 604–09, 623, 630, 632). Dunn followed Torres downstairs (Tr. 430, 521–22, 525–26).

Dunn was standing next to Torres when the police arrived approximately eight minutes later (Tr. 360–61, 369–70, 384–85, 387–89, 530). Dunn was loud and excited (Tr. 394, 409, 427, 449, 463). He "kept saying he didn't do anything" (Tr. 395). He told an officer "that he turned around and told the guy on the ground to stop hitting him, and the guy hit him again in the back, and he said he turned

[4] "St. Ex." refers to the State's trial exhibits.

around and pushed him, and the guy fell down the steps" (Tr. 397). Dunn had Torres's blood in the tread and on top of his shoe (Tr. 695, 699, 738, 751, 805).

Torres, who was breathing but nonresponsive, was lying facedown on the concrete and the bat (Tr. 392–93, 402, 407, 417, 427, 453–54, 626–27, 727). There was a pool of blood around his head, blood on the concrete, blood on a car that was parked on the pad, and blood on the stairs (Tr. 392, 782–84, 791, 795, 818–19, 898–917; St. Exs. 46, 48–52, 56–58, 63, 64, 73, 74). Externally, he had scrapes, bruises, swelling, and a large gash on the back of his head (Tr. 474–80, 856, 858, 937–38). Internally, he had 10 broken ribs, a broken clavicle, a bruised lung, a lacerated liver, multiple skull fractures, and significant bleeding in his brain (Tr. 470–72, 481–82, 859–60, 871, 873–76, 878–82, 938–50). He died from blunt force trauma to his head, chest, and abdomen two days later (Tr. 482–83, 882, 951, 955).

B. The jury finds Dunn guilty of murder.

The State charged Dunn with murdering Torres. Its theory was that Dunn beat Torres with a blunt object on the ground (Tr. 344–45). Before trial, Letha told a detective that Dunn had kicked Torres when he was on the ground (Tr. 537–39). But she changed her story at trial, and none of the other eyewitnesses testified that they had seen Dunn beat Torres after he fell (Tr. 358–59, 372, 378–79, 521–22, 525–26, 540–41, 547, 550, 580, 615, 643). Although Dunn told an officer that he had pushed Torres down the stairs (Tr. 397), and Willie told his brother that Dunn had pushed Torres down the stairs (Tr. 610–11), the State's experts did not believe that the fall killed Torres.

Dr. Scott Wagner, a forensic pathologist who testifies 98% of the time for the State, testified that some of Torres's injuries—the external scrapes and bruises—were consistent with falling down the stairs, but not the deep injuries to Torres's skull and chest (Tr. 953–56). Dr. Wagner testified that those injuries, which were on different sides of Torres's body, were not consistent with a single fall or a single event (Tr. 953–55). They resulted from "severe blunt force trauma" (Tr. 953–55). For example, Dr. Wagner "usually see[s] a first rib fracture [like Torres's] with severe trauma like a high speed motor … vehicle crash" (Tr. 955). And based on the blood evidence, crime scene investigator Dean Marks concluded "that an event of some type took place between the car and the stairwell" (Tr. 918–19).

Another pathologist, Dr. Blair Chrenka, defined the five possible manners of death for his report as accidental, natural, homicide, suicide, and uncertain (Tr. 853–54, 882). He agreed with Dr. Wagner that the cause of Torres's death was "massive blunt trauma to the head," but he concluded that the manner of Torres's death was uncertain (Tr. 882).

Dunn's counsel, Clifford Williams, used Dr. Chrenka's testimony to contend that Torres had died from the fall (Tr. 997–98). Williams joined the public defender's office in 1980 (PCR Tr.[5] 3). He had represented defendants at over 100 murder trials and had never consulted an independent forensic pathologist (PCR Tr. 7, 13).

[5] "PCR Tr." refers to the state post-conviction transcript.

Based on the physical evidence, Williams believed that the State's theory was logical (PCR Tr. 6–9). He was especially impressed by the blood evidence, which he could not refute (PCR Tr. 6–7, 11, 16). To him, "the bat was everything" (PCR Tr. 9; *see also* PCR Tr. 6, 15, 17). He wanted to convince the jury that "[t]here was no blood, no hair, no nothing linking the decedent to having been beaten with the bat," which "was discovered underneath the decedent's body" (PCR Tr. 6). He cross-examined the witnesses about whether there was any evidence that Dunn had used the bat the beat Torres (Tr. 379, 416, 545–46, 624, 627, 630, 727–28, 730, 735–36, 741–42, 754, 837, 840–42, 844–45, 923). He argued that the jury "didn't hear anyone on the stand put the bat in Dewayne's hands" or "testify that Dewayne hit the victim" (Tr. 995; *see also* Tr. 999). He reminded the jury that there was no visible blood on the bat, which "should have had a lot of blood on it" if it had "caused the cast-off pattern" (Tr. 998; *see also* Tr. 1003).

During closing argument, the prosecutor conceded that the State did not prove that Dunn beat Torres with the bat:

> We're not asking you to flat out believe that this baseball bat was what was used to crush Angel Torres's skull. We don't know that, and quite frankly the evidence suggests the contrary. Unless somebody did a really good job cleaning this bat off, it's not going to be what was used to hit a source of blood and cause spatter on the east side of that garage. This is not it.

(Tr. 1015). The jury found Dunn guilty of murdering Torres (Tr. 1045).

C. The state court affirms Dunn's murder conviction.

On appeal, Dunn challenged the sufficiency of the evidence to support his conviction (App.[6] 21). The Indiana Court of Appeals determined that the evidence did not show that Torres simply fell down the stairs based on Dr. Wagner's and Marks's testimony (App. 24–25). The court also concluded that Dunn was not convicted purely because he was present at the scene, but rather because the evidence showed that

> (1) Dunn and the victim were in a physical altercation minutes before the victim sustained the injuries that ultimately led to his death; (2) very shortly after the altercation, Dunn kicked in the door to the victim's apartment; (3) when police arrived, Dunn was found standing next to the victim at the bottom of the steps; (4) at that time, Dunn appeared to be very agitated and was shouting that he "didn't do anything"; (5) the victim's blood was found on Dunn's shoes; (6) Dunn left a shoeprint in the victim's blood on the second step, near the bottom of the staircase; (7) blood spatter evidence indicated that an "event" occurred at the bottom of the staircase between the building and the parked vehicle; (8) "cast-off blood stains" in the same area indicated that someone had swung a bloody instrument; and (9) the victim's cause of death was massive blunt force trauma to the head.

(App. 25). The court affirmed Dunn's conviction (App. 26).

D. The state court affirms the denial of post-conviction relief.

In Dunn's state post-conviction proceedings, he argued that Williams was ineffective for not consulting his own forensic pathologist. To support this claim, Dunn offered the testimony of Dr. Thomas Sozio, a forensic pathologist who most often testifies for the State (PCR Tr. 19–20). Like the two other pathologists, Dr. Sozio concluded that the cause of Torres's death was blunt force trauma to the head

[6] "App." refers to the Appellant's Appendix.

(PCR Tr. 31). And like Dr. Chrenka, he "believe[d] that the manner is best to be undetermined in this case" (PCR Tr. 31; *see also* PCR Tr. 47). He thought that Torres's injuries more likely resulted from a fall than from a beating (PCR Tr. 33, 52). But he had no explanation for some of the blood stains on the stairs (PCR Tr. 41). And he did not "know what happened at the top of the stairs" (PCR Tr. 52). If Dunn had pushed Torres down the stairs, then Dr. Sozio would have concluded that the manner of death was homicide (PCR Tr. 47–48).

The Indiana Court of Appeals affirmed the post-conviction court's decision to deny Dunn's petition for post-conviction relief. The court could not "say that the evidence as a whole leads unerringly and unmistakably to the conclusion that there is a reasonable probability that the evidence produced from consulting with a forensic pathologist would have changed the outcome of Dunn's trial" (App. 2). The court agreed with the post-conviction court "that Dunn's claim can be resolved based solely on whether the evidence produced from consultation with a forensic pathologist would have had a reasonable probability of affecting the outcome of Dunn's trial" (App. 16). The court examined Dr. Sozio's testimony and concluded that, "when viewed in conjunction with the totality of evidence at trial, his testimony is not so compelling that there is a reasonable probability that had it been offered the jury would have concluded that Torres's injuries were solely the result of a fall" (App. 17).

E. The district court grants a conditional writ of habeas corpus.

The district court decided that the state court's decision was contrary to clearly established federal law based on this sentence from the final paragraph: "Based on this record, we cannot say that the evidence as a whole leads unerringly and unmistakably to the conclusion that the evidence produced from consulting with a forensic pathologist would have changed the outcome of Dunn's trial" (App. 19; R.S.A. 23–26). So the court reviewed Dunn's claim *de novo* and concluded that Williams was ineffective for not consulting a forensic pathologist (R.S.A. 26–34).

SUMMARY OF THE ARGUMENT

The Court should reverse the district court because Dunn cannot show that the state court's decision was contrary to or an unreasonable application of clearly established federal law. The state court correctly stated—seven times—and applied the standard for ineffective assistance of counsel. The court reasonably determined that Dunn was not prejudiced by his counsel's failure to consult a forensic pathologist because his proffered testimony was either cumulative or unpersuasive. At most, the additional evidence would have given the State another theory of prosecution. Dunn's counsel also did not perform deficiently because this was not a rare case that required consultation with a forensic pathologist, and he put on a reasonable defense.

ARGUMENT

The state court reasonably determined that Dunn's trial counsel was not ineffective.

This Court should reverse the district court, whose factual findings it reviews for clear error and whose legal conclusions it reviews *de novo*. *Woods v. McBride*, 430 F.3d 813, 817 (7th Cir. 2005) (citing *Richardson v. Briley*, 401 F.3d 794, 799 (7th Cir. 2005)). Dunn is not entitled to a writ of habeas corpus because he is not "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The state court adjudicated his claim on the merits, so he must show that the 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," or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). He cannot meet his burden.

A. The state court's decision was not contrary to *Strickland v. Washington*.

A decision is contrary to federal law if "the state court arrives at a conclusion opposite that reached by [the Supreme Court] on a question of law" or "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and" reaches an opposite result. *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). A decision is also contrary to "clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases." *Id.* at 405. But "a run-of-the-mill state-court decision applying the correct legal rule from [Supreme Court] cases to the facts of a prisoner's case" is not. *Id.* at

406. For example, if "a state-court decision on a prisoner's ineffective-assistance claim correctly identifies *Strickland* as the controlling legal authority and, applying that framework, rejects the prisoner's claim[,] … the state-court decision would be in accord with … *Strickland* as to the legal prerequisites for establishing an ineffective-assistance claim." *Id.*

The state court correctly identified the controlling legal authority, applied that framework, and rejected Dunn's claim. The clearly established federal law that governs claims of ineffective assistance of counsel is *Strickland v. Washington*, which requires a petitioner to show that his "counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. 668, 688–89, 694 (1984). The court recognized and recited the *Strickland* test (App. 14–16). Its decision was based on lack of prejudice; it accurately stated *Strickland*'s prejudice standard seven times: once in its case summary, three times in its rule statement, and three more times in its analysis (App. 2, 14–17). This was "a run-of-the-mill" application of *Strickland*. *Williams*, 529 U.S. at 406.

But the court did not apply *Strickland* on a blank slate. Just as the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) confines a federal court's authority to grant a writ of habeas corpus, Indiana precedent restricts an appellate court's ability to award post-conviction relief. As the court explained, it could not reverse unless "'the evidence as a whole leads unerringly and

unmistakably to a decision opposite that reached by the post-conviction court.' *Wesley v. State*, 788 N.E.2d 1247, 1250 (Ind. 2003)" (App. 13). In other words, the appellate court must be convinced "'that there is *no* way within the law that the court below reached the decision it did.' *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002), *cert. denied* (2003)" (App. 13). When that standard is combined with the standard for *Strickland* prejudice, it looks like the summary of the court's holding at the beginning of its decision: "Based on the record before us, we cannot say that the evidence as a whole leads unerringly and unmistakably to the conclusion that there is a reasonable probability that the evidence produced from consulting with a forensic pathologist would have changed the outcome of Dunn's trial" (App. 2).

The district court discarded AEDPA deference because the state court used a shorthand version of that summary in its conclusion: "Based on this record, we cannot say that the evidence as a whole leads unerringly and unmistakably to the conclusion that the evidence produced from consulting with a forensic pathologist would have changed the outcome of Dunn's trial" (App. 19; *see* R.S.A. 23–24). But an imprecise shorthand statement does not prove that the state court applied the wrong standard, as this Court has repeatedly explained. In *Sussman v. Jenkins*, for example, the state court correctly cited *Strickland*'s prejudice standard at the outset of its opinion but "omitted the 'reasonable probability' language from its concluding sentence." 636 F.3d 329, 359–60 (7th Cir. 2011). Based on the earlier citation and the court's analysis, this Court did "not believe the court's use of a 'short-hand' recitation of the *Strickland* test suggests that it employed the incorrect standard."

Id. (citing *Woods v. Schwartz*, 589 F.3d 368, 378 n.3 (7th Cir. 2009)); *see also Woods*, 589 F.3d at 378 n.3 (citing *Stanley v. Bartley*, 465 F.3d 810, 813 (7th Cir. 2006)) ("We have noted numerous times that there is no error when a court has correctly noted the *Strickland* standard and then used an incorrect shorthand version when stating its conclusion."). There is no indication that the state courts ever cited the correct prejudice standard before applying an incomplete version in the cases that the district court relied on (R.S.A. 24–25). *See Mosley v. Atchison*, 689 F.3d 838, 849–51 (7th Cir. 2012); *Martin v. Grosshans*, 424 F.3d 588, 592 (7th Cir. 2005); *see also Jones v. Calloway*, 842 F.3d 454, 464–65 (7th Cir. 2016); *Thomas v. Clements*, 789 F.3d 760, 767–68 (7th Cir. 2015).

Even if the Court were to ignore the state court's seven correct statements of the *Strickland* prejudice standard and home in on one sentence, like the district court did, the state court's decision still would not be contrary to *Strickland*. Habeas review is not like grading homework: AEDPA only requires state courts to correctly identify and apply the governing law. *Williams*, 529 U.S. at 405–06. As this Court explained in *Gage v. Richardson*, "[w]hen a state court misstates *Strickland*'s prejudice prong, AEDPA deference may still apply if its analysis 'focused on whether the proffered testimony could have affected the outcome, which is the correct inquiry under *Strickland*.'" 978 F.3d 522, 528 (7th Cir. 2020) (quoting *Carter v. Duncan*, 819 F.3d 931, 944 (7th Cir. 2016); citing *Sussman*, 636 F.3d at 360). And "[t]his is true even when the incorrect recitation seemingly places an additional burden on the petitioner." *Id.* (citing *Carter*, 819 F.3d at 944). So even though the

state court in *Gage* "stated that to prove prejudice, a defendant must show that the attorney's errors rendered the resulting conviction *unreliable in light of the other evidence presented*," it correctly compared the post-conviction testimony with the trial testimony, so its decision was not contrary to *Strickland*. *Id.* (internal quotation marks and citation omitted); *cf. Goodman v. Bertrand*, 467 F.3d 1022, 1028 (7th Cir. 2006) (holding that the state court's decision was contrary to *Strickland* because it cited the right standard but applied the wrong one).

Like the state court in *Gage*, the state court in this case "focused on whether the proffered testimony could have affected the outcome." 978 F.3d at 528 (internal quotation marks and citations omitted). The court found "that Dunn's claim can be resolved based solely on whether the evidence produced from consultation with a forensic pathologist would have had a reasonable probability of affecting the outcome of Dunn's trial" (App. 16). The court specifically responded to Dunn's argument "that with Dr. Sozio's testimony, there is a reasonable probability that he would have been acquitted" (App. 17). And the court concluded that, "when viewed in conjunction with the totality of evidence at trial," Dr. Sozio's "testimony is not so compelling that there is a reasonable probability that had it been offered the jury would have concluded that Torres's injuries were solely the result of a fall" (App. 17). The court did not cite the right standard and then apply the wrong one like the court in *Goodman*. 467 F.3d at 1028. Because the court's decision was not contrary to *Strickland*, the district court should not have reviewed Dunn's claim *de novo*.

B. The state court reasonably applied *Strickland*.

The state court also reasonably applied *Strickland* to the facts. When a state court "correctly identifies the governing legal rule," the petitioner must prove that the court "applie[d] it unreasonably to the facts of [his] case." *Williams*, 529 U.S. at 407–09. It is not enough for him to show that the court applied federal law incorrectly because "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Harrington v. Richter*, 562 U.S. 86, 101–02 (2011) (citing *Williams*, 529 U.S. at 410; *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)). He must demonstrate that all "fairminded jurists" would agree "that the state court's decision conflicts with [Supreme Court] precedents." *Id.* at 102. That means the state court's ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fairminded disagreement." *Id.* at 103. It is a difficult standard to meet "because it was meant to be." *Id.* at 102.

Dunn's burden is all the more difficult because he alleges ineffective assistance of counsel. On its own, the *Strickland* standard is "highly deferential." 466 U.S. at 689. A petitioner must show that his "counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 694. But the standard is "doubly deferential" under AEDPA because "the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied

Strickland's deferential standard." *Richter*, 562 U.S. at 105. The *Strickland* standard is general, "so the range of reasonable applications is substantial." *Id.* (citing *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)).

The state court's application of *Strickland* fit well within the reasonable range. The court reasonably determined that there was no reasonable probability that the testimony of another forensic pathologist would have changed the outcome of Dunn's trial. Dr. Sozio's testimony was partly cumulative of and partly contradicted by evidence that was presented at trial. It also would have made the State's case easier.

It was reasonable to determine that "Dr. Sozio's testimony is not as definitive as Dunn suggests" because "Dr. Sozio did not conclusively identify the manner of Torres's death as an accident" (App. 17). Like the two pathologists who testified at trial, Dr. Sozio concluded that the cause of Torres's death was blunt force trauma to the head (Tr. 882, 950–51; PCR Tr. 31). But Dr. Sozio concluded that "the manner [of death] is best to be undetermined in this case" (PCR Tr. 31). His conclusion about the manner of death is consistent with the trial testimony of Dr. Chrenka, who also concluded that the manner of death was unknown (Tr. 882–83). And Dr. Sozio's testimony that "it could have been an accidental death" was cumulative of Dr. Chrenka's testimony. Dr. Chrenka explained that there are five possible manners of death to write in a report—homicide, accidental, suicide, natural, and uncertain—and Torres's manner of death was "uncertain" (Tr. 882). As the circumstances did not suggest suicide or natural death, Dr. Chrenka's "uncertain"

conclusion showed that Torres's death could have been accidental. Dr. Sozio's conclusion about the manner of death would not have added anything to Dr. Chrenka's testimony.

And it was reasonable for the court to discount Dr. Sozio's testimony that he "highly favored a fall" over a beating as the source of Torres's injuries because he had no explanation for some of the State's evidence, especially the blood spatter analysis (PCR Tr. 33; App. 18–19). He believed that all of Torres's injuries could have been caused by falling down the stairs or over the railing and that he did not move after he hit the ground (PCR Tr. 29–31, 34–37, 40, 52). Although Dr. Sozio does not "have any expertise in blood spatter analysis," he testified at the post-conviction hearing that he did not see any cast-off blood in the photographs that were admitted at trial (PCR Tr. 20, 29–30). Even assuming that the trial court would have allowed Dr. Sozio to opine about evidence outside of his expertise, the State could have easily discredited his testimony.

Unlike Dr. Sozio, Marks is an expert in blood spatter analysis (Tr. 886–88). He gave detailed testimony about the cast-off blood on the ground (Tr. 911–13; *see* St. Ex. 64). He also testified about impact-spatter blood on the wall, which was not consistent with just falling down the stairs (Tr. 899–905, 920; St. Exs. 48–52). And he testified about blood from flight, either cast-off or impact spatter, on the door, the stairway beam, the stairway railing, the steps, and the car (Tr. 896–97, 913–18; St. Exs. 46, 56–58, 63, 73, 74). Based on all of this evidence that he has been trained to analyze, he believed that the blood stains "are all related to each other" and

indicate "that an event of some type took place between the car and the stairwell" (Tr. 918–19).

It was also reasonable to determine that Dr. Sozio's testimony was contradicted by the State's "common-sense argument that Torres's injuries could not have been caused merely from the fall" (App. 19). The deck was approximately six feet high (Tr. 454–56; St. Ex. 9). The State presented detailed evidence about Torres's significant injuries (Tr. 470–82, 858–60, 878–82, 939–44, 954–55). In addition to scrapes, bruises, swelling, and a large gash on the back of his head, he had 10 broken ribs, a broken clavicle, a bruised lung, a lacerated liver, multiple skull fractures, and significant bleeding in his brain (Tr. 470–72, 474–82, 856, 858–60, 871, 873–76, 878–82, 937–50). The broken first rib was consistent "with severe trauma like a high speed motor … vehicle crash" (Tr. 955).

Dr. Wagner testified that "multiple injuries on multiple surfaces of the body is not totally consistent with only falling downstairs" (Tr. 953). Some of the injuries were consistent with a fall down the stairs, such as the scrapes on Torres's hands and feet, but "the deep injuries to the skull … and chest would not be consistent with a simple fall down the steps" (Tr. 954–55). Dr. Wagner's testimony corroborated Marks's testimony that something happened at the bottom of the stairs because the blood spatter was inconsistent with simply falling down the stairs (Tr. 918–20). Marks also refuted Dr. Sozio's testimony that Torres stayed in one place after he fell with blood evidence that he moved (Tr. 907–09).

Even in the best light, there is no reasonable probability that Dr. Sozio's testimony would have changed the outcome of Dunn's trial. Dunn's argument depends on the State's case remaining static, but there is no reason to assume that it would have. The State followed the science: Its experts believed that something happened on the ground (Tr. 918–19, 953–56). That theory made the State's case more difficult to prove because none of the eyewitnesses testified that Dunn beat Torres after he fell (Tr. 358–59, 372, 378–79, 521–22, 525–26, 540–41, 547, 550, 580, 615, 643). The State could have easily adapted to Dr. Sozio's opinion that Torres's injuries more likely resulted from a fall than from a beating, so his testimony would have made the State's case stronger.

Dr. Sozio concluded that the manner of Torres's death was undetermined in part because he did not "know what happened at the top of the stairs" (PCR Tr. 52). If he had known that Dunn had pushed Torres down the stairs, then he would have concluded that the manner of Torres's death was homicide (PCR Tr. 47–48). And there is evidence that Dunn pushed Torres down the stairs—from Dunn's own mouth. He told an officer "that he turned around and told [Torres] to stop hitting him, and [Torres] hit him again in the back, and he said he turned around and pushed him, and [Torres] fell down the steps" (Tr. 397). Dunn's confession was corroborated by Willie's statement to his brother that Dunn "just pushed [Torres] downstairs" (Tr. 610–11; *see also* Tr. 604–09, 623, 630, 632). The State did not rely on the evidence that Dunn pushed Torres because that was not its theory of the case. But the State could have used that theory if Dr. Sozio had testified that the

fall likely killed Torres.[7] Dunn cannot demonstrate that all "fairminded jurists" would agree "that the state court's decision conflicts with [Supreme Court] precedents," *Richter*, 562 U.S. at 102, so he is not entitled to habeas relief.

C. Dunn cannot show that he received ineffective assistance of counsel under *de novo* review.

Even if Dunn could overcome AEDPA deference, he cannot demonstrate that his counsel performed deficiently or prejudiced him by failing to consult a forensic pathologist. Dunn was not entitled to "perfect representation, only a 'reasonably competent attorney.'" *Richter*, 562 U.S. at 110 (citing *Strickland*, 466 U.S. at 687). He must show that his counsel's "representation amounted to incompetence under 'prevailing professional norms.'" *Id.* at 105 (quting *Strickland*, 466 U.S. at 690). It is not enough to say that his counsel "deviated from best practices or most common custom." *Id.* (citing *Strickland*, 466 U.S. at 690). Although one mistake by his counsel could support a *Strickland* claim, "it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." *Id.* at 111.

Dunn did not demonstrate that his counsel needed to consult a forensic pathologist under prevailing professional norms or that his counsel's overall performance was incompetent. *Strickland* does not require counsel to consult a

[7] Self-defense was unavailable because Dunn started the fight by kicking Torres's door open (Tr. 519, 566, 568, 582–83, 709–10, 742–43, 769–70, 775, 777). *See Carroll v. State*, 744 N.E.2d 432, 433 (Ind. 2001) (citing *Brooks v. State*, 683 N.E.2d 574, 577 (Ind. 1997)) ("A claim of self-defense in a homicide prosecution requires that the defendant acted without fault, was in a place where he had a right to be, and was in reasonable fear of death or great bodily harm.").

forensic pathologist to be effective. *Thomas v. Clements*, 789 F.3d 760, 770 (7th Cir. 2015); *see also Dunn v. Jess*, 981 F.3d 582, 594 (7th Cir. 2020). It "does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense." *Id.* at 111. Often "cross-examination will be sufficient to expose defects in an expert's presentation. When defense counsel does not have a solid case, the best strategy can be to say that there is too much doubt about the State's theory for a jury to convict." *Id.*

Dunn did not present evidence that consulting a forensic pathologist was consistent with prevailing professional norms. *See Strickland*, 466 U.S. at 688 (referring to "[p]revailing norms of practice as reflected in American Bar Association standards and the like"). The record shows that it was not. At trial, Dr. Wagner, who had testified in court hundreds of times, testified that he does so "98 percent" for the State (Tr. 956). At the post-conviction hearing, Dr. Sozio testified that he usually testifies for the State (PCR Tr. 20). And Dunn's counsel testified that he had represented defendants in over 100 homicide trials and had never consulted an independent forensic pathologist (PCR Tr. 13). Dunn has not demonstrated why his counsel should have seen that his case was exceptional. The first two pathologists reached similar conclusions; nothing about their opinions or the physical evidence suggested that Dunn's counsel needed to seek a third opinion.

Based on the physical evidence, especially the blood spatter, Dunn's counsel believed that the State's theory that something happened after the fall was logical (PCR Tr. 6–9, 11, 16). Although none of the eyewitnesses ultimately testified that

Dunn beat Torres when he was on the ground, Letha told a detective before trial that Dunn had kicked Torres when he was on the ground, and there was blood on Dunn's shoe (Tr. 537–39, 695, 699, 738, 751, 805). So there was little reason to doubt the opinions of the State's experts until Dr. Sozio rendered his own in "'the harsh light of hindsight.'" *Richter*, 562 U.S. at 107 (quoting *Bell v. Cone*, 535 U.S. 685, 702 (2002)). In other words, Dunn's counsel needed to consult Dr. Sozio to know that he needed to consult Dr. Sozio. *Cf. Thomas*, 789 F.3d at 769 ("Counsel should have known there was reason to question a finding of intentional homicide."). If that were sufficient to show deficient performance, then defense counsel would be constitutionally required to consult forensic pathologists in every homicide case. *But see id.* at 770; *Dunn v. Jess*, 981 F.3d at 594.[8]

Dunn's counsel used a reasonable trial strategy to respond to the State's theory of the case. The State's theory that something happened on the bottom of the stairs was supported by the physical evidence, Dr. Wagner's testimony about Torres's injuries, and Marks's testimony about the blood spatter (*see, e.g.*, Tr. 918–19, 953–55). But that theory was difficult to prove because none of the eyewitnesses testified that Dunn beat Torres on the ground and there was no murder weapon. Although the evidence seemed to suggest that Dunn killed Torres with the bat, the

[8] The district court believed that *Dunn v. Jess* was "oddly similar" to this case (R.S.A. 28). But counsel in *Dunn v. Jess* consulted a forensic pathologist and gleaned "crucial information" about his defense and then did not put the pathologist on the stand because he misread the medical examiner's report and mistakenly expected the examiner to support his defense. 981 F.3d at 592.

State conceded that he probably did not during closing argument (Tr. 989–90, 1011, 1027).

Dunn's counsel tried to exploit the weaknesses in the State's case. He knew that he could not answer the blood spatter evidence, so "the bat was everything" (PCR Tr. 6–7, 9, 11–12, 16–17). He cross-examined the witnesses about whether there was any evidence that Dunn had used the bat the beat Torres (Tr. 379, 416, 545–46, 624, 627, 630, 727–28, 730, 735–36, 741–42, 754, 837, 840–42, 844–45, 923). He argued that the jury "didn't hear anyone on the stand put the bat in Dewayne's hands" or "testify that Dewayne hit the victim" (Tr. 995; *see also* Tr. 999). And he reminded the jury that there was no visible blood on the bat, which "should have had a lot of blood on it" if it had "caused the cast-off pattern" (Tr. 998; *see also* Tr. 1003). That is to say, he followed the Supreme Court's guidance: "To support a defense argument that the prosecution has not proved its case it sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates." *Richter*, 562 U.S. at 109.

Dunn also cannot demonstrate prejudice, as explained above. Dr. Sozio's testimony would have been cumulative of the other pathologists' testimony or unpersuasive. Even worse, it would have helped the State's case. Evidence that Torres died from falling down the stairs would not have exonerated Dunn; it would have given the jury an alternative, and arguably more plausible, theory to find him guilty of murder. To meet *Strickland*'s deferential standard, "[a]n attorney need not pursue an investigation that would be fruitless, much less one that might be

harmful to the defense." *Id.* at 108. Dunn's counsel did not perform deficiently or prejudice him. He is not entitled to habeas relief.

CONCLUSION

The Court should reverse the district court.

Respectfully submitted,

Jesse R. Drum
Assistant Section Chief, Criminal Appeals

Attorney for Respondent-Appellant

REQUIRED SHORT APPENDIX

The State submits the following Required Short Appendix, which contains all of the materials required by Circuit Rule 30(a).

/s/ Jesse R. Drum
Jesse R. Drum

UNITED STATES DISTRICT COURT

for the
Northern District of Indiana

DEWAYNE A DUNN

Petitioner

v.

Civil Action No. 3:18-cv-178

WARDEN
Indiana State Prison

Respondent

JUDGMENT IN A CIVIL ACTION

The court has ordered that (*check one):*

___ the plaintiff_____
recover from the defendant _____ the amount of_____
dollars $, which includes prejudgment interest at the rate of _____% plus post-
Judgment interest at the rate of _____ % along with costs.

___ the plaintiff recover nothing, the action is dismissed on the merits, and the defendant_____
recover costs from the plaintiff _____.

_X_ Other: The Petition for Writ of Habeas Corpus CONDITIONALLY GRANTED. The State of Indiana may re-try Dewayne A. Dunn, provided that it files appropriate documents to do so in the State trial court within 120 days of the Order. The respondent is ORDERED to file a notice in this court within 150 days of this Order demonstrating that Dewayne A. Dunn has either been released or that the State of Indiana has initiated re-trial proceedings against him.

This action was (*check one):*

___ tried to a jury with Judge _____ presiding, and the jury has rendered a verdict.

___ tried by Judge _____ without a jury and the above decision was reached.

_X_ decided by Judge Philip P. Simon on a Petition for Writ of Habeas Corpus.

DATE: 12/29/2020 ROBERT N. TRGOVICH, CLERK OF COURT

by s/ M. Murray
Signature of Clerk or Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

DEWAYNE A. DUNN,

Petitioner,

v.

WARDEN,

Respondent.

CAUSE NO. 3:18CV178-PPS/MGG

OPINION AND ORDER

Dewayne A. Dunn filed a pro se petition for writ of habeas corpus challenging his conviction in State court for the murder of Angel Torres. Torres and Dunn were friends and neighbors. They lived in adjacent apartments on the second floor of a small apartment building. They shared a deck with stairs leading down to ground level. The basic question at trial was whether Torres died falling down the stairs or, as the State theorized, he was bludgeoned to death by Dunn after he landed at the bottom. The case against Dunn was not a strong one. Indeed, the only two eyewitnesses supported Dunn's theory that Torres died from the fall. The State's case relied almost exclusively on the testimony of two experts, a forensic pathologist and a blood spatter specialist. Dunn's lawyer made no effort to contradict the testimony of the State's experts. Dunn was convicted of first degree murder and sentenced to a lengthy term of imprisonment. It is trial counsel's alleged ineffectiveness in failing to consult an expert pathologist that is presently before me in this habeas corpus petition. And because I find that Dunn received ineffective assistance of counsel in the trial of his case, and but for his lawyer's

subpar performance, there is a reasonable probability that he would have been acquitted, habeas relief will be granted.

FACTUAL AND PROCEDURAL BACKGROUND

In deciding this habeas petition, I must presume the facts set forth by the State courts are correct. 28 U.S.C. § 2254(e)(1). Unless otherwise noted, the facts set forth below come from the opinion of the Indiana Court of Appeals. *See Dunn v. State*, 959 N.E.2d 935 (Ind. Ct. App. Dec. 22, 2011) (table), *trans. denied* 963 N.E.2d 1119 (Ind. Feb. 13, 2012) (table); DE 24-5 at 2-4. Occasionally, where the Court of Appeals' factual discussion is incomplete, I have augmented it and, when I do, I cite directly from the trial transcript (Tr.) or the transcript from the post conviction relief hearing (PCR Tr.) (Both can be found at Docket Entry 25.)

Facts

In September 2008, Dunn lived in an apartment in Elkhart, Indiana with his former girlfriend, Letha Sims, and two of her sons. Their rental unit was located on the second floor of the apartment building, next door to another unit rented by Angel Torres. The units shared a common balcony, with an exterior staircase leading to the ground. Dunn, Sims and Torres were friends. They would frequently sit on the porch socializing, smoking and drinking. Tr. 500-06.

On the evening of September 3, 2008, Damen Collins was riding his bike near the apartment building when he witnessed an altercation between a man and a woman taking place on the balcony. Although Collins was approximately 100 feet away from

the balcony when he saw the dispute, nothing was blocking his view. Tr. 356. He claims that it was dusk at the time. Tr. 365-66. But this was plainly incorrect; the 911 call that he placed was received at 11:40 p.m. Tr. 384. Anyway, Collins saw what he believed to be a man and woman fighting, heard the woman screaming for help and saw her being pushed down the stairs. Another man then came out of his apartment, but he was shoved back inside by the man on the balcony. At that point, Collins called 911 and left the area. As he was leaving, Collins heard loud noises coming from the area of the fight, but he was unsure what they were. When asked if he could describe the aggressor, Collins testified that he didn't have a clear view of the matter. Tr. 363-64.

The first police officer arrived on the scene eight minutes after receiving the dispatch. At that time, Torres was lying at the bottom of the staircase in a pool of blood. He was unresponsive and his breathing was very labored. A baseball bat was positioned underneath Torres's body, and Jamar Sims (Letha's son) and Dunn were standing nearby. Dunn was very agitated and shouting that he "didn't do anything." Tr. 394.

At the time of Torres's death, Jamar resided in the apartment with Dunn, his mom and his little brother. Jamar was a junior in high school. Tr. 595-96. Jamar goes by the name "Willie" and that is how I will refer to him. Tr. 588. Willie testified that he was present on the night Torres died and actually witnessed the altercation. Here's what he says happened: Their apartment was on the second floor of the building and an outside staircase led to a small balcony from which you could go into either their apartment or

Torres's. Tr. 590-93. The balcony was small, maybe four feet by ten feet. Tr. 595. And the staircase was dangerous. Tr. 562, PCR Tr. 31. According to Willie, earlier in the day, several people, including Letha, Dunn, Torres and other friends, were all on the balcony drinking. Tr. 597. Willie went to take a nap in the downstairs bedroom. (There is an interior staircase that leads down to the apartment's bedroom). Willie was awakened by Dunn who was screaming and hollering. Tr. 600-01. Willie followed Dunn upstairs and, while he was getting a drink of water, Dunn walked outside; Willie then heard an argument ensue between Dunn and Torres. Tr. 601-02. Specifically, Willie heard Dunn say "don't hit me with that bat." Tr. 601-02. Willie looked outside and saw Torres and Dunn fighting. He then saw Torres strike Dunn on the shoulder with a baseball bat. Tr. 604.

Willie's testimony that he saw Torres strike Dunn with a bat was corroborated by medical reports and photographs taken of Dunn that evening. Dunn was taken to the hospital and photos were taken of his back. Tr. 714-15. Those photos show abrasions on Dunn's shoulders consistent with being struck by a bat. Tr. 717-19. When asked at the hospital how he got the injury, Dunn told the evidence technician that he was indeed struck by a baseball bat. *Id*. Dunn also told the responding police officer the same thing. Tr. 396-97.

After seeing Torres strike Dunn with the bat, Willie saw the two wrestling over it. Both were perilously close to the top of the stairs. From Willie's vantage point, Torres had his back to the stairs and Dunn was facing Torres with his back to Willie. As Dunn

and Torres were struggling over the bat, Willie saw Torres fall backwards down the steps. Tr. 604, 606-07. Willie was equivocal about whether Torres fell or was pushed down the stairs. Tr. 610. On direct examination, he told the prosecutor he really wasn't sure if Torres fell or was pushed. *Id.* On cross, he was more emphatic that Torres was not pushed. Tr. 630. Torres was likely unsteady on his feet. He was wearing sandals and was extremely drunk at the time. Tr. 488, 484. In either event, whether he was pushed or he fell, Torres went down the stairs while struggling with Dunn over the bat. Tr. 630. According to Willie, Torres landed on the bannister first, then flipped over it and hit the pavement below head first. Tr. 608-09. Willie ran down the stairs to help and saw Torres in a pool of blood. Tr. 611-12. From there, Willie ran to flag down a police officer. Tr. 612-13. At no time during the altercation did Willie see Dunn strike Torres with the bat or anything else. Tr. 624, 630.[1]

Willie's mother, Letha, although not an eyewitness to the confrontation between Dunn and Torres, heard the confrontation and largely corroborated Willie's account of events. According to Letha, by the date of the incident in question, she and Dunn were no longer on good terms. Tr. 506. Although they continued to live with one another, they were no longer intimate. Tr. 507. Although Letha and Torres had sex on one occasion prior to his death, she described her relationship with Torres as more like close friends. Tr. 508, 510. On the day in question, Letha went next door to Torres's apartment

[1] In its opinion denying post conviction relief, the Indiana Court of Appeals incorrectly stated that Willie never testified that Dunn did not inflict injury on Torres. *See* PCR Opinion at DE 24-12 at n.1. Yet Willie did testify to that at the pages I've cited to in the text above. Tr. 624, 630.

to have a beer while Dunn went to take the dog for a walk. Tr. 510-14. One beer led to a few which led to some Bacardi Rum. Tr. 512-13. When Dunn got home from walking the dog, he joined them. Tr. 514-15. They were all laughing and having a good time until an argument between Torres and Dunn broke out. Tr. 514. Letha did not recall what prompted the argument except to say that Torres and Dunn argued a lot, especially when they were drinking. Tr. 514.

As noted above, Torres was extremely intoxicated upon his death. According to the emergency room doctor who worked on him later that evening, his blood alcohol content was .294 making him, in the words of the attending doctor, "significantly under the influence of alcohol." Tr. 484-85. This is not surprising since he had been drinking most of the day.

According to Letha, after the argument broke out between Torres and Dunn, it spilled out onto the porch. Tr. 516. Letha and her son (Andre, not Willie) went outside to break up the fight, and then she went back inside Torres's apartment. Tr. 517-18. Torres and Dunn each went back into their own apartments. Tr. 518. At some point later, Dunn kicked the door to get back inside Torres's apartment. Tr. 519. Torres then grabbed a baseball bat, and Torres and Dunn went back outside. *Id*. Through the screen door she could hear the commotion outside as the two were tussling, and she heard Dunn tell Torres — consistent with what Willie heard — to "stop hitting me with the bat." Tr. 519-20. She remained inside because she was scared. *Id.* Finally, she heard a thud, went out on the porch, looked down and could see Torres at the bottom of the

stairs with the bat underneath him. Tr. 521-25. When Letha came out of the apartment and onto the deck, she saw Dunn standing at the top of the stairs; she then saw him descend the stairs and begin tugging on Torres's arm, imploring him to get up. *Id*.

As noted above, the first officer to arrive on the scene, Jason Runyon, observed Dunn standing next to Torres's body exclaiming,"I didn't do anything!" Tr. 394. He further told the officer that Torres had struck him with the bat and that a scuffle had ensued. Tr. 396-97. According to the officer, Torres was lying on the baseball bat when he arrived. Tr. 402. Dunn was upset but was not acting aggressively. Tr. 413-14. Another officer, Bryan Moore, also arrived on the scene. He interviewed Letha. She told him, consistent with what she later told the jury, that she heard Dunn tell Torres to stop hitting him with the bat, then she heard a thud, went outside and saw Torres on the pavement below. Tr. 461-62.

After paramedics took Torres to the hospital for treatment, police conducted an extensive forensic examination of the area. Dunn's shoeprint was found on the outside of Torres's apartment door, and the doorjamb was freshly splintered. There was also blood on the outside of the door, and crime scene investigators were able to determine that the blood was cast onto the door after the shoeprint was made. Another of Dunn's shoeprints, in what was later determined to be Torres's blood, was found on the second step of the staircase. A pool of blood on the pavement at the bottom of the staircase contained Dunn's shoeprint, and Torres's blood was found on the sole of Dunn's shoe. Blood was also found on Dunn's shorts, and DNA testing revealed a mixture of a major

and minor profile. Dunn was the source of the major profile, and no conclusions could be drawn from the minor profile. Torres's blood was found on the handle and middle portion of the baseball bat, but not on the barrel of the bat. Tr. 836-37.

When Torres arrived at the emergency room, physicians determined that he had suffered a traumatic head injury, including significant brain injury, bleeding within the brain, and skull fractures. Torres also had blood and air within his chest wall cavity, indicating a significant lung injury. Torres died after being removed from life support on September 5, 2008.

An autopsy was conducted by Dr. Chrenka. According to Chrenka, the cause of Torres's death was massive blunt trauma to the head. Tr. 882. But the manner of death — homicide, suicide, accident, etc. — was deemed to be uncertain. Dr. Chrenka is board certified as an anatomical, clinical and pediatric pathologist but he is not a board certified forensic pathologist. Tr. 849-50. Most of his work does not involve doing autopsies, although he occasionally does them. Tr. 850-51.

The State's theory of prosecution was that Torres was pushed down the steps by Dunn and, after he landed, Dunn found some object to bludgeon him with. The State did not contend that the bat was the offending object. Instead, they theorized it was likely some other instrument; but no other instrument was ever found. The only evidence on this critical point came from two experts: a forensic pathologist and a blood spatter expert from the Indiana State Police.

The State's theory required a different pathologist than Dr. Chrenka, who was uncertain on the manner of death. It found one in the person of Dr. Scott Wagner who practices out of Fort Wayne. Dr. Wagner was hired by the State to review the autopsy of Dr. Chrenka. Unlike Chrenka, Wagner is a well-qualified board certified forensic pathologist. Tr. 925-27. Wagner has testified hundreds of times, but 98% of the time he testifies for the State. Tr. 956. On direct examination, Wagner was never asked whether the fall could have caused the injuries to Torres. He simply said that the degree of trauma was severe, that Torres had multiple skull fractures and part of the skull was "crushed like gravel." Tr. 944-48. In addition, all of Torres's ribs were broken, as well as his clavicle. Tr. 939-41. There was no meaningful cross-examination of Wagner. Tr. 952. Counsel only confirmed that Wagner was being called for his second opinion on the cause and manner of death. *Id*. On redirect examination, the State finally got around to asking whether Dunn's injuries were consistent with someone falling down the stairs, and Wagner said they were not. Tr. 954-55.

As for the blood spatter evidence, there was substantial evidence of several people stomping around the crime scene. First, Dunn and Willie went up and down the stairs and walked next to Torres's body. Indeed, Dunn was seen standing next to Torres trying to forcibly pull him up by his arm. Both Dunn and Willie were standing near Torres when the police arrived. Officers Runyon, Weaver and Moore also were all seen walking around the crime scene near the body. Tr. 462, 724. There were photos admitted at trial which showed several people in boots standing right next to Torres's

body. Tr. 731-33, Trial Exhibit 26. Indeed, the photo shows what appears to be medics walking through the blood. Additionally, while the crime scene was being processed, it started to rain heavily. Tr. 764.

Notwithstanding this evidence of the crime scene having been disrupted, the State's blood spatter expert testified that nothing he saw suggested that the blood spatter could have been caused by stomping around the scene. Tr. 902. That expert was Dean Marks of the Indiana State Police. He has investigated crime scenes for 15 years and has specialized training in blood spatter analysis. Tr. 884-88. He has a Bachelor's Degree from Indiana University in sociology and forensic science. Tr. 885. He's evaluated 1500 crime scenes and has testified for the prosecution about 47 times around the State of Indiana. Tr. 887-88. Torres's blood was found on the wall at the bottom of the staircase. Marks determined from the pattern of the bloodstains that they were caused by "impact spatter" which means that some degree of force was applied to a blood source, causing the blood to disperse. According to Marks, the blood spatter pattern was not consistent with someone walking, or even stomping, through blood that was already pooled on the pavement, or with Torres simply falling down the stairs. Torres's blood was also spattered on a vehicle parked adjacent to the staircase and parallel to the bloodstained wall. There was "cast-off blood staining" on the concrete between the staircase and the vehicle, indicating that a bloody instrument of some kind had been "swung or flung[.]" Tr. 911.

The State charged Dunn with Torres's murder nearly two years after his death. As mentioned above, the State's theory of prosecution was that Torres fell down the stairs and, once he was at the bottom, Dunn bludgeoned him with a blunt object. The State conceded that the bat Torres was lying on was likely not the murder weapon. Instead, the State suggested that some other instrument was used by Dunn and later discarded in the few minutes before the police arrived. No such weapon was ever recovered.

The trial lasted four days but took nearly four weeks to complete. The trial commenced on Monday, January 31, 2011. After the second day of trial, a snow storm hit the area, as often happens in Elkhart County in January. Somewhat oddly, the trial did not pick up again until three weeks later on February 21. The following day, February 22, 2011, the jury returned a verdict convicting Dunn of first degree murder. Dunn was sentenced to a term of imprisonment of 58 years.

Procedural History and Post Conviction Relief

After his conviction, Dunn appealed, arguing that there was insufficient evidence to support his conviction. DE 24-3 at 5. The Indiana Court of Appeals disagreed and affirmed Dunn's conviction and sentence. *Dunn v. State*, 959 N.E.2d 935 (Ind. Ct. App. Dec. 22, 2011) (table), *trans. denied* 963 N.E.2d 1119 (Ind. Feb. 13, 2012) (table); DE 24-5 at 7. Dunn sought transfer to the Indiana Supreme Court, but his petition for transfer was denied. *Dunn v. State*, 963 N.E.2d 1119 (Ind. Feb. 13, 2012) (table); DE 24-6.

Dunn timely filed a Petition for Post-Conviction Relief which was later amended by counsel. DE 24-7, DE 25-11. In that petition Dunn claimed that he received ineffective assistance of counsel during the trial of the case. In particular, Dunn argued that his lawyer never consulted with, much less hired, a forensic pathologist even though the cause and manner of death was the critical issue at trial. DE 25-11 at 107-09. A hearing was held, at which Dunn's trial counsel (Attorney Clifford Williams) and a forensic pathologist (Dr. Thomas Sozio) both testified. DE 25-9.

Dr. Sozio is a board certified and licensed forensic pathologist. He has done roughly 4500 autopsies in his career. He testifies throughout the State of Indiana as an expert pathologist on the cause and manner of death, and he usually testifies for the State. PCR Tr. 19-20. Recall that the critical issue at trial was whether Torres died falling down the steps or whether, as the State contended, he was bludgeoned to death after he fell. Dr. Sozio first testified that the autopsy conducted by Dr. Chrenka was substandard; he missed a lot. PCR Tr. 50. After reviewing all of the relevant materials, Dr. Sozio testified, contrary to the testimony of Dr. Wagner at trial, that Torres's injuries were much more consistent with a fall than with being bludgeoned by a blunt object. PCR Tr. 23-33.

Here's why: Dr. Sozio noted that Torres BAC was .294. Sozio opined that Torres's fatty liver was consistent with chronic alcoholism, and that chronic alcoholism is associated with reduced clotting times and greater susceptibility to broken bones. *Id.* at 29. Given that Torres was extremely intoxicated, and that the

staircase did not appear safe, Dr. Sozio "highly favored a fall" as the way in which Torres died. PCR Tr. 28-35. He explained that he reached this conclusion because he observed just one small laceration on Torres's scalp. Additionally, the skull fracture is more indicative of a fall because of the area of the injury on Torres's head. *Id.* at 34-35. What's more, the straight line break of several ribs was not at all consistent with him being battered. PCR Tr. 37. In sum, Sozio's opinion was as follows: "I don't believe [Torres] was struck at the bottom of the stairs." PCR Tr. 51.

Also testifying at the PCR hearing was trial counsel, Clifford Williams. Williams is a very experienced criminal defense attorney, but he conceded at the hearing that he had a myopic focus on the bat. The fact it was found under the victim "obscured" his judgment in the case. PCR Tr. 6. After all, he had two eyewitnesses on his side, Willie and Letha Sims, and he was confident. As he testified at the PCR hearing: "I'm going to be very blunt. I thought I won the case." PCR Tr. 11.

Williams testified that his theory of the case was that Dunn and Torres were drinking and had an argument that led to a physical confrontation. PCR Tr. 4. They were tussling at the top of the stairs. A bat became involved. They were struggling over the bat, each holding one end, when Torres fell down the stairs. Counsel believed that the State's theory of the case was that, however Torres got to the bottom of the stairs, Dunn struck him with the bat at the bottom of the stairs. PCR Tr. 4-5. In other words, Williams believed that the State's theory was that the bat was the instrument that was

used to bludgeon Torres, and since there was no DNA on the barrel of the bat, this would carry the day for him and his client. PCR Tr. 6.

But that wasn't the State's theory. As noted above, the State admitted in closing that "we don't know the baseball bat was the instrument and quite frankly the evidence suggests the contrary." Tr. 1015. They again conceded that it was likely some other instrument a few moments later: "Do we know what kind of weapon was used? No." Tr. 1018. In other words, the State would have the jury believe that the instrument used by Dunn to bludgeon Torres was discarded in the few minutes from the time the 911 call was made and the police arrived at the scene.

Williams admitted that he never consulted a pathologist or blood spatter expert, and did not bother to depose Dr. Chrenka or Dr. Wagner, despite rules in the State of Indiana that permit depositions in criminal cases. He further admitted that the blood spatter testimony "clouded" his judgment in the case. PCR Tr. 6-7. In the end, he conceded there was no "strategic reason" for not consulting an expert forensic pathologist in the case. PCR Tr. 8. If he had to do it over again, he would have had another person examine the blood spatter evidence. PCR Tr. 14.

After a hearing, the court denied Dunn's request for post-conviction relief. DE 25-11 at 121-29. In reaching this conclusion, the post-conviction relief (PCR) court noted that:

> [Dunn] has failed in his burden to develop evidence that establishes that consulting with another expert would have changed the outcome of the trial. The witness presented by [Dunn] simply provided another expert opinion as to the cause of death of the victim which lacks some credibility

> when considered in connection with the totality of the evidence presented at trial.

Id. at 128. This was the wrong legal standard. The issue was not whether consulting with or calling a forensic pathologist "would have changed the outcome of the trial." Instead, under *Strickland v. Washington*, 466 U.S. 668 (1984), the issue was whether there was a "reasonable probability" of that occurring.

Dunn appealed, raising the same argument. *Dunn v. State*, 94 N.E.3d 367 (Ind. Ct. App. Oct. 31, 2017) (table), *trans. denied* 95 N.E.3d 1294 (Ind. Jan. 25, 2018) (table); DE 24-12. The Court of Appeals upheld the PCR court's judgment. *Id.* Dunn sought transfer to the Indiana Supreme Court, again raising only this issue. 95 N.E.3d 1294 (Ind. Jan. 25, 2018) (table). The Indiana Supreme Court denied transfer. *Id.*

Proceedings in this Court

In his petition before this Court, Dunn argues that his trial counsel was ineffective for failing to retain an expert to testify on his behalf at trial and that he was not tried by a jury of his peers. DE 1 at 3. Respondent filed a response to the petition (DE 24), and Dunn filed a traverse (DE 27). After reviewing the record, I noticed that the trial exhibits were missing from the record and ordered the respondent to produce them. DE 30. The exhibits were produced (DE 31), and now that I have read the entirety of the record, the petition is ripe for adjudication.

DISCUSSION

A. Claim Relating to Jury Selection

Dunn's first issue relates to jury selection. I have omitted any discussion of the issue above because, as we will see in a moment, the issue has been procedurally defaulted. The labyrinth of "procedural default" is where a lot of habeas cases go to die. One way that a claim can be procedurally defaulted is if the petitioner fails to exhaust all available remedies in State court. 28 U.S.C. § 2254(b)(1)(A); *Lewis v. Sternes*, 390 F.3d 1019, 1025 (7th Cir. 2004). In other words, to get to the merits of a claim, a petitioner must fully and fairly present the federal claim to the State courts. *Boyko v. Parke*, 259 F.3d 781, 788 (7th Cir. 2001). Fair presentment requires "the petitioner to assert his federal claim through one complete round of state-court review, either on direct appeal of his conviction or in post-conviction proceedings." *Lewis*, 390 F.3d at 1025 (internal quotations and citations omitted). "This means that the petitioner must raise the issue at each and every level in the state court system, including levels at which review is discretionary rather than mandatory." *Id.* at 1025-26. If he fails to do so, the claim is defaulted. *Id.* at 1026. *See also Snow v. Pfister*, 880 F.3d 857, 864 (7th Cir. 2018).

Respondent argues that one of the grounds raised by Dunn — the one dealing with jury selection — is barred from review in federal court due to procedural default. Dunn claims that he was not tried by a jury of his peers. Dunn did not raise this argument on direct appeal. *Dunn v. State*, 959 N.E.2d 935 (Ind. Ct. App. Dec. 22, 2011) (table), *trans. denied* 963 N.E.2d 1119 (Ind. Feb. 13, 2012) (table); DE 24-5 at 7. He also did

not raise this argument in his PCR petition. *Dunn v. State*, 94 N.E.3d 367 (Ind. Ct. App. Oct. 31, 2017) (table), *trans. denied* 95 N.E.3d 1294 (Ind. Jan. 25, 2018) (table); DE 24-12. Thus, I'm barred from reviewing the merits of this argument unless Dunn's procedural default can be overcome.

A habeas petitioner can overcome a procedural default by showing both cause for failing to abide by State procedural rules and resulting prejudice from that failure. *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977); *Wrinkles v. Buss*, 537 F.3d 804, 812 (7th Cir. 2008), *cert. denied*, 556 U.S. 1239 (2009). Cause sufficient to excuse procedural default is defined as "some objective factor external to the defense" which prevented a petitioner from pursuing his constitutional claim in State court. *Murray v. Carrier*, 477 U.S. 478, 492 (1986). Ineffective assistance of counsel at the initial level of post-conviction proceedings can constitute cause for a procedurally defaulted claim of ineffective assistance of trial counsel. *Trevino v. Thaler,* 569 U.S. 413 (2013); *Martinez v. Ryan*, 566 U.S. 1 (2012). The Seventh Circuit has held that this exception applies to prisoners in Indiana. *Brown v. Brown*, 847 F.3d 502, 513 (7th Cir. 2017). However, "a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez*, 566 U.S. 1, 14 (2012).

Dunn suggests that *Martinez* and *Trevino* apply here. Even if I assume that Dunn is arguing that his counsel was ineffective in failing to raise this argument at the initial level of his post-conviction relief proceedings and that *Martinez* and *Trevino* apply,

Dunn's procedural default cannot be excused because he has not shown that his argument is a "substantial one." Dunn argues that, of the fifty possible jurors, only one was an African American and that he was struck because he "had a problem with the judge when he was a prosecutor," relating to the long-ago prosecution of the juror's brother. DE 1 at 3. The individual in question was a "Mr. Jackson." Tr. 257-89. Jackson revealed that his brother, Johnny Anderson, had been incarcerated for 42 years. Tr. 268, 276. He further revealed that he did not believe that his brother was guilty, and that the criminal justice system failed his brother. Tr. 269. When the prosecutor sought to use a peremptory strike to remove Jackson, the trial court judge recognized that, because Jackson was an African American, *Batson v. Kentucky*, 476 U.S. 79 (1986), was implicated. Tr. 277. He required the prosecution to state a race-neutral reason for striking Jackson. The prosecutor's stated reason was Jackson's forty years' worth of hostility to the criminal justice system related to his brother's conviction. Tr. 280. The prosecution pointed out that Jackson had very strong feelings about his brother's case and wanted to be sure that nobody else had to go through what his brother has suffered. Tr. 286. The trial court found that the prosecution had set forth a race-neutral reason for the peremptory strike. Tr. 289. Under *Batson*, "[u]nless a discriminatory intent is inherent in the [challenged party's] explanation, the reason offered will be deemed race neutral." *Hernandez v. New York*, 500 U.S. 352, 360, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991). There was no error in how the *Batson* issue was handled.

Dunn also claims that the jury in this case did not reflect a fair cross section of his peers. But while the Constitution entitles Dunn to an impartial jury, it does not entitle him to a jury of any particular racial composition. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991); *Teague v. Lane,* 820 F.2d 832, 843 (7th Cir. 1987), *aff'd,* 489 U.S. 288, 109 S.Ct. 1060 (1989). Counsel was not ineffective for failing to raise this issue.

In sum, I cannot find that Dunn has raised a substantial claim about jury selection at his trial or that he has demonstrated cause and prejudice such that his procedural default can be excused. His first claim relating to jury selection is therefore dismissed.

B. Ineffective Assistance of Counsel

Dunn gets more traction on his second argument. He claims he was denied effective assistance of counsel when his lawyer failed to consult a forensic pathologist to testify on the cause of Torres's death — the crucial issue at trial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Dunn's petition is governed by the provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). *Lindh v. Murphy*, 521 U.S. 320, 336 (1997). AEDPA allows a district court to issue a writ of habeas corpus on behalf of a person in custody pursuant to a state court judgment "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The court can grant an application for habeas relief if the adjudication of his claim in State court either (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;" or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

To prevail on an ineffective assistance of counsel claim, Dunn has to show that counsel's performance was deficient, and that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668 (1984). Regarding the deficient-performance prong, great deference is given to counsel's performance, and the petitioner has a heavy burden to overcome the strong presumption of effective performance. *Strickland*, 466 U.S. at 690; *Coleman v. United States*, 318 F.3d 754, 758 (7th Cir. 2003) (citation omitted). A petitioner must establish specific acts or omissions that fall below professional norms. *Strickland*, 466 U.S. at 690. The test for prejudice is whether there was a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Id*. at 693. In assessing prejudice under *Strickland,* "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

1. Is the State Appellate Court Entitled to AEDPA Deference?

The first question is what standard of review governs here. A federal habeas court must "attend closely" to the decisions of State courts and "give them full effect when their findings and judgments are consistent with federal law." *Williams v. Taylor*, 529 U.S. 362, 383 (2000). A State court decision is contrary to federal law if the State

court arrives at a conclusion opposite to that reached by the U.S. Supreme Court or reaches an opposite result in a case involving facts materially indistinguishable from relevant U.S. Supreme Court precedent. *Bell v. Cone*, 535 U.S. 685, 694 (2002). On habeas review of an ineffective assistance claim, when the State court applied the correct legal standard, the inquiry is "whether the state court unreasonably applied *Strickland* . . . ." *McNary v. Lemke*, 708 F.3d 905, 914 (7th Cir. 2013). In addition, "because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (*citing Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). This creates a "doubly deferential" standard of review. *Id.*

However, deference applies only when the state court applies the correct legal standard. *See Williams*, 529 U.S. at 383. When the state court applies the wrong standard, "the decision is not entitled to the usual AEDPA deference and is therefore reviewed *de novo* with the reviewing court applying the correct legal standard." *Mosley v. Atchison,* 689 F.3d 838, 844 (7th Cir. 2012).

Dunn argues that trial counsel provided ineffective assistance of counsel when he did not consult with a forensic pathologist on the critical issue at trial — the cause and manner of the victim's death. The Indiana Court of Appeals chose not to consider the first prong of *Strickland* — whether trial counsel's performance was deficient — and focused instead only on the second prong of *Strickland*: whether there was prejudice. At the outset of its analysis the Court of Appeals quoted directly from the trial court's

conclusion that consulting with a forensic pathologist "would have changed the outcome of the trial." DE 24-12 at 12-13. But this was the wrong standard.

It is true that when the Court of Appeals later stated the *Strickland* standard, it did so correctly on three occasions. *See* DE 24-12 at 14, 16 and 17. The problem is that the Court also incorrectly stated the standard a number of times, including in its ultimate conclusion. DE 24-12 at 2, 12-13, and 19. Indeed, after reviewing the evidence, the Court arrived at a conclusion affirming the trial court's denial of the petition based on a different, and more stringent, standard. Here's what the court said: "Based on this record, we cannot say that the evidence as a whole leads *unerringly and unmistakably* to the conclusion that the evidence produced from consulting with a forensic pathologist would have changed the outcome of Dunn's trial." DE 24-12 at 19 (emphasis added).

The terms "unerringly" and "unmistakably" did not come out of the clear blue. Those are the terms the Indiana Supreme Court has used in describing the standard of review under state law when a petitioner appeals the denial of a post conviction relief petition in Indiana state court. According to the Indiana Supreme Court, a petitioner must show that "the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court." *Wesley v. State*, 788 N.E.2d 1247, 1250 (Ind. 2003). But that is not the standard to be applied to Sixth Amendment claims of ineffective assistance of counsel. So when the Court of Appeals in this case concluded that "Based on this record, we cannot say that the evidence as a whole leads unerringly and unmistakably to the conclusion that the evidence produced from

consulting with a forensic pathologist would have changed the outcome of Dunn's trial" it was conflating the federal ineffective of counsel standard with the State PCR review standard. DE 24-12 at 19. And that was an error.

Application of the wrong standard can make all the difference in the world. This case proves the point. To say that something would "unerringly" and "unmistakably" change a result is a far cry from saying there is a reasonable probability (as required by *Strickland)* that the result would have been different. Indeed, it is precisely this sort of error that the United States Supreme Court determined constitutes a decision contrary to federal law in *Williams v. Taylor*, 529 U.S. 362 (2000):

> A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. Take, for example, our decision in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed 2d. 674 (1984). If the state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be diametrically different, opposite in character or nature, and mutually opposed to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a reasonable probability that the result of the proceeding would have been different.

Id. at 383 (internal quotations omitted).

A similar error was made by the State court in *Mosley v. Atchison*, 689 F.3d 838 (7th Cir. 2012). In *Mosley*, the State court required the defendant claiming ineffective assistance of counsel to show that "the results of the proceeding would have differed" not that there was a "reasonable probability" of a different result but for counsel's errors. *Id*. at 850. This was found to be a critical error. As the Seventh Circuit noted in granting habeas relief: "This is not a mere detail or quibble over word-smithing." *Id.* at

850, citing *Williams,* 529 U.S. at 405-06, *see also Martin v. Grosshans*, 424 F.3d 588, 592 (7th Cir. 2005).

What's more, this is not a case where the Court of Appeals correctly stated the standard and then later in the opinion merely used a shorthand version of the standard when applying it. This type of error — using a shorthand reference or imprecise language in enunciating the *Strickland* standard— has been held to not be a misapplication of *Strickland*. *See e.g. Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (using a "shorthand" or "imprecise" recitation of the *Strickland* standard is not a misapplication of *Strickland*); *Sussman v. Jenkins,* 636 F.3d 329, 360 (7th Cir. 2011) (using a "shorthand" version of the *Strickland* does not lead to a loss of AEPDA deference); *Stanley v. Bartley*, 465 F.3d 810, 813 (7th Cir. 2006) (stating the *Strickland* standard "imprecisely" does not lead to a loss of AEDPA deference); *Woods v. Schwartz*, 589 F.3d 368, 375, n. 3 (7th Cir. 2009) (same).

It is one thing to say that the state court used "imprecise" language or a "shorthand" reference in announcing the *Strickland* standard. It is an altogether different thing when the court applies a totally different standard — and a much more stringent one at that — as was done here. As the court concluded in *Mosley*, "The state appellate court did not merely recite the wrong standard or use an inept shorthand expression of the standard. It applied an incorrect and more onerous standard, and the difference may well have been decisive." *Mosley*, 689 F.3d at 850-51. By asking whether

failing to consult an expert pathologist would have "unerringly and unmistakably" changed the result, the Indiana Court of appeals made the same mistake here.

In sum, while the Court of Appeals in this case stated the correct standard, it applied the incorrect one. Dunn was not required to demonstrate that the testimony of a forensic expert would have "unerringly" and "unmistakably" changed the outcome of his trial. Instead, he had to demonstrate that, but for counsel's error, there is a reasonable probability that the result would have been different. And because the Indiana Court of Appeals did not correctly apply the *Strickland* standard, I am not bound by the doubly deferential standard that typically must be applied when reviewing a habeas corpus petition challenging a conviction. Rather, I must give *de novo* review to Dunn's assertion that his trial counsel was ineffective.

2. The Performance Prong of *Strickland*

Applying *de novo* review, I'll begin by considering whether Dunn has met his burden of demonstrating that counsel's performance fell below professional norms — a question the Indiana Court of Appeals did not address. Dunn's counsel's theory of the case was that Dunn and Torres were drinking and had an argument that led to a physical confrontation. They tussled on the shared balcony just outside their apartments. A bat was involved, and they struggled over the bat. During that struggle, Torres fell down the stairs. PCR Tr. 4. Counsel's recollection of the State's theory of the case was that, however Torres got to the bottom of the stairs, Dunn struck him with the bat once he was at the bottom of the stairs. PCR Tr. 4-5. After sending an investigator to

the scene, counsel felt that his theory of defense made sense, given the unsafe balcony, the lack of DNA found on the barrel of the bat, and the position of the bat underneath Torres. PCR Tr. 5-6. Counsel did not consider consulting with a forensic pathologist on the case. PCR Tr. 6-8. He was focused on how the bat was not the murder weapon, and he admits that this misplaced focus "obscured [his] judgment." *Id.* In other words, he did not make a strategic decision not to consult with a forensic pathologist. PCR Tr. 8. He simply did not consider it.

Often, the decision not to consult an expert is the sort of strategic choice that requires my deference, but here counsel admits that his failure to consult an expert was not a strategic decision. When trial counsel never considers an issue, it is difficult to say the decision was a strategic one. *See Thomas v. Clements*, 789 F.3d 760, 768 (7th Cir. 2015) ("In many cases, we would chalk such a decision up as strategic or tactical... . But we cannot reach such a conclusion because counsel admitted his failure to reach out to an expert was not a conscious decision — he just did not think to do so.").

By focusing on the bat, Dunn's counsel seemingly had a fundamental misunderstanding of the State's theory of the case. In opening statement, the prosecutor conceded that there was a lack of consensus about how Torres ended up at the bottom of the stairs, but that the consensus was that he did not move once he was there. Tr. 344-45. The prosecutor indicated that an expert would testify that Torres's injuries were not consistent with a fall but were instead consistent with being struck multiple times with a blunt object. *Id.* at 345. The prosecutor conceded in closing that the blunt object wasn't

the bat "and the evidence suggests the contrary." Tr. 1015. Thus, the bat was not essential to the prosecution's theory of the case, and the lack of evidence that the bat was the murder weapon did little to exonerate Dunn. Counsel should have recognized that the State would produce evidence from experts that Torres's injuries and the blood spatter pattern were both inconsistent with a fall. In other words, the State's evidence on the crucial issue at trial — did Torres die in the fall or was he bludgeoned after the fall? — was not based on the bat but, instead, entirely on the two experts. Yet trial counsel did nothing to counter it.

What's more, reliance by Attorney Williams on the pathologist who did the autopsy (Dr. Chrenka) was unwise. Chrenka was unwilling to opine on whether Torres died falling or by being struck by an instrument. And Chrenka only occasionally does autopsies and he is not a forensic pathologist. Yet, despite this uncertainty, Williams still didn't think to consult with a board certified forensic pathologist. That was a monumental oversight. There are cases, albeit not many, where "the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both." *Harrington v. Richter*, 562 U.S. 86, 106 (2011). This was one of those cases.

Interestingly, just a few weeks ago, the Seventh Circuit issued an opinion that is oddly similar to this one. The similarity starts (but doesn't end) with the surname of the defendant: "Dunn." *See Dunn v. Jess*, No. 20-1168, 2020 WL 6883423 (7th Cir. Nov. 24, 2020). In that case, the court held that the failure of trial counsel to call a forensic

pathologist amounted to deficient performance under the performance prong of *Strickland* even though trial counsel actually consulted with an expert prior to trial. The Seventh Circuit held that the error was trial counsel's failure to use what he had learned in his interview of the pathologist. Under those circumstances the Seventh Circuit found that it was "[u]nreasonable to view trial counsel's decision to consult with a forensic pathologist as satisfactory performance, considering trial counsel did not use the crucial information gleaned from that consultation." *Id.*

This case is worse than that *Dunn*. Perhaps it is a little too facile to say, but if interviewing a forensic pathologist but not using what is gleaned from the interview amounts to subpar performance, then, surely, failing to even consult with a forensic pathologist in a case like this — where the entirety of the State's case was based on expert testimony — must likewise be considered ineffective assistance of counsel. The simple fact of the matter is that this case cried out for a forensic pathologist on the defense side. It's not an exaggeration to say that *how Torres died is the whole case.* Without expert testimony to support his claim, counsel's theory that Torres died when he fell didn't have much of a chance.

It is true that Letha and Willie testified in a manner consistent with that theory. But their testimony was not without problems as the State aptly noted. Counsel knew or should have known before trial that their testimony would be directly contradicted by experts who would offer opinions as to how Torres died. In the absence of supporting evidence from an expert like Dr. Sozio, it was unlikely that the jury would accept the

testimony of Letha and Willie. In other words, if counsel's theory of defense was that Torres died from a fall, he needed to do more than rely on Letha and Willie; he needed expert testimony that offered an alternative to the testimony of Dr. Wagner. Dr. Sozio would have provided that. With all due respect to counsel, the failure to consult with an expert pathologist fell below professional norms.

3. The Prejudice Prong

The next question is whether there is a reasonable probability that, but for counsel's error, the results of the trial would have been different. In other words, was Dunn prejudiced by counsel's error? The starting point in answering that question is the strength of the State's case. As *Strickland* observes: "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696. Thus, the quantum of doubt necessary to reach the threshold of "reasonable probability" that the verdict would have been different is far less in cases where the evidence isn't strong to begin with. And this was not a strong prosecution case.

Recall that the State argued that the evidence showed that Dunn and Torres were fighting on the balcony outside their apartments, Torres probably fell down the stairs, and Dunn then fatally beat Torres with an unidentified object. Tr. 1016-18. But if Dunn savagely bludgeoned Torres to death at the bottom of the stairs, why did he stick around the scene? What's more, Letha contradicted the State's theory by testifying that when she went outside shortly after she heard a loud noise, she saw Torres on the

ground and Dunn still at the top of the stairs. Tr. 521-22. She also testified that she did not see Dunn injure Torres. In fact, Letha testified that Dunn went to Torres and tried to get him up. Tr. 521-25. Her testimony, if credited, is highly favorable for Dunn. It provides an alternative explanation for why Dunn's shoes had blood on them, and why Dunn's bloody footprints were found around the scene. It tends to disprove the State's theory that Dunn beat Torres at the bottom of the stairs. And, it suggests that Dunn's intent was inconsistent with that required to find him guilty of murder.

What's more, Willie's testimony was even more on point. *He was an eyewitness.* He saw Torres strike Dunn with the bat. This was corroborated by the photos of Dunn's back taken at the hospital as well as what Dunn told the attending physician when asked how he got hurt: he was hit by a baseball bat. Willie testified consistently that he saw Dunn and Torres struggling over the bat and Torres fell down the steps in that struggle. Tr. 604-36. At no time did Willie see Dunn strike Torres. T. 624, 630. If credited, this specifically contradicts the State's expert testimony that suggested that Torres was bludgeoned after he fell.

It bears repeating that the State did not insist that the bat found under Torres was the murder weapon. They theorized that some other instrument was used. Tr. 1015, 1018. But when police arrived only a few minutes after the incident occurred, they could not find a murder weapon. In any event, undoubtedly, the reason the State did not argue that the bat found under Torres was the murder weapon was because there was

no evidence to support such a claim. So, instead, they lobbed an alternative theory involving a phantom instrument with little evidence to support it.

As for Letha and Willie, according to the State, they're just a couple of liars because their testimony was not consistent with the State's experts. Here's how the State presented it as a binary choice in closing arguments:

> Ladies and gentlemen, this case really does boil down to what you're going to believe. Are you going to believe people who are demonstrated to lie, or are you going to look at people whose reputations, whose entire professions and their life's work has been to figuring out mysteries?

Tr. 1024-25. But the question at this point is how would jurors weigh the testimony of Letha and Willie if they had also heard from an independent forensic pathologist like Dr. Sozio who would have supported Letha and Willie's first hand accounts of what happened.

And, by the way, why would Letha and Willie lie for Dunn anyway? The State never offered a motivation for lying. After all, Letha and Torres were close friends. What's more, Letha no longer had an attachment to Dunn. Letha's relationship with Dunn ended shortly after Torres's death and she moved to Michigan City, Indiana, and she didn't see Dunn anymore. Tr. 554, 561-63. Nonetheless, the State argued in closing that Letha and Willie were simply lying. Tr. 1101. But when their testimony is supported by a forensic pathologist like Dr. Sozio, the State's theory that they are nothing more than a couple of liars loses much of its traction.

If Dunn's trial counsel had consulted with Dr. Sozio prior to trial, he could have learned that Dr. Sozio believed that a fall was the most reasonable explanation for Torres's injuries. First, Dr. Sozio concurred with Dr. Chrenka that the manner of death was "undetermined." Neither could conclude whether the manner was homicide, accident or suicide. So both felt the most cautious approach would be to call it "undetermined." But unlike Dr. Chrenka, Dr. Sozio offered a number of reasons for his conclusion that Torres died as the result of the fall. The jury, of course, heard none of it.

The jury did not get to hear that Torres had a laceration in an area associated with falls. PCR Tr. 34. The jury did not get to hear Dr. Sozio's testimony that the type of skull fracture Torres suffered is more indicative of a fall. *Id.* at 35. The jury did not get to hear that blood could spew from a skull fracture, and that, even though he isn't a blood spatter expert, the location of the blood — low to the ground — was significant to his opinion regarding the manner of death. *Id.* at 41. The jury did not get to hear that his opinion was based in part on the circumstances: that Torres was highly intoxicated and on the top of a staircase that did not appear safe. *Id.* at 31. Finally, the jury did not get to hear Dr. Sozio testify that Torres's fatty liver was consistent with chronic alcoholism, and that chronic alcoholism is associated with reduced clotting times and greater susceptibility to broken bones. *Id.* at 29.

It's certainly true that after hearing all this evidence the jury could have found that Torres was pushed down the steps by Dunn and died. And perhaps this could have resulted in a murder conviction or more likely a conviction of a lesser offense such as

voluntary manslaughter or criminal recklessness. *See* I.C. § 35-42-1-3 (voluntary manslaughter) and I.C. § 35-42-2-2 (criminal recklessness). But the State never offered this as a viable theory. Instead, it had a single theory of the case: Torres was bludgeoned after he fell. Dr. Sozio's testimony would have created substantial doubt about that theory especially since Sozio's opinion happened to be consistent with the testimony of the two eyewitnesses.

In sum, I am of the firm belief that Dunn was denied the effective assistance of counsel, and but for counsel's errors, there is a reasonable probability that the results of the trial would have been different.

CONCLUSION

For the foregoing reasons, habeas corpus is CONDITIONALLY GRANTED. The State of Indiana may re-try Dewayne A. Dunn, provided that it files appropriate documents to do so in the State trial court within 120 days of this Order. The respondent is ORDERED to file a notice in this court within 150 days of this Order demonstrating that Dewayne A. Dunn has either been released or that the State of Indiana has initiated re-trial proceedings against him.

SO ORDERED on December 23, 2020.

/s/Philip P Simon
UNITED STATES DISTRICT JUDGE