

No. _____

IN THE
Supreme Court of the United States

JOHN LOUIS VISCIOTTI,

Petitioner,

v.

RONALD DAVIS, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

In *Woodford v. Visciotti*, 537 U.S. 19 (2002), this Court summarily reversed a grant of habeas corpus relief on a question Respondent presented only under 28 U.S.C. § 2254(d)(1).

In doing so, did this Court intend to bar the Court of Appeals from considering, on remand, Visciotti's argument that he also satisfies 28 U.S.C. § 2254(d)(2) and therefore can obtain relief from his death sentence?

If this Court did not intend to foreclose the possibility of relief under § 2254(d)(2), should this case be remanded so that the Ninth Circuit may consider Visciotti's § 2254(d)(2) argument in the first instance?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner John Louis Visciotti (“Visciotti” or “Petitioner”) respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Court of Appeals for the Ninth Circuit in *Visciotti v. Martel*, No. 11-99008.

OPINIONS BELOW

The final opinion of the Court of Appeals affirming denial of relief, *Visciotti v. Martel*, is published at 862 F.3d 749 (9th Cir. 2016) (“*Visciotti V*”) and is contained at Pet. App. 1.

The 2011 order of the United States District Court for the Central District of California denying relief is unpublished and is contained at Pet. App. 51.

This Court’s per curiam opinion reversing the grant of penalty relief, *Woodford v. Visciotti*, is published at 537 U.S. 19 (2002) (“*Visciotti IV*”) and is contained at Pet. App. 98.

The 2002 opinion of the Court of Appeals affirming penalty relief, *Visciotti v. Woodford*, is published at 288 F.3d 1097 (9th Cir. 2002) (“*Visciotti III*”) and is contained at Pet. App. 136.

The 1999 judgment of the United States District Court for the Central District of California granting penalty relief is unpublished and is contained at Pet. App. 160.

The opinion of the California Supreme Court denying relief on state habeas, *In re Visciotti*, is published at 14 Cal. 4th 325 (1996) (“*Visciotti II*”) and is contained at Pet. App. 257.

The opinion of the California Supreme Court denying relief on appeal, *People v. Visciotti*, is published at 2 Cal. 4th 1 (1992) (“*Visciotti I*”) and is contained at Pet. App. 317.

JURISDICTION

The Court of Appeals issued an opinion on October 17, 2016 and Visciotti timely petitioned for rehearing. On July 6, 2017, the court issued an amended opinion and denied rehearing. On September 21, 2017, the Court of Appeals stayed the mandate pending the filing of a timely petition for certiorari. On September 29, 2017, Justice Kennedy granted Visciotti’s application for an extension of time to file this Petition for a Writ of Certiorari to December 1, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

A. U.S. Const., Amend. VI

“In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.”

B. 28 U.S.C. § 2254(d)

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

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

INTRODUCTION

There is no dispute that Visciotti’s lawyer, Roger Agajanian, failed him at his capital penalty trial. Every state and federal judge who has examined Agajanian’s performance has found or assumed that it was deficient¹ and “[t]he State does not dispute that Agajanian rendered deficient performance throughout the trial.” (Pet. App. 31.) This case is, and has always been, about prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984).

¹ This Court’s 2002 per curiam opinion did not analyze deficient performance, only the Ninth Circuit’s application of 28 U.S.C. § 2254(d)(1) to *Strickland*’s prejudice prong. (Pet. App. 98)

When the Court of Appeals first examined Visciotti's ineffective assistance of counsel claim in 2002, it held that the state court's prejudice finding was both "contrary to" and an "unreasonable application" of *Strickland* under 28 U.S.C. §2254(d)(1). The court did not consider whether the state court opinion was based upon an "unreasonable determination of facts" under § 2254(d)(2). The state petitioned for a writ of certiorari to decide whether § 2254(d)(1) had been properly applied. (S. Ct. No. 02-137.)

When this Court summarily reversed, without merits briefing or argument, its opinion focused on the State's § 2254(d)(1) argument and never mentioned § 2254(d)(2), aside from when it quoted the text of § 2254(d). (Pet. App. 99.) The per curiam opinion concluded with the statement that "habeas relief is therefore not permissible under § 2254(d)." (Pet. App. 102.) The question now is whether this Court intended that single sentence to foreclose, on remand, the Ninth Circuit from considering Visciotti's argument that he satisfies § 2254(d)(2) and therefore may obtain relief from his death judgment.

Visciotti's § 2254(d)(2) argument centers around the state court's finding that he could not mitigate or rebut the testimony of Kathy Cusack, a penalty-phase witness who testified that Visciotti stabbed her in the stomach when she was pregnant. Visciotti contends that the California Supreme Court unreasonably assumed that Cusack's testimony was

admissible, even though the trial record shows that it was only admitted because of Agajanian's deficient performance. (Pet. App. 23.) The trial court had excluded Cusack's testimony for lack of notice, and this exclusion "would have remained in force had Agajanian not 'opened the door' by incompetently eliciting evidence as to Visciotti's character for nonviolence." (Pet. App. 23.) Visciotti pointed out this important fact to the California Supreme Court on state habeas but it still "weighed the Cusack testimony as part of its *Strickland* prejudice analysis without acknowledging that it came into evidence only as a result of Agajanian's deficient performance." (Pet. App. 23, n.6.) The state court opinion is therefore unreasonable under § 2254(d)(2) because it ignores material facts and is contradicted by the trial record, and this factual error was central to the court's conclusion that Visciotti was not prejudiced.

The Court of Appeals stated that Visciotti's § 2254(d)(2) argument was likely meritorious, but that this Court's 2002 statement that relief was impermissible "under § 2254(d)" foreclosed the panel from considering the issue. Both the principal opinion, and the concurrence by Judges Berzon and Pregerson, expressed the belief that this Court was never presented with the § 2254(d)(2) issue in 2002 and almost surely did not consider it.

When this Court made a similarly overbroad ruling in another habeas case, *Johnson*² v. *Williams*, 133 S. Ct. 1088 (2013), it later granted, vacated, and remanded to allow the Court of Appeals to consider previously undecided issues under § 2254(d). *Williams v. Johnson*, 720 F.3d 1212 (9th Cir. 2013), *judgment vacated*, 134 S. Ct. 2659 (2014). This Court did so, even though *Williams* was a non-capital case decided after full briefing and argument. Here, inadvertently overbroad language from a summary reversal will preclude a death row inmate from having a likely meritorious penalty claim considered on the merits, unless this Court acts. At a minimum, this Court should grant, vacate, and remand, as in *Williams*.

STATEMENT OF THE CASE

A. Crime and Trial

On November 8, 1982, Visciotti and his co-defendant Brian Hefner killed Timothy Dykstra and attempted to kill Michael Wolbert. (Pet. App. 336-37.) The State sought the death penalty against Visciotti but not Hefner, who was tried separately and received life without parole. (Pet. App. 7, n.1.)

Visciotti's parents hired Roger Agajanian to represent him at trial and on appeal. Agajanian had neither tried a capital case before, nor conducted a penalty phase investigation. He agreed to represent Visciotti for \$25,000, a

² In this petition, Visciotti refers to this case as *Williams*, after the inmate, rather than *Johnson*, who was the warden.

sum the family could not afford. They attempted to cover the debt through performing cleaning, tile work, and tree-trimming at Agajanian's home and office. (Pet. App. 164-65.)

Prior to trial, the State gave notice that it intended to introduce Visciotti's 1978 assault conviction against William Scofield as penalty-phase aggravation. (Pet. App. 338.) Visciotti had also been accused of stabbing Kathy Cusack in the same incident, but those charges were dropped and Visciotti was never convicted of any offense against Cusack.

Agajanian's guilt-phase defense was poorly planned and presented. He attempted to rely on diminished capacity, even though that defense had been abolished in a widely-publicized initiative measure. (Pet. App. 377; 312, n.1.) He presented psychologist Dr. Louis Broussard, who testified that Visciotti's long-term cocaine use resulted in a psychotic state at the time of the crime and that Visciotti had "minimal brain injury of a type associated with impulse disorders and specific learning disorders." (Pet. App. 338.) Visciotti testified about the crime and his drug addiction, the latter of which began in childhood. On counsel's advice, Visciotti also testified about the 1978 assault and admitted that he stabbed Scofield. On cross examination, he denied seeing, let alone stabbing, a woman who had been in the same room. (Pet. App. 336.) The jury found him guilty of the capital crime.

At the penalty trial, the State sought to introduce Cusack's testimony that Visciotti had attacked her during the assault of Scofield. But given that Visciotti had never been convicted of attacking Cusack, the trial court held it was not within the scope of the State's notice of aggravation on the 1978 Scofield conviction. Cusack was excluded as a witness and the State presented no other evidence in its aggravation case-in-chief. (Pet. App. 12.)

In mitigation, Agajanian presented evidence that Visciotti came from a loving family, that he had never been violent toward them, and that he was violent toward others only when under the influence of drugs. (Pet. App. 260.) In response to this evidence, the State renewed its request to present Cusack. The trial court granted the motion, based on Agajanian's presentation:

[T]he evidence introduced by the defense is opinion evidence by every defense witness offered [during the penalty phase] . . . that the defendant is in fact a non-violent person. The People are entitled as a matter of law to rebut that by competent evidence. Specific acts of violence and rebuttal are relevant and are appropriate to rebut an opinion that the defendant is in fact a non-violent person, so the court shall allow the witness to testify as requested.

(Pet. App. 187.)

Cusack then testified that Visciotti and others broke into her hotel room, dragged Scofield outside, and that Visciotti stabbed her in the forearm, leg, and ankle. She testified that when Visciotti went to stab her in the

stomach, she told him not to because she was pregnant. He nonetheless tried to stab her in the abdomen but she rolled over and he stabbed her in the side. He then stabbed her chest, shoulder, and breast area. Cusack testified that she was stabbed eight or more times in total and that she had to be hospitalized. She was the last penalty-phase witness. (Pet. App. 339.)

In closing argument, the State capitalized on Agajanian's error to argue for a death verdict. He told the jury that the assault on Cusack was the "prime example" of Visciotti's history of violence:

Going in and taking a woman alone in her bedroom after you've kicked in the door in the middle of the night for no apparent reason. She couldn't offer any motivation why he would have done this and none was presented to you. There is no reason. It's a totally senseless, vicious, brutal attack on this woman who again is isolated and by herself, totally defenseless in her bedroom that night.

(Pet. App. 24.)

In the defense's closing argument, Agajanian conceded that "past violence" was a factor in aggravation, largely based on Cusack's testimony. (Pet. App. 188.) He also failed to argue any of the mitigating circumstances of the capital crime: that Visciotti only planned to rob the victims of their money, he did not own a gun and he specifically told his co-defendant Hefner *not* to bring a gun to the robbery, and Visciotti shot the victims only after

Hefner handed him the gun during the robbery and repeatedly urged him to shoot. (Pet. App. 189.) Visciotti was sentenced to death.

B. State Appeal and Habeas Proceedings

Agajanian represented Visciotti on appeal to the California Supreme Court. After he filed a two-claim brief, he was removed from the case and eventually suspended from the practice of law for repeated abandonment of his clients. (Pet. App. 15; 377, n.1, 2.) Visciotti's conviction and death sentence were affirmed on appeal in a 5-2 decision, after numerous findings that Agajanian failed to preserve issues for appeal. Justice Mosk dissented, sua sponte raising Agajanian's ineffective assistance. (Pet. App. 376.) Justice Mosk described Agajanian's "pervasive and serious" deficiencies at trial, including his "worthless" penalty phase argument. (*Id.* at 377) He would have reversed the judgment on the trial record alone. (*Id.*)

Visciotti filed a state habeas corpus petition alleging ineffective assistance of counsel. The California Supreme Court ordered a judge to take evidence and make findings of fact on seven questions pertaining to Agajanian's preparation for the guilt and penalty trials.³ (Pet. App. 257-58.)

³ Visciotti also alleged that counsel suffered from a financial conflict of interest due to non-payment; that he failed to make appropriate objections; failed to attack the aggravating evidence; failed to follow up with recommendations made by a forensic psychiatrist; and that he did not

The focus of the hearing was on Agajanian’s failure to investigate and present mitigating evidence at penalty.

The hearing judge found that Agajanian’s penalty-phase strategy was to show that Visciotti’s “parents were nice people whose son should not be killed.” (Pet. App. 267.) He made this choice without any investigation: he conducted no interviews of the family and did not have a social worker or investigator seek any mitigating evidence. (Pet. App. 268.) Agajanian did tell his guilt-phase expert Louis Broussard, Ph.D., that there was “brutality” in the family,⁴ so Agajanian was likely aware of some abuse. (Pet. App. 271-72.)

The hearing revealed several areas of mitigation that Agajanian could have developed but did not. Visciotti was born with “severe club feet” which required him to wear leg braces for three years as a small child. (Pet. App. 263.) The treatment caused isolation for him and financial stress for his family. (Pet. App. 264) Visciotti’s parents—far from being the loving family portrayed at trial—called Visciotti an “asshole,” “motherfucker,” and

properly seek a continuance to read the police reports in order to rebut Cusack’s testimony. (Pet. App. 262-63.)

⁴ At trial, Agajanian also requested the appointment of two other mental health experts, Seawright Anderson, M.D., (to evaluate competency to stand trial) and Kaushal Sharma, M.D. (to evaluate sanity at the time of the crime). Neither was provided with social history information and neither testified at trial. (Pet. App. 269-271.)

“retarded” throughout his childhood. (Pet. App. 195.) A social historian, Shirley Reece, M.S.W., testified that Visciotti’s siblings “lived a life of terror,” as they were frightened that their parents would kill each other. (Pet. App. 274.) Visciotti’s father blamed him for the family’s difficulties and often told Visciotti that he “paid to have [his] legs fixed and would break them again.” (Pet. App. 274; 276.) Visciotti’s academic records revealed more trouble. Visciotti left kindergarten after nine days and was not re-enrolled in first grade for two years. (Pet. App. 274.) The family moved “at least 20 times,” which caused the children to change schools frequently; they fell behind and had few friends. (Pet. App. 277.)

All this chaos caused young Visciotti to believe that he could never do anything right. He suffered from depression and suicidal ideation. (Pet. App. 277-75.) He hid in dark places or abandoned cars to escape his parent’s wrath. (Pet. App. 277.) At age eight, Visciotti began to use alcohol and Seconal, a hypnotic sedative. (Pet. App. 278.) These drugs relieved Visciotti’s distress and allowed him to feel “mellow.” (Pet. App. 278.)

When he was sent to the California Youth Authority, his drug use abated. Still, the staff suspected he had a brain abnormality and an EEG suggested a seizure disorder, for which Visciotti was prescribed medication. (Pet. App. 277.) When he was released to his dysfunctional family, Visciotti’s depression and illicit drug use resumed. At age 15, he began to use cocaine,

and later turned to phencyclidine (“PCP”). (Pet. App. 278.) A mental health expert, Jay Jackman, M.D., explained that PCP allowed Visciotti to become a dispassionate observer of his family circumstances. (Pet. App. 278.) Most of Visciotti’s criminal conduct occurred after he had begun injecting PCP several times per day “in order have that detached experience.” (Pet. App. 278.) Dr. Jackman determined that Visciotti’s criminal behavior was directly related to his drug use, not to any anti-social personality disorder. (Pet. App. 279.)

As for the crime against Cusack, the hearing judge found that Agajanian never read the documents pertaining to Visciotti’s 1978 assault conviction, even though the district attorney had made the file available to him. (Pet. App. 273.) Agajanian admitted he was unaware that Visciotti had ever been accused of stabbing Cusack during the Scofield incident. (*Id.*)

Based on the evidence adduced at the state court evidentiary hearing, the California Supreme Court assumed that Agajanian performed deficiently in (1) failing to investigate and uncover mitigating evidence, (2) failing to present readily available mitigating evidence about Visciotti’s dysfunctional family and abuse, (3) failing to prepare, which “left him unaware of the scope of aggravating evidence to be introduced,” and (4) delivering an unfocused closing argument in which he undercut his own case. (Pet. App. 291.) Nevertheless, the court divided on the issue of prejudice. (Pet. App. 258.) Justice Kennard concurred with the denial of relief, but found “the issue of

prejudice to be quite close.” (Pet. App. 297.) Justices Mosk and Brown dissented, concluding that “Agajanian’s abysmal across-the-board performance” meant that the court could “have no confidence that the jury was actually able to perform its normative function of determining the appropriate punishment.” (Pet. App. 313.) These two state court justices would have granted relief, even without a showing of specific prejudice. (*Id.*) Justice Mosk expressed confidence that the district court would find and correct this error in Visciotti’s federal habeas proceedings. (Pet. App. 305, n.1.)

C. Federal Habeas Proceedings

Visciotti filed a federal habeas corpus petition alleging ineffective assistance of counsel at both phases of trial. The petition was subject to the Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”). The district court held an evidentiary hearing on Visciotti’s claim that counsel was ineffective at the guilt phase; it did not take new evidence of Agajanian’s penalty phase errors, given the state court’s prior hearing on that claim. The district court granted relief on Claim 1.C, ineffective assistance at the penalty phase. (Pet. App. 160.) The remaining penalty claims were deemed moot and the court did not decide them.

The State appealed and the Ninth Circuit upheld the judgment on two grounds. First, the court held that the California Supreme Court’s decision

was “contrary to” *Strickland* under 28 U.S.C. § 2254(d)(1) because it “mischaracterized the prejudice standard.” (Pet. App. 147) The state court evaluated whether a favorable result was “probable” absent Agajanian’s deficient performance, not “reasonably probable” as *Strickland* requires. Second, the state court’s decision was an “unreasonable application of *Strickland*” under § 2254(d)(1), given Agajanian’s clear deficient performance and the wealth of mitigating evidence that could have been presented. (Pet. App. 157-58.) The Ninth Circuit’s opinion did not discuss, or even cite, 28 U.S.C. § 2254(d)(2)’s “unreasonable determination of the facts” provision, aside from a quote of the statute in the “Standard of Review” section. (Pet. App. 143.)

The State petitioned for certiorari on the following two questions:

1. Whether, under AEDPA, a state court decision is “contrary to” United States Supreme Court precedent (28 U.S.C. § 2254(d)(1)) when it quotes and cites the proper standard to be applied from the controlling Supreme Court authority, but in discussing the issue also uses a single word as a shorthand term for that standard, which, when considered in isolation, can be interpreted as stating an incorrect standard?
2. In determining under AEDPA, whether a state court decision is an unreasonable application of United States Supreme Court precedent (28 U.S.C. § 2254 (d)(1)), may a federal court assume a state

court did not consider relevant matters because the state court did not expressly state it considered the matters, even if the state court discusses the matters in another part of its written decision, such as in a review of the evidence from lower court proceedings or a review of the petitioner's allegations?

(Pet. App. 105.) The text of the petition also focused exclusively on § 2254(d)(1), never discussing (d)(2).

This Court granted certiorari and summarily reversed, without merits briefing or argument. The per curiam opinion held that the California Supreme Court's "occasional shorthand references" to the *Strickland* standard (i.e. using "probable" instead of "reasonably probable") may have been "imprecise" but that did not render the state court's decision "contrary to" *Strickland* under § 2254(d)(1). (Pet. App. 100.) This Court also found that the Ninth Circuit erred with respect to the "unreasonable application" clause of 2254(d)(1). This Court gave deference to the state court's finding that the aggravating circumstances, including the Cusack stabbing, were "devastating." (Pet. App. 102) The opinion concluded with the pronouncement that "[h]abeas relief is therefore not permissible under § 2254(d)." (Pet. App. 102.)

The case was remanded to the Ninth Circuit and then eventually to district court for a merits determination on the claims that had been rendered moot by the initial grant of relief. Visciotti argued that the district

court could still consider his entitlement to relief on Claim 1.C (ineffective assistance at penalty) under 28 U.S.C. § 2254(d)(2), which had not been within the scope of this Court’s review. The district court denied the claim on the merits but granted a certificate of appealability on the issue.

Visciotti raised the § 2254(d)(2) issue on appeal to the Ninth Circuit. He contended that the California Supreme Court’s prejudice analysis wrongly assumed that Cusack’s testimony was admissible when, in fact, it had been excluded for lack of notice. That exclusion would have remained in force had Agajanian not “opened the door” to her testimony through his incompetent penalty presentation of Visciotti’s history of nonviolence. (Pet. App. 23.) Visciotti had called attention to these facts in state habeas proceedings, but the state court ignored his argument and considered Cusack’s testimony in assessing prejudice and subsequently denying relief.

The Ninth Circuit’s opinion noted Visciotti’s attempts to raise the issue in state court, as well as the importance of the Cusack stabbing in the prejudice analysis. It was the stabbing—rather than the circumstances of the capital crime or the Scofield assault—that the prosecutor called the “prime example” of Visciotti’s history of violence in his penalty closing argument. (Pet. App. 24) It was also the image of a “pregnant Kathy Cusack as she lay in bed trying to protect her fetus,” that the California Supreme Court “lingered over” in its prejudice analysis. (Pet. App. 25.)

The Ninth Circuit said “Visciotti’s § 2254(d)(2) arguments are not without substance. Were we writing on a blank slate, we would likely find them meritorious. But we are not writing on a blank slate.” (Pet. App. 26.) The panel believed it was precluded from considering the argument due to this Court’s broad conclusion that “[h]abeas relief is . . . not permissible under § 2254(d).”⁵ (Pet. App. 26.) But the panel noted that despite the expansive language of that sentence, this Court’s “actual analysis was narrow; it focused exclusively on the applicability of § 2254(d)(1).” (Pet. App. 27.) The State’s 2002 certiorari petition focused only on § 2254(d)(1) and neither party raised § 2254(d)(2) in any briefing. (*Id.*) Agajanian’s role in provoking the Cusack testimony, and the California Supreme Court’s unreasonable reliance on her testimony in assessing prejudice, was never litigated in this Court. (*Id.*)

Judge Berzon, joined by Judge Pregerson, wrote a separate concurrence “to emphasize one point: This case illustrates that Supreme Court summary

⁵ The panel also held that this language foreclosed consideration of Claim 58, a cumulative error claim that included various acts of ineffective assistance of counsel. Visciotti first raised the claim in 1998 but the district court denied him leave to amend it into the petition. After this Court’s summary reversal, the district court allowed Visciotti to amend in the claim but then *sua sponte* reversed course and dismissed the claim as “second or successive.” (Pet. App. 31.) As a result, Claim 58 has never been ruled upon by any federal court.

reversals cannot, and do not, reflect the same complete understanding of a case as decisions after plenary review.” (Pet. App. 44.) The concurrence expressed concern that the summary review process in this case may have unintentionally foreclosed issues that were never presented to or decided by this Court. (Pet. App. 50.) The concurrence noted that this Court corrected a similarly overbroad ruling in *Williams v. Johnson*, 134 S. Ct. 2659 (2014), which was neither a capital case nor one in which this Court’s prior decision was a summary reversal. Given that “[h]ere, a person’s life *is* at stake,” the concurring judges anticipated that this Court would “look closely” at whether certiorari should be granted. (Pet. App. 50, emphasis in original.)

This petition followed.

REASONS FOR GRANTING THE WRIT

- A. A single, inadvertently overbroad sentence in a per curiam summary reversal should not preclude the Court of Appeals from considering a likely meritorious issue in a death penalty case**

Though bound by this Court’s prior statement that “[h]abeas relief is . . . not permissible under § 2254(d),” concurring judges Berzon and Pregerson believed that this Court may not have intended to foreclose the § 2254(d)(2) issue. (Pet. App. 50) Their opinion is based on the fundamental differences between judicial decisions made on certiorari pleadings alone (as

Visciotti IV was) and those decisions made after full merits briefing and argument.

As the concurring opinion explains, the “parties’ [certiorari-stage] submissions are—quite properly—not designed to comprehensively inform the Court about the merits of the case.” (Pet. App. 44.) This Court’s rules do not allow for it; Rule 10 provides that certiorari “will be granted only for compelling reasons” such as a split in circuit authority or questions of great national importance. *See* S. Ct. R. 10. Thus, practice guides advise petitioners to emphasize the “certworthiness” of the case and avoid describing the merits in too much detail. (Pet. App. 45-46.) Successful briefs in opposition are “the mirror image of an effective [certiorari] petition” in that the merits of the decision below are “definitely a secondary argument at best.” (Pet. App. 47 citing Stewart A. Baker, *A Practical Guide to Certiorari*, 33 Cath. U. L. Rev. 611, 627, 629 (1984).)

And as the concurrence noted, that is precisely what Visciotti did when he was the respondent in 2002. His brief in opposition focused on the reasons why the State’s petition did not meet the parameters of Rule 10; it did not raise alternative arguments not addressed in the Ninth Circuit’s opinion, such as Visciotti’s ability to satisfy § 2254(d)(2). (Pet. App. 48.) Although they are part of the same statute, sections 2254(d)(1) and (d)(2) are separate bars to relief. This Court’s jurisprudence reflects that a petitioner need only show

that one section is satisfied for relief to be available under the AEDPA. *See Brumfield v. Cain*, 135 S. Ct. 2269, 2276 (2015) (“Because we agree that the state court's rejection of Brumfield's request for an *Atkins* hearing was premised on an ‘unreasonable determination of the facts’ within the meaning of § 2254(d)(2), we need not address” the habeas petitioner’s § 2254(d)(1) arguments). Likewise, a failure to meet the burden under § 2254(d)(1) in this Court does not foreclose relief under § 2254(d)(2) on remand. *See Thaler v. Haynes*, 559 U.S. 43 (2010) (per curiam) (reversing grant of habeas relief under § 2254(d)(1) but remanding for consideration of claim under § 2254(d)(2)). Because it would have been improper for Visciotti to raise an alternative merits argument at the certiorari stage, the Ninth Circuit noted that it was “not oversight or poor lawyering” that Visciotti did not raise the § 2254(d)(2) argument before this Court last time. (Pet. App. 48.)

As a result, § 2254(d)(2) was never argued by Visciotti, nor by the State, nor analyzed by this Court when the case was here before. Judges Berzon and Pregerson concluded that the apparent breadth of the final sentence of *Visciotti IV* “may have been inadvertent” and suggested that this Court may want to grant certiorari in order to rectify that apparent error. (Pet. App. 49.) Although it is commonly said that this certiorari is not granted to engage in “error correction” in individual cases, this Court has recognized that “in death cases, the exercise of our discretionary review for just this

purpose may be warranted.” *Calderon v. Thompson*, 523 U.S. 538, 569 (1998) (Souter, Stevens, Ginsburg, Breyer, JJ., dissenting.) This is especially true here, where the apparent error may have been inadvertently made by the Court itself.

B. This case is more compelling than *Williams v. Johnson*, in which this Court granted certiorari to correct an inadvertently overbroad ruling

As unusual as Visciotti’s case is, it is not the only time that this Court may have inadvertently issued a ruling that was broader than intended. A similar problem arose in *Williams v. Johnson*, 720 F.3d 1212 (9th Cir. 2013), *judgment vacated*, 134 S. Ct. 2659 (2014), and that case provides instruction here.

When *Williams* was before the Ninth Circuit, the petitioner argued that the state court did not adjudicate his federal claims on the merits and therefore § 2254(d) did not apply. The Ninth Circuit agreed, conducted de novo review, and granted relief. *Williams v. Cavazos*, 646 F.3d 626, 653 (9th Cir. 2011) *rev’d sub nom. Johnson v. Williams*, 133 S. Ct. 1088 (2013). The state sought certiorari on two separate questions:

1. Whether a habeas petitioner’s claim has been “adjudicated on the merits” for purposes of 28 U.S.C. § 2254(d) where the state court denied relief in an explained decision but did not expressly acknowledge a federal-law basis for the claim.

2. Whether, under § 2254, a federal habeas court (a) may grant relief on the ground that the petitioner had a Sixth Amendment right to retain a biased juror on the panel and (b) may reject a state court's finding of juror bias because it disagrees with the finding and the reasons stated for it, even where the finding was rationally supported by evidence in the state-court record.

Cavazos v. Williams, 2011 WL 4874095.

This Court granted certiorari only as to Question 1. *Cavazos v. Williams*, 132 S. Ct. 1088 (2012). Because the grant was limited to *whether* § 2254(d) applied, neither party briefed Williams's entitlement to relief under that more restrictive standard of § 2254(d), nor did this Court analyze the merits of Williams's claims under § 2254(d). After full briefing and oral argument, this Court determined § 2254(d) should apply and that the Ninth Circuit erred by conducting de novo review. *Johnson v. Williams*, 133 S. Ct. at 1091-92. Like *Visciotti IV*, the *Williams* opinion concluded with the broad statement "that under [§ 2254(d)], respondent is not entitled to habeas relief." *Id.*

On remand to the Ninth Circuit, the *Williams* panel held that single sentence foreclosed further review under § 2254(d), even though this Court's reasoning did not reflect such analysis. 720 F.3d at 1213-14 (Reinhardt, J., concurring). Though "troubled" by the result, Judge Kozinski stated that he

“[took] comfort in knowing that, if we are wrong, we can be summarily reversed.” 720 F.3d at 1214 (Kozinski, J., concurring).

That is precisely what this Court did: it granted Williams’s subsequent certiorari petition, vacated the Ninth Circuit’s judgment, and remanded “for consideration of petitioner’s Sixth Amendment claim under the standard set forth in 28 U.S.C. § 2254(d).” *Williams v. Johnson*, 134 S. Ct. 2659 (2014).

Visciotti’s panel was aware of the Ninth Circuit’s decision in *Williams* and felt compelled to follow the same course. (Pet. App. 29.) The principal opinion reluctantly found that the express language in this Court’s summary reversal foreclosed further consideration of the § 2254(d)(2) issue, but as in *Williams*, the panel “took comfort” in knowing that this Court may summarily reverse to correct any overbreadth in its prior opinion. Indeed, a grant of certiorari is now the only way to remedy any unintended consequences of *Visciotti IV*.

It bears noting that the consequences here are higher than those in *Williams*, which was “neither a capital case nor one in which [this Court’s] first decision was a summary reversal.” (Pet. App. 50.) As Judges Berzon and Pregerson noted, “[h]ere a person’s life *is* at stake” and in *Visciotti IV*, this Court “proceeded without following its plenary process.” (Pet. App. 50, emphasis in original.) This Court should grant certiorari to ensure that

Visciotti does not proceed to execution without consideration of his § 2254(d)(2) argument.

C. A grant of certiorari will provide the Court of Appeals with much needed guidance on the scope of habeas remands after reversal by this Court

Both the *Williams* and *Visciotti* panels struggled with the same basic question on remand: Are we bound by what the Supreme Court said in a single sentence, or what the Court actually did in its opinion as a whole? This is an important question that “has not been, but should be, settled by this Court.” U.S. Sup. R. 10(c).

In *Williams*, a single sentence in this Court’s introductory paragraph said that habeas relief was not available, even though that issue was outside the scope of the question presented. Judge Reinhardt, in his concurrence, explained that “the Supreme Court’s opinion, on its face, creates substantial uncertainty as to this court’s duty on receiving the mandate on remand.” 720 F.3d at 1212. Judge Kozinski also wrote separately to say he was “troubled” by the conflict between the Court’s express language and its analysis, but “deference to judicial hierarchy” left no option but for the panel to deny Williams’s claim. *Id.* Likewise, the *Visciotti* panel concluded that as “an intermediate court within the federal system,” it was bound by this Court’s seven-word conclusion, rather than the issues actually presented and considered. (Pet. App. 29) Both panels required the habeas petitioners to seek

certiorari from this Court a second time in order to gain clarification on the scope of this Court's prior opinion—a procedure that is burdensome and inefficient, both for petitioners and for this Court. A grant of certiorari, followed by full review and a reasoned opinion, would provide the intermediate federal courts with much needed guidance on how to interpret this Court's mandate where there is a discrepancy between the Court's express language and its analysis, especially in cases like this one, where the Court's prior decision was a summary reversal based solely on certiorari pleadings.

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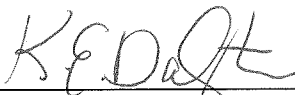
CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted. In the alternative, the Court should grant, vacate, and remand to allow the Ninth Circuit to consider Visciotti's § 2254(d)(2) argument in the first instance.

Respectfully submitted,

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DATED: November 29, 2017

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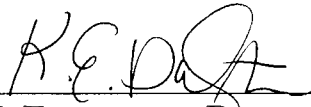
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CERTIFICATE OF WORD COUNT

As required by Supreme Court Rule 33.1(h), I certify that the document contains 5,836 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 29, 2017



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