
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

BRIEF IN OPPOSITION

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**CAPITAL CASE
QUESTION PRESENTED**

This case arises out of a murder that petitioner committed in 1982. In *Woodford v. Visciotti*, 537 U.S. 19 (2002) (*per curiam*), this Court reversed a grant of federal habeas relief on a claim of ineffective assistance of counsel at the penalty phase of petitioner’s capital trial, holding that the California Supreme Court reasonably applied established law in concluding that petitioner suffered no prejudice given the mitigating and aggravating factors in the case. The question presented is:

Whether there is any basis for still further proceedings in this case based on petitioner’s repackaging of the same claim of ineffective assistance as one involving alleged “factual” error by the state court in identifying the relevant mitigating and aggravating factors in order to decide the prejudice issue.

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STATEMENT

1. In 1982, petitioner John Visciotti and an accomplice lured two co-workers—Timothy Dykstra and Michael Wolbert—to a remote area as part of a plan to rob them. Pet. App. 335 (Cal. Supreme Ct. opinion on direct review). After obtaining cash from the victims, Visciotti killed Dykstra with a point-blank gun shot to the chest. *Id.* Visciotti then shot Wolbert in the torso and left shoulder and, finally, in the left eye at close range. *Id.* Visciotti and his accomplice left the victims to die, but “Wolbert miraculously survived to testify against them.” *Id.* at 99 (this Court’s prior opinion).

The State charged Visciotti with first-degree murder, attempted murder, and armed robbery. Pet. App. 334. It also charged, as a special circumstance making the murder punishable by death, that the murder had been committed during a robbery. *Id.* The prosecution presented testimony from Wolbert, Visciotti’s recorded confessions (including a videotaped reenactment of the crime), and the murder weapon found hidden in his apartment. *Id.* at 335-336. The jury found Visciotti guilty as charged. *Id.* at 334.

At the penalty phase of the trial, the prosecution relied on the circumstances of the crime and also produced evidence of facts underlying Visciotti’s earlier conviction for stabbing William Scofield in the back with a knife. Pet. App. 338. The prosecution further sought to present, as part of the circumstances of the Scofield assault, evidence of a gratuitous knife attack on Scofield’s pregnant companion, Kathy Cusack, that occurred as part of the

same incident. *Id.*¹ The trial judge initially sustained a defense objection to the testimony of Cusack about Visciotti's attack on her, on the ground that the prosecution's pretrial notice of its intent to rely on the conviction for the Scofield assault, required by state statute, was not broad enough to encompass the Cusack evidence. *Id.* But after the defense produced mitigation evidence implying that Visciotti was a nonviolent person, the judge allowed the prosecution to call Cusack as a witness in rebuttal to testify that Visciotti had stabbed her eight or more times, even after she told him she was pregnant. *Id.* at 338-339. The jury returned a verdict of death. *Id.* at 334.

2. The California Supreme Court affirmed the conviction and sentence on direct appeal. Pet. App. 317-376. As particularly relevant here, in the course of rejecting various challenges to admission at the penalty phase of evidence of the Cusack assault, the court explained that "[n]otice that evidence will be presented regarding a specific prior crime or crimes should alert counsel that evidence of all crimes committed as part of the same course of conduct may be offered and, therefore, substantially complies with" the state statutory notice requirement that the trial judge had relied on in initially excluding the Cusack evidence. *Id.* at 367. The state supreme court also noted that, although the trial court refused to grant a mid-trial continuance after ruling that the Cusack evidence would be admitted in rebuttal, it did order the prosecution to

¹ Visciotti entered into a plea deal in which he admitted assault with a deadly weapon on Scofield, and the Cusack stabbing was not adjudicated. Pet. App. 336.

give defense counsel copies of the relevant police reports, and Cusack was not called to the stand until the following day. *Id.* Moreover, the court observed, counsel should have been alerted to this evidence when the prosecution tried to introduce it during its case in chief. *Id.*

Visciotti filed a petition for a writ of habeas corpus in the California Supreme Court, claiming pervasive ineffective assistance of trial counsel at the penalty phase. *See* Pet. App. 257-313. The court appointed a referee to hold an evidentiary hearing and to make findings of fact. *Id.* at 257-258, 265-266. After receiving the referee's report, assessing the evidence, making its own findings, and thoroughly considering Visciotti's arguments, the court denied the petition in 1996. *Id.* at 257-299. Applying the standard set out in *Strickland v. Washington*, 466 U.S. 668 (1984), the court "assume[d] *arguendo*" that Visciotti's trial counsel had rendered deficient performance during the penalty phase in the manner alleged by Visciotti. *Id.* at 291. But it concluded that any such deficient performance was not prejudicial. *Id.* at 291-296. First, the court observed that Visciotti had not shown that any failure to prepare to counter the Cusack evidence was prejudicial, because he "[did] not suggest that this evidence could have been rebutted." *Id.* at 293. Moreover, the aggravating factors in the case—the execution of Dykstra and the attempted execution of Wolbert, both in support of a pre-planned robbery; the knife attack on Scofield; and the knife attack on the pregnant Cusack—were overwhelming. *Id.* at 294. Any additional mitigating evidence that could have been offered, the court

explained, “was minimal in comparison with the aggravating evidence.” *Id.* at 296. The court therefore saw no basis for concluding that defense counsel’s “conduct during the penalty phase of the trial “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Id.* (quoting *Strickland*, 466 U.S. at 686).

3. In 1998, Visciotti filed a federal petition for a writ of habeas corpus. Pet. App. 163. The following year, the district court denied the petition as to the judgment of conviction and the finding of a special circumstance, but granted the petition as to the judgment and sentence of death. *Id.* at 160-161. In support of its ruling, the district court made extensive findings of fact and conclusions of law regarding Claim 1.C of Visciotti’s petition, which was his claim of ineffective assistance of counsel at the penalty phase. *Id.* at 162-256. The district court’s findings of fact were all based on the state court record. *Id.* at 163-203.

The court of appeals affirmed in 2002. Pet. App. 136-159.² It reasoned that, notwithstanding the deferential standard of review mandated by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) in 28 U.S.C. § 2254(d), relief was appropriate because the California Supreme Court had both applied the wrong standard for prejudice under *Strickland* and, in any

² The same panel of the court of appeals has retained jurisdiction over this case since the initial appeal. See, e.g., Pet. App. 1, 139.

event, unreasonably applied that standard in rejecting Visciotti's claim of ineffective assistance at the penalty phase. *Id.* at 143, 147-148, 157-158.

This Court summarily reversed. Pet. App. 98-102; *Woodford v. Visciotti*, 537 U.S. 19, 20-22 (2002) (*per curiam*). It explained that the court of appeals had "ultimately substituted its own judgment for that of the state court, in contravention of 28 U.S.C. § 2254(d)." Pet. App. 101. And it emphasized that "[t]he federal habeas scheme leaves primary responsibility with the state courts for these judgments, and authorizes federal-court intervention only when a state-court decision is objectively unreasonable." *Id.* at 102. The Court held that in this case the state court's assessment of the prejudice issue under *Strickland* was "not unreasonable." *Id.*

4. a. On remand, the court of appeals granted Visciotti's request for further briefing, over the State's objection. Visciotti then argued that this Court's decision had addressed and resolved only a "narrow question"; and that despite this Court's ruling the court of appeals could and should, on the existing record, reinstate its prior judgment on his penalty-phase ineffective assistance Claim 1.C, "grant the writ and vacate the sentence of death." Opening Brief on Remand 19-20, *Visciotti v. Woodford*, No. 99-99031 (9th Cir. May 27, 2003). His argument relied on § 2254(d)(1) and *Williams v. Taylor*, 529 U.S. 362, 397-398 (2000). Opening Brief on Remand 3. Among other things, he argued that it was "unreasonable" for the California Supreme Court, in assessing prejudice under *Strickland*, to fail to consider that the Cusack

testimony was admitted only as a result of defense counsel’s error in calling mitigating witnesses. Opening Brief on Remand 12. Notably for present purposes, Visciotti framed this argument in terms of “§ 2254(d)” as a whole. *E.g., id.* at 1, 20. Indeed, he specifically argued that while there was “some ambiguity” about whether his argument was best considered under § 2254(d)(1) or (d)(2), in the end any distinction “ma[de] no difference.” *Id.* at 5 (internal quotation marks omitted); *see also id.* at 3 (framing argument in terms of subsection (d)(1)); *id.* at 20 (“neither § 2254(d)(1) nor (d)(2) bars relief”). The State’s response argued primarily that Visciotti was improperly seeking to raise both new and recycled arguments to re-litigate a claim that had already been finally resolved, Response Brief on Remand 1-11, No. 99-99031 (9th Cir. June 9, 2003), although it also explained why in any event the arguments lacked merit, *id.* at 11-18.

Almost two years after completion of the remand briefing it had ordered, the court of appeals issued a two-sentence order remanding the case to the district court “for further proceedings consistent with” this Court’s decision. *Visciotti v. Brown*, 406 F.3d 1131 (9th Cir. 2005). The court “express[ed] no opinion on any of the arguments offered by the parties in their post-remand briefing, as the proper course would be for the district court to review and rule on the arguments in the first instance.” *Id.*

b. Some eighteen months later, the district court set an evidentiary hearing on Visciotti’s new theory about Claim 1.C, penalty-phase ineffective

assistance. Minute Order, *Visciotti v. Woodford*, No. 97-4591 (C.D. Cal. Nov. 27, 2006). The State sought a stay and a writ of mandamus from the court of appeals. *In re Ayers*, No. 06-75628 (9th Cir. Dec. 12, 2006; Dec. 20, 2006). After that court refused to stay the hearing with respect to the ineffective assistance claim, the State sought a stay from this Court. *See* App. for Stay of Nov. 21, 2006 Order of U.S. Dist. Ct., C.D. Cal. No. CV-97-4591, *Ayers v. Visciotti*, No. 06A711 (Jan. 11, 2007). It argued that Visciotti was seeking “to re-litigate the exact factual and legal situation that was presented to this Court in *Woodford v. Visciotti*.” *Id.* at 5.

In response to that application, Justice Kennedy temporarily stayed the evidentiary hearing and ordered the submission of supplemental briefs addressing whether Visciotti had raised the claim to be considered at that hearing (i) before the state court and (ii) before the district court prior to this Court’s 2002 decision. Order, *Ayers v. Visciotti*, No. 06A711 (Jan. 19, 2007). In that briefing, the State advanced and supported with documentation its argument that the ineffective assistance claim at issue was the same one that Visciotti had raised in his prior state and federal habeas proceedings and that was resolved by this Court’s decision. State Supp. Br. 2-9 (Jan. 24, 2007). Visciotti at that point argued—as he does in his present petition—that this Court had “found prejudice lacking [only] under § 2254(d)(1),” while the new evidentiary hearing would develop his claim “pursuant to § 2254(d)(2).” Visciotti Supp. Br. 1 (Jan. 24, 2007). The parties’ briefs, although short,

specifically addressed the issue of Cusack's testimony. State Supp. Reply Br. 2-3 & n.1 (Jan. 26, 2007); Visciotti Supp. Reply Br. 2-3 (Jan. 26, 2007). After considering these submissions, Justice Kennedy granted the State's application, staying the evidentiary hearing pending the court of appeals' disposition of the State's petition for mandamus. Order, *Ayers v. Visciotti*, No. 06A711 (Jan. 29, 2007).

For the next two years, the court of appeals entertained briefing and argument on the mandamus petition. Ultimately it granted the petition and barred the new evidentiary hearing, recognizing that there were "no material facts in dispute" as to the penalty-phase ineffective assistance claim, which could be "resolved as a matter of law and on the existing record." Memorandum Disposition 7, *In re Ayers*, No. 06-75628 (9th Cir. Apr. 21, 2009). It reasoned in part (*id.* at 4):

Visciotti argues that neither the California Supreme Court nor the United States Supreme Court ever addressed his argument that, but for trial counsel's ineffectiveness ..., the evidence that Visciotti had previously stabbed a pregnant woman ("the Cusack evidence") never would have come in at all, as the trial court ruled at the penalty phase that the evidence was inadmissible because the prosecutor did not give timely notice that it would be used as an aggravating factor. Whether Visciotti is correct on these points or not, resolution of this issue turns on purely legal questions (*e.g.*, could competent counsel have kept the Cusack evidence out?), not upon any "facts" that could be proven at an evidentiary hearing on ineffective assistance of counsel.

Two years later, the district court rejected Visciotti's renewed claim of ineffective assistance of counsel at the penalty phase. Pet. App. 51-97. The court rejected Visciotti's claim of prejudice because it "d[id] not find a

reasonable probability that the jury, or even one juror, would have returned with a different sentence if Cusack's stabbing had not been part of the penalty phase presentation." *Id.* at 59 n.3; *see id.* at 55-59. Rather, given the other aggravating evidence—"the premeditated murder of one man and the attempted murder of another in the course of a felony, combined with a prior stabbing of another man that arose out of a dispute over a cat"—the state court's decision that there was no prejudice at the penalty stage did not reflect "either an unreasonable application of the law or an unreasonable determination of the facts." *Id.* at 59; *see id.* at 58-59.

c. Five years later, the court of appeals affirmed. Pet. App. 1-50. In this decision, the court accepted Visciotti's contention that his "refashioned" penalty-phase ineffective assistance argument was properly analyzed as one under 28 U.S.C. § 2254(d)(2), challenging the California Supreme Court's denial of relief as "based on an unreasonable determination of the *facts*." *Id.* at 22 (quoting statute; emphasis added). It indicated that in its independent judgment—if it were "writing on a blank slate"—it would "likely" accept Visciotti's argument that evidence of the Cusack assault was presented to the penalty-phase jury only because defense counsel incompetently opened the door for its use on rebuttal, and that the state supreme court unreasonably assumed in its *Strickland* no-prejudice analysis that the evidence was admissible without regard to counsel's incompetence. *Id.* at 26; *see id.* at 22-26. Ultimately, however, the court recognized that it was bound to reject

Visciotti's claim based on this Court's 2002 decision in *Woodford v. Visciotti* that the state court's decision was not objectively unreasonable. *Id.* at 26-30.

The court of appeals expressed concern that this Court never specifically considered Visciotti's current argument—that the California Supreme Court's “implicit assumption[] as to the inevitable admission of Cusack's testimony” was not “factually correct,” and thus was “unreasonable” under § 2254(d)(2). Pet. App. 27-28; *see id.* at 26-30. It reasoned, however, that it was barred from undertaking any further consideration of that argument itself because this Court, in summarizing the holding at the end of its decision in the case, “broadly concluded that ‘[h]abeas relief is . . . not permissible under § 2254(d),’” rather than referring only to § 2254(d)(1). *Id.* at 26 (quoting *Visciotti*, 537 U.S. at 27). Seemingly resting on that technical wording point, the court of appeals held that this Court's prior decision “entirely preclude[d] any review at this juncture of Visciotti's IAC claims.” *Id.* at 28; *see, e.g., id.* at 29-30, 31-32. It professed, however, to “take comfort in knowing that, if we are wrong, we can be summarily reversed.” *Id.* at 29 (quoting *Williams v. Johnson*, 720 F.3d 1212, 1214 (9th Cir. 2013) (Kozinski, J., concurring), *vacated and remanded*, 134 S. Ct. 2659 (2014)).³

³ The court also addressed other issues, including Visciotti's further assertion that he was prejudiced by the cumulative effect of ineffective assistance at both the guilt and penalty phases of his trial. Pet. App. 30-32. That claim is barred for a variety of reasons (*see, e.g., id.* at 31 n.8), but in any event Visciotti does not advance that or any other additional issue in his present petition. *See* Pet. 18 n.5.

In a separate concurrence for herself and Judge Pregerson, Judge Berzon discussed this Court’s practice of occasional summary reversals. Pet. App. 44-50. Observing that in such cases the Court acts “without the benefit of merits-stage briefing or oral argument” (*id.* at 48), she suggested that the summary language in the *Visciotti* opinion on which the court of appeals focused here “may have been inadvertent” (*id.* at 49). And, as in the court’s opinion (which she also authored), she suggested that this Court might “correct[] the apparently inadvertent overreach of its original opinion by reversing” the decision below and remanding to allow the court of appeals to give further consideration to “the quite colorable issues raised before us on remand.” *Id.* at 50.

ARGUMENT

Fifteen years ago, this Court held that the California Supreme Court’s 1996 decision rejecting Visciotti’s claim of ineffective assistance of counsel at the penalty phase of his capital trial was “not unreasonable.” *Woodford v. Visciotti*, 537 U.S. 19, 25, 27 (2002) (*per curiam*) (internal quotation marks omitted); Pet. App. 101-102. Accordingly, that claim provided no permissible basis for a federal court to substitute its own judgment and set aside the sentence imposed and upheld by the state courts. *Id.* As the court below correctly (although reluctantly) concluded, this Court’s prior decision precludes Visciotti from proceeding any further with a repackaged version of the same claim of ineffective assistance at the penalty phase, Claim 1.C, that was at issue in 2002. That is not because of any hypertechnical reading of this Court’s

opinion, or any “inadvertent overreach” by the Court (Pet. App. 50). The preclusion here rests on basic principles of orderly litigation and repose. Moreover, even if Visciotti’s restated claim were properly subject to review, there would be no ground for federal habeas relief because the state court determination was not objectively unreasonable.

1. a. The court of appeals correctly held that this Court’s rejection of petitioner’s ineffective assistance claim in *Woodford v. Visciotti* is the law of this case, precluding further proceedings on that claim. Pet. App. 28. When a court decides an issue of law, its decision governs the same issue in later proceedings in the same case. *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816 (1988). “This rule of practice promotes the finality and efficiency of the judicial process by ‘protecting against the agitation of settled issues.’” *Id.* It applies to issues that were decided either explicitly or by necessary implication. *Vehicle Market Research, Inc. v. Mitchell Int’l, Inc.*, 839 F.3d 1251, 1256 (10th Cir. 2016); *United States v. Garcia-Beltran*, 443 F.3d 1126, 1129 (9th Cir. 2006); *United States v. Jordan*, 429 F.3d 1032, 1035 (11th Cir. 2005).⁴ The court of appeals was thus correct in recognizing that it was bound by this Court’s earlier *Visciotti* decision. Pet. App. 28.

⁴ This rule does not apply to discrete claims that were not decided on appeal. Here, for example, when the district court concluded that the death sentence should be vacated based on ineffective assistance of counsel, it declared moot several separate claims about the death penalty. After this Court’s prior decision, the State agreed that remand to the district court was proper and necessary so the court could decide those claims, because they were

While the judgment below, rejecting petitioner’s claim, correctly reflects that principle of preclusion, the court of appeals’ explanation of its decision is somewhat flawed. The lower court portrayed the preclusive effect of this Court’s judgment as resting on the single sentence in the 2002 opinion stating that relief on Visciotti’s ineffective assistance claim is “not permissible under § 2254(d).” Pet. App. 26. But the basis for preclusion goes beyond that single sentence. It extends, more fundamentally, to the identity of the claim—the same claim that this Court resolved in 2002 and that Visciotti now seeks to re-litigate, based on a new theory, almost two decades later and almost four decades after the murder of Timothy Dykstra. Visciotti’s Claim 1.C is that the California Supreme Court acted unreasonably in rejecting his claim of ineffective assistance based on its assessment that, given the available mitigating and aggravating evidence, any constitutional deficiency in counsel’s performance did not ultimately prejudice Visciotti. He argues in support of that same claim here. The only difference is that, whereas he earlier posited that the unreasonableness in the state court’s no-prejudice ruling lay in its alleged failure to consider all of the mitigating evidence, he now posits that the unreasonableness lies instead in the state court’s alleged failure to exclude the

no longer moot. Response to Petitioner’s Motion Regarding the Mandate 2-3, *Visciotti v. Woodford*, No. 99-99031 (9th Cir. Jan. 27, 2003). For fifteen years, however, the State has vigorously resisted Visciotti’s attempt to re-litigate his Claim 1.C, ineffective assistance of counsel at the penalty phase, because that is the very claim that was rejected by this Court in 2002.

Cusack aggravating evidence from its consideration. Allowing a state prisoner, perhaps decades later, to re-open an otherwise settled claim by advancing a new argument to support it would be inimical to law-of-the-case principles and to AEDPA's purpose of focusing and limiting the scope of federal habeas review of state judgments.

Visciotti's present petition accurately refers to the claim before this Court in 2002 and the claim before it now as the same claim—designated as Claim 1.C. Pet. 4, 5, 17. Indeed, he relies on the proposition, accepted by the court below, that his comprehensive framing of Claim 1.C adequately placed before the state court the specific Cusack-evidence argument he presents here. Pet. 5, 17; Pet. App. 23. Visciotti and the State agreed, in supplemental briefs they filed in this Court at Justice Kennedy's request on January 24, 2007, that Claim 1.C encompassed that argument. State Supp. Br. 2-9 (Jan. 24, 2007); Visciotti Supp. Br. 5-6 (Jan. 24, 2007). When this Court in its 2002 opinion reviewed the state supreme court's direct-appeal opinion and that court's habeas corpus examination of the state-court record (Pet. App. 99, 102), the circumstances of trial counsel's performance, leading to admission of the Cusack testimony, were before this Court. *Id.* at 291, 338, 365-366. This Court's 2002 decision thus settled—either “explicitly or by necessary implication,” *Vehicle Market Research*, 839 F.3d at 1256; *United States v. Garcia-Beltran*, 443 F.3d at 1129—the question whether, on the state court

record, § 2254 bars federal relief on Visciotti's challenge to the effectiveness of his trial counsel at the penalty phase.

b. Visciotti argues that he can now challenge the reasonableness of the state court's decision not on account of its application of *Strickland* to the facts under § 2254(d)(1), but on account of its underlying determination of the facts under subsection (d)(2). Pet. 4-5, 21. As the court of appeals stated it, "Visciotti's central § 2254(d) contention is that in its prejudice analysis, the California Supreme Court unreasonably assumed that Cusack's testimony was *admissible* without regard to [defense counsel's] IAC." Pet. App. 23 (emphasis in original). But Visciotti's argument does not fit under § 2254(d)(2). The California Supreme Court did not make any contested findings of historical fact about the circumstances surrounding the admission of the Cusack assault evidence. Nor did it need to do so. As the court of appeals correctly concluded in the post-remand mandate proceeding, there are "no material facts in dispute as to the ineffective assistance at penalty phase claim." Memorandum Disposition 2, 4-5, *In re Ayers*, No. 06-75628 (9th Cir. Apr. 21, 2009).

Moreover, the California Supreme Court expressed important *legal* conclusions relevant to this point in Visciotti's direct appeal. It determined as a matter of state law that, contrary to the trial judge's initial ruling excluding the Cusack evidence, the prosecution's pre-trial notice of aggravating evidence substantially complied with the applicable state statute. Pet. App. 367. In deciding this point, further, the supreme court cited one its prior decisions

explaining that a continuance, rather than exclusion of evidence as the trial judge ordered, would ordinarily be the remedy for any notice violation. *Id.* (citing *People v. Cooper*, 53 Cal. 3d 771, 842 (1991).) It noted that California courts have no discretion to exclude all evidence relating to a prior violent felony, because a prior act of violence is a statutory sentencing factor. *Id.* at 365 (citing *People v. Karis*, 46 Cal. 3d 612, 641 (1988)). The state supreme court’s legal conclusions on these state-law matters make clear that, in the words of the decision below, “Cusack’s testimony was *admissible* without regard to [trial counsel’s] IAC.” Pet. App. 23 (emphasis in original). Thus, contrary to the court of appeal’s suggestion, it could not have been unreasonable for the state court to “assume” that the Cusack testimony was properly considered among the mitigating and aggravating circumstances to assess possible prejudice. The California Supreme Court’s resolution of these state-law matters is authoritative. *Riley v. Kennedy*, 553 U.S. 406, 425 (2008); *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). A federal court may not treat a resulting decision as unreasonable under either subsection of § 2254(d).

c. Similarly, Visciotti’s misplaced reliance on *Johnson v. Williams*, 568 U.S. 289 (2013), and its later proceedings, only highlights the reasons this Court’s 2002 *Visciotti* opinion precludes his attempt to re-package Claim 1.C. See Pet. 22-26; Pet. App. 28-29. The circumstances in *Williams* were fundamentally different from those here. In *Williams*, this Court’s initial opinion discussed and analyzed only the threshold § 2254(d) issue of whether

the petitioner's federal claim had been adjudicated on the merits by the state court. *Williams*, 568 U.S. at 298-306. Although the Court's opinion included a bare statement that the petitioner was not entitled to relief under § 2254(d), it never analyzed or discussed the petitioner's substantive Sixth Amendment claim that an unconstitutional dismissal of a juror required federal relief. *Id.* at 293, 304-306. On remand, however, the court of appeals held that a literal reading of language in this Court's opinion foreclosed any review of the substance of the Sixth Amendment claim. *Williams v. Johnson*, 720 F.3d 1212 (9th Cir. 2013) (*per curiam*). This Court granted certiorari, vacated that judgment, and remanded the case for "consideration of petitioner's Sixth Amendment claim under the deferential standard set forth in 28 U.S.C. § 2254(d)." *Williams v. Johnson*, 134 S. Ct. 2659 (2014) (*per curiam*).

In contrast, this Court in *Woodford v. Visciotti* did not concern itself with issues only preliminary or collateral to Visciotti's ineffective assistance claim. Instead, the validity of that claim as a basis for relief was the only issue before the Court. This Court explicitly reviewed the facts of this case as detailed by the state court, and considered Visciotti's substantive Claim 1.C that he was prejudiced by constitutionally deficient performance by his counsel at the penalty phase. Pet. App. 99-102. Then it concluded, and explained in detail, that the state court's adjudication precluded federal relief because it was neither contrary to nor an unreasonable application of *Strickland*. Pet. App. 101-102 (citing *Williams v. Taylor*, 529 U.S. at 410-411, and *Bell v. Cone*, 535

U.S. 685, 694 (2002)). That holding, fully explained, was the opposite of “inadvertent.” *See* Pet. App. 49, 50 (Berzon, J., concurring).

d. Nor do equitable considerations warrant review of Visciotti’s case-specific argument for error correction in what he acknowledges is an “unusual” case. Pet. 22. It is unrealistic for Visciotti to argue that a mistaken assumption fatally undermines the state-court *Strickland* ruling that this Court validated in 2002, but that it somehow would have been “improper” for him to mention that to this Court in his earlier brief in opposition to certiorari. *Id.* at 21. Nothing at that time prevented Visciotti from presenting what he now advances as a “§ 2254(d)(2)” argument, as an alternate ground supporting the lower court judgment and obviating any need for this Court’s review. *See* Stephen M. Shapiro et al., *Supreme Court Practice*, chs. 6.37(i)(1), at 506, 6.37(i)(3), at 508 (10th ed. 2013). Indeed, if Visciotti were correct that his current argument challenges the *factual* basis on which the state court ruled in rejecting his ineffective assistance claim, then he ran a risk of forfeiting that argument under this Court’s Rule 15.2 when he declined to alert this Court to the point in his opposition brief. That choice still carries significance for his present petition. If he had raised the alleged factual point back then, the current occasion for him to ask this Court to consider the same ineffective assistance claim yet again might never have arisen. And finally, although Visciotti was not entitled to any further review of his current argument after this Court’s prior decision, in fact he received review when the district court

expressly considered, but rejected, his argument that the *Strickland* prejudice analysis would come out differently if the Cusack evidence were excluded from the balance. *See* p. 9, *supra*; Pet. App. 58-59 & n.3.

2. a. In any event, even if Claim 1.C were re-litigated, Visciotti's argument about the state court's treatment of the Cusack evidence would fail. First, Visciotti seeks an undeserved windfall the denial of which is not cognizable as prejudice under *Strickland*. He argues that the California Supreme Court's analysis of *Strickland* prejudice was skewed because that court considered the Cusack attack evidence as partially offsetting the potential effect of available mitigating evidence, without accounting for the fact that the trial judge, who first had excluded the Cusack evidence because of the prosecutor's alleged violation of a state notice statute, admitted it as rebuttal only after defense counsel incompetently opened the door. Pet. 4-5. But the evidence of that prior instance of violence was reliable and relevant as aggravation under state law. Cal. Penal Code § 190.3 & factor (b); Pet. App. 365-367.⁵ Indeed, the state supreme court deemed Visciotti's violent attack on Cusack to be "particularly relevant." Pet. App. 365. Moreover, as discussed

⁵ Section 190.3 provides: "In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

"...

"(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence."

above, the court concluded in Visciotti's direct appeal that, contrary to the trial judge's ruling, the pre-trial notice given by the prosecution substantially complied with the state statute. Pet. App. 367. Further, as reflected in *People v. Cooper*, 53 Cal. 3d at 842, cited by the state supreme court, the remedy for any notice violation is ordinarily a continuance to allow the defense to meet the evidence, rather than excluding the evidence as the trial judge initially did here. *See also People v. Karis*, 46 Cal. 3d at 641 (trial court cannot entirely exclude evidence of prior violent act). Visciotti has never presented any grounds for concluding that a continuance would have enabled him to rebut the evidence, or would have changed the calculus of prejudice. *See* Pet. App. 293.

In light of the California Supreme Court's authoritative interpretation of state law in this regard, counsel's challenged conduct in "opening the door" to the Cusack evidence did not deprive him of a fair and reliable trial or of any procedural or substantive right to which he was entitled. His complaint centers, instead, on the loss of an undeserved windfall from the trial judge's error in excluding the Cusack testimony in the first place. The loss of such a windfall from legal error, however, may not be considered as prejudice under the *Strickland* standard. *Williams v. Taylor*, 529 U.S. at 392-393 & n.17; *Lockhart v. Fretwell*, 506 U.S. 364, 369-370 (1993); *Strickland*, 466 U.S. at 695.

In *Fretwell*, defense counsel failed to object to the sole aggravating factor advanced in support of a death sentence, even though it was unconstitutional

under then-controlling circuit precedent. 506 U.S. at 366-367. Fretwell sought habeas relief, arguing that he could not have received a death sentence but for his attorney's failure to object. *Id.* at 367. In the meantime, the circuit court overruled its precedent on the aggravator. *Id.* at 368. Nevertheless, the Eighth Circuit upheld a grant of habeas relief because the State's reliance on the sole aggravating factor would have been invalidated, albeit erroneously, if defense counsel had objected at trial. *Id.* at 367-368. This Court reversed. It explained that "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Id.* at 369, 372. Even though the failure to object made the practical difference between life and a death sentence, this Court ruled that, "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." *Id.* at 369-370. The penalty aggravator, this Court said, was neither unfair nor unreliable; and defense counsel's performance did not deprive the defendant of any substantive or procedural right to which the law entitled him. *Id.* at 372.

Under *Strickland*, prejudice can be found only where there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. at 694. But, as *Fretwell* recognized and as this Court has since reaffirmed, see *Williams v. Taylor*, 529 U.S. at 393 & n.18, a different rule

governs where the probability of a different result arises from a windfall such as an undeserved benefit flowing from a judge's legal mistake in the defendant's favor at trial. In such cases, as in this one, *Strickland* prejudice is measured instead by the fundamental fairness of the proceeding. *Id.* Here, consideration of the Cusack evidence did not render the proceeding fundamentally unfair. That evidence constituted relevant and reliable aggravation, and Visciotti never had any state or federal right to exclude it. It was therefore entirely proper for the California Supreme Court to consider the evidence when assessing *Strickland* prejudice. And even if that proposition were debatable, in light of *Fretwell* the state court's consideration of the Cusack evidence was certainly neither "contrary to," nor an "unreasonable application of," any holding of this Court, and there is no basis for setting aside the state judgment under § 2254(d).

b. Finally, as also noted above, in 2011 the district court correctly concluded, after an independent de novo review of the question, that there is no reasonable probability that the outcome of the penalty trial would have been different if Cusack's stabbing had not been part of the penalty phase presentation. Pet. App. 59 & n.3. At the very least, the court further concluded, the state court's determination was not objectively unreasonable. *Id.* at 59.

The decision below suggests that, in making that determination, the district court relied in part on this Court's 2002 *Visciotti* opinion crediting the

reasonableness of the state court's adjudication. Pet. App. 26 n.7. But even if the district judge did that in part, and even if this Court's opinion did not preclude Visciotti's current argument, the district court also assessed the merits of the claim independently. *Id.* at 58-59 & n.3. It concluded that, regardless of Visciotti's allegation of unreasonableness in the state court adjudication, his claim failed on the merits for want of *Strickland* prejudice. *Id.* at 59 & n.3. In the district court's independent judgment, not even one juror would have voted differently if the Cusack stabbing had been excluded at the penalty phase. *Id.* at 59 n.3. As the court correctly explained, that conclusion follows from the prosecution's aggravating evidence of the "premeditated murder of one man and the attempted murder of another in the course of a felony, combined with a prior stabbing of another man that arose out of a dispute over a cat." *Id.* at 59; *see id.* at 338. And for that reason, too, there is no reason for yet more review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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