
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

PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION

HILARY POTASHNER
Federal Public Defender
MARK R. DROZDOWSKI
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012
Telephone: (213) 894-2854
Facsimile: (213) 894-1221
Mark_Drozowski@fd.org

STATIA PEAKHEART
Attorney at Law
P.O. Box 531967
Los Angeles, California 90053
Telephone: (310) 692-5500
Statia.Peakheart@gmail.com

K. ELIZABETH DAHLSTROM*
Deputy Federal Public Defender
411 West Fourth Street, Suite 7110
Santa Ana, California 92701
Telephone: (714) 338-4500
Facsimile: (714) 338-4520
Elizabeth_Dahlstrom@fd.org

Counsel for Petitioner
John Louis Visciotti
** Counsel of Record*

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ARGUMENT

John Visciotti has petitioned this Court for a writ of certiorari to correct an apparent error in *Visciotti v. Woodford*, 537 U.S. 19 (2002) (per curiam), which stated that habeas relief was “not permissible under [28 U.S.C.] § 2254(d)” even though the Question Presented, and this Court’s analysis, was limited to § 2254(d)(1). Respondent argues that the petition should be denied because Visciotti’s argument under § 2254(d)(2) is a “repackaged” version of the ineffective assistance of counsel claim this Court decided in 2002 and, in any case, Visciotti is not entitled to relief on the merits. (Brief in Opposition, “Opposition” or “Opp.” at i, 22.) This misapprehends Visciotti’s petition in several important ways.

First, Respondent asserts that Visciotti should not get another chance for relief on Claim 1.C because there has already been a decision by this Court on the same claim. This might be true for a petitioner who lost in district court, lost in the Court of Appeals, and then petitioned this Court for relief and was denied. Surely, that petitioner had the opportunity, and incentive, to raise his entitlement to relief under both §§ 2254(d)(1) and (d)(2) in his certiorari petition to this Court. But in 2002, Visciotti was *defending* a grant of relief, premised on § 2254(d)(1), that was ordered by the district court and later affirmed by the Court of Appeals. (Pet. App. 136, 162.) Respondent was the petitioner to this Court in 2002, and it was he, not

Visciotti, who narrowly framed the Questions Presented and argument under § 2254(d)(1) only. (Pet. App. 105.)

That is also why Visciotti's § 2254(d)(2) argument was not decided by this Court in 2002, "either explicitly or by necessary implication," as Respondent states. (Opp. at 12.) Throughout its Opposition, Respondent conflates "claims for relief" (like ineffective assistance of counsel) with "arguments" for surmounting § 2254(d)'s bar to relief. All that was decided in the prior appeal was that Visciotti cannot overcome the bar to relief in § 2254(d)(1) on Claim 1.C, a ruling that Visciotti does not, and cannot, challenge now. What this Court did not decide, however, is whether Visciotti can overcome the separate bar to relief in § 2254(d)(2). Sub-sections 2254(d)(1) and (d)(2) are distinct provisions, and this Court treats them as such.

Thaler v. Haynes, 559 U.S. 43 (2010), which Visciotti's petition cited and Respondent ignored, is instructive on this point. There, the Fifth Circuit granted relief on a *Batson*¹ claim after finding § 2254(d)(1) satisfied. *Id.* at 47. As in Visciotti's case, the appellate court did not address § 2254(d)(2) and the state petitioned for a writ of certiorari, presenting a question under

¹ *Batson v. Kentucky*, 476 U.S. 79 (1986).

§ 2254(d)(1).² When Haynes raised § 2254(d)(2) in his brief in opposition (which is what Respondent suggests Visciotti should have done), the state objected on the ground that the § 2254(d)(2) argument had not been considered by the Court of Appeals.³ The state urged this Court to reverse the grant of relief under § 2254(d)(1) and remand the case to allow the Fifth Circuit to decide the § 2254(d)(2) argument in the first instance. That is exactly what this Court did, and it instructs habeas petitioners that a reversal on one prong of § 2254(d) does not preclude remand or relief on the other.

² The state presented two questions, only one of which is relevant here: “Was this purported right to an automatic new trial “clearly established” under this Court's precedents at the time of trial in 1999, as required under the Antiterrorism and Effective Death Penalty Act of 1996 (28 U.S.C. § 2254(d)(1))? And does this purported right prevent federal courts from applying the presumption of correctness to the state court finding that the peremptory strike was not racially motivated, as required under the AEDPA (28 U.S.C. § 2254(e)(1))?” *Quarterman v. Haynes*, No. 09-273, 2009 WL 2864366 at i (Petition for Certiorari).

³ The state argued: “In an effort to avoid the panel’s significant errors of law, Haynes urges this Court to determine in the first instance whether the trial court’s credibility finding was an unreasonable determination of fact under AEDPA §2254(d)(2). . . . This is precisely the analysis that the Fifth Circuit declined to perform . . . as Haynes eventually concedes. Rather than waste its scarce resources on this previously unaddressed argument, the Court should remand to allow the Fifth Circuit to consider it in the first instance, giving appropriate AEDPA deference to the trial court’s credibility determination.” *Thaler v. Haynes*, 2009 WL 3776254 at *13 (Reply Brief for the Petitioner)(internal citations omitted).

This remains true even when the § 2254(d)(1) and (d)(2) arguments are closely related, as they often are. In *Haynes*, for example, the § 2254(d)(1) argument centered around whether *Batson* and its progeny allow appellate courts to engage in fact-finding where a peremptory strike was based on the juror’s demeanor. 559 U.S. at 46. This was a legal question under § 2254(d)(1), even though it had to do with how state courts may find facts. This Court’s rejection of that § 2254(d)(1) argument did not foreclose remand for consideration of other arguments under § 2254(d)(2). *Id.* at 49 (remanding the case with an advisement that the Court of Appeals “may consider whether the Texas Court of Criminal Appeals’ determination may be overcome under the federal habeas statute’s standard for reviewing a state court’s resolution of questions of fact.”).

In *Brumfield v. Cain*, this Court also treated sections 2254(d)(1) and (d)(2) separately. 135 S.Ct. 2269. After holding that the state court’s denial of an *Atkins*⁴ hearing was based upon an “unreasonable determination of the facts” under § 2254(d)(2), the case was remanded without deciding the closely-related question of whether the state court’s refusal to provide expert funding was an unreasonable application of *Atkins* under § 2254(d)(1). *Id.* at 2274-76. Neither *Haynes* nor *Brumfield* “repackaged” his § 2254(d)(1) and

⁴ *Atkins v. Virginia*, 536 U.S. 304 (2002).

(d)(2) arguments (to use Respondent’s term) and neither did Visciotti. The § 2254(d)(1) argument that this Court decided in 2002 is distinct from the § 2254(d)(2) argument Visciotti raised on remand to the district court, Court of Appeals, and now to this Court.

Finally, Respondent argues that even if Visciotti could overcome § 2254(d)(2), his ineffective assistance of counsel claim lacks merit. (Opp. at 22.) In Respondent’s view, Visciotti had no right to the alleged “windfall”⁵ that resulted from the state’s failure to give timely notice of the Cusack evidence, and even so, the prejudice determination would not have been any different if the Cusack stabbing had not been admitted. (Opp. at 19; 22.) Respondent is incorrect on both points. The question is not whether Visciotti was “entitled to a windfall” but whether effective counsel must tailor his presentation to avoid harmful rebuttal evidence.⁶ This Court’s decisions

⁵ In making this argument, Respondent states that the California Supreme Court disagreed with the trial court’s initial exclusion of the Cusack evidence. (Opp. at 2, 15-16, citing Pet. App. 376.) But the quotation Respondent cites was made in response to Visciotti’s argument that the Cusack evidence should not have come in *as rebuttal*, even after defense counsel opened the door to it. The state court did not hold that the trial court was wrong to exclude the Cusack evidence from the prosecution’s case-in-chief.

⁶ Respondent’s reliance on *Lockhart v. Fretwell*, 506 U.S. 364, 369-70 (1993), is both newfound and misplaced. (Opp. at 20.) The California Supreme Court’s reasoned decision on this claim never discussed, or even cited *Fretwell*. (Pet. App. 257-316.) The case played no role in the adjudication of this claim then, nor does it now.

indicate that the answer is yes. *See Strickland v. Washington*, 466 U.S. 668, 699 (1984) (“Restricting testimony on respondent’s character to what had come in at the plea colloquy ensured that contrary character and psychological evidence and respondent’s criminal history, which counsel had successfully moved to exclude, would not come in.”); *Wong v. Belmontes*, 558 U.S. 15, 16 (2009) (finding no prejudice from failing to present additional mitigation evidence where trial counsel carefully crafted his strategy to prevent the admission of “potentially devastating” evidence of a prior murder that had not been admissible in the prosecution’s case-in-chief.).

As for the weight of the Cusack evidence, there is little doubt that it was the most aggravating piece of evidence presented at the penalty trial. The district attorney’s closing argument cited it as the “prime example” of Visciotti’s capacity for violence, and the state court “lingered over” the Cusack evidence in its prejudice analysis. (Pet. App. 24-25.) Without this critical testimony, the prosecution’s case for death would have been much weaker. But even a strong aggravation case does not preclude a finding of prejudice, as this Court has so held. *Williams v. Taylor*, 529 U.S. 362, 368 (2000) (finding prejudice even though Williams killed a man who refused to lend him “a couple of dollars,” assaulted an elderly woman who was left in a “vegetative state” and set fire to the jail while awaiting trial); *Rompilla v. Beard*, 545 U.S. 374, 378, 393 (2005) (on de novo review, finding prejudice

even though Rompilla had a “significant history of felony convictions” involving violence, and committed the charged murder by repeatedly stabbing the victim and setting him on fire, and the jury had found true the allegation that the murder was committed by torture). If counsel had never opened the door to the Cusack evidence, there is a reasonable probability that at least one juror would have “struck a different balance” and voted to spare Visciotti’s life. *Wiggins v. Smith*, 539 U.S. 510, 513 (2003).

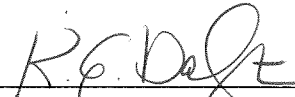
CONCLUSION

This Court should grant Visciotti’s petition for a writ of certiorari and order merits briefing, or in the alternative, grant, vacate, and remand to the Court of Appeals for further consideration of Visciotti’s Sixth Amendment claim under the standard set forth in 28 U.S.C. § 2254(d)(2).

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: March 16, 2018

By: 
K. ELIZABETH DAHLSTROM*
MARK R. DROZDOWSKI
Deputy Federal Public Defenders
STATIA PEAKHEART
Attorney at Law

Counsel for Petitioner
John Louis Visciotti
**Counsel of Record*

CERTIFICATE OF WORD COUNT

As required by Supreme Court Rule 33.1(h), I certify that the document contains 1,647 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 March 16, 2018



K. ELIZABETH DAHLSTROM*
Deputy Federal Public Defender

Counsel for Petitioner
John Louis Visciotti

**Counsel of Record*

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CERTIFICATE OF SERVICE

I, K. Elizabeth Dahlstrom, a member of the Bar of this Court, do swear or declare that on this date, March 16, 2018, as required by Supreme Court Rule 29, I have served the enclosed Petitioner's Reply to the Brief in Opposition on each party to the above proceeding required to be served, or that party's counsel, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

MEAGAN BEALE
Deputy Attorney General
HOLLY D. WILKENS
Supervising Deputy Attorney General
CALIFORNIA DEPARTMENT OF JUSTICE
600 West Broadway, Suite 1800
San Diego, CA 92101
(619) 738-9031
Holly.Wilkens@doj.ca.gov
Counsel for Respondent

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

Executed on March 16, 2018.



K. ELIZABETH DAHLSTROM*
Counsel for Petitioner John Louis Visciotti
**Counsel of Record*