

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

VARDAN ABRAMYAN,

Petitioner,

v.

JEFF MACOMBER, Warden,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

HEATHER E. WILLIAMS
Federal Defender
Eastern District of California
CAROLYN M. WIGGIN
Assistant Federal Defender
Counsel of Record
801 I Street, 3rd Floor
Sacramento, California 95814
carolyn_wiggin@fd.org
Telephone: (916) 498-5700

Attorneys for Petitioner
VARDAN ABRAMYAN

QUESTIONS PRESENTED FOR REVIEW

Petitioner Vardan Abramyan was severely abused by his father Norik Abramyan for his entire childhood. He also witnessed Norik abuse and attempt to kill his mother and sisters. Vardan made and participated in a plan to kill Norik because, he testified, he feared that if he did not kill Norik, Norik would kill him or his mother or sisters. At his trial for murder, his attorney introduced evidence that would only be helpful to Vardan to support a theory of imperfect self defense or defense of others. Although the attorney introduced lay and expert witness testimony laying the foundation for a theory of imperfect defense, the attorney failed to ask for an imperfect defense jury instruction or argue that defense theory to the jury.

The questions presented are:

- (1) In a case involving a teenager who had been severely beaten by his father for his entire life, did the state court unreasonably find the evidence petitioner did not *subjectively* fear imminent harm from his father was so overwhelming that trial counsel's failure to argue an imperfect defense theory to the jury was competent?
- (2) When the record makes clear that the actual basis for counsel's acts or omissions was ignorance of the law, and trial counsel's "advocacy" only

bolstered the prosecution's case without aiding the defendant, is a state court's denial of an ineffective assistance of counsel claim reasonable?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW	i
Table of Authorities	vi
I. Citations of Opinions and Orders.....	1
II. Basis for Jurisdiction.....	3
III. Constitutional Provisions and Statutes Involved in the Case.....	3
A. The Sixth Amendment to the United States Constitution.....	3
B. 28 United States Code Section 2254.....	3
IV. Statement of the Case.....	4
A. Factual Background.....	5
B. Petitioner’s Trial.....	8
1. Attorney Levinson Introduces Evidence that Abramyan Family Members Feared Norik Abramyan.	8
2. Attorney Levinson Introduces Expert Testimony on “Intimate Partner Battering and Its Effect” Syndrome.	8
3. Vardan Abramyan Acknowledges that Objectively, Norik Abramyan Did Not Present a Threat to Others at the Moment He Was Shot.....	10
4. Mr. Abramyan’s Trial Counsel Fails to Request an Instruction on Imperfect Self Defense or Defense of Others.	10
5. Closing Arguments.....	12
6. Verdict and Sentencing	13
C. Post-Trial Proceedings and Appeal.....	14
1. State Proceedings	14

2. Federal Proceedings	16
V. Reasons for Granting the Writ	18
A. This Court Should Grant <i>Certiorari</i> Because the Critical Factual Finding Underlying Denial of Relief is Unreasonable, and the Federal Court’s Failure to Recognize This Conflicts With 28 U.S.C. Section 2254(d)(2) and This Court’s Precedent.....	18
B. This Court Should Grant <i>Certiorari</i> Because the California Court of Appeal Unreasonably Applied <i>Strickland</i> by Overlooking the Fact that Counsel’s Omissions Were the Result of Ignorance and Mistake.	25
VI. Conclusion.....	30

TABLE OF CONTENTS FOR APPENDIX

Appendix A--	Order of the United States Court of Appeals for the Ninth Circuit Denying Petition for Rehearing and Rehearing <i>En Banc</i> (October 23, 2017).....	1a
Appendix B--	Memorandum Disposition of the United States Court of Appeals for the Ninth Circuit affirming District Court Judgment (June 1, 2017).....	2a
Appendix C--	Judgment of the United States District Court for the Eastern District of California (November 21, 2014).....	6a
Appendix D--	Order of the District Court for the Eastern District of California Denying Habeas Corpus Petition (November 21, 2014).....	7a

Appendix E--	Findings and Recommendations of Magistrate Judge Recommending Denial of Habeas Corpus Petition (October 9, 2014).....	9a
Appendix F--	Order of the Supreme Court of California Denying Petition for Writ of Habeas Corpus (May 15, 2013)	33a
Appendix G--	Order of the Sacramento Superior Court Denying Petition for Writ of Habeas Corpus (March 15, 2013)	34a
Appendix H--	Order of the Supreme Court of California Denying Petition for Review (November 17, 2011).....	39a
Appendix I--	Opinion of the California Court of Appeal For the Third Appellate District affirming Mr. Abramyan’s conviction and sentence (August 9, 2011)	40a

TABLE OF AUTHORITIES

Federal Constitution

Sixth Amendment to the United States Constitution..... 3, 26

Federal Cases

Abramyan v. Macomber, 691 Fed. Appx. 893, 2017 U.S. App. LEXIS 9681,
2017 WL 2378211 (9th Cir. June 1, 2017) 2, 18

Brumfield v. Cain, __ U.S. __, 135 S. Ct. 2269 (2015)19

Grant v. Lockett, 709 F.3d 224 (3d Cir. 2013)23

Hinton v. Alabama, 134 S. Ct. 1081 (2014)26

Kimmelman v. Morrison, 477 U.S. 365 (1986) 25, 26

Strickland v. Washington, 466 U.S. 668 (1984) 17, 25, 26, 29

Williams v. Taylor, 529 U.S. 362 (2000)26

Federal Statutes

28 United States Code Section 1254.....3

28 United States Code Section 2253.....5

28 United States Code Section 2254..... *passim*

State Cases

Abramyan on H.C., 2013 Cal. LEXIS 4267 (Cal. 2013)2

In re Walker, 54 Cal. Rptr. 3d 411 (Cal. 2007), *as modified on denial of reh’g*
(Mar. 6, 2007) 22, 28

People v. Aris, 264 Cal. Rptr. 167, 180 (Cal. 1989) 22, 28

<i>People v. Battle III (Arthur James)</i> , 2011 Cal. LEXIS 12020 (Cal. 2011)	2
<i>People v. Battle</i> , 198 Cal. App. 4th 50, 129 Cal. Rptr. 3d 828 (Cal. 2011)	<i>passim</i>
<i>People v. Humphrey</i> , 13 Cal. 4th 1073, 921 P.2d 1 (Cal. 1996)	22, 23, 24, 28
<i>See In re Christian S.</i> , 7 Cal. 4th 768, 872 P.2d 574 (Cal. 1994).....	13, 14, 22, 28
 <u>State Statutes</u>	
California Evidence Code Section 1107	14, 20, 27
 <u>Other Authorities</u>	
California Criminal Jury Instruction 571.....	11

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

VARDAN ABRAMYAN,

Petitioner,

v.

JEFF MACOMBER, Warden,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

I. Citations of Opinions and Orders

The order issued by the United States Court of Appeals for the Ninth Circuit denying the Petition for Rehearing and Rehearing *En Banc* is unreported and is reproduced at Appendix A (Pet. App. 1a).

The citation for the unpublished Memorandum Disposition issued by the United States Court of Appeals for the Ninth Circuit affirming the district court

judgment is: *Abramyan v. Macomber*, 691 Fed. Appx. 893, 2017 U.S. App. LEXIS 9681, 2017 WL 2378211 (9th Cir. June 1, 2017).

The judgment issued by the United States District Court for the Eastern District of California is reproduced at Appendix C (Pet. App. 6a). The order issued by that court denying the Petition for Writ of Habeas Corpus is unreported and is reproduced at Appendix D (Pet. App. 7a-8a).

The Findings and Recommendations issued by the United States District Court for the Eastern District of California is unreported and is reproduced at Appendix E (Pet. App. 9a-32a).

The citation for the order issued by the Supreme Court of California denying Mr. Abramyan's habeas corpus petition is: *Abramyan on H.C.*, 2013 Cal. LEXIS 4267 (Cal. 2013).

The order issued by the Superior Court of California for the County of Sacramento is unreported and is reproduced at Appendix G (Pet. App. 34a-38a).

The citation for the order issued by the Supreme Court of California denying the Petition for Review is: *People v. Battle III (Arthur James)*, 2011 Cal. LEXIS 12020 (Cal. 2011).

The citation for the opinion issued by the California Court of Appeal for the Third Appellate District is: *People v. Battle*, 198 Cal. App. 4th 50, 129 Cal. Rptr. 3d 828 (Cal. 2011).

II. Basis for Jurisdiction

The Memorandum Disposition affirming the district court's judgment was issued by the United States Court of Appeals for the Ninth Circuit on June 1, 2017. Pet. App. 2a-5a. The Ninth Circuit denied Mr. Abramyan's Petition for Rehearing and Rehearing *En Banc* on October 23, 2017. Pet. App. 1a. This Court has jurisdiction to review the judgment on a writ of *certiorari* pursuant to 28 U.S.C. Section 1254(1).

III. Constitutional Provisions and Statutes Involved in the Case

A. The Sixth Amendment to the United States Constitution

The Sixth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides in relevant part:

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

B. 28 United States Code Section 2254

The requirements for obtaining habeas relief are set out in 28 U.S.C. § 2254(d), which provides:

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.

IV. Statement of the Case

In 2009, following a jury trial, petitioner Vardan Abramyan was convicted of first degree murder with special circumstances and sentenced to life in prison without the possibility of parole. Vardan, his siblings, and his mother had been brutalized by Vardan's father Norik Abramyan for the entirety of Vardan's childhood. During a particularly frightening period in 2006, when Vardan was 19-years-old and the entire family was living together in a small apartment, Vardan came to believe that his father would seriously injure or kill a family member. He hired an acquaintance to kill his father and the acquaintance carried out the plan with the help of Vardan and two other accomplices. Vardan's trial attorney put on evidence that could have supported a theory of imperfect self defense or defense of others, but the attorney failed to request an imperfect defense jury instruction or argue imperfect defense to the jury. Instead, the attorney argued a legal theory that had no basis in California law and was not supported by the evidence or the jury instructions. The California courts, and the federal court below, have rejected Mr. Abramyan's claim that his trial lawyer committed ineffective assistance of counsel.

The district court had jurisdiction over this case under 28 U.S.C. § 2254. The Ninth Circuit had jurisdiction over the appeal of the district court's order and judgment denying relief under 28 U.S.C. § 2253.

A. Factual Background

Vardan Abramyan, his three sisters, and his mother, all testified that throughout their lives Norik Abramyan brutally beat family members for any reason or no reason at all. Anna Abramyan, the oldest child in the family, testified that

Sometimes it was just out of the blue we didn't expect it. Everything was fine and in a split second he would just snap and just start yelling at all of us. Hitting us. Other times it would be for financial reasons. Other times it would be what we were wearing. What we said. Just different all the time.

Reporter's Transcript ("RT") p. 1120. Norik hit his wife and the children's mother, Siran, on a daily basis. RT 1126. According to Anna, "the majority of time it was terror in the house." RT 1122. Vardan often tried to stop his father from beating his mother and sisters, but he was unsuccessful and ended up getting beaten himself. RT pp. 1156, 1253-54, 1301, 1326.

Norik also made threats that he would kill family members. RT p. 1139, 1142. At one point he told Vardan that he wanted to kill Siran and bury her in the family's backyard. RT p. 1328. Norik also told family members that he would kill them if they ever told anyone about his abuse. RT pp. 1234, 1328, 1349. Norik also made credible attempts to kill Siran. Vardan saw his father try to force

prescription pills down his mother's throat (RT pp. 1145-50, 1324-25), pour bleach down her throat (RT pp. 1294-95), and try to stab her. RT pp. 1352-53. Once, when police were called after Norik beat Siran with a metal lamp, the police declined to arrest Norik because they believed his claim that nothing had happened. RT pp. 1295-96. This led Vardan to feel that the police could not stop the violence, and his father threatened to kill family members for reporting the abuse. RT p. 1349.

In the summer of 2006, Norik's behavior became especially frightening. Vardan, who was 19-years-old, and his older sister Anna were living in an apartment in Sacramento while Norik, Siran, and the two younger Abramyan sisters lived in Fresno. Siran and the two younger sisters left Fresno to escape Norik's violence and came to Sacramento to stay with Anna and Vardan. RT 1161, 1256. Norik followed the family to Sacramento and stayed with them in the apartment. *Id.* Anna testified that in the two weeks before he was shot, Norik's violent behavior was escalating and "[t]he last time we all got beat up was by far the worse that I've ever experienced." RT p. 1237.

Within the week before the shooting, Norik asked his youngest daughter Alina to mail a letter, and then when she did he inexplicably became angry at her. He beat her, "kicking her and stomping on her back and picked her up and started slapping her around." RT 1166, 1300, 1364-65. Vardan tried to stop the beating

but was beaten by Norik himself. RT 1165-67, 1239, 1257-58, 1300, 1366-67. At that point, Vardan sought to have his father killed:

[b]ecause all the abuse that he did to my mom, my sisters and myself throughout the past ten years that I know of. I just really felt that he was going to kill my mom and my sisters.

RT p. 1339.

Vardan offered an acquaintance \$4,000 to kill Norik. The acquaintance and Vardan formed a plan to have Vardan get Norik to the parking lot of a video rental store. Vardan testified that at the time he persuaded his father to go to the video store, he

just wanted him gone. I just wanted to protect my mom and my sisters, you know. I really believed he was going to end up killing one of us.

RT p. 1367.

The plan was successful. Norik and Vardan went to the video rental store together. While Norik was alone in his car and Vardan was inside the store, an accomplice shot and killed Norik. *People v. Battle*, 129 Cal. Rptr. 3d 828, 834 (Cal. App. 3d Dist. 2011).

B. Petitioner's Trial

1. Attorney Levinson Introduces Evidence that Abramyan Family Members Feared Norik Abramyan.

Attorney Donald Levinson, who would later resign from the State Bar of California with charges pending,¹ represented Mr. Abramyan at trial. Levinson decided to call all three of Mr. Abramyan's sisters and his mother as witnesses to testify as to the years of beatings they suffered at the hands of Norik and to the constant fear they felt when with him. He also had Vardan testify as to the years of abuse he suffered and witnessed from Norik.

2. Attorney Levinson Introduces Expert Testimony on "Intimate Partner Battering and Its Effect" Syndrome.

Levinson also decided to call as an expert witness for the defense Dr. Linda Barnard. Dr. Barnard had a Ph.D. in counselor education, a masters degree in counseling, and extensive training and experience regarding domestic abuse, particularly the syndrome of Intimate Partner Battering and its Effects ("IPB and E"). RT p. 1469. Dr. Barnard testified that IPB and E refers to

any kind of domestic violence either physical, sexual, verbal, or psychological abuse that occurs within the context of an intimate relationship and its effect on those who are subject to that or witness that or experience that.

¹ See Public Record of Discipline for Donald Erwin Levinson, California State Bar No. 68360, available at <http://members.calbar.ca.gov/fal/Member/Detail/68360> (last accessed January 4, 2018).

RT p. 1472. Levinson had Dr. Barnard testify that based on her interviews with all members of the Abramyan family, including Vardan, she determined that Norik was abusive and controlling to all family members and that this scenario could leave a child to believe that options such as leaving the home or calling the police will only make things worse. RT pp. 1480-1483. She described the fact that a child who experiences and witnesses the type of abuse dispensed by Norik would grow up “knowing that there’s violence in their lives and anticipating future violence which effects their perceptions of the world and their safety in the world.”

RT p. 1489. The person would develop

a sense of what’s escalating danger in his family . . . And if something happened or series of events happened that caused him to see that abuse escalating based on that experience then it would make sense in his world and his mind for him to believe that he needed to protect those around him and himself.

RT pp. 1492-93.

On cross-examination, Dr. Barnard acknowledged that a person who is the victim of IPB and E could form the intent to kill. RT p. 1494, 1498. On re-direct, Levinson had Dr. Barnard re-affirm that a person who suffers from IPB and E could form the intent to kill. RT p. 1499.

3. Vardan Abramyan Acknowledges that Objectively, Norik Abramyan Did Not Present a Threat to Others at the Moment He Was Shot.

During cross-examination by the prosecutor, Mr. Abramyan acknowledged that objectively, Norik Abramyan did not present a threat to others at the moment he was shot:

PROSECUTOR: So as your father sat in that white Kia in front of Hollywood Video he posed no danger to you; correct?

VARDAN: No.

PROSECUTOR: He posed no danger to your sisters; correct?

VARDAN: No.

PROSECUTOR: He posed no danger to your mom; correct?

VARDAN: No.

RT pp. 1441-42. Vardan did not retract his testimony, however, that from his subjective viewpoint, at the time he made and participated in the shooting plan, he believed that if Norik was not killed he would kill Vardan or another member of the family.

4. Mr. Abramyan's Trial Counsel Fails to Request an Instruction on Imperfect Self Defense or Defense of Others.

Levinson never requested an instruction on imperfect self defense or defense of others, despite the fact that a model jury instruction on those defenses had been

published by the California Judicial Council.² Thus the jury was never told that it could consider whether, due to a genuine but unreasonable fear that Norik would imminently kill or greatly injure himself or another family, Vardan lacked the malice required for both counts.

² The California Judicial Council's model California Criminal Jury Instructions, "CALCRIM," provided in relevant part:

A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because he acted in imperfect self-defense or imperfect defense of another. If you conclude the defendant acted in complete self-defense or defense of another, his action was lawful and you must find him not guilty of any crime. The difference between complete self-defense or defense of another and imperfect self-defense or imperfect defense of another depends on whether the defendant's belief in the need to use deadly force was reasonable.

The defendant acted in imperfect self-defense or imperfect defense of another if, one, the defendant actually believed that he or someone else was in imminent danger of being killed or suffering great bodily injury; and two, the defendant actually believed that the immediate use of deadly force was necessary to defend against the danger, but three, at least one of those beliefs was unreasonable. Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant.

CALCRIM 571.

5. Closing Arguments

In closing arguments, the prosecutor exploited Levinson's mistakes at trial. The prosecutor emphasized to the jury that it had not been instructed on imperfect self defense or defense of others, stating:

[t]his is not a case about self-defense. This is not a case about self-defense of others. Meaning his self-defense of his sisters, his self-defense of his mother. You will see and you've hear the Court has gone through the law with you already, you've heard no instructions about self-defense.

RT pp. 1903-04.

The prosecutor also reminded the jury that Dr. Barnard had opined that even with IPB and E syndrome, a person could form the intent to kill. RT p. 1950.

Levinson's closing argument was rambling and difficult to follow. He had not asked for or received an imperfect self defense or defense of others instruction, so he could only argue that "my client snapped." RT p. 1956. Levinson talked about Vardan's fear that his father would kill a family member but said,

this is not a self-defense case; definitely not self-defense. But what it is, is a case of not having the specific intent because he has this syndrome. Because he was so traumatized. Tortured in his mind that he had no alternative.

RT p. 1984. Levinson's argument ignored the fact that he had had his *own expert* testify that a person with IPB and E syndrome could form the intent to kill. The defense theory in Levinson's closing argument also disregarded the fact that Levinson had Vardan testify about why he made a plan to have his father killed,

testimony which left no doubt that Vardan acted with intent. Because there was no imperfect defense instruction, Levinson could not argue that Vardan's genuine fear of imminent harm from Norik negated not intent but malice. Finally, Levinson's argument showed complete ignorance of the fact that the defense he was arguing for – an inability to form the required intent due to a mental disease or defect – did not exist in California law³ and, accordingly, was not supported by the jury instructions.

In the final rebuttal, the prosecutor was able to remind the jury that it had not received a self defense instruction so it could not consider whether Vardan acted in self defense. RT p. 1993.

6. Verdict and Sentencing

After two days of deliberations, the jury found Mr. Abramyan guilty of murder with special circumstances. He was sentenced to a term of life without the possibility of parole for this offense.

³ California had long since abolished the diminished capacity defense, *i.e.* a defense that because of a mental disease or defect the defendant is incapable of forming the required intent. *See In re Christian S.*, 7 Cal. 4th 768, 774-75, 872 P.2d 574, 577 (Cal. 1994) (discussing 1981 amendments to California Penal Code that did away with diminished capacity defense).

C. Post-Trial Proceedings and Appeal

1. State Proceedings

In a motion for a new trial, and later on direct appeal and in a state habeas proceeding, Mr. Abramyan argued that his trial counsel violated his right to effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution. He argued that Levinson should have presented a defense theory of imperfect self defense (or imperfect defense of others). Under this theory, if a jury finds that a defendant killed another person because he actually but unreasonably believed that person put the defendant or others in imminent danger of death or great bodily injury, the defendant is deemed to have acted without malice and therefore cannot be convicted of a crime greater than voluntary manslaughter. *In re Christian S.*, 7 Cal. 4th at 771, 872 P.2d at 575 (1994).

Mr. Abramyan's motion for a new trial was supported by declarations by Dr. Barnard regarding the fact that IPB and E evidence is regularly introduced in California murder trials to support this defense theory. CT 516. Dr. Barnard cited California Evidence Code § 1107, which explicitly makes IPB and E expert testimony admissible on a defendant's "beliefs, perceptions, or behavior." *Id.* Dr. Barnard's declarations also stated that in Mr. Abramyan's, case it could have been used to show that when Vardan carried out his plan to kill Norik by getting Norik

out of the house and over to the parking lot where he would be shot, Vardan could have genuinely believed his father would imminently try to kill the other family members if he stayed in the home, and that Norik's death was the only way to save himself and his mother and sisters from imminent death or great bodily injury. CT pp. 517-23. Dr. Barnard explained that because Norik had abused and threatened family members over a long period of time, "Vardan and all the family believed [Norik] was going to kill them at any moment and they lived each moment believing this could be the moment of their deaths." CT p. 541.

Mr. Abramyan's argument was also supported by a declaration of an experienced California attorney who had worked both as a prosecutor and a defense lawyer, Jan Karowsky. CT pp. 528-32. After reviewing records in the case, Mr. Karowsky found that had Levinson presented an imperfect self defense/defense of others argument, rather than the unsupportable argument that Mr. Abramyan did not have the requisite intent, "a result different from a conviction for first degree murder would have occurred." CT p. 532.

The trial court rejected Mr. Abramyan's ineffective assistance of counsel theory both when it denied his motion for a new trial and later when it denied his state habeas petition. The highest California court to issue a decision on the issue was the California Court of Appeal in its decision in Mr. Abramyan's direct appeal, *People v. Battle*, 198 Cal. App. 4th 50, 129 Cal. Rptr. 3d 828 (2011). Both

the California Court of Appeal and the Superior Court rejected the ineffective assistance of counsel claim on the same ground. The Court of Appeal first “found” that Vardan “did not fear imminent harm from Norik at the time of the shooting.” *Battle*, 198 Cal. App. 4th at 73, 129 Cal. Rptr. 3d at 847. It based its finding on the fact that during trial, Vardan acknowledged that objectively at the moment Norik was shot he “posed no danger to [Vardan], to his mother, or to his sisters.” *Id.* The Court of Appeal concluded that “[b]ecause the evidence did not support an argument that Abramyan harbored no malice because he actually feared imminent harm to himself or others, trial counsel competently did not make the argument.” *Battle*, 198 Cal. App. 4th at 76, 129 Cal. Rptr. 3d at 849–50.⁴

2. Federal Proceedings

Mr. Abramyan subsequently brought his ineffective assistance claim in a federal habeas corpus petition he filed under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of California. In the Findings and Recommendations for denial of the petition, which were adopted in full by the

⁴ Mr. Abramyan re-raised the same ineffective assistance of counsel claim in a state habeas corpus petition he later filed first in the Superior Court of California for Sacramento County and then in the California Supreme Court. Only the Superior Court issued a reasoned decision, and it decided the claim had been raised and resolved in the direct appeal. It pointed out that the California Court of Appeal had rejected the argument because “the actual evidence of [Vardan Abramyan’s] state of mind was that he did not fear imminent harm.” Pet. App. p. 36a.

district court, the magistrate judge rejected the claim. The magistrate judge reasoned

in order to succeed on [imperfect defense of self or others, Mr. Abramyan] was required to show that he was in fear of imminent harm when he killed the victim. However, [Mr. Abramyan] testified at trial that he was not in imminent fear of harm when his father was killed at the video store. Rather, he explained that he wanted his father killed because he was afraid for the safety of his mother and/or sisters at some point in the future.

District Court Clerk's Record ("CR") 23, p. 23; Pet. App. 31a. In fact, Vardan Abramyan never testified that he was not in imminent fear when his father was killed; he instead acknowledged that objectively his father did not present an imminent threat at the moment he was shot.

The magistrate judge held that the state courts' rejection of Mr. Abramyan's ineffective assistance of counsel claim was not contrary to or an unreasonable application of federal law as set forth in *Strickland* because "[i]t is certainly possible that counsel chose not to present such a defense because there was insufficient evidence to support it. In addition, petitioner's argument that such a defense would have succeeded if it had been pursued is not supported by the record." CR 23, p. 23; Pet. App. 31a.

In affirming the district court judgment, the United States Court of Appeals for the Ninth Circuit reasoned,

Abramyan testified at trial that his father did not pose a threat to himself or his immediate family when his father sat in a car, alone,

before he was shot by two of the hitmen whom Abramyan had hired. Abramyan's statements indicate that Abramyan did not possess a subjective fear of his father at the time of the killing and also that Abramyan did not think that his father posed an imminent threat at the time of the killing. Abramyan's statements failed to support his proposed theory of imperfect self-defense or imperfect defense of others.

Abramyan v. Macomber, 691 F. App'x 893, 894 (9th Cir. June 1, 2017)

(unpublished); Pet. App. 4a. Therefore, the Ninth Circuit decided, "Abramyan's trial counsel appears to have made a reasonable decision not to pursue imperfect defense theories in light of Abramyan's testimony at trial and the requirements for a successful imperfect defense theory." *Id.*

V. Reasons for Granting the Writ

A. This Court Should Grant *Certiorari* Because the Critical Factual Finding Underlying Denial of Relief is Unreasonable, and the Federal Court's Failure to Recognize This Conflicts With 28 U.S.C. Section 2254(d)(2) and This Court's Precedent.

The state courts that rejected Mr. Abramyan's ineffective assistance of counsel claim, as well as the federal court that rejected the claim, all hinged their determination on one supposed "fact": because, at the moment Norik Abramyan was shot, he did not objectively pose an immediate threat, it would be impossible for a jury to find that Vardan Abramyan subjectively feared immediate harm at the time of the shooting. The California Court of Appeal "found" that Vardan "did not fear imminent harm from Norik at the time of the shooting." *Battle*, 198 Cal. App. 4th at 73, 129 Cal. Rptr. 3d at 847. It based its finding on the fact that during trial,

Vardan acknowledged that objectively “at the time of the shooting, Norik posed no danger to [Vardan], to his mother, or to his sisters.” *Id.* The Court of Appeal concluded that “[b]ecause the evidence did not support an argument that Abramyan harbored no malice because he actually feared imminent harm to himself or others, trial counsel competently did not make the argument.” *Battle*, 198 Cal. App. 4th at 76, 129 Cal. Rptr. 3d at 849–50. The finding that Vardan did not fear Norik has been the basis for denial of Vardan Abramyan’s ineffective assistance of counsel claim in state direct appeal and habeas proceedings, as well as federal habeas proceedings.

Contrary to the decisions below, the finding that Vardan did not fear imminent harm from Norik is an “an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(2). This Court has recognized that although § 2254(d)(2) “requires that we accord the state trial court substantial deference,” in a proceeding under 28 U.S.C. § 2254, the federal court is bound to examine the state court record and make its own determination as to whether the state court’s factual determinations are unreasonable. *Brumfield v. Cain*, ___ U.S. ___, 135 S. Ct. 2269, 2277 (2015). Here, the record shows the following:

- Norik Abramyan had a history of severely beating and attempting to kill family members for any reason or no reason at all. RT pp. 1120,

1122, 1126, 1139, 1142, 1145-50, 1234, 1294-95, 1324-25, 1328, 1349, 1352-53. Near the time of the shooting, he had followed family members who were trying to escape his violence to Sacramento, he was living in the same small apartment as those family members, and tensions and violence were rising. RT pp. 1161, 1166, 1256, 1237, 1300, 1366-67.

- Persons such as Vardan Abramyan who have been severely abused over a long period of time by a family member, and who have witnessed severe abuse of fellow family members, can develop a syndrome known as “Intimate Partner Battering and Its Effects,” or “IPB and E.” RT pp. 1469, 1472. California law provides that evidence of IPB and E is admissible and relevant as to the “beliefs, perceptions, or behavior of victims of domestic violence.” California Evidence Code § 1107.
- Vardan Abramyan testified that he made and participated in a plan to kill Norik Abramyan because he feared Norik would kill or seriously injure a family member. RT pp. 1339, 1367. Dr. Barnard’s testified that Vardan could have suffered from IPB and E, and this would have affected his perception of escalating danger in his family and the need

to act immediately to protect family members. RT pp. 1480-83, 1489, 1492-93.

- Had attorney Levinson more thoroughly examined Dr. Barnard, she could have explicitly testified that at the time Vardan made and carried out the plan to kill Norik, Vardan could have genuinely believed his father would imminently try to kill the other family members if he stayed in the home, and that Norik's death was the only way to save himself and his mother and sisters from imminent death or great bodily injury. CT pp. 517-23. Dr. Barnard could have testified that because Norik had abused and threatened family members over a long period of time, "Vardan and all the family believed [Norik] was going to kill them at any moment and they lived each moment believing this could be the moment of their deaths." CT p. 541.

In light of this record, it was unreasonable for the California Court of Appeal (and the California Superior Court) to decide that evidence was *so clear* that Vardan Abramyan did not fear subjectively imminent harm from Norik Abramyan that his attorney's decision not to ask for a jury instruction or argue imperfect defense, despite having put on the building blocks of that defense, was competent. The theory of imperfect self defense, and imperfect defense of others, exist in

California law to address those situations in which a defendant acts due a *sincere, but unreasonable*, fear of harm.⁵ IPB and E is explicitly made admissible in California to help a jury understand the sincere fear that a victim of domestic violence may have, even if that fear appears unreasonable to others.⁶ The fact that objectively the fear of immediate harm is not warranted is not a barrier to arguing this defense theory since the theory is centered on an unreasonable fear. Indeed, if the fear of harm was objectively reasonable, the defendant could simply argue self defense.

A state court makes an unreasonable finding of fact under 28 U.S.C. § 2254(d)(2) when it's factual finding ignores or is inconsistent with the record. *See*,

⁵ Under California law, a theory of imperfect self defense, or imperfect defense of others, provides that if a jury finds that a defendant killed another person because he actually but unreasonably believed that person put the defendant or others in imminent danger of death or great bodily injury, the defendant is deemed to have acted without malice and therefore cannot be convicted of a crime greater than voluntary manslaughter. *In re Christian S.*, 872 P.2d 574, 575 (Cal. 1994).

⁶ *See People v. Humphrey*, 13 Cal. 4th 1073, 921 P.2d 1 (Cal. 1996) (expert testimony regarding battered women's syndrome, the forerunner to IPB and E, relevant to credibility of defendant's claim that s/he actually believed killing was necessary); *In re Walker*, 54 Cal. Rptr. 3d 411, 426 (Cal. 2007), *as modified on denial of reh'g* (Mar. 6, 2007) (expert testimony on intimate partner battering could have supported successful imperfect self defense claim where defendant shot abusive husband); *People v. Aris*, 264 Cal. Rptr. 167, 180 (Cal. 1989) (in case where defendant shot sleeping husband "it was error not to permit [expert on battered women's syndrome ("BWS")] to testify, based on her experience and BWS theory, as to how the defendant's particular experiences as a battered woman affected her perceptions of danger, *its imminence*, and what actions were necessary to protect herself") (*emphasis added*)).

e.g., Grant v. Lockett, 709 F.3d 224, 232–33 (3d Cir. 2013) (state postconviction court’s “factual determination simply ignored the evidence of [prosecution witness’s] parole status in the supplemented record” and “relied upon this erroneous determination” in rejecting claim that defense counsel was ineffective in failing to impeach key government witness with this evidence). In this case, the California Court of Appeals’ finding ignored all of Mr. Abramyan’s testimony about his fear of Norik Abramyan, as well as the evidence and testimony regarding the effect of IPB and E on the perceptions of a victim of domestic violence. The California Supreme Court made clear over a decade before Mr. Abramyan’s trial that evidence of IPB and E is “generally relevant to the reasonableness, as well as the subjective existence, of defendant’s belief in the need to defend.” *Humphrey*, 13 Cal. 4th at 1088–89, 921 P.2d at 10. Despite Vardan’s testimony that he participated in the plan to kill his father out of a fear that his father would kill or harm himself or a family member, and despite the fact that expert testimony on IPB and E supported Vardan’s testimony, the Court of Appeal found that the evidence Vardan experienced fear was so lacking in support that his attorney should not have even tried to argue it to the jury.

The California Court of Appeals finding of fact notwithstanding contrary evidence in the record is particularly problematic because of the critical nature of the fact at issue. California law makes an important distinction between an

unlawful killing of a human being with malice aforethought (murder under California Penal Code § 187(a)), and the unlawful killing of a human being due to a subjective, but unreasonable, fear of imminent harm (manslaughter due to the fact that malice is negated by the subjective fear, *Humphrey*, 13 Cal. 4th at 1082, 921 P.2d at 6). Despite the critical importance of the factual question regarding whether a defendant in a California murder case acted out of a subjective but unreasonable fear of imminent harm, the California Court of Appeal found that Vardan could not have subjectively experienced this fear because objectively, at the moment he was shot, Norik did not present a threat. For this reason, the Court of Appeal decided Vardan's trial counsel acted competently despite his failure to properly argue the defense to the jury. The Court of Appeals effectively wrote the possibility of imperfect self defense out of Mr. Abramyan's case by finding that Mr. Abramyan could not have subjectively experienced fear since objective facts did not support the fear. This is gravely unfair since California law places great importance on the subjectively genuine, even if objectively unreasonable, fear that a survivor of domestic violence might hold regarding their abuser. In light of the record, there was enough evidence that Mr. Abramyan genuinely acted out of his fear of imminent harm that the theory of imperfect self defense or defense of others should have gone to the jury, and defense counsel was ineffective in failing to effectively present it to the jury.

B. This Court Should Grant *Certiorari* Because the California Court of Appeal Unreasonably Applied *Strickland* by Overlooking the Fact that Counsel's Omissions Were the Result of Ignorance and Mistake.

The lower courts that have rejected Mr. Abramyan's ineffective assistance of counsel claim determined that Mr. Abramyan's trial counsel did not perform deficiently. Under this Court's foundational ineffective assistance of counsel case, *Strickland v. Washington*, 466 U.S. 668 (1984), to show deficient performance by counsel, a defendant must "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690. The court must then "reconstruct the circumstances of counsel's challenged conduct" and ask whether, "from counsel's perspective at the time," his decisions complied with "prevailing professional norms." *Id.* at 689, 688. *Strickland's* performance prong focuses on the actual lawyer who represented the defendant and the decision that lawyer made in the context of the actual litigation. The performance inquiry is a "mixed" question "of law and fact." *Id.* at 698.

Two years after *Strickland* was decided, this Court reiterated that "[t]he reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986). While the standard of review is highly deferential, it is not insurmountable. This is because to be effective for

Sixth Amendment purposes, defense counsel has a “duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.”

Kimmelman, 477 U.S. at 384 (quoting *Strickland*, 466 U.S. at 688). Where the record in a case reveals that defense counsel failed to take an action “not due to strategic considerations” but because of ignorance and mistake, his or her performance is “unreasonable, that is, contrary to prevailing professional norms.”

Kimmelman, 477 U.S. at 385. *See also Williams v. Taylor*, 529 U.S. 362, 396 (2000) (finding ineffective assistance of counsel where counsel’s omissions were “not justified by a tactical decision.”). More recently, in *Hinton v. Alabama*, 134 S. Ct. 1081 (2014), this Court held that defense counsel’s failure to hire an effective expert at trial due to his mistaken belief that the state would pay no more than \$1,000 for an expert constituted inadequate performance. *Hinton*, 134 S. Ct. at 1088.

Here, rather than fully examining the trial record to determine whether Levinson’s failure to ask for an imperfect defense jury instruction and failure to argue this theory to the jury was the result of either (a) ignorance and mistake, or (b) an informed strategic decision, the California Court of Appeal, and then the lower federal courts, short-circuited the analysis. Instead of looking at all of the evidence that was, or could have been, presented at trial in light of a correct understanding of California homicide law, the courts focused on one inaccurate

characterization of the facts—the erroneous factual finding that Vardan Abramyan testified he did not fear Norik Abramyan when he acted—to let attorney Levinson off the hook for his grossly deficient performance as trial counsel. An honest at Levinson’s actions in the context of the litigation reveals the following:

- Vardan never testified that he did not subjectively fear imminent harm from Norik at the time he played his role in the plan to kill his Norik; his testimony was that he *did* act out of fear that Norik would kill him or a family member.
- Attorney Levinson called an expert witness, Dr. Barnard, who testified that given the long-term abuse Vardan suffered and witnessed from Norik, Vardan could have developed IPB and E, and this could have affected his perception of danger with respect to Norik.
- In declarations she provided in support of Vardan’s motion for a new trial, Dr. Barnard stated she had been ready, willing, and able to provide more thorough expert testimony that Mr. Abramyan had a genuine, if unreasonable, fear of imminent harm at the time of the shooting.
- At the time of Vardan’s 2009 trial, California law made IPB and E evidence admissible (Cal. Evid. Code § 1107) and relevant to whether

the defendant held an actual, if unreasonable, belief that danger was imminent for the purposes of imperfect defense of self or others.⁷

- Levinson's trial decisions and argument to the jury show that he simply did not understand California homicide law. He had Vardan testify that he made a plan to kill his father to protect the rest of the family, *i.e.* that he acted with *intent* to kill. Moreover, California law does not contain a defense that, because of a mental disease or defect, the defendant is incapable of forming the required intent. *Christian S.*, 7 Cal. 4th at 774-75. Despite evidence Vardan acted with intent, and the absence of a valid theory that a defendant could lack the capacity to form intent due to a mental disease, Levinson's only argument to the jury was that Vardan was incapable of forming the requisite intent. This shows that Levinson was not making informed strategic or tactical decisions to help his client.

⁷ See *Humphrey*, 13 Cal. 4th 1073, 921 P.2d 1 (expert testimony regarding battered women's syndrome relevant to credibility of defendant's claim that s/he actually believed killing was necessary); *In re Walker*, 54 Cal. Rptr. at 426 (expert testimony on intimate partner battering could have supported successful imperfect self defense claim where defendant shot abusive husband, even where it would have been inconsistent with defense theory that shooting was accidental); *Aris*, 264 Cal. Rptr. at 180 (in case where defendant shot sleeping husband "it was error not to permit [expert on battered women's syndrome] to testify, based on her experience and BWS theory, as to how the defendant's particular experiences as a battered woman affected her perceptions of danger, *its imminence*, and what actions were necessary to protect herself") (emphasis added).

- Levinson's failure to present a valid defense for which there was support, and his presentation of an invalid defense that was not supported by the evidence at trial or the jury instructions, fell below the professional legal standards of attorneys in the community. CT pp. 528-32.

As outlined above, an accurate assessment of the record shows Levinson not only did not help Vardan at trial, he harmed Vardan and helped the prosecution by having Vardan admit that he played a role in the homicide and that he acted with intent. Even giving the utmost deference to the California courts, this cannot be effective assistance of counsel under *Strickland*. This Court should grant *certiorari* to correct a wrongly decided case and to clarify that 28 U.S.C. § 2254(d)(2) and *Strickland* require lower courts to (1) view the state court record accurately in deciding whether state courts have made an unreasonable finding of fact, and (2) view the entire record in determining whether counsel's actions or omissions were simply the result of mistakes and ignorance rather than effective advocacy.

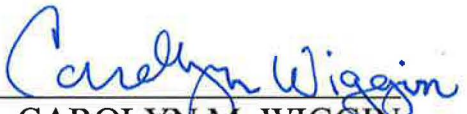
VI. Conclusion

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Dated: January 17, 2018

Respectfully submitted,

HEATHER E. WILLIAMS
Federal Defender


CAROLYN M. WIGGIN
Assistant Federal Defender

Attorney Petitioner
VARDAN ABRAMYAN