No. _____

IN THE

Supreme Court of the United States

JOHN LOUIS VISCIOTTI,

Petitioner,

v.

RONALD DAVIS, WARDEN,

Respondent.

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

APPENDIX IN SUPPORT OF PETITION FOR CERTIORARI

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APPENDIX INDEX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN LOUIS VISCIOTTI, *Petitioner-Appellant*, v. MICHAEL MARTEL, *Respondent-Appellee.*	No. 11-99008 D.C. No. 2:97-cv-04591-R ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted November 12, 2013
Pasadena, California

Filed October 17, 2016
Amended July 6, 2017

Before: Harry Pregerson, A. Wallace Tashima,
and Marsha S. Berzon, Circuit Judges.

Order;
Opinion by Judge Berzon;
Concurrence by Judge Berzon

SUMMARY*

Habeas Corpus / Death Penalty

The panel affirmed the district court's denial of habeas relief in a case in which California state prisoner John Visciotti raised (1) a penalty-phase ineffective assistance claim, focused on the allegation that key aggravating evidence was introduced only as a result of counsel's errors during the penalty proceedings; (2) a new claim that the cumulative effect of counsel's ineffectiveness during both the guilt and penalty phases of trial ultimately prejudiced the penalty proceedings; and (3) a claim that the trial judge's closure of the death-qualification voir dire proceedings violated Visciotti's Sixth Amendment right to a public trial.

The panel held that, whether or not the ineffective assistance of counsel claims have merit, they are foreclosed by the Supreme Court's prior decision in this case, *Woodford v. Visciotti*, 537 U.S. 19 (2002) (per curiam).

Regarding the trial judge's closure of death-qualification voir dire, to which counsel did not object, the panel held that de novo review continues to apply, post-AEDPA, to a contention that ineffective assistance of trial counsel constitutes cause to excuse a procedural default. The panel concluded that counsel's failure to object to the closure of death-qualification voir dire did not constitute deficient performance, and that Visciotti therefore cannot demonstrate cause to excuse his default of the public trial right claim.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Concurring, Judge Berzon, joined by Judge Pregerson, wrote separately to emphasize that this case illustrates that Supreme Court summary reversals cannot, and do not, reflect the same complete understanding of a case as decisions after plenary review.

COUNSEL

Mark R. Drozdowski (argued), Deputy Federal Public Defender; K. Elizabeth Dahlstrom, Research & Writing Specialist; Hilary Potashner, Federal Public Defender; Office of the Federal Public Defender, Los Angeles, California; Statia Peakheart, Los Angeles, California; for Petitioner-Appellant.

Meagan J. Beale (argued), Deputy Attorney General; Holly Wilkens, Supervising Deputy Attorney General; Julie L. Garland, Senior Assistant Attorney General; Kamala D. Harris, Attorney General; Office of the Attorney General, San Diego, California; for Respondent-Appellee.

ORDER

The opinion filed October 17, 2016 is amended as follows:

1. At page 48, footnote 15 of the opinion, delete "Because we conclude that counsel's performance was not deficient, we do not consider the prejudice prong of the *Strickland* analysis." Add the following text in its place:

> The Supreme Court has recently held that a petitioner claiming that trial counsel was ineffective for failing to object to the closure of voir dire bears the burden of demonstrating prejudice. *Weaver v. Massachusetts*, No. 16-240, slip op. at 11 14 (U.S. June 22, 2017). Because of our holding that counsel's performance was not ineffective, we need not determine whether Visciotti could demonstrate prejudice. We note, however, that it is extremely dubious that he could.

With the aforementioned change, the panel has unanimously voted to deny appellant's petition for rehearing. Judge Berzon has voted to deny the petition for rehearing en banc. Judges Pregerson and Tashima recommend denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the petition for rehearing en banc is rejected. No new petition for panel rehearing or petition for rehearing en banc will be entertained.

OPINION

BERZON, Circuit Judge:

In 1983, an Orange County jury convicted John Visciotti of first-degree murder, attempted murder, and robbery. The same jury then sentenced Visciotti to death.

On direct, automatic appeal, the California Supreme Court affirmed the judgment in its entirety. *People v. Visciotti*, 2 Cal. 4th 1 (1992) ("*Visciotti I*"). Visciotti filed a state petition for writ of habeas corpus, alleging ineffective assistance of his counsel (IAC) during the guilt and penalty phases of his trial in violation of the Sixth Amendment. *See Strickland v. Washington*, 466 U.S. 668 (1984). The California Supreme Court assumed that counsel afforded Visciotti "inadequate representation in some respects" during the penalty phase, but determined that Visciotti was not prejudiced and so denied his petition. *In re Visciotti*, 14 Cal. 4th 325, 330 (1996) ("*Visciotti II*").

Visciotti next brought a federal habeas petition, alleging, among many other claims, ineffective assistance of counsel during the guilt and penalty phases of his trial. The district court granted Visciotti's habeas petition as to the penalty phase and denied it as to his conviction. We affirmed. *See Visciotti v. Woodford*, 288 F.3d 1097 (9th Cir. 2002) ("*Visciotti III*"). The United States Supreme Court summarily reversed our decision, holding that we "exceed[ed] the limits imposed on federal habeas review by" the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. § 2254). *Woodford v. Visciotti*, 537 U.S. 19, 20 (2002) (per curiam) ("*Visciotti IV*").

Following remand and further proceedings, the district court denied Visciotti's remaining claims. Visciotti appeals that denial. He asserts two species of claims. First, he contends that his counsel's ineffective assistance during the guilt and penalty phases of trial requires habeas relief as to his death sentence. Acknowledging that the Supreme Court expressly denied relief on his ineffective assistance of counsel claim, he argues that the Court did not decide the particular claims he now appeals. Second, he claims that the trial judge's closure of the death qualification voir dire proceedings violated his Sixth Amendment right to a public trial.

I. BACKGROUND

Visciotti I extensively details the facts of this case. 2 Cal. 4th at 28 33. We thus recite only a brief summary of the events here, as described by the Supreme Court in *Visciotti IV*.

> [Visciotti] and a co-worker, Brian Hefner, devised a plan to rob two fellow employees, Timothy Dykstra and Michael Wolbert, on November 8, 1982, their payday. They invited the pair to join them at a party. As the four were driving to that supposed destination in Wolbert's car, [Visciotti] asked Wolbert to stop in a remote area so that he could relieve himself. When all four men had left the car, [Visciotti] pulled a gun, demanded the victims' wallets (which turned out to be almost empty), and got Wolbert to tell him where in the car the cash was hidden. After Hefner had retrieved the cash, [Visciotti]

> walked over to the seated Dykstra and killed him with a shot in the chest from a distance of three or four feet. [Visciotti] then raised the gun in both hands and shot Wolbert three times, in the torso and left shoulder, and finally, from a distance of about two feet, in the left eye. [Visciotti] and Hefner fled the scene in Wolbert's car. Wolbert miraculously survived to testify against them.

Visciotti IV, 537 U.S. at 20.[1]

A. Trial

Visciotti's parents retained Roger Agajanian for representation in the pretrial proceedings, at the trial, and on appeal. Agajanian was admitted to the bar in July 1973, had never before the Visciotti case tried a capital case that went to a jury, and had never conducted a penalty phase trial. *See Visciotti II*, 14 Cal. 4th at 336.

At the outset of Visciotti's 1983 trial, the court mentioned that it would conduct "sequestered voir dire." The court explained to the pool of prospective jurors that, because the state could seek the death penalty, "we must . . . inquire of each prospective juror individually to determine in private with just the court, the two attorneys, possibly the defendant and the court personnel present, your attitudes and . . . attempt to determine if there exists any prejudice or bias that

[1] Hefner, Visciotti's co-defendant, was tried separately, convicted of the same offenses, and sentenced to life in prison without the possibility of parole. 2 Cal. 4th at 20 n.2. The State did not seek Hefner's execution. *Id.*

may affect your attitude toward the imposition of the capital punishment." On July 5, 6, 7, 11, 12, 13, and 14, the court conducted the death qualification voir dire. The clerk's transcript for each day reveals that the examinations were conducted "in chambers," in the presence of only the court, counsel, court reporters, and, some of the time, Visciotti.[2] Agajanian never objected to this practice on the record. Nor did the judge make findings on the record justifying the private voir dire sessions.

The prosecution's case was "based in major part on the testimony of Michael Wolbert, and on [Visciotti's] confessions." *Visciotti I*, 2 Cal. 4th at 28. Of particular relevance to this appeal, the parties agreed at the start of trial that the prosecution would not in its guilt phase case-in-chief present evidence of Visciotti's previous conviction for assaulting William Scofield with a deadly weapon. Visciotti had pleaded guilty to that offense in 1978 and served time in state prison. The prosecution abided by this agreement.

Agajanian nevertheless had Visciotti testify about his criminal history, including his 1978 conviction:

> In his guilt phase testimony, [Visciotti] claimed that the 1978 incident occurred when two men who had a problem with his roommate, Doug Favello, kicked in the door of the apartment he shared with Favello, ran in, and cut Favello's throat. A third person

[2] The clerk's transcript indicates that Visciotti "personally and through counsel waived his appearance for the remainder of the individual voir dire conferences" on the afternoon of July 12. He was absent as well for voir dire conducted in chambers on July 13 and 14.

> with a gun remained at the door. [Visciotti] testified that he picked up the knife dropped by the person who had stabbed Favello, ran after the fleeing intruders, and stabbed the one who had slashed Favello's throat just as that person (Scofield) was trying to enter his own room. On cross examination [Visciotti] conceded that he and several friends went to Scofield's room later that night, denied that they had kicked in the door to that room or that anyone had been in bed in the room, and denied seeing, let alone stabbing, a woman who had been in the room.

Visciotti I, 2 Cal. 4th at 30 n.5.

On rebuttal, the prosecution called Robert D. McKay, a Crime Scene Investigator for the Anaheim Police Department, to contradict Visciotti's testimony concerning the 1978 incident. McKay had investigated the scene of the 1978 incident, including Scofield's room. He testified with respect to the door to the apartment that it "appeared it had been forced open," as the door molding and latching had been partially destroyed and there was a hole in the adjoining wall from "where the doorknob would have struck the wall." He authenticated several photographs he had taken of the crime scene, including images of two knives, blood-stained bedding, and the damaged door to the apartment.

That same night, at a hospital, McKay observed and photographed two injured parties: Scofield and Kathy Cusack. He authenticated at trial a photograph he had taken of several of Cusack's stab wounds while she lay half naked on a table in the hospital emergency room. McKay testified

that Cusack suffered from seven wounds, including "a deep laceration to the lower right breast area, a deep long cut to the inside of the right thigh, a cut to the right side, and four cuts to the back of the right arm." McKay later returned to the police department, where he observed Favello. He testified that Favello "did not have blood on his clothing or on his body," nor any evidence of an injury to his neck.

On July 29, 1983, the jury found Visciotti guilty of first degree murder of Dykstra, attempted murder of Wolbert, and robbery. *Visciotti I*, 2 Cal. 4th at 27 28. The jury "also found that the murder was committed under the special circumstance of murder in the commission of robbery, and that [Visciotti] had personally used a firearm in the commission of the offenses." *Id.* at 28 (internal citation omitted).

B. Penalty Phase

Visciotti's penalty trial began several days later. As the California Supreme Court recounted, "[t]he only evidence presented by the [prosecution] in the initial phase of the penalty trial was the testimony of William Scofield, the victim of the June 15, 1978, assault with a deadly weapon offense to which [Visciotti] had pleaded guilty and for which he had served a prison term." *Visciotti I*, 2 Cal. 4th at 33.

Scofield testified as follows: At the time of the incident, he lived with Kathy Cusack in the same complex as Doug Favello. The dispute between him and Favello had arisen out of Favello's "loss" of Cusack's cat. At Cusack's request, Scofield spoke with Favello about the loss of the cat. Their conversation degenerated into a fist fight. Later that evening, Scofield went to Favello's room armed with a knife and

continued the argument. He did not strike Favello with the knife he brandished.

The following night, "five or six guys kicked the door [to Scofield's room] down," dragged him out of the room, and assaulted him with some combination of baseball bats, sticks, knives, and an ice pick. Scofield testified that Visciotti, part of this group, stabbed him in his back. During the altercation, Cusack remained in the room. When Scofield returned to the room, he saw her "covered with blood." Scofield's back required surgery.

The prosecution next called Cusack to testify. Agajanian objected on the ground that Visciotti had pleaded guilty only to stabbing Scofield and was not charged in the criminal information with assaulting Cusack. The court initially overruled the objection.

Just after Cusack was sworn in but before the prosecution began to examine her, the court again called counsel to the bench. The court asked the prosecutor whether the Notice of Evidence of Aggravation informed Visciotti that the prosecution would rely on Cusack's testimony during the penalty phase. The prosecutor replied that Cusack's testimony related to facts "that are an integral part of the transaction concerning [Visciotti's] prior felony conviction," which was included in the Notice.[3] As the initial 1978

[3] The Notice stated that "the prosecution intends to introduce, in addition to the circumstances of the charged offenses and the circumstances surrounding the alleged special circumstances the following evidence in aggravation of the penalty and wherever else admissible: . . . . Proof of Defendant's prior conviction for violation of Penal Code Section 245(a), a felony, on or about August 11, 1978, in the Superior Court of the State of California, in and for the County of Orange."

criminal complaint had expressly referred to an assault on Cusack, the prosecutor argued, even "a preliminary, absolutely minimal threshold type of investigation on the part of the defense which I'm sure a competent attorney like Mr. Agajanian . . . would do . . . would alert them to the fact there was more than one victim alleged."

The court noted that the Notice "refers strictly to a conviction for which the defendant stands accused . . . that is, the assault with a deadly weapon upon William Scofield. . . . [It] talks about what appears to be a single violation . . . and it talks about a conviction." In the end, the court precluded Cusack from testifying at all. The prosecution offered no further evidence in its aggravation case-in-chief.

Agajanian's "theory was to invoke jury sympathy for [Visciotti's] family." In particular, Agajanian presented evidence from various family members and friends that Visciotti "had never been violent toward anyone in [his] family," and that "he was violent only when under the influence of drugs." *Visciotti I*, 2 Cal. 4th at 34.

Midway through Visciotti's mitigation presentation, the prosecution moved for permission to introduce Cusack as a rebuttal witness at the close of Visciotti's case. The court granted the motion, holding "that the evidence introduced by the defense is opinion evidence by every defense witness offered [during the penalty phase] . . . that the defendant is in fact a non-violent person. The people are entitled as a matter of law to rebut that by competent evidence. Specific acts of violence and rebuttal are relevant and are appropriate to rebut an opinion that the defendant is in fact a non-violent person, so the court shall allow the witness to testify as requested."

Agajanian, in turn, moved for a continuance "to find out all of this information that this lady is apparently going to be testifying to . . . ." After the court denied this motion, Agajanian moved for production of "certain reports . . . to help us prepare for this witness and determine the truthfulness of the statements." The court granted the second motion.

The California Supreme Court summarized Cusack's testimony as follows:

> She first met [Visciotti] on June 12, 1978, at a party in [Visciotti's] apartment. She had not seen him again until the early morning hours of June 15 when he and several other men broke into the apartment she shared with Scofield. [Visciotti] had a knife. When the other men, who were beating Scofield with bats and sticks, dragged Scofield out of the room, [Visciotti] remained in the room where Cusack was standing on the bed. He stabbed her through the right forearm, which she had raised to protect herself, stabbed her farther up that arm, and when she fell down onto the bed, slashed her leg. He then stabbed her in the ankle. When [Visciotti] attempted to stab Cusack in the abdomen she told him she was pregnant. He nonetheless tried again to stab her in the abdomen, but she rolled over and he stabbed her in the side. He then stabbed her in the chest, slashed her shoulder, stabbed her in the area of her breast. After stabbing Cusack eight or more times, [Visciotti] began to carve up the walls of the apartment, and to cut up the posters and pictures. When Cusack

> hit him over the head with a stick, [Visciotti] ran out of the apartment. She . . . had to be hospitalized for treatment of her wounds.

Visciotti I, 2 Cal. 4th at 33 34 (footnote omitted). Cusack added that she was four months pregnant at the time of the attack. *Id.* at 33 n.7. Cusack was the last witness to testify in the penalty phase of Visciotti's trial.

During his closing argument, the prosecutor emphasized Visciotti's attack on Cusack as the primary example of Visciotti's history of violence. While the prosecutor noted that Visciotti's conviction for assaulting Scofield qualified as an aggravating prior conviction, he emphasized Cusack's perspective on the incident.

For his part, Agajanian delivered a closing argument that the California Supreme Court, on direct appeal, described as "a rambling discourse, not tied to particular evidence." *Visciotti I*, 2 Cal. 4th at 82 n.45. Agajanian "did not argue that any statutory mitigating factor was present." Rather than arguing against the aggravating factors or for any mitigating factors, Agajanian's "approach was to note the tragedy and the impact of the murder victim's death on other people, and to ask the jury not to add to the tragedy or cause others to suffer the same impact by condemning [Visciotti] to death." *Id.* at 66 n.35. And, as Justice Brown noted in her California Supreme Court habeas dissent "Agajanian systematically conceded nine of the eleven aggravating and mitigating factors set forth in Penal Code section 190.3 . . . to the prosecution." *Visciotti II*, 14 Cal. 4th at 365 (Brown, J., dissenting). To the extent Agajanian asserted any theory, it was to "ask[] the jury to spare [Visciotti's] life because he

was the only bad child of a loving family who would suffer if petitioner were to be executed." *Id.* at 331.

The jury began deliberating on the afternoon of August 3. After nearly two days of deliberations, the jury condemned Visciotti to death.

C. Direct Appeal and State Post-Conviction Proceedings

Visciotti automatically appealed to the California Supreme Court. Agajanian continued to represent him for about seven years following his conviction. During that time, Agajanian filed but a single, thirty-page brief on Visciotti's behalf. Also during that period, Agajanian was convicted in an unrelated matter, in the District of Vermont, of two counts of criminal contempt. His representation of Visciotti ended in 1990, when the State Bar suspended his license to practice law.[4]

[4] Additional discipline followed. As the California Supreme Court explained:

> The bases for the disciplinary proceedings that followed the proceeding related to the contempt conviction were complaints that Agajanian had abandoned clients, failed to respond to client communications, made false representations and misrepresentations, lost files, and failed to perform promised services. Evidence was admitted at the evidentiary hearing that during the time he represented [Visciotti], Agajanian did not respond to client communications, failed to make court appearances, did not visit clients in jail or show up in court or other places as promised, and was distracted by

Replacement counsel filed a supplemental brief following Agajanian's suspension. That brief asserted that the closure of penalty phase voir dire violated the Sixth Amendment right to a public trial, citing *Press-Enter. Co. v. Superior Court of Cal., Riverside Cty.*, 464 U.S. 501 (1984), and *Waller v. Georgia*, 467 U.S. 39 (1984).

The California Supreme Court affirmed the judgment on direct appeal. *See Visciotti I*, 2 Cal. 4th 1. Justice Mosk dissented, writing that he would have *sua sponte* decided that Agajanian's "pervasive and serious" deficiencies as trial counsel "resulted in a breakdown of the adversarial process at trial" to such an extent that Visciotti's conviction should not stand. *Id.* at 84 (Mosk, J., dissenting).

Visciotti next filed a habeas petition in the California Supreme Court. That court appointed a referee to take evidence and make factual findings on certain discrete questions, most of which concerned Agajanian's failure to investigate, discover, and use mitigating evidence in Visciotti's penalty phase hearing.

At the hearing, Agajanian testified that he "did not conduct formal interviews with any members of [Visciotti's] family in preparation for the penalty phase," and that he "did no investigation and did not have a social worker or investigator do any investigation to seek potentially mitigating evidence." *Visciotti II*, 14 Cal. 4th at 337. He further testified that, although he decided "to elicit sympathy

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> a civil suit against a nonlawyer who shared his office and was accused of fraudulent sales of trust deeds.

Visciotti II, 14 Cal. 4th at 350 n.6.

for [Visciotti's] family as his penalty phase strategy," *id.* at 336, "he had no information about [Visciotti's] family when he made his decision on penalty phase tactics," *id.* at 337. Visciotti also offered evidence that Agajanian failed to provide mental health experts appointed by the trial court with the necessary information to provide a competent and informed evaluation. *See id.* at 337 40.

Particularly relevant here is Visciotti's evidence that "Agajanian did not review the prosecutor's file." *Id.* at 340. As *Visciotti II* described,

> [a]lthough it was the practice of the district attorney at the time of the Visciotti trial to make the case files of prosecutors available to defense counsel, Agajanian was not aware that during petitioner's 1978 assault with a deadly weapon on William Scofield, petitioner had also repeatedly stabbed Kathy Cusack who was pregnant. Agajanian did not send for the police report or go through the prosecutor's file to read it in advance of trial and thus was surprised and unprepared to face that evidence.

Id. Finally, Visciotti presented at the habeas hearing considerable evidence concerning facts relevant to mitigation that Agajanian failed to discover and present during the penalty phase proceedings. The California Supreme Court summarized that evidence at length in its habeas decision. *See id.* at 341 45.

After considering the referee's report, a divided court denied relief for want of prejudice. Assuming that

Agajanian's performance was constitutionally inadequate, and "[n]otwithstanding Agajanian's multiple failings,"[5] the majority reasoned, it was not reasonably probable that the jury would have recommended a lesser sentence had Visciotti received competent representation. *Id.* at 352 57. The dissent concluded otherwise, maintaining that "Agajanian's abysmal across-the-board performance rendered the penalty phase of the trial a complete and utter farce." *Id.* at 366 (Brown, J., dissenting).

D. Federal Habeas Proceedings

In 1998, Visciotti filed the habeas petition at issue here. The district court granted relief on the basis of Agajanian's ineffectiveness during the penalty phase of Visciotti's trial but expressly rejected most of Visciotti's remaining challenges to his conviction, including his guilt phase IAC claim. Additionally, because of its ruling on the penalty phase IAC claim, the court held moot several of Visciotti's remaining claims, including his objection to the closure of the death qualification portion of voir dire. We affirmed the

[5] The majority assumed Agajanian "failed to afford constitutionally adequate representation because he allegedly: (1) failed to investigate and discover mitigating evidence as a result of his ignorance of the types of evidence a jury might consider mitigating; (2) failed to present readily available evidence that would have revealed to the jury the extent to which petitioner was subjected to psychological and physical abuse as a child, the impact the dysfunctional and peripatetic family life had on petitioner's development, and the correlation between these events and petitioner's resort to drugs; (3) failed to prepare, which left him unaware of the scope of the aggravating evidence to be introduced; and (4) delivered an [unfocused] closing argument, during which he undercut his client's own case by telling the jury that the evidence of petitioner's mental and emotional problems was not mitigating, prejudiced petitioner at the penalty phase of the trial." *Id.* at 353.

district court's judgment in its entirety. *See Visciotti III*, 288 F.3d at 1101.

The U.S. Supreme Court summarily reversed in a *per curiam* opinion, without merits briefing. The Court reasoned that the California Supreme Court's denial of Visciotti's state habeas petition for want of prejudice was neither contrary to, nor an unreasonable application of, clearly established federal law under 28 U.S.C. § 2254(d)(1). *Visciotti IV*, 537 U.S. at 22 27. As relevant here, *Visciotti IV* rejected our conclusion that the California Supreme Court failed to take into account available mitigating evidence, noting that "[a]ll of the mitigating evidence" that we "referred to as having been left out of account or consideration [was] in fact described" in *Visciotti II*. *Id.* at 25. Furthermore, *Visciotti IV* held that the California Supreme Court's conclusion that the "aggravating factors [were] so severe that . . . [Visciotti] suffered no prejudice from trial counsel's (assumed) inadequacy" was not unreasonable. *Id.* at 26 27. "Habeas relief," the Court concluded, "is therefore not permissible under § 2254(d)." *Id.* at 27.

On remand to this court, Visciotti asked us to consider whether the California Supreme Court's denial of his state habeas petition rested on an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2). We remanded to the district court "to review and rule on the argument[] in the first instance." *Visciotti v. Brown*, 406 F.3d 1131, 1131 (9th Cir. 2005).

The district court denied Visciotti's remaining claims for relief. It issued a certificate of appealability on claim 1.C (contesting trial counsel's penalty phase effectiveness) and claim 12 (contesting closure of the death qualification voir

dire). This appeal followed. After oral argument, we granted Visciotti's request to expand the certificate of appealability to cover claim 58 of his proposed second amended petition, limited to the question whether "the cumulative effect of constitutionally ineffective representation throughout the criminal process, including both the guilt and penalty phases, prejudice[d] Visciotti in the penalty phase of his trial?"

II. STANDARD OF REVIEW

We review a district court's denial of a petition for writ of habeas corpus de novo. *Deck v. Jenkins*, 768 F.3d 1015, 1021 (9th Cir. 2014). As Visciotti's petition is governed by AEDPA, Visciotti can prevail on a claim "that was adjudicated on the merits in State court" only if he can show that the adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Under AEDPA, "[w]e review the last reasoned state court opinion." *Musladin v. Lamarque*, 555 F.3d 830, 834 35 (9th Cir. 2009) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991)). However, "when it is clear that a state court has not reached the merits of a properly raised issue, we must review it de novo." *Pirtle v.*

Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002); *see also Cone v. Bell*, 556 U.S. 449, 472 (2009).

III. DISCUSSION

A. Ineffectiveness of Counsel (IAC)

Ordinarily, "[a] convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "First, the defendant must show that counsel's performance was deficient." *Id.* "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* To establish *Strickland* prejudice, Visciotti must show that but for Agajanian's deficient performance, "there is a reasonable probability that [the jury] would have returned with a different sentence." *Wiggins v. Smith*, 539 U.S. 510, 536 (2003). Further, "[t]o assess that probability, we consider 'the totality of the available mitigation evidence both that adduced at trial, and the evidence adduced in the habeas proceeding' and 'reweig[h] it against the evidence in aggravation.'" *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (quoting *Williams v. Taylor*, 529 U.S. 362, 397 98 (2000)).

Visciotti presents two IAC claims in this appeal. First, he raises a penalty phase IAC claim, focused on the allegation that key aggravating evidence, Cusack's testimony, was introduced only as a result of Agajanian's errors during the penalty proceedings. Second, as a new IAC claim, Visciotti contends that the cumulative effect of Agajanian's ineffectiveness during both the guilt and penalty phases of trial ultimately prejudiced the penalty proceedings. We conclude that, whether or not these claims have merit, they

are foreclosed by the Supreme Court's decision in *Visciotti IV*, so we may not grant habeas relief.

1. Claim 1C — penalty phase IAC

The California Supreme Court denied Visciotti's penalty phase IAC claim, concluding that, assuming that Agajanian's performance was constitutionally deficient, "it is not probable that the jury would have found" the mitigation evidence Agajanian failed to present was "mitigating or sufficiently so that the evidence would have affected the jury determination that the aggravating factors outweighed the mitigating in this case." *Visciotti II*, 14 Cal. 4th at 356. The Supreme Court held the California Supreme Court's prejudice determination reasonable under 28 U.S.C. § 2254(d)(1), as the decision was not contrary to or an unreasonable application of clearly established Supreme Court law. *See Visciotti IV*, 537 U.S. at 27.

Visciotti now argues that the California Supreme Court's decision deserves no deference for a different reason because it "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2). The thrust of Visciotti's refashioned penalty phase argument is as follows: The California Supreme Court specifically assumed that Agajanian performed deficiently by "fail[ing] to prepare, which left him unaware of the scope of the aggravating evidence to be introduced." *Visciotti II*, 14 Cal. 4th at 353. Indeed, the state high court found that, prior to the penalty phase of trial, Agajanian "was not aware that during [Visciotti's] 1978 assault with a deadly weapon on William Scofield, [he] had also repeatedly stabbed Kathy Cusack"; "did not send for the police report or go through the prosecutor's file to read it in advance of trial"; and "did not

know evidence of the Cusack stabbing was to be presented." *Id.* at 340, 346. The California Supreme Court's ensuing prejudice determination, Visciotti contends, relied on that court's preceding determination that Visciotti "has not shown that Agajanian's failure to prepare to meet or counter the evidence about his assault on Kathy Cusack was prejudicial. He does not suggest that this evidence could have been rebutted." *Id.* at 355.

Visciotti's central § 2254(d)(2) contention is that in its prejudice analysis, the California Supreme Court unreasonably assumed that Cusack's testimony was *admissible* without regard to Agajanian's IAC, yet the trial court had initially excluded her testimony. Cusack's testimony was eventually admitted only as rebuttal to Agajanian's deficient mitigation presentation. The trial court's initial decision entirely to exclude Cusack's testimony from the penalty phase, Visciotti maintains, would have remained in force had Agajanian not "opened the door" by incompetently eliciting evidence as to Visciotti's character for nonviolence.

Visciotti called attention to these circumstances in his state habeas petition, arguing that Agajanian performed deficiently by choosing a mitigation case that opened the door to Cusack's previously precluded penalty phase testimony.[6]

[6] That the California Supreme Court weighed the Cusack testimony as part of its *Strickland* prejudice analysis without acknowledging that it came into evidence only as a result of Agajanian's deficient performance (which the Court otherwise assumed) is the crux of Visciotti's § 2254(d)(2) argument. That is, his challenge is not "based on the claim that the finding is unsupported by sufficient evidence," but that "the process employed by the state court [was] defective." *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004). As in *Taylor*, Visciotti claims that the

The assault on Cusack was one of the three components of the State's death-penalty argument at the penalty phase, along with Visciotti's prior conviction for assaulting Scofield and the heinousness of the crimes for which Visciotti was being tried. The prosecution dramatically emphasized the attack on Cusack during its penalty phase case. Most notably, in closing argument the prosecutor referred to Cusack as the "prime example" of Visciotti's history for violence, noting that Scofield fell in a "different category." The prosecutor continued:

> Going in and taking a woman alone in her bedroom after you've kicked in the door in the middle of the night for no apparent reason. She couldn't offer any motivation why he would have done this and none was presented to you. There is no reason. It's a totally senseless, vicious, brutal attack on this woman who again is isolated by herself, totally defenseless in her bedroom that night.
>
> The statements about her saying I'm pregnant, don't stab me, don't hurt the baby, then [Visciotti] immediately thereafter stabbing her right in the stomach. It's almost too cold and brutal to comment on. . . .

court "fail[ed] to consider and weigh relevant evidence that was properly presented" to the state habeas court, *id.* at 1001 — here, that Cusack's testimony would not have been admitted absent Agajanian's deficient performance. *See also id.* at 1008 ("[F]ailure to take into account and reconcile key parts of the record casts doubt on the process by which the finding was reached, and hence on the correctness of the finding.").

> [Visciotti] reenters the room where she's all by herself; she doesn't know what's going on; she's totally defenseless. And [Visciotti] stabs her seven or eight times for no apparent reason.
>
> The only conversation is she tells him, "My god. I'm pregnant. Don't hurt the baby."
>
> That's what really happened. That's the basis for his prior felony conviction. That's why he went to state prison. Now, to possibly think that's not aggravating, it's hard to believe.

Moreover, the California Supreme Court in its prejudice analysis lingered over the image of a "pregnant Kathy Cusack as she lay in bed trying to protect her fetus." *Visciotti II*, 14 Cal. 4th at 355.

Cusack's testimony would not have been admitted had Visciotti been properly represented, Visciotti argues. And, he goes on, had Cusack's testimony been precluded, that omission would have significantly affected the California Supreme Court's determination on state habeas as to whether Agajanian's deficiencies prejudiced Visciotti. In reviewing Agajanian's asserted ineffectiveness, the California Supreme Court recognized that the state courts were obliged, in assessing the prejudice worked by Agajanian's penalty phase IAC, to consider the mitigating evidence which Agajanian failed to present. *Id*. at 333 34. Consequently, in Visciotti's view, a proper reweighing of mitigating and aggravating evidence, excluding Cusack's testimony as the product of

Agajanian's incompetence and including the mitigating evidence proffered on habeas for the same reason, would have resulted in an entirely different prejudice determination, one which could have entitled him to a different penalty phase result.

Visciotti's § 2254(d)(2) arguments are not without substance. Were we writing on a blank slate, we would likely find them meritorious. But we are not writing on a blank slate.

"According to the law of the case doctrine, on remand a lower court is bound to follow the appellate court's decision as to issues decided explicitly or by necessary implication." *United States v. Garcia-Beltran*, 443 F.3d 1126, 1129 (9th Cir. 2006) (internal citation and quotation marks omitted). "When a case has been once decided by [the Supreme Court] on appeal, and remanded to the circuit court, whatever was before [the Court], and disposed of by its decree, is considered as finally settled. The circuit court is bound by the decree as the law of the case, and must carry it into execution according to the mandate." *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895).

In deciding Visciotti's prior appeal, the U.S. Supreme Court broadly concluded that "[h]abeas relief is . . . not permissible under § 2254(d)." *Visciotti IV*, 537 U.S. at 27.[7]

[7] We note that the district court declined to address whether the U.S. Supreme Court's decision precluded review of Visciotti's IAC claim. Instead, it denied the claim on the merits. Explaining that, if the Cusack evidence had been the primary basis for the jury's sentencing decision, it "might be persuaded that Agajanian's decision to present a case in mitigation was both wrong and prejudicial," the district court found that "there was much more to the jury's penalty decision than the

Yet the Court's actual analysis was narrow; it focused exclusively on the applicability of § 2254(d)(1), reversing our prior conclusion that the California Supreme Court's previous adjudication of Visciotti's claim was both contrary to, and an unreasonable application of, clearly established federal law. *See* 537 U.S. at 27.

Moreover, and critically, the Cusack-centered IAC issues were not presented to the United States Supreme Court at all, not for lack of diligence but because of the procedural posture in which the case was decided by the Court. *Visciotti IV* was issued summarily, on the basis of the petition for certiorari alone. There were no merits briefs, and there was no oral argument. The State's petition for certiorari focused on the reasoning of our prior decision, without independently addressing the merits of any of Visciotti's contentions not directly implicated by that decision. The petition asked the Court to clarify the meaning of § 2254(d)(1). Neither the petition nor Visciotti's brief in opposition mentioned § 2254(d)(2) at all, and neither discussed the circumstances surrounding the admission of Cusack's testimony or the connection between those circumstances and the IAC prejudice determination. *See* Petition for Writ of Certiorari, *Woodford v. Visciotti*, 537 U.S. 19 (2002) (No. 02-137), 2002 WL 32134887; Brief in Opposition, *id.*, 2002 U.S. S. Ct. Briefs LEXIS 1091. The question whether the California Supreme Court's implicit assumptions as to the inevitable

unadjudicated Cusack stabbing." The district court did rely on *Visciotti IV* when it concluded that the presence of other aggravating factors was not "such scant justification for the imposition of a death sentence as to indicate either an unreasonable application of the law or an unreasonable determination of the facts."

admission of Cusack's testimony was factually correct was thus never litigated in the Supreme Court.

Nevertheless, *Visciotti IV* entirely precludes any review at this juncture of Visciotti's IAC claims. *Williams v. Johnson*, 720 F.3d 1212 (9th Cir. 2013), *judgment vacated,* 134 S. Ct. 2659 (2014), requires this conclusion.

Williams had previously concluded that the state court had not adjudicated petitioner's claims on the merits. After conducting de novo review, this court granted habeas relief. *Williams v. Cavazos*, 646 F.3d 626, 653 (9th Cir. 2011), *rev'd sub nom. Johnson v. Williams*, 133 S. Ct. 1088 (2013). The Supreme Court granted certiorari. Before the Supreme Court, the parties did not brief and the Supreme Court did not expressly analyze the merits of the petitioner's claim under more restrictive standards of § 2254(d). *Williams v. Johnson*, 720 F.3d at 1213 (Reinhardt, J., concurring). Rather, the Supreme Court explained that we had erred in determining that the state court had not adjudicated the case on the merits, and therefore in holding that § 2254 did not apply. *See Johnson v. Williams*, 133 S. Ct. at 1091 92. The Supreme Court's *Williams* opinion nonetheless stated, broadly, "that under [§ 2254(d)] respondent is not entitled to habeas relief." *Id.* at 1092. That sentence, the *Williams* panel concluded on remand, precluded further consideration by this Court of the claim under § 2254(d), even though the Supreme Court's reasoning in its opinion did not support the breadth of its conclusion. 720 F.3d at 1213 14 (Reinhardt, J., concurring). As Judge Kozinski put it, "[d]eference to the judicial hierarchy leaves room for no other course of action on our part." 720 F.3d. at 1214 (Kozinski, J., concurring).

The same is true here. As in *Williams*, the parties here "did not brief the merits of [Visciotti's § 2254(d)(2) claim regarding ineffective assistance of counsel with respect to Cusack's testimony] before the Court," either by mentioning that section or by discussing the difficulties with the California Supreme Court's assumption concerning the inevitable admission of Cusack's testimony. *Cf.* 720 F.3d at 1213 (Reinhardt, J., concurring). Nonetheless, just as in *Williams*, the Supreme Court concluded generically that "[h]abeas relief is . . . not permissible under § 2254(d)." *Visciotti IV*, 537 U.S. at 27. Accordingly, we could not grant such relief under § 2254(d)(2), a subsection of § 2254(d). As in *Williams*, "[w]e are . . . required to assume that the Court meant what it said in . . . its opinion, in which it appears to have . . . deliberately precluded us from considering the merits of [Visciotti's] habeas petition under AEDPA." 720 F.3d at 1213 14 (Reinhardt, J., concurring).

Following our second decision in *Williams*, the Supreme Court, without explanation, granted the petitioner's new petition for certiorari, vacated our judgment, and "remanded for consideration of petitioner's Sixth Amendment claim under the standard set forth in 28 U.S.C. § 2254(d)." 134 S. Ct. 2659 (2014). This development does not change the fact that we are bound by the express language in *Visciotti IV* barring relief on Visciotti's penalty phase IAC claim. But, as in *Williams*, we "take comfort in knowing that, if we are wrong, we can be summarily reversed." 720 F.3d at 1214 (Kozinski, J., concurring).

"[W]e are an intermediate court within the federal system, and as such, we must take our cue from the Supreme Court." *United States v. Lindsey*, 634 F.3d 541, 550 (9th Cir. 2011). As the express language of *Visciotti IV* bars any

reconsideration of Visciotti's penalty phase IAC claims, even one not presented to the Supreme Court in the submissions before it at the time it ruled, we deny his claim for habeas relief.

2. Claim 58 — cumulative error IAC claim

In addition to his penalty phase IAC claim, Visciotti raises a new IAC claim in this appeal, contending that the cumulative effect of Agajanian's ineffective assistance during *both* the guilt and penalty phases of trial prejudiced him with respect to the ultimate penalty imposed by the jury. The California Supreme Court denied this claim on the merits, and, alternatively, on procedural grounds.

The procedural history of Visciotti's cumulative error claim deserves further mention. When Visciotti first filed his federal habeas petition, he also filed both a notice of unexhausted claims and a motion to equitably toll the AEDPA statute of limitations. The district court denied the tolling motion. Visciotti then filed an exhaustion petition in the California Supreme Court in October 1998, about four months after filing the federal petition in district court. That petition included the cumulative error claim, as Claim 19. Visciotti's filing of the additional petition appeared compelled at that time by *Rose v. Lundy*, 455 U.S. 509, 522 (1982), which was generally understood to require dismissal of petitions containing unexhausted claims. The California Supreme Court denied the claim on both the merits and procedural grounds.

Visciotti then requested leave to amend his federal petition to include a cumulative error claim, now styled as Claim 58; the district court summarily denied leave. When

the case was remanded to the district court following *Visciotti IV*, Visciotti renewed his motion for leave to amend his petition. The district court this time granted the motion and ordered an evidentiary hearing. After this Court issued a writ of mandamus, at the state's request, vacating the order for an evidentiary hearing, the district court reconsidered its decision to allow amendment of Visciotti's petition and, this time, struck the amended petition as an improperly filed second or successive petition. The district court thus never decided the cumulative error claim. After oral argument, we expanded the certificate of appealability to include Visciotti's cumulative error claim.[8]

We now turn to the substance of Visciotti's cumulative error claim. The State does not dispute that Agajanian rendered deficient performance throughout the trial. Rather, it contends that, in *Visciotti IV*, the Supreme Court decided whether the cumulative effect of these errors prejudiced Visciotti at the penalty phase. We are constrained to agree. Even assuming that Visciotti could overcome the substantial procedural obstacles he faces, *Visciotti IV* squarely forecloses Visciotti's cumulative error claim as well.

As we have already explained, the Court's conclusion in *Visciotti IV* that "[h]abeas relief is . . . not permissible under § 2254(d)" precludes our review of Visciotti's IAC cumulative error claim. *Visciotti IV*, 537 U.S. at 27. Visciotti

[8] In light of this procedural history, the State argues that Claim 58 is not properly before us because (1) it was presented in a "second" or "successive" petition, 28 U.S.C. § 2244(b)(3)(A); and (2) the California Supreme Court denied the claim on the alternative basis that it was procedurally defaulted. As we conclude that the Supreme Court's ruling precludes our review of Visciotti's claim in any case, we decline to address these procedural questions.

presents that issue as one specifically raised before, and decided by, the state courts, and therefore as one covered by § 2254(d). That Visciotti did not present this particular, cumulative error, IAC claim to the United States Supreme Court in 2002 does not, for the reasons discussed above, allow us to overlook *Visciotti IV*'s clear, mandatory language. The Court's broad language in *Visciotti IV* therefore covers the issue, and we may not reach it.[9]

* * *

In conclusion, the Supreme Court's previous adjudication precludes relief on Visciotti's present penalty phase and cumulative error IAC claims. We therefore do not reach the question whether the California Supreme Court's analysis violated § 2254(d)(2), or whether there was cumulative prejudice at the penalty phase due to ineffective assistance of counsel at both the guilt and penalty phases of trial. Instead, as required by the Supreme Court's ruling in *Visciotti IV*, we affirm the district court's denial of Visciotti's IAC claims.

[9] Visciotti accurately argues that "a cumulative error claim is a separate, stand-alone claim . . . [not] merely a method of conducting prejudice review for separately alleged claims," and emphasizes that his cumulative error claim includes non-IAC errors such as "claims of prosecutorial misconduct and trial court error." But, in granting Visciotti's request for a certificate of appealability, we limited our review to a single sub-question: whether "the cumulative effect of constitutionally ineffective representation throughout the criminal process, including both the guilt and penalty phases, prejudice[d] Visciotti in the penalty phase of his trial[.]" Thus, while claims of cumulative error may generally be distinct from the underlying errors on which they rely, the particular cumulative error on which we granted a certificate of appealability is not.

B. Public Trial Right

The Sixth Amendment guarantees criminal defendants "the right to a speedy and public trial." U.S. Const. amend VI. Visciotti contends that the trial judge's closure of the courtroom for six-and-a-half days during the death qualification portion of voir dire violated this Sixth Amendment right.

1. Legal Principles

The public trial right, the Supreme Court has repeatedly held, encompasses pre-trial proceedings, including voir dire.

Press-Enterprise, 464 U.S. at 511 13, held a trial judge's closure of almost six weeks of death qualification voir dire unconstitutional. "[S]ince the development of trial by jury," the Court explained, "the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown." *Id.* at 505. "The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed . . . Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to the public confidence in the system." *Id.* at 508. Consequently, *Press-Enterprise* cautioned, "[c]losed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness." *Id.* at 509. That is, "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 510.

Press-Enterprise was decided on First Amendment grounds, not Sixth Amendment grounds. *See id.* at 516 (Stevens, J., concurring). Soon thereafter, however, *Waller v. Georgia*, 467 U.S. 39, 47 48 (1984), concluded that a trial judge's closure of a pre-trial suppression hearing violated the defendant's Sixth Amendment public trial right. In so concluding, it relied on *Press-Enterprise* and prior First Amendment precedent, noting that "there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public." *Id.* at 46. *Waller* went on to hold that "under the Sixth Amendment any closure of a suppression hearing over the objections of the accused must meet the tests set out in *Press-Enterprise* and its predecessors" that is, "the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Id.* at 47 48. "The requirement of a public trial," *Waller* further explained, "is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions . . . ." *Id.* at 46 (internal citations and quotation marks omitted).

More recently, *Presley v. Georgia*, 558 U.S. 209, 212 213 (2010), emphasized that the Sixth Amendment "right to a public trial in criminal cases extends to . . . the *voir dire* of prospective jurors . . . is well settled under *Press-Enterprise* [] and *Waller*." In a per curiam disposition, the Court concluded that "there is no legitimate reason, at least in the context of juror selection proceedings, to give one who asserts a First Amendment privilege greater rights to insist on public proceedings than the accused has." *Id.* at 213.

Denial of the public trial right is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). Violation of the public trial right is therefore structural error. *See Waller*, 467 U.S. at 49 50; *see also Johnson v. United States*, 520 U.S. 461, 468 69 (1997) (listing the right to a public trial as one of the "very limited class of cases" in which the Court has found structural error). As in other classes of structural error, "a requirement that prejudice be shown would in most cases deprive [the defendant] of the [public-trial] guarantee, for it would be difficult to envisage a case in which he would have evidence available of specific injury." *Waller*, 467 U.S. at 49 n.9 (alterations in original) (internal quotations omitted).

2. Procedural Default

The State contends that the California Supreme Court denied Visciotti's public trial claim in part on procedural grounds namely, on the ground that Agajanian failed to object to the trial judge's closure decision. Consequently, before turning to Visciotti's public trial claim we address whether the claim was procedurally defaulted. If in fact the state "discuss[ed] the merits of the claim" but "separately relied on [a] procedural bar, the claim is defaulted." *Zapata v. Vasquez*, 788 F.3d 1106, 1112 (9th Cir. 2015). If the claim is defaulted, we are barred from reviewing the merits of the public trial right claim unless Visciotti can sufficiently establish "cause" and "prejudice" to excuse the default. *Wainwright v. Sykes*, 433 U.S. 72, 84 85 (1977).

In denying Visciotti's public trial claim, *Visciotti I* stated that "[Visciotti] concedes that the issue was not raised in the trial court." 2 Cal. 4th at 50. It is evident that the California

Supreme Court determined that, as Agajanian did not object to the trial judge's closure of voir dire, Visciotti defaulted his public trial right claim by failing to comply with California contemporaneous-objection rule. That the Court's denial was premised on a procedural ground is all the more clear from its repeated citations to *People v. Thompson*, which held that a defendant's public trial right "may be waived by the failure to assert it in timely fashion." 50 Cal. 3d 134, 157 (1990).

Visciotti acknowledges that Agajanian did not object to the trial judge's closure of death qualification voir dire. But, he contends, Agajanian's ineffective assistance in failing to raise the objection constitutes cause for purposes of excusing the default.[10] *See Coleman v. Thompson*, 501 U.S. 722,

[10] The State argues in its brief that the California Supreme Court "has already found that Visciotti had no cause for his failure to object." That cannot be so.

In the direct appeal opinion, the California Supreme Court stated that the possible benefits of sequestered voir dire to defendants, in combination with the active litigation at the time of Visciotti's trial on the question of the right of the public to attend jury voir dire, made it "doubtful that any competent defense counsel would have objected to it." *Visciotti I*, 2 Cal. 4th at 51. But, on direct review, Visciotti did not seek to excuse his default by claiming Agajanian's ineffectiveness as cause. Nor did the California Supreme Court perform a *Strickland* analysis — properly so, as in California, IAC claims, "except in . . . rare instances," are to be "raised on habeas corpus, not on direct appeal." *People v. Lopez*, 42 Cal. 4th 960, 972 (2008). In any event, the question whether a petitioner's procedural default is excused by cause and prejudice for purposes of federal habeas review is a federal, not state, question. *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988); *see also Martinez v. Ryan*, 132 S. Ct. 1309, 1318 (2012) ("The rules for when a prisoner may establish cause to excuse a procedural default are elaborated in the exercise of the [U.S. Supreme] Court's discretion."); *Murray v. Carrier*, 477 U.S. 478, 517 (1986) (Brennan, J., dissenting) (noting that the cause-and-prejudice rule

753 54 (1991); *Murray v. Carrier*, 477 U.S. 478, 488 (1986).[11] To demonstrate such ineffectiveness, Visciotti must satisfy *Strickland*'s familiar standard: he must establish that Agajanian's performance was deficient and that he was prejudiced by the deficient performance. 466 U.S. at 687 88.

Before proceeding to the *Strickland* analysis, we consider a preliminary question: should we "give AEDPA deference to the state court determination on an ineffective assistance of counsel claim when deciding whether that claim constitutes cause for procedural default[?]" *Jones v. Ryan*, 691 F.3d 1093, 1101 n.2 (9th Cir. 2012).[12] There is disagreement among federal courts of appeal on this question. *See Janosky v. St. Amand*, 594 F.3d 39, 44 45 (1st Cir. 2010).[13]

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constitutes an exercise of "*federal power* to entertain a habeas petition in the face of a procedural default" (emphasis added)).

[11] Visciotti alleged in his initial state habeas petition that trial counsel was ineffective for failing to object to closing the courtroom. The California Supreme Court rejected the claim without analysis. *See Visciotti II*, 14 Cal. 4th at 329, 333. The IAC claim was therefore properly "presented" to the state courts for exhaustion purposes. *Edwards v. Carpenter*, 529 U.S. 446, 452 (2000).

[12] *Jones* expressly declined to answer this question, as it held the petitioner's IAC claim there failed whether it was reviewed de novo or applying AEDPA deference. *See id.*

[13] *Compare Joseph v. Coyle*, 469 F.3d 441, 459 (6th Cir. 2006) ("Although [petitioner] must satisfy the AEDPA standard with respect to his independent IAC claim, he need not do so to claim ineffective assistance for the purpose of establishing cause"), *and Fischetti v. Johnson*, 384 F.3d 140, 154–55 (3d Cir. 2004) (same), *with Richardson v. Lemke*, 745 F.3d 258, 273 (7th Cir. 2014) (when reviewing a state court's resolution of an ineffective assistance claim in the cause-and-prejudice context, it applies the "same deferential standard as [it] would

We agree with our sister circuits that have reviewed IAC claims in the cause-and-prejudice context de novo, thereby applying a "differing standard for evaluating constitutional error as a substantive basis of relief and as a cause to avoid default of other claims." *Fischetti*, 384 F.3d at 154. As the cases so proceeding have recognized, the *Coleman* cause and prejudice standard was in no way affected by AEDPA. "AEDPA does not establish a statutory high hurdle for the issue of cause," and *Coleman* "made its determination of cause, or lack of cause, based on a straightforward analysis whether the denial of counsel was 'an independent constitutional violation.'" *Id.* at 154 55 (quoting *Coleman*, 501 U.S. at 755). Absent any indication to the contrary in AEDPA, the *Coleman* independent constitutional analysis continues to apply, post-AEDPA, to a contention that trial counsel IAC constitutes cause to excuse a procedural default.

Accordingly, the question whether we can review the merits of Visciotti's public trial right claim turns entirely on whether Visciotti has established that trial counsel was ineffective, under the *Strickland* standard, for not objecting to the trial judge's closure of death qualification voir dire. To that question we now turn.

3. Deficient Performance

To prevail on a *Strickland* ineffective assistance of counsel claim, "the defendant must show that counsel's performance was deficient." *Strickland*, 466 U.S. at 687. Counsel is deficient when he or she "made errors so serious

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when reviewing the claim on its own merits," declining to follow the approach taken by other courts that review so-called "nested ineffective assistance issues" de novo).

that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"; that is, when "counsel's representation fell below an objective standard of reasonableness." *Id.* at 687 88. Our review of counsel's performance is deferential, for "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Carrera v. Ayers*, 670 F.3d 938, 943 (9th Cir. 2011) (quoting *Strickland*, 466 U.S. at 689) (internal quotation marks omitted). Recognizing that the Sixth Amendment's guarantees "do[] not insure that defense counsel will recognize and raise every conceivable constitutional claim," *Engle v. Isaac*, 456 U.S. 107, 134 (1982), we cannot conclude that Agajanian's failure to object to the closure of death qualification voir dire constituted deficient performance under *Strickland*.

We reiterate that, since Visciotti's 1983 trial, the Supreme Court has unequivocally established that the Sixth Amendment guarantees a defendant's right to public voir dire. *Presley*, 558 U.S. at 212 13; *see also United States v. Cazares*, 788 F.3d 956, 970 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2484 (2016). We have also suggested previously that counsel's failure to object to the closure of voir dire may, at least in some circumstances, "[fall] below an objective standard of reasonableness . . . particularly because the right to a public trial is critical to ensuring a fair trial," *United States v. Withers*, 638 F.3d 1055, 1066 (9th Cir. 2010). At least two of our sister circuits have found that a failure to object to partial closure of trial proceedings, including voir dire, can constitute ineffective assistance of counsel. *See Johnson v. Sherry*, 586 F.3d 439, 446 (6th Cir. 2009); *Owens v. United States*, 483 F.3d 48, 64 (1st Cir. 2007).

Those decisions, however, do not foreclose the possibility that in specific instances, counsel's choice not to object to closure of trial proceedings might be sound trial strategy. For example, the First Circuit has held in two cases decided after *Owens* that counsel may make a reasonable strategic choice not to oppose partial closure of voir dire, *Wilder v. United States*, 806 F.3d 653, 660 (1st Cir. 2015), *cert. denied*, 136 S. Ct. 2031 (2016), or to forgo an objection to devote limited resources to more important trial issues, *Bucci v. United States*, 662 F.3d 18, 32 (1st Cir. 2011). The Supreme Court has long held that a defendant may waive his right to a public trial. *Levine v. United States*, 362 U.S. 610, 619 20 (1960). As Justice Brennan observed in *Levine*, the power to waive the right "must be . . . based on a defendant's conclusion that 'in his particular situation his interests will be better served by foregoing the privilege than by exercising it.'" *Id*. at 626 (Brennan, J., dissenting) (quoting *United States v. Sorrentino*, 175 F.2d 721, 723 (3d Cir. 1949)).

As the Supreme Court explained in *Strickland*, our "highly deferential" review of counsel's performance "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689. At the time of Visciotti's trial in 1983, neither *Press-Enterprise* nor *Waller* had yet been decided; in fact, "the question of press access to voir dire was a matter of active litigation." *Thompson*, 50 Cal. 3d at 157; *see also United States v. Brooklier*, 685 F.2d 1162, 1167 (9th Cir. 1982) ("The standard for determining whether a criminal proceeding may be closed to the public and the proper allocation of the burden of making the required showing are not yet clearly settled."). While a prudent attorney in Agajanian's position may have

objected to closure to preserve the issue while it was being resolved in the appellate courts, we cannot say that *any* competent attorney would have done so, given that some measure of sequestration of jurors during voir dire was at the time required by California law in capital cases.

Three years earlier, in *Hovey v. Superior Court*, 28 Cal. 3d 1, 80 (1980), *superseded by statute*, 1990 Cal. Legis. Serv. Prop. 115 (West) (1990) (codified at Cal. Civ. Proc. Code § 223), the California Supreme Court had required California state courts to conduct "individualized sequestered voir dire" when evaluating potential jurors' qualifications to hear a capital case. As the State explains, the *Hovey* requirement was based on evidence that showed that sequestration of the jury panel during voir dire about penalty "minimize[d] the tendency of a death-qualified jury to presume guilt and expect conviction," *id.*, and therefore resulted in more favorable juries for capital defendants.

As Visciotti points out, *Hovey* required only the insulation of prospective jurors from the death qualification questioning of their *peers*, emphasizing that the rule it prescribed would "not in any way affect the open nature of a trial." *Id.* at 80 81. *Hovey* thus did not in express terms require closure of voir dire proceedings to the public. But California courts appear often to have understood *Hovey* to support the principle that a general closure of voir dire proceedings would be similarly beneficial to the defendant. For example, in *Thompson*, "[t]o comply with *Hovey*'s mandate," the trial court "conducted the death-qualification voir dire in chambers" where "[n]either the public nor the press was present." 50 Cal. 3d at 156. The California Supreme Court held that there was no violation of the public trial right in part because "the sequestered voir dire was

ordered by the judge primarily for the benefit of the defendant." *Id.* at 157. In *Visciotti I*, the California Supreme Court similarly cited *Hovey* in the course of explaining that "because the sequestered voir dire is for the benefit of the defendant 'it is doubtful that any competent defense counsel would have objected to it.'" 2 Cal. 4th at 51 (quoting *Thompson*, 50 Cal. 3d at 156 57). Against this background, competent counsel in 1983 may similarly have reasonably believed that closure of voir dire was in the best interests of his client.

We recognize the importance of a defendant's interest in preserving his right to a public trial. "Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982). And we recognize that the cases since Visciotti's trial suggest that counsel's failure to safeguard this right during voir dire may in some contexts fall below objective standards of reasonable representation. Nevertheless, in "tak[ing] account of the variety of circumstances faced by defense counsel," we must not "restrict the wide latitude counsel must have in making tactical decisions," and must accord considerable deference to trial counsel's representation decisions when reviewing counsel's performance on a cold record. *Strickland*, 466 U.S. at 688 89. "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect. . . . That presumption has particular force where a petitioner bases his ineffective-assistance claim solely on the trial record, creating a situation in which a court 'may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive.'"

Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting *Massaro v. United States*, 538 U.S. 500, 505 (2003)). Failing to object to the closure of voir dire in Visciotti's trial cannot overcome our "presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).[14]

In sum, we cannot conclude that counsel's failure to object to the closure of the death qualification voir dire constituted deficient performance.[15] Visciotti therefore

[14] The parties dispute the extent to which closure of voir dire was the norm during this period. The State's counsel represented at oral argument that "in California from 1980 to 1990 it was the prevailing norm of defense counsel to seek closure of the voir dire as to the death penalty phase, the *Hovey* voir dire. That was the prevailing norm of counsel." The panel then inquired whether the State's reference to the prevailing norm meant that "the practice was just to exclude prospective jurors or to exclude everybody?" "Based on personal knowledge," the State's counsel continued, "it was as a practice, it was always done in chambers." Visciotti contested this representation, and submitted certified transcripts of several California capital trials conducted around the time of Visciotti's trial to demonstrate that it was not "prevailing" practice to close the courtroom to the public and press. These transcripts reveal that, at least in these California capital cases, the trial courts implementing *Hovey* sequestered voir dire conducted such proceedings in open court, not in chambers. But, again, *Thompson* and *Brooklier* point in the opposite direction. From this mixed record we cannot conclude that counsel's failure to object ran counter to "prevailing professional norms." *Strickland*, 466 U.S. at 688.

[15] The Supreme Court has recently held that a petitioner claiming that trial counsel was ineffective for failing to object to the closure of voir dire bears the burden of demonstrating prejudice. *Weaver v. Massachusetts*, No. 16-240, slip op. at 11–14 (U.S. June 22, 2017). Because of our holding that counsel's performance was not ineffective, we need not

cannot demonstrate cause to excuse his default of the public trial right claim.

IV. CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's denial of habeas relief with respect to each of Visciotti's claims.

AFFIRMED.

BERZON, Circuit Judge, joined by PREGERSON, Circuit Judge, concurring:

Not surprisingly, I join the principal opinion in full. I write separately to emphasize one point: This case illustrates that Supreme Court summary reversals cannot, and do not, reflect the same complete understanding of a case as decisions after plenary review. Relying on broad language in such decisions, as we do in Section III.A, *supra*, is an obligation of intermediate courts of appeals. But fulfilling that obligation does not require that we blinker reality by pretending that the summary reversal entailed full consideration of the issues covered by the language of the Supreme Court opinion issued.

At the certiorari stage, the parties' submissions are quite properly not designed comprehensively to inform the Court about the merits of a case. The Supreme Court's Rules

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determine whether Visciotti could demonstrate prejudice. We note, however, that it is extremely dubious that he could.

explain that petitions for certiorari "will be granted only for compelling reasons," including when (1) the decision below conflicts with the decisions of federal courts of appeals or state courts of last resort on an "important matter" or "an important federal question"; (2) the decision conflicts with a Supreme Court decision on an "important question of federal law"; and (3) when the lower court "decide[s] an important question of federal law that has not been, but should be, settled by th[e] Court." S. Ct. R. 10.

Both scholarly articles and Supreme Court practice guides suggest that petitioners will encounter greater success at the petition for certiorari stage when they emphasize "certworthy" aspects of the decision below, such as the presence of a circuit conflict or the national importance of an issue, rather than their legal and factual arguments on the merits. *See* Stephen M. Shapiro et al., Supreme Court Practice, ch. 4.17, at 278 (10th ed. 2013). Whether the decision below conflicts with decisions of other courts appears to be the paramount factor at the certiorari stage. Scholars have estimated that "seventy percent of Court's plenary docket is devoted to addressing legal issues on which lower courts have differed, and law clerks and Justices alike have acknowledged that ensuring uniformity is a driving force in case selection." Amanda Frost, *Overvaluing Uniformity*, 94 Va. L. Rev. 1567, 1569 (2008); David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 Tex. L. Rev. 947, 982 (2007) (collecting data from 2003 to 2005 terms).[1] "Most of

[1] *See also* Supreme Court Practice, ch. 4.3, at 241 (providing data about the 1993 term); Kevin H. Smith, *Certiorari and the Supreme Court Agenda: An Empirical Analysis*, 54 Okla. L. Rev. 727, 747 (2001) ("[S]tatistical analysis suggests that the Supreme Court is more likely to

the rest are cases that involve no conflict among lower courts but present contentious legal issues of great national significance." Robert M. Yablon, *Justice Sotomayor and the Supreme Court's Certiorari Process*, 123 Yale L.J. Forum 551, 561 (2014).

Practice guides and other secondary sources recommend that petitioners specifically *avoid* describing the merits of a case in too great detail, so as to dissuade the Court from perceiving the certiorari petition merely as a request for "error correction." Quoting Justice Vinson, the authoritative guide to Supreme Court practice explains: "Lawyers might be well-advised, in preparing [certiorari petitions] to spend a little less time discussing the merits of their cases and a little more time demonstrating why it is important that the Court should hear them." Supreme Court Practice, ch. 6.31(a), at 479.[2] Similarly, as successful briefs in opposition to

grant certiorari if the petition for a writ of certiorari contains an allegation of a conflict with Supreme Court precedent or contains an allegation of a conflict between two or more federal circuit courts of appeals than if such a claim of conflict is absent.") (footnotes omitted); Robert M. Lawless & Dylan Lager Murray, *An Empirical Analysis of Bankruptcy Certiorari*, 62 Mo. L. Rev. 101, 133 (1997) (concluding that "the existence and depth of a circuit conflict is important when the Court decides whether to grant [certiorari] in a bankruptcy case"); Kevin Russell, *Commentary: Writing a Convincing Cert. Petition When There is No Direct Circuit Split*, SCOTUSblog (May 17, 2007), available at http://www.scotusblog.com/2007/05/commentary-writing-a-convincing-cert-petition-when-there-is-no-direct-circuit-split/.

[2] *Accord* Timothy S. Bishop, Jeffrey W. Sarles & Stephen J. Kane, *Tips on Petitioning for and Opposing Certiorari in the U.S. Supreme Court*, Litigation, Winter 2008 ("It is crucial to temper the natural instinct to focus on defending or attacking the lower court's decision on the merits."); Scott L. Nelson, *Getting Your Foot in the Door: The Petition for Certiorari*, Public Citizen Litigation Group, *available at*

certiorari are in many respects "the mirror image of an effective [certiorari] petition," demonstrating that "the decision below was right . . . is definitely a secondary argument" at best. Stewart A. Baker, *A Practical Guide to Certiorari*, 33 Cath. U. L. Rev. 611, 627, 629 (1984); *see also* Supreme Court Practice, ch. 512(c), at 355 ("The merits of the decision below are not among the ceritorari considerations of Rule 10 . . . [n]either the petition nor the brief in opposition is designed to be a brief on the merits."). As Justice Stevens explained:

> The most helpful and persuasive petitions for certiorari to this Court usually present only one or two issues, and spend a considerable amount of time explaining why those questions of law have sweeping importance and have divided or confused other courts. Given the page limitations that we impose, a litigant cannot write such a petition if he decides, or is required, to raise every claim that might possibly warrant reversal in his particular case.

O'Sullivan v. Boerckel, 526 U.S. 838, 858 (1999) (Stevens, J., dissenting).

It comes as no surprise, then, that parties do not indeed, *should not* fully develop their merits arguments in certiorari-stage briefing. *See* Supreme Court Practice, ch.

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https://www.citizen.org/documents/GettingYourFootintheDoor.pdf ("[Y]ou don't want your merits argument to suggest that your principal goal is error correction as opposed to the presentation of an important issue requiring the Court's review.").

6.31(c), at 484 ("The attempt to show error below . . . should not be a long, full-dress argument such as would be proper in the brief on the merits."). Normally, of course, this omission raises no concerns; if the Court grants certiorari, the parties will be afforded substantial opportunity to explain their positions in their merits-stage briefing and at oral argument. But when the Court issues a summary reversal, without the benefit of merits-stage briefing or oral argument, it necessarily decides the case based on the limited presentation and arguments raised in the certiorari-stage briefing.

Such was the case here. As the principal opinion explains, in their certiorari-stage briefing in *Visciotti IV*, neither the State nor Visciotti raised the particular IAC claims now at issue in this appeal, nor did either explain that further issues could be litigated on remand. Instead, the State's petition for certiorari contested, and Visciotti's brief in opposition defended, our previous conclusion that the California Supreme Court's *Strickland* prejudice determination was contrary to or an unreasonable application of established federal law for particular reasons, in violation of 28 U.S.C. § 2254(d)(1). Thus, the Supreme Court never had before it the questions whether (1) the California Supreme Court's assumption that Cusack's testimony would have been before the jury regardless of any ineffective assistance of counsel constitutes an "unreasonable determination of the facts" under 28 U.S.C. § 2254(d)(2); and (2) the cumulative effect of Agajanian's IAC during both the guilt and penalty phases of trial prejudiced Visciotti at the penalty phase.

That Visciotti did not raise these claims was not an oversight or poor lawyering. His "opposition to the [State's] petition for certiorari understandably focuse[d] on arguments

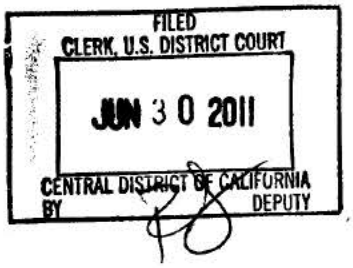
for denying certiorari." *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 271 (1982) (Blackmun, J., dissenting).

Nevertheless, at the end of its summary reversal, the Court held broadly that "[h]abeas relief is . . . not permissible under § 2254(d)." *Visciotti IV*, 537 U.S. at 27. Today, we conclude that this language precludes our review of Visciotti's present IAC claims. In so concluding, our opinion simply reflects, as in *Williams v. Johnson*, 720 F.3d 1212 (9th Cir. 2013), *judgment vacated,* 134 S. Ct. 2659 (2014), what the Court actually encompassed in its broad language. And, as appears to have been the case in *Williams*, that breadth may have been inadvertent.

My concern is that "[t]he Court's decisionmaking process at the certiorari stage is fundamentally different from traditional judicial decisionmaking." Margaret Meriwether Cordray & Richard Cordray, *Strategy in Supreme Court Case Selection: The Relationship Between Certiorari and the Merits*, 69 Ohio St. L.J. 1, 3 (2008). Summary reversals, which are the product of such a decisionmaking process, are also fundamentally different from traditional judicial opinions, as they issue without the benefit of fully developed, adversarial legal argument. As a result, what these decisions say about the broader merits of a case may not reflect the interwoven legal issues and arguments omitted from the parties' certiorari-stage briefing. And so, Justice Blackmun observed, by deciding unraised claims and questions "without briefing or argument, . . . the Court's summary disposition [can] deprive[] respondents of their 'day in court.'" *Hollywood Motor*, 458 U.S. at 271 72 (Blackmun, J., dissenting).

As the principal opinion recognizes, the Court's summary per curiam reversals are no less binding upon us than the authored opinions issued after full briefing and argument. *Visciotti IV* therefore requires that we deny habeas relief on Visciotti's present IAC claims, even though the substance of such claims were never presented to the Court and were almost surely not actually considered.

In *Williams*, the Supreme Court corrected the apparently inadvertent overreach of its original opinion by reversing our second opinion without comment. *Williams v. Johnson*, 134 S. Ct. 2659 (2014). Notably, *Williams* was neither a capital case nor one in which the Supreme Court's first decision was a summary reversal. Here, a person's life *is* at stake, and the Court proceeded without following its plenary processes. If a second certiorari petition is filed, as I expect it will be, I fully anticipate that, as in *Williams*, the Court will look closely at whether it meant to reject the quite colorable issues raised before us on remand, never alluded to in our prior opinion or in the papers filed in the Supreme Court, with regard to whether certiorari should be granted.



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOHN LOUIS VISCIOTTI,

Petitioner,

v.

Michael Martel, Warden of California State Prison at San Quentin,

Respondent.

CASE NO. CV 97 CV 4591 R

DEATH PENALTY CASE

ORDER DENYING PETITION AND GRANTING CERTIFICATE OF APPEALABILITY

After being fired from their jobs, Petitioner John Visciotti and Brian Hefner attempted to rob and murder former co-workers Timothy Dykstra and Michael Wolbert to obtain rent money. On November 8, 1982, they shot both men after luring them to a remote area. Dykstra was killed, but Wolbert survived despite being shot five times. Wolbert identified Visciotti and Hefner, and Visciotti confessed to the murder and participated in a re-enactment of the crime. Visciotti was found guilty of murder, attempted murder and robbery, and sentenced to death. Now, following remand by the United States Supreme Court, this Court must consider whether the remaining claims of this petition which have not previously been decided justify granting Petitioner relief from his sentence of death. Having

reviewed the evidence and the briefing before it, the Court decides that the verdict is proper, and **denies** the petition. A Certificate of Appealability is granted to Petitioner.

1. Procedural History

Petitioner was convicted and sentenced to death following a jury trial in 1983. The judgment was affirmed by the California Supreme Court nine years later. *People v. Visciotti*, 2 Cal. 4th 1 (1992). Certiorari on the direct appeal was denied. *Visciotti v. California*, 506 U.S. 893 (1992).

Petitioner filed a state habeas petition in 1993, and was granted a state evidentiary hearing on inadequate assistance of counsel. Relief was denied in the inadequate assistance of counsel claim because of lack of prejudice to Petitioner. *In re Visciotti*, 14 Cal. 4th 325 (1996). Certiorari was again denied. *Visciotti v. California*, 521 U.S. 1124 (1997).

Petitioner sought federal habeas Corpus relief, filing his petition on June 22, 1998. An evidentiary hearing was held in this Court on June 8-10, 1999, on guilt phase inadequate assistance of counsel and counsel's conflict of interest. Following the hearing, this Court issued an order on October 8, 1999, denying relief on the guilt phase claims and a second order and judgment on October 19, 1999, on the penalty phase claims granting Petitioner relief from his sentence of death because of inadequate assistance of counsel. Other claims in the peition relating to Petitioner's request for penalty-phase relief were denied as moot.

Both parties appealed the decisions of this Court, which were affirmed by the Court of Appeals. *Visciotti v. Woodford*, 288 F.3d 1097 (2002). Again, both parties sought certiorari. The Supreme Court affirmed the order denying relief on the guilt phase claims. *Visciotti v. Woodford*, 537 U.S. 1004 (2002). However, in a separate opinion, it reversed the grant of penalty phase relief, adopting the California Supreme Court's ruling that any inadequate assistance of counsel at the

penalty phase was not prejudicial to Petitioner. It held the state court's ruling was not "objectively unreasonable," noting that the state court's "lengthy and careful opinion" had considered the totality of the mitigating evidence and that the court reasonably found the aggravating evidence "overwhelming." *Woodford v. Visciotti*, 537 U.S. 19, 25-26 (2002) (per curiam).

On remand to consider the mooted claims, Visciotti filed a Second Amended Petition on October 7, 2005. This Court set a second evidentiary hearing but the Ninth Circuit vacated the order for an evidentiary hearing by order dated April 21, 2009, ruling that holding an evidentiary hearing would be an abuse of discretion as there were no material facts in dispute. Following that ruling, this Court dismissed the Second Amended Petition as a second or successive petition under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). Accordingly, this Court ordered final briefing on the remaining claims from the First Amended Petition, and now issues this order.

2. Effect of *Pinholster v. Cullen*

Having been initiated after the 1986 effective date, this case is covered by the terms of AEDPA. That Act codified deference to state court criminal convictions, within certain limits. It states:

> 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.

28 U.S.C. § 2254(d).

Under AEDPA, factual issues decided by the state court are presumed correct. *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005). "[A] state court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance. . . . [E]ven if '[r]easonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice...'" *Wood v. Allen*, __ U.S. __, 130 S. Ct. 841, 849 (2010) (quoting *Rice v Collins*, 546 U.S. 333, 341-42 (2006).) "Questionable" or even "incorrect" factual findings do not equate to unreasonable ones. Similarly, this Court's review of legal conclusions reached by the state courts is circumscribed.

Only when a state court decision is contrary to, or an unreasonable application of, clearly established federal law as determined by the United States Supreme Court may relief be granted. To find an "unreasonable application" of federal law, a petitioner must show the state court's decision to be "objectively unreasonable." *Woodford v. Visciotti*, 537 U.S. at 27. Again, an "unreasonable application" is different from an erroneous or incorrect one. *Visciotti*, 537 U.S. at 25. "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable--a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007).

After the close of briefing in this matter, the United States Supreme Court issued its opinion in *Pinholster v. Cullen*, __ U.S. __, 131 S.Ct. 1388 (2011). That decision restricted the ability of federal courts to receive evidence in support of habeas petitions. *Pinholster* requires that federal courts only grant habeas relief under §2254(d) when the evidence presented to the state courts, and only that evidence, justifies relief. As noted above, this Court had scheduled an evidentiary

hearing in this matter but was instructed by the Ninth Circuit that doing so would constitute an abuse of discretion. Accordingly, no further evidence was taken. Since the Court has decided that the evidence presented does not justify relief, the parties were not asked to rebrief this matter in light of the *Pinholster* standard. To whatever degree additional evidence improperly taken at the evidentiary hearing may have contaminated the consideration of the remaining claims, there has been no prejudice to the state's position and no change in result. The Court is mindful of the greater line of authority, preceding and culminating in *Pinholster*, implementing AEDPA and requiring deference to state court determinations.

3. Claims at Issue

I. Claim 1.C: Penalty Phase Inadequate Assistance of Counsel

This claim was to be developed at the second evidentiary hearing. In vacating the hearing, the Ninth Circuit advised this Court that all of Petitioner's allegations of counsel's derelict representation were "assumed to be true in Visciotti's favor" by the California Supreme Court. (April 29, 2009, Memorandum at pg. 4.) The issue was framed by the Circuit as a strictly legal question: was counsel ineffective at the guilt phase for failing to prevent the introduction of evidence that in the past Petitioner had stabbed a pregnant woman? The Circuit noted that the evidence was barred at the penalty phase because the prosecution did not give timely notice that it would be used in aggravation. Consideration of this claim then falls to strictly legal principles.

First, the Court must determine whether a competent lawyer would have acted in the guilt phase to exclude the testimony. The evidence entered as part of a presentation by Petitioner's counsel Roger Agajanian ("Agajanian") of Petitioner's prior offenses. Petitioner testified to a number of misdeeds, ranging from truancy to drug sales. His only felony at that time was an assault with a deadly weapon charge. According to Petitioner, William Scofield ("Scofield") and another man

attacked a group of Petitioner's friends with knives, and Petitioner wrested a knife away from an attacker and turned it on him. Following that presentation, the Court allowed the prosecution an opportunity to cross-examine.

On cross-examination, Petitioner was asked if he had stabbed a woman in the same fracas during which he stabbed Scofield. Petitioner denied doing so or even seeing a woman present. Reporter's Transcript ("RT") 2552-53, 2559, 2563-64. In response, the prosecution detailed the fact that Petitioner had also stabbed Kathy Cusack ("Cusack"), who was then four months pregnant, in the belly and arm. Further, the prosecution put on testimony by a police office which detailed the stabbing and also, over Agajanian's objection, showed pictures of her injuries.

This Court has previously stated that Agajanian was unprepared for cross-examination on Petitioner's prior offenses and that he left his client in a similarly unprepared position. Petitioner's testimony was unnecessary and revealed to be untruthful, which negatively impacted his credibility.

At the trial, the court first ruled that it would allow Cusack to testify in the penalty phase as her stabbing represented an unadjudicated offense. The next day, the court reversed itself and excluded the testimony because the prosecution had failed to give proper notice that it intended to introduce the evidence in aggravation. After Petitioner put on evidence from family and friends representing that Petitioner was of nonviolent character, the prosecution took a new tack and sought to introduce the stabbing as rebuttal evidence, which did not have a notice requirement. The court then allowed the testimony, noting that "[t]he people are entitled as a matter of law to rebut that by competent evidence. Specific acts of violence [in] rebuttal are relevant and are appropriate to rebut an opinion that the

defendant is in fact a non-violent person" RT 3179[1]. Agajanian had argued that allowing the testimony would essentially re-open the prosecution's aggravation presentation, but the court rejected his argument. The evidence was, as has been noted, harmful to Petitioner's interest.

Petitioner's argument, as framed by the Ninth Circuit[2], is that counsel's error during the guilt phase in opening the door for evidence concerning Cusack's stabbing at the guilt phase constitutes penalty phase inadequate assistance of counsel because otherwise the evidence would not have been taken in the penalty phase. However, elsewhere in his brief Petitioner argues that "counsel's ineffective examinations of mitigation witnesses opened the door to its admission." Petitioner's Opening Brief, pg. 7, lns. 21-22. The Court finds the latter a more persuasive argument, as nothing in the trial transcript nor argued in the briefing suggests that the presentation of the Cusack stabbing in the guilt phase led to its introduction in the penalty phase. The trial court's second ruling, excluding the evidence, was made after its presentation in the guilt phase. The introduction of the evidence at the guilt phase did not operate to 'waive' the notice requirement for evidence used in aggravation. To the extent that Petitioner argues that counsel's deficient performance at the guilt phase affected his penalty verdict, the claim is denied.

Again, this Court has previously found counsel's preparation for and performance at the penalty phase to be riven with inadequacies. The presentation

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[1] The Reporter's Transcript reads "specific acts of violence and rebuttal are relevant." That most likely is transcription error, but it does not change the meaning of the passage.

[2] "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 at the guilt phase, the evidence that Visciotti 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." April 29, 2009, Memorandum at pg. 4.

at the penalty phase was awkward at best. Counsel told the trial court that he would try to gain sympathy for Petitioner's family, but his presentation was of "the other side of John Visciotti" R.T. 3114, attempting to draw observations of Petitioner's good features from family members. This Court has discounted counsel's assertions that his poor preparation for his mitigation presentation had a strategic basis, and found that the prosecution did a better job of engendering sympathy for Petitioner's family. Still, however poorly executed it was, the choice to pursue a family sympathy strategy in mitigation even with weak facts does not constitute inadequate assistance of counsel.

Petitioner might argue that competent counsel would not have presented any evidence in mitigation, and in that event no further evidence of the Cusack stabbing would have been presented. Much in Petitioner's briefing suggests that line of argument, as he frequently characterizes the Cusack stabbing evidence as "devastating," often referencing the opinion by United States Supreme Court. Petitioner's Opening Brief at 10, 13, 15 (fn), 23, 25 (twice), 26, 34, 35, 104, and 158. For example, he states that "the United States Supreme Court described the Cusack evidence as devastating, *Woodford v. Visciotti*, 537 U.S. at 26." Petitioner's Opening Brief at 15, fn. 1. If the Cusack stabbing evidence was correctly described as 'devastating' to the fairness of the trial of Petitioner's penalty phase, the Court might be persuaded that Agajanian's decision to present a case in mitigation was both wrong and prejudicial.

However, there was much more to the jury's penalty decision than the unadjudicated Cusack stabbing. The United States Supreme Court noted, and this Court agrees, that:

> In the state court's judgment, the circumstances of the crime (a cold-blooded execution-style killing of one victim and attempted execution-style killing of another, both during the course of a

> preplanned armed robbery) coupled with the aggravating evidence of prior offenses (the knifing of one man, and the stabbing of a pregnant woman as she lay in bed trying to protect her unborn baby) was devastating.

Woodford v. Visciotti, 537 U.S. at 26. This Court cannot say that 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, *People v. Visciotti*, 2 Cal.4th 1, 33 (1992), is such scant justification for the imposition of a death sentence as to indicate either an unreasonable application of the law or an unreasonable determination of the facts.[3] At the very least, such a decision is not "objectively unreasonable" so as to require the intervention of this Court. *Woodford v. Visciotti*, 537 U.S. at 27. Relief is **denied** on Claim 1.C of the petition.

II. Claim 1.D: Inadequate Assistance of Counsel: Other Failures

This Court denied this subclaim as to the counsel's performance at the guilt phase of this case and held moot all aspects relating to the penalty phase. Petitioner now seeks relief for counsel's errors at voir dire, failure to object to testimony, and deficient closing argument. He argues that the fact the Court found counsel's performance deficient elsewhere at trial, even though lacking sufficient

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[3] Because it is not necessary to do so, this Court has not addressed Respondent's contention that this claim may not be granted because all aspects of the guilt phase of this case were resolved by this Court's previous orders and the lack of contrary decisions by the higher courts. Petitioner's description at pp. 29-33 of his opening brief of other mitigating evidence that could have been presented does, however, exceed the scope of this remand. Similarly, the resolution of this claim has not implicated any issues that may be impacted by the decision in *Wiggins v. Smith*, 539 U.S. 510 (2003), referenced by the Ninth Circuit in its mandamus Memorandum. Petitioner states that the California Supreme Court made a factual error, as in *Wiggins*, by assuming "that the Cusack evidence was before the jury exclusive of counsel's ineffective assistance regarding its ultimate presentation to the jury." Petitioner's Opening Brief at 24. As noted above, the assertion that counsel's guilt phase performance led to the evidence's introduction in the penalty phase is incorrect. In any event, the Court does 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. *Wiggins*, 539 U.S. at 536.

prejudice to support overturning the verdict, should be a supporting factor in finding dereliction here.

Petitioner cites the individual questioning of jurors (the "*Hovey* voir dire," from *Hovey. Superior Court*, 28 Cal. 3d 1, 80-81 (1980)) as an element of this claim, suggesting that counsel's performance was so inadequate as to render him complicit in prejudicing the jury against Petitioner. He cites a specific line of questioning where "counsel informed prospective juror Joanne Herbal that, if the 'scales' are '51 percent in favor of aggravation,' 'you're going to kill him, right?' " Petitioner's Opening Brief at 37. Petitioner states that counsel was educating the jurors to conduct a mechanical weighing process that would bring "an automatic death sentence." Petitioner's Opening Brief at 38. Petitioner reads the transcript too literally and places an unlikely purpose into counsel's questioning.

'*Hovey* voir dire' was a process in capital cases by which jurors could be examined more closely for attitudes and prejudices, as it was conducted individually and out of the presence of other jurors. The process was time-consuming, and for that reason was sometimes limited in scope by the trial judge. See *People v. Tuilaepa*, 4 Cal. 4th 569, 586-587 (1992). The intent of *Hovey* voir dire was to diminish the danger of bias toward the imposition of the death penalty that might occur from having the jurors repeatedly exposed to death-qualifying voir dire. *Hovey*, 28 Ca. 3rd at 80. By statutory change, Hovey voir dire is no longer required. *Covarrubias v. Superior Court* , 60 Cal.App.4th 1168 (1998).

Voir dire is not jury instruction, and counsel are allowed latitude to ask questions that would draw a prospective juror into admitting bias or prejudice. In the cited example, the questioning of Prospective Juror Herbel was begun by the trial judge, who asked a series of minimally interactive questions before turning the questioning over to Petitioner's counsel to "draw you out a little bit and see if you have some attitudes you hadn't even thought you had." RT 1276, lns. 3-5. In the

course of questioning, counsel arrived at the "51 percent" formulation Petitioner cites as being prejudicial. The prospective juror balked at that, stating that "Forty-nine to fifty-one percent, it's almost 50-50, too close to 50-50," and, after follow-up by counsel, stated "If it was ten percent to ninety percent, maybe." RT 1280, lns. 17-20. Counsel was clearly posing a searching hypothetical to discover the juror's views, and not, as Petitioner argues, incompetently miseducating the jury. Likewise, other 'errors' of law posited by Petitioner, such as the death-eligibility of a getaway car driver, or of the banker who made the loan used to buy the getaway car, RT 1266-1267, were rhetorical flourishes and not evidence of incompetence.

Petitioner also asserts that counsel failed to object to improperly suggestive questions by the prosecutor and failed to object to implications by the judge that jurors could be more candid in their answers because the defendant was not present at the voir dire. Petitioner's absence itself is argued to be prejudicial, as implying that Petitioner was "callously disinterested in the proceedings." Petitioner's Opening Brief at 39. Further, when the sitting jurors were chosen from lists submitted by the defense and prosecution "trial counsel never did anything to assure that the selection was not rigged" and "[n]o objection was made to the fact that the judge selected more jurors from the prosecution's list (5) than the defense list (4).[4]" Ibid. Petitioner states that he was thus deprived of a fair jury.

The Court finds no unfairness to petitioner from his counsel's cited errors at jury selection. The proffered errors during the *Hovey* voir dire were only leading questions, and counsel's inactions regarding the selection of the jury from the lists was not inappropriate. Petitioner's assertion that the prosecution's suggestive questioning biased the jury is overstated. While the California Supreme Court did state that voir dire questioning should not be used to educate or compel jurors, it

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[4] According to the California Supreme Court, "four were taken from the prosecution list, three from the defense list, and five were on neither list." *Visciotti,* 2 Cal 4th at 40.

found, despite the lack of counsel's objection, that the questions were "not unfair" and represented "an attempt to retain reluctant jurors, a purpose to which defendant can have no legitimate objection." *Visciotti*, 2 Cal. 4th at 48, fn. 18. The Court does not find that conclusion unreasonable. Relief is not merited for the cited errors in the voir dire and jury selection process.

Without discussion, Petitioner argues that counsel failed to object "adequately" to testimony by Cusack and Scofield and made a "half-hearted" effort to obtain a continuance. Such perfunctory complaints about the quality of representation do not meet the *Strickland* standards, *Strickland v. Washington*, 466 U.S. 668 (1984). Petitioner's claim that counsel was derelict in failing to object to improper closing argument by the prosecution is subsumed by Claim 14. Finally, Petitioner's claims that counsel's dismal performance at closing argument and passivity in response to the jury's note merit reversal founder in light of the lack of prejudice caused to him when measured against the severity of the circumstances of the crime and Petitioner's other bad acts. Relief is **denied** on Claim 1-D.

III. Claims 3 and 14-B: Penalty Phase Prosecutorial Misconduct

Petitioner combines his argument on two penalty phase claims in one section. He argues that the prosecutor made a generally "knowingly false" and "misleading" argument to the jury in Claim 3 and argues that the cross-examination of two mitigation witnesses was improper in Claim 14-B. Petitioner argues that this Court should reverse the penalty verdict so "that justice will be done." *United States v. Bagley*, 473 U.S. 667, 676 (1985) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935). Respondent counters that this Court should only grant relief if it finds that "the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright,* 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)). Examination of the specific acts by the

prosecutor complained of by Petitioner is necessary to determine if relief is warranted.

In cross-examination, Petitioner's girlfriend was asked if she was "gonna wait for him" until he got out of jail. RT 3170. Counsel's objection on relevance was sustained. Petitioner argues now that the question was designed to raise "fear and anger" that he would one day be released. Petitioner's Opening Brief at 43. Later, Petitioner's father was cross-examined about how Petitioner had escaped from juvenile facilities. The prosecutor asked, "At some time after one of his escapes – maybe he escaped more than three times. Well, let me ask you, do you know how many times he escaped?" RT at 3223. Petitioner's father did not know. This is argued to be misconduct because Petitioner believes it encourages the jury to speculate that Petitioner will escape if given a life sentence and because it implies that the prosecutor is aware of more escape attempts than were in the record. Petitioner's Opening Brief at 44-45. The Court does not find these acts to be examples of serious misconduct.

The Court does not know exactly what the prosecution was fishing for in its questioning of Petitioner's girlfriend. The slapdash formulation– "you gonna wait"– does not indicate that it was a carefully prepared line of inquiry. In preceding questioning he had established that she had testified directly that Petitioner was a loving, caring, gentle, and considerate person. RT 3151. However, he got her to agree that roughly three weeks before the crime she had "dumped" him because he wouldn't straighten up and get a job. RT 3169. After the objection was sustained to the question of whether she would wait for Petitioner, he asked her directly if she still loved Petitioner. She said she did, and, after one more unsuccessful attempt to get her to say that he was a violent person, the prosecution had no further questions. RT 3171. There is no groundwork lain in the questioning that leads to any improper crescendo. The Court does not see that

the question about whether Petitioner's girlfriend of eighteen months would wait for him to be released was intended to raise fear and anger that Petitioner would one day walk the streets. Such an interpretation is a non-sequitur in the line of questioning. In any event, the question was stricken for relevance and that line of inquiry was abandoned. The Court is unsure whether the question was innocent or an ordinary, minor trial error, but finds it insignificant. Misconduct that does not deprive the defendant of due process is trial error but not a Constitutional violation requiring reversal of a criminal conviction. *Smith v. Phillips*, 455 U.S. 209, 219 (1982).

Similarly, the questioning of Petitioner's father about escapes from juvenile facilities does not constitute professional misconduct. It had been established in direct mitigation testimony that Petitioner had thrice walked away from low-security facilities, and Petitioner's father stated on cross-examination that he had warned petitioner that he would be placed in a more secure facility than the Joplin Youth camp if he kept walking away. The prosecutor then asked:

> Q. After he escaped the third time, that's exactly what happened; isn't it?
> A. The third time he escaped they got him back and put him up there again.
> Q. At some time after one of his escapes– maybe he escaped more than three times. Well, let me ask you, do you know how many times he escaped?
> A. No.
> Q. Well, at some point he was put in a more secure facility; wasn't he?
> A. Yes.

RT at 3223. The Court finds that the prosecutor's questioning arose out of confusion between what the prosecutor knew and what the witness gave as testimony. The witness incorrectly said that Petitioner was returned to Joplin after the third escape, but in fact that escape triggered his transfer to the California Youth Authority system. The prosecutor did not correct the witness, perhaps because he was unsure of who was wrong, but quickly moved on to establish that

Petitioner ignored his father's warning and was punished within the system for repeatedly walking away from the youth camp. Petitioner's view that the prosecutor's questions were designed to signal that he had secret knowledge of more escape attempts is highly unlikely. Similarly, it is unlikely that the prosecutor seized upon this confusion to suggest that Petitioner was likely to escape from life imprisonment because he had walked away from a low security boys' camp. The Court finds no misconduct.

Petitioner also claims misconduct that the prosecutor interjected himself into his closing argument, noting that he had prosecutorial experience and that it was common to have testimony from unsavory characters in criminal trials. RT 3305-3306. While it is improper for lawyers to personally vouch for evidence they present, nothing of the kind has occurred here. Indeed, Petitioner has presented these acts without discussion of them or their import. Petitioner's Opening Brief at 45. As presented, the Court finds no misconduct.

Similarly, the Court does not find misconduct in the prosecutor's penalty-phase closing argument. Petitioner argues that the prosecutor knew that Petitioner had a less-than-ideal childhood. There was documentation in Petitioner's California Youth Authority case summaries and his probation evaluation that reported a chaotic and violent home life. Petitioner states that it was misconduct for the prosecution to state in closing argument that Petitioner was a "bad seed" who came from a "nice family." RT 3290. Instead, the prosecutor had "a duty to fairness and truth." He argues that the prosecutor should have recognized that Petitioner was physically abused as a child and that his "violent home environment strongly contributed" to his bad behavior. Petitioner's Opening Brief at 47. Stopping short of urging this Court to prohibit the prosecution from taking advantage of the opportunity presented by Agajanian's choice of mitigation narratives or requiring him to actively assist the defense case, Petitioner

nonetheless states that the prosecution committed misconduct that deprived him of a fair trial. Petitioner's Opening Brief at 48. The Court does not agree.

The prosecution did not misrepresent objective facts or in any way subvert Petitioner's mitigation presentation. Petitioner has cited parts of some reports that opine that Petitioner's family was dysfunctional. One reported that the family was "in outer appearances a tightly knit Italian family" but was on the verge of "falling apart." Another reported that there was "much arguing and harsh criticism" and that "[t]he mother tends to be somewhat over-protective and the father is rather rejecting." There are allegations of beatings, "punitive discipline and negative recognition" seeded among the reports, but the most severe assessment by Petitioner of his homelife is that he "disliked immensely the home being in a constant state of turmoil." Petitioner's Opening Brief at 46. Petitioner argues that these opinions constitute an indisputable factual showing of which the prosecution should have been aware and, because of that awareness, had a duty to do some act short of assisting the defense or forgoing an opportunity to take advantage its mitigation presentation. Petitioner's novel argument is difficult to implement and is unsupported by precedent. Further, as noted by the United States Supreme Court, the overwhelming nature of the crime and Petitioner's other bad acts suffices to make a showing of prejudice impossible. Claims 3 and 14-B are **denied**.

IV. Claim 4: Sentencing Guidelines

The California sentencing statute, Penal Code §190.3, contains a list of enumerated sentencing factors but does not designate whether sentencing factors are mitigating or aggravating. In addition, Petitioner argues that the sentencing factors are vague and unclear. Petitioner's Opening Brief at 49. Specifically, the statute cites the "circumstances of the crime," "criminal activity," "age," "moral justification," and "extreme duress." The California Supreme Court denied

Visciotti's claims on the merits. *People v. Visciotti*, 2 Cal. 4th at 73-75 (rejecting claim of vagueness of the terms "extreme duress," and "moral justification"), and 76-77 (rejecting claim that age factor is vague and should be delineated as a mitigating factor and not an aggravating factor).

California's death penalty law has been repeatedly upheld by the United States Supreme Court and the Ninth Circuit as constitutional. See, e.g., *Williams v. Calderon*, 52 F.3d 1465. The California Supreme Court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; nor did it result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in state court. The Court **denies** relief on Claim 4.

V. Claim 12: Restriction of Access to Jury Selection

The press and public were barred from the death qualification portion of the jury voir dire ("the *Hovey* voir dire"). Petitioner argues that under *Press-Enterprise v. Superior Court*, 464 U.S. 501 (1984), the press and public have a right to attend the jury selection process in criminal trials. To close the proceedings, the trial court must find that "closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise*, 464 U.S. at 510. The trial court's failure to make such findings constitutes structural error, requiring reversal without the need to show prejudice. Petitioner's Opening Brief at 53.

Respondent notes that the *Hovey* procedure was instituted for the benefit of capital case defendants to meet concerns "over the potentially prejudicial effect of an open voir dire on jurors' views and willingness to reveal their views about capital punishment." *People v. Visciotti*, 2 Cal. 4th at 50-51, citing *Hovey v. Superior Court*, 28 Cal. 3d at 80 (1980) ("As we observed in *People v. Thompson*, supra, 50 Cal.3d 134, 156-157, there was active litigation of the question of the

right of the press to attend jury voir dire in 1983 when this trial occurred, and because the sequestered voir dire is for the benefit of the defendant 'it is doubtful that any competent defense counsel would have objected to it.' ").

Petitioner argues that the trial court did not give trial counsel "any real opportunity to object," Petitioner's Opening Brief at 52, because the closure of the death qualification voir dire was announced in front of the venire. However, the California Supreme Court made the factual finding that "[t]he record is also devoid of any support for [Petitioner's] claim that trial counsel had no opportunity to object to the sequestered voir dire." *People v. Visciotti*, 2 Cal. 4th at 50. Respondent notes there was ample opportunity to object outside the jury's presence between June 23, 1983, when the trial court referred to sequestered voir dire and the next court appearance on July 5,1983.

The Supreme Court has clarified that the Sixth Amendment right to a public trial extends to voir dire of prospective jurors. That rule was not firmly established at the time the state court ruled on this claim. *Presley v. Georgia*, __ U.S. __, 130 S. Ct. 721, 724 (2010) (per curiam). There, the defendant objected to the closing of the court room during jury selection. The court did so because it felt there wasn't enough room to comfortably seat prospective jurors and the public and because the judge did not wish to have jurors "intermingle" with the public. *Presley*, 130 U.S. at 722. Here, the closing of the courtroom was done to protect the defendant by allowing jurors privacy so they might speak freely. Still, closure of the courtroom against the wishes of the defendant or the public requires the judge to set out an overriding interest to be served, narrow the closure to the need served, consider reasonable alternatives, and make findings adequate to support the closure. *Waller v. Georgia*, 467 U.S. 39, 48 (1984). The California Supreme Court had made findings based on evidence presented before that court that partial closure of voir dire in capital cases was necessary to preserving the higher value of

protecting the accused's right to an impartial jury. *Hovey v. Superior Court*, 28 Cal. 3d at 80. Respondent notes that transcripts of the voir dire were made available to the public afterwards.

Significantly, Petitioner never objected to the closing of the voir dire. By its terms, *Presley*'s holding is limited to an "accused who invoked his right to a public trial." 130 U.S. at 723. However, under recent Ninth Circuit precedent, it is possible that an objection may not be necessary. Discussing a claim of inadequate assistance of appellate counsel for failure to raise a claim against trial counsel, the Circuit noted that trial counsel's failure to object to the closure of voir dire did not necessarily defeat the claim against appellate counsel. *United States v. Withers*, 638 F.3d 1055 (2011). The claim could still be addressed under "plain error" review, with the Circuit noting the possibility under *Puckett v. United States*, — U.S. —, 129 S.Ct. 1423, 1432 (2009) "that structural errors may automatically satisfy the plain error requirement that the error affect substantial rights." *Withers*, 638 F.3d at 1065, fn. 4. Given the posture of *Withers*, it is not clear whether the Circuit is saying that the substantive claim survives failure to object or whether only the derivative inadequate assistance of counsel and appellate counsel claims survive.

Here, however, there was an accepted practice in California courts of closing the *Hovey* voir dire to the public that was broadly accepted and desired by the defense bar. That practice arose from findings of an overriding necessity by the California Supreme Court, and resulted in closures that were narrowly applied and unrivaled in efficacy by any alternatives. During the time period it was employed, the *Hovey* voir dire was in anticipatory compliance with the *Waller* standards. On that basis, and in light of the fact that there was no objection to the closure, this Court does not find structural error. The state court's ruling denying this claim was neither contrary to, nor an objectively unreasonable application of federal law

that was firmly established at the time, and the ruling was not an objectively unreasonable determination of the facts in light of the state court record. Claim 12 is **denied**.

VI. Claim 16: Prosecutorial Misconduct on Voir Dire

Petitioner claims here that the prosecutor used the voir dire proceeding to argue the case and instill bias by posing case-specific hypothetical questions to the prospective jurors. Specifically, Petitioner calls the questioning of prospective juror John Norton and Jurors Heidi Raban and Edwin Dekal an "abuse" of the voir dire process.

Questioning Mr. Norton, the prosecutor asked him if he would vote for the death penalty if it was established beyond a reasonable doubt that a thief had taken a man to a "desolate part of the country" and shot him through the heart after robbing him, thinking he would get away with it. Similarly, Ms. Raban and Mr. Dekal were asked if they could vote for the death penalty for a similar thief who killed his victim in order to eliminate him as a witness. Petitioner states that eight of the 12 jurors were asked similar questions, as were both alternates, and 25 other members of the panel. Petitioner states that this amounted to step-by-step education as to the prosecution's theory of the case. Petitioner's Opening Brief at 56.

Petitioner argues that it was reversal misconduct to present those thinly-veiled hypotheticals to the jury panels, citing *Witherspoon v. Illinois*, 391 U.S. 510, 520 (1968) for the proposition that doing so creates a jury "uncommonly willing to sentence a man to death." Petitioner's Opening Brief at 58, fn24. However, *Witherspoon* did not involve weighted hypotheticals, but instead the prosecution's sweeping "from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle" through challenges

for cause, thus creating a "hanging jury." *Witherspoon*, 391 U.S. at 520, 523. Petitioner later quotes the Supreme Court as noting that "[t]he most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of proceedings." *Witherspoon*, 391 U.S. at 522, fn. 21. Respondent argues that this is what the prosecutor was attempting to do.

The Court does not see that it was necessary for the prosecution to posit facts so close to the actual facts of the crime in order to ascertain whether any potential juror had a disqualifying unwillingness to apply the death penalty. Petitioner has not cited any case law mandating reversal of a verdict for posing such questions to jurors. Most appositely, Petitioner has cited *United States v. Toomey*, 764 F.2d 678, 683 (9th Cir. 1985), which stated that "a defendant is not necessarily entitled to test jurors on their capacity to accept his theory of the case." Petitioner's Opening Brief at 59. However, that case involved a court's denial of a request to ask certain questions in supplemental voir dire and did not sanction counsel for posing improper questions.

The California Supreme Court found this claim was forfeited for failure to object, *Visciotti*, 2 Cal. 4th at 46-48, but noted that "the scope of the inquiry permitted during voir dire is committed to the discretion of the court." Counsel should not be allowed to pre-try their cases in order to obtain amenable jurors, but that does not mean that all of the circumstances of the case to be tried are off-limits. As the California Supreme Court noted in *People v. Williams*, 29 Cal.3d 392, 408, (1981, superseded by statutory change) "[o]n the other hand, a question fairly phrased and legitimately directed at obtaining knowledge for the intelligent

exercise of peremptory challenges may not be excluded merely because of its additional tendency to indoctrinate or educate the jury." That court has taken the position that it is within the discretion of the trial court to set the boundaries between what is and is not appropriate in jury questioning. See, e.g. *People v. Mendoza*, 24 Cal. 4th 130, 168 (2000). Here, the prosecution presented something more than a bare skeleton of the crime of which Petitioner was accused, but that is partly due to the circumstance that the facts of the crime were in so little dispute because there was a surviving victim to testify against the defendant. This Court cannot say that the trial court exceeded the bounds of its discretion by allowing the questioning, and **denies** relief on Claim 16.

VII: Claim 17: Exclusion of Potential Juror Dale Rokes

Mr. Rokes expressed doubt that he could impose the death penalty. He was asked by the judge, "Do you think there's any possibility by any stretch of the imagination, that you might impose a death penalty for a very horrible crime, for a mass murderer?" He responded, "I don't think I could, no." The court then presented a hypothetical question involving "a guy by the name of Hitler" and asked whether, if Rokes was on Hitler's jury, he would "impose" the death penalty. Mr. Rokes responded, "No, I couldn't do it." RT 459 Asked by the prosecutor if he would vote 'not guilty' even if he believed him guilty so that he could avoid having to vote on death, Mr. Rokes stated "No, I think I'd vote – if he is guilty – if he's guilty, I would definitely vote for – say he was guilty, but as for the second part of the trial, I don't think I could impose the death penalty." RT 461. He then agreed that he could not think of an "activity" so offensive as to make him vote for the death penalty. RT 462.

The judge made one last attempt to save Mr. Rokes, asking him if he would hold out against eleven other jurors voting for the death penalty because under no

circumstances would he impose the death penalty. Rokes responded, "If I was forced to sit on the case, I would do the best I could." After Mr. Rokes was excused to the hallway, Petitioner's counsel opposed the challenge for cause, interpreting Mr. Rokes to mean that "if push came to shove and he were pushed up against the wall, he would do his duty and impose the death sentence" and that he should not be automatically disqualified for "reluctance." RT 465 Nevertheless, Mr. Rokes was excused for cause.

Petitioner argues that the exclusion was wrongful and denied him his right to a fair and reliable penalty verdict. Citing *Witherspoon*, he states that jurors may not be excused for cause from capital cases for expressing hesitation or conscientious objections to the death penalty unless their questioning established that they would vote against death no matter what the evidence showed. 391 U.S. at 522, fn. 21. Petitioner notes that Mr. Rokes stated he had "been thinking about" the question and didn't "have a yes or no answer," RT 458, and that he "didn't disagree with the law." RT 460. However, as noted above, after those initial expressions of uncertainty, further questioning established that he was resolved against the death penalty.

> Q. (Prosecutor) If during the course of the trial where the death penalty was a possibility, the defendant got up on the stand and he said I did it, I committed this horrible murder, and he looked over at the jury box and he said, Mr. Rokes, and all you other jurors, I did it and I'm a viscious [sic] person; you better put me to death because if you don't I'm going to get out and come to your neighborhood and kill you or you family members.
> A. No, I can't.
> Q. You still couldn't do it?
> A. No.
> ....
> Q. (by the Court) The court has a responsibility before I excuse a juror to determine if it's under the law unmistakably clear that under no circumstances they would ever vote for the death penalty. That's the position you've taken?
> A. Yes.

RT 462-463. Against this, Petitioner proposes that the Court find Mr. Rokes qualified to serve because he stammered out a denial that he would falsely withhold a vote on guilt in order to avoid having to vote on the death penalty and because he stated he would do "the best he could" if it came to a situation where he was the last holdout against the death penalty.

The California Supreme Court denied the claim on the merits. *Visciotti*, 2 Cal. 4th at 44-46. As noted by Respondent, the United States Supreme Court "does not require that a juror's bias be proved with 'unmistakable clarity.'... What common sense should have realized experience has proved: any veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear;' these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings." *Wainwright v. Witt*, 469 U.S. 412, 424-25 (1985). Common sense compels the conclusion that Mr. Rokes was properly challenged for cause. Relief is **denied** on Claim 17.

VIII. Claim 19:[5] Excusal of "Uncomfortable" Jurors

Petitioner argues that the jury selection process was tainted because the trial judge essentially allowed jurors to remove themselves from the jury pool if they felt uncomfortable with the idea of sitting on a capital trial. Petitioner argues that this eliminated jurors who felt "distaste" for capital proceedings and left him with a jury that was "tilted in favor of capital punishment." Petitioner's Opening Brief at 71. He cites four jurors who were removed in this manner. Two, Arlene German

[5] Respondent noted in his Opposition that Petitioner has not briefed Claim 18 of the First Amended Petition, which was denied as moot. Petitioner did not raise that claim in his Reply brief. In this Order, the Court has resolved all briefed claims that were denied as moot, even where they touched upon aspects of the guilt phase, which has been resolved. However, the Court will not sua sponte address claims that are not being prosecuted. The Court thus **denies** Claims 18 and 30 as abandoned.

and Ruth Gillespie, were in fact taken out by peremptory challenges by the prosecution. Joanne Herbel[6] and Mary Sheehan were excused after they had expressed discomfort.

Ms. Sheehan was dismissed by stipulation of both counsel. She was not dismissed after expressing displeasure at having to serve, however. In the course of her voir dire, she stated that her friend's son had been "involved with drugs and committed a murder." RT 2047. Asked earlier by the court if she had any conscientious opposition to the death penalty, she stated "if they go in with the intent of killing somebody, that they should expect to pay the punishment." RT 646. Later questioned by Petitioner's counsel, she stated that "if he went in there with the idea that I'm going to rob this person, if he comes in with I'm going to kill him, then, yes, I'm going to vote for the death penalty." RT 654. She also stated that she "would rather be dead than to be locked up." RT 655. Pressed by defense counsel, she said that "if there's definite proof that that person or persons did that, I don't feel that we should have trials for that." RT 658. Ms. Sheehan was questioned fairly extensively.

Ms. Sheehan underwent two sessions of voir dire, RT 645-661, 2046-2053. In the first session, she did tell the judge "I don't want to serve on a murder trial, I'll be honest with you there, because I'm scared. I've never experienced it before." RT 653. Later, when asked if she was willing to serve on the jury, she said "If I was chosen, I would do it. I don't think I'm the only one that has a feeling, I guess, a feeling of responsibility of making a decision on someone else's life. That was my whole thing right there. If I had to, at least I wouldn't be the only person; there would be 11 other people along with me, but I really don't like

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[6] Petitioner's briefing refers to her as "Herkel," but the Court will use the spelling used in the Reporter's Transcript.

this." RT 2052. After that, counsel stipulated to her dismissal. Although Ms. Sheehan was reluctant, she did not refuse to serve and was not excused because the judge let her enter her own dismissal. She expressed her fear of having to vote for the death penalty to the prosecutor, RT 660, and, as noted above, gave defense counsel multiple reasons to be concerned with her thinking as to penalty. Her dismissal was not improper.

The prosecutor also stipulated to the removal of Ms. Herbel, which was granted by the judge without any response on the record by Petitioner's counsel. Herbel was also examined in detail, RT1272-1296, and described herself as "nervous." RT 1277. In the course of questioning she gave 58 one-word answers, 33 of them transcribed as "uh-huh." She stated that she thought that "almost any kind of murder" would carry the death penalty, RT 1286, and that there was "an awful lot of bad" in someone who "would do a horrible violent crime." RT 1279. Ms. Herbel, also, did not refuse to serve on the jury. She stated that she would accept the responsibility of sitting on the jury, RT 1290, and that she would follow the law. RT 1294. After that questioning, the prosecutor offered to stipulate to her dismissal. The trial judge interrupted, and stated that "the probability is one or both lawyers would excuse you" so he was releasing her at that time. Ms. Herbel then left.

Petitioner argues that this means that "anyone who hesitated at the opportunity to sit on a capital case was either excused or invited to excuse themselves." Doing so, he states, meant the trial court defaulted its duty to ensure that Petitioner was tried by an impartial jury. Petitioner's Opening Brief at 71. The Court does not agree. Petitioner has not cited any precedent that supports his reading of the facts. At most two prospective jurors were excused in this manner, and one was dismissed by stipulation after saying some things that were potentially

troubling to Petitioner's counsel. The record does not state that Petitioner's counsel agreed to the dismissal of Ms. Herbel, but he did not object, as he did to the challenge to Mr. Rokes. From the cold record, the Court has no insight into why counsel and the trial judge felt so strongly that Ms. Herbel wanted or needed to be excused, but it is clear they were all aware of that fact. In support of this claim, Petitioner has argued that the dismissals of Ms. Sheehan and Ms. Herbel has denied him his right to have his jurors selected from a representative cross-section of his community under *Taylor v. Louisiana*, 419 U.S. 522 (1975), and left him to be tried before "a tribunal organized to return a verdict of death." *Witherspoon*, 391 U.S. at 521. Petitioner overstates. Jurors who are nervous about or uncomfortable with serving on a death penalty jury are common, and not part of any suspect class. Absent some factual basis to suspect an invidious practice, and limited as it is to at most two occurrences, the Court finds no Constitutional violation in the dismissal of prospective jurors. Claim19 is **denied**.

IX. Claim 21: CALJIC 8.84.1

The jury was given the following instruction regarding sentencing:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant. After having heard all the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
> If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without possibility of parole.

CALJIC 8.84.1. Petitioner argues that the use of the word "shall" in the instruction completed a "course of indoctrination" intended to lead the jury to treat the sentencing process as mechanical or "arithmetic" process. Petitioner's Opening Brief at 73. If the jurors treated the weighing process as mandatory, Petitioner

argues, the resulting sentence would violate the fundamental principle of individualized sentencing determinations. *Woodson v. North Carolina*, 428 U.S. 280, 304-305 (1976). Further, it would allow the jury to avoid taking responsibility for determining the appropriateness of the penalty. *Caldwell v. Mississippi,* 472 U.S. 320 (1986). Petitioner argues that jurors may not pass a death sentence just because they find that the 'bad' outweighs the 'good.' To do so fails to make the constitutionally required finding that a death sentence was appropriate for Petitioner.

Petitioner's arguments have been rejected by the Supreme Court. *Boyde v. California*, 494 U.S. 370, 377 (1990), held the instruction constitutional. The Court found no merit to the petitioner's claim, noting that the "States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.' " (Quoting *Franklin v. Lynaugh*, 487 U.S. 164, 181 (1988)). The Court is not persuaded by Petitioner's argument that the weighing involves either strictly mechanical activity, abdication of responsibility for the verdict, or the ability to render a verdict that is not individually appropriate. Relief is **denied** on Claim 21.

X. Claim 22: Motion to Modify Sentence

Petitioner argues that the trial court's denial of his automatic motion to modify his sentence of death to life without possibility of parole pursuant to California Penal Code § 190.4(e) was arbitrary and erroneous, improperly considered matters in the probation report and evidence improperly admitted at trial, and failed to recognize mitigating inferences. Petitioner's Opening Brief at 85. The purpose of the motion is to ensure that the jury's findings and verdicts are not contrary to law or the evidence presented.

Petitioner objects that the trial judge read the probation report prior to ruling

on the modification motion, and in its ruling cited facts present only in the probation report. Petitioner states that the probation report contained material that was incorrect, unreliable, or inflammatory, such as statements by family members of the victims. Petitioner's Opening Brief at 87-88. Mitigating evidence was ignored, according to Petitioner. He argues the court should have considered his co-defendant's lesser sentence, his intoxication, and extenuating circumstances of the crime. In addition, the trial evidence that the judge reviewed was tainted by his own, unspecified erroneous rulings. Lastly, the judge operated under the same flawed and weighing process imposed upon the jury, preventing an appropriate and individualized penalty. Petitioner's Opening Brief at 88-89. Petitioner's contentions lack merit.

As noted above, the weighing process of CALJIC 8.84.1 is not constitutionally inform. Petitioner's unsupported allegations of evidentiary errors do not suffice to undermine confidence in the verdict against him. The mitigating evidence he proposes is insufficient to overcome the mass of the aggravating evidence.[7] The Court turns to the question of the propriety of reading the probation report before ruling upon the motion to modify the sentence.

The California Supreme Court found that the judge based his decision on the motion only the evidence that was before the jury in ruling on the motion and that he "was aware of, understood why the jury might have discounted, and did himself consider all of the potentially mitigating evidence." *Visciotti*, 2 Cal. 4th at 78. However, Petitioner asserts, and Respondent does not contravene, that the trial judge cited the fact that petitioner was "before the juvenile court some 32 times," RT 3412, lns. 24-25, had a prior conviction, RT 3413, lns. 22-23, and had

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[7] In addition, this Court has already entered a factual finding that Petitioner has not proven intoxication at the time of commission of the crime. October 8, 1999, Findings of Fact and Conclusions of Law (Claims 1.A, 1.B, 1.D).

performed unsatisfactorily on parole, RT 3413, lns. 24-25. It has not been disputed that this material comes to the court's attention only through the probation report.[8] Respondent argues that this claim does not raise a federal question because it involves only an allegation that the trial court violated state law in ruling on the modification motion, a state-law remedy. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.") Respondent's argument is persuasive. In any event, the Court finds that any error in considering these three facts did not prejudice Petitioner because of the extreme degree to which the evidence in aggravation outweighed the mitigating evidence. Claim 22 is **denied**.

XI. Claims 23 and 24: Testimony of Kathy Cusack

As discussed above, evidence related to the stabbing of Ms. Cusack was to have been barred from the trial because the prosecution did not provide timely notice that it was going to introduce that evidence in aggravation at the penalty phase. The testimony was admitted in rebuttal of Petitioner's character evidence, particularly his portrayal of himself a non-violent person. Petitioner argues that the admission of this testimony in rebuttal was in error, and that he was thereby deprived of a fair trial. In addition, the introduction of the evidence on short notice was equivalent to convicting him on secret evidence. Petitioner's Opening Brief at 94, ln. 17-24. In addition, after deciding to allow the evidence, the trial court deprived him of his constitutional rights by refusing his request for a continuance. Despite Petitioner's characterization of the effects of the ruling as impairing his constitutional rights, he is complaining of state-court evidentiary rulings.

These claims do not involve Federal law as determined by the Supreme Court of the United States. *Carey v. Musladin*, 549 U.S. 70, 74 (2006). Questions on the

[8] The Court sees no allegation or evidence that other complained-of material from the probation report contaminated the decision on the motion to modify the sentence.

admissibility of evidence are state law questions. *Estelle*, 502 U.S. at 67-68. The United States Supreme Court permits prosecution rebuttal evidence: when a defendant introduces "'good character' evidence," the state is entitled to introduce relevant "'bad' character evidence." *Dawson v. Delaware*, 503 U.S. 159, 167-168 (1992). Here, the California Supreme Court found the testimony to be "relevant and proper rebuttal to the evidence that he was a kind and considerate person." *Visciotti*, 2 Cal. 4th at 69. Further, that court held that the decision not to grant a continuance was proper because the defense had notice that the attack on Scofield, during which Cusack was stabbed, was going to be used in aggravation. Petitioner's counsel asked for the continuance so as to be able to prove "what really happened" that night, Petitioner's Opening Brief at 100, but could not name any witnesses he planned to contact. Scofield was dragged from the room he shared with Cusack, and Cusack was left behind with Petitioner, who then attacked her.[9] Petitioner could not then justify a continuance because the Cusack stabbing was part of a transaction that he was necessarily prepared to address.

Respondent points out that the evidence which Petitioner's counsel was able to uncover during his cross-examination of Cusack the next day demonstrated his knowledge of the circumstances of the attack on her. He obtained admissions that she knew Scofield had been convicted of rape and took drugs, she had been at a party with people taking drugs, and Scofield had been drinking tequila when the initial dispute began over her cat. RT 3256-59. Earlier, during cross-examination of Scofield, counsel elicited that Scofield had a prior conviction for rape, that the

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[9] The California Supreme Court described the attack as follows: Petitioner "stabbed her through the right forearm, which she had raised to protect herself, stabbed her farther up that arm, and when she fell down onto the bed, slashed her leg. He then stabbed her in the ankle. When defendant attempted to stab Cusack in the abdomen she told him she was pregnant. He nonetheless tried again to stab her in the abdomen, but she rolled over and he stabbed her in the side. He then stabbed her in the chest, slashed her shoulder, stabbed her in the area of her breast." *Visciotti*, 2 Cal. 4th at 33.

stabbing incident began with a dispute over Kathy Cusack's cat when Scofield was intoxicated on tequila, and that before the attacks, Scofield had drug dealings with one of Visciotti's accomplices in the attacks. RT 3071-76. Petitioner has not indicated that a continuance would have led to and more or more significant material.

Nothing in these claims present an unreasonable application or contravention of Federal law. Similarly, Petitioner's subordinate claims in Claim 23 that the trial court should have employed its discretion to exclude evidence of the stabbing and that admission of the Cusack stabbing here stabbing violated the terms of his state plea bargain for the assault on Scofield are both questionable propositions and ultimately immaterial under AEDPA. Petitioner is correct that the introduction of unadjudicated criminal conduct as an aggravating factor implicates his constitutional rights, but there is no clearly established federal law on that point. *People v. Cruz*, 44 Cal. 4th 636,(2008), cert. den., 129 S. Ct. 1531, 173 L. Ed. 2d 661 (2009) (A jury may consider unadjudicated offenses, as aggravating circumstance at penalty phase of capital murder trial, without violating defendant's rights to trial, confrontation, an impartial and unanimous jury, due process, or a reliable penalty determination.)

Similarly, Petitioner's reliance on *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964), to support his argument that he had a Constitutional right to a continuance is misplaced precisely because, just as in *Ungar*, Petitioner here has not explained why the investigation he seeks to do was or could not already been done "nor did he name the witnesses he would call nor did he give the substance of their testimony. *Ungar*, 376 U.S. at 591. In denying relief to the defendant, the Supreme Court noted that deference is due a trial court's decisions on continuances and "the fact that something is arguable does not make it unconstitutional." Ibid. Relief on Claims 22 and 23 is **denied**.

XII. Claim 25: Admission of Scofield Testimony

Five years before the trial, Petitioner pled guilty to charges from the Scofield assault. Details of that crime were introduced at the penalty phase, which Petitioner argues 'relitigated' that crime and introduced "[p]otential crimes of breaking and entering, conspiracy and even attempted murder." Petitioner's Opening Brief at 105. Petitioner argues that his due process rights were violated by the introduction of this evidence.

In discussing this claim, Petitioner frames it as involving "relitigation," whereas in Claim 23 he made a similar complaint about introducing the events of the Cusack stabbing as involving unadjudicated criminal conduct. Here he argues that testimony about how the stabbing took place elevated the crime to include new criminal acts such as conspiracy, breaking and entering, and attempted murder, to which he did not plead and of which he was not convicted. Again, however, there is no showing that the denial of claim was either contrary to, or an objectively unreasonable application of federal law as determined by the United States Supreme Court and or an objectively unreasonable determination of the facts in light of the state court record. Accordingly, the Court denies relief on Claim 25.

XIII. Claim 26: Definition of Statutory Factors

Toward the end of the second day of deliberation, the jurors sent a note asking for "a more explicit legal definition" of the terms "extreme duress" and "moral justification." The jury sought those definitions presumably because of their usage in two sentencing factors in Penal Code §190.3:

> (f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
> (g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

The trial Court responded by note, stating that "The definition of the terms of which you inquire are self evident. These are not especially technical terms under

the law and you are to construe these phrases in their common meaning. In other words, they mean what they say." The jury returned their verdict the next morning.

Petitioner argues that the judge's response was improper and did not counsel the jury to consider unenumerated mitigating factors. The judge has a responsibility to give guidance to a jury, *Bollenbach v. United States*, 326 U.S. 607, 612-13, (1945) (mistaken instruction), and has a "requirement of a response to a jury's request for guidance after deliberation has begun. *Powell v. United States*, 347 F.2d 156 (9th Cir. 1965)." Petitioner's Opening Brief at 109. In *Powell*, the judge stated that the jury's note "just doesn't make sense" to him, and so he re-read the instruction he had given and dismissed the jury without inquiry about their confusion. 347 F.2d at 157. Petitioner argues that *Powell*[10] stands for the proposition that a judge has a duty to "go behind the jury's question to clear up underlying ambiguities." Petitioner's Opening Brief at 109. Petitioner argues that, as a point of California law, the terms were not in everyday use and needed to be explained by the trial court. *People v. Ponce*, 96 Cal. App. 2d 327, 331 (1950); *People v. Vela*, 172 Cal App. 3d 237, 240 (1985).

The California Supreme Court found differently. It held the terms were not vague. *Visciotti*, 2 Cal. 4th at 74-75. It also found Petitioner was "further protected against possible arbitrary sentencing in that any mitigating evidence he offers must be considered by the jury," and that it "had been expressly instructed that any factor offered in mitigation could be considered." *Visciotti*, 2 Cal. 4th at 75. The court found it was "highly improbable" that the jury would have found "evidence of duress of any sort," and there was no evidence suggesting that

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[10] Petitioner also cites language from *United States v. Bolden*, 514 F.2d 1301 (D.C. Cir 1975), intending that it be persuasive authority. Because of the unique position of that Circuit in relation to interpretation of the statutory structure of the District of Columbia, the Court finds that case limited in its general applicability.

Petitioner believed he was morally justified.[11] As a consequence, the court found "no prejudice from the failure of the court to respond differently." Ibid. That conclusion is reasonable.

Respondent notes that the United States Supreme Court rejected a nearly identical claim in *Waddington v Sarausad*, 555 U.S. 179, 129 S.Ct. 823[12] (2009). The trial court had responded to a jury question by instructing them to re-read the instructions and consider them as a whole. On appeal, the state supreme court found the instructions unambiguous. The Supreme Court reversed the Ninth Circuit's grant of relief under AEDPA, noting that "[e]ven if we agreed that the instruction was ambiguous, the Court of Appeals still erred in finding that the instruction was so ambiguous as to cause a federal constitutional violation, as required for us to reverse the state court's determination under AEDPA." *Sarausad*, 129 S.Ct. at 833. To justify relief, Petitioner must show "both that the instruction was ambiguous and that there was 'a reasonable likelihood' that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt." *Sarausad*, 129 S. Ct. at 831-32 (citations omitted). The Court finds the California Supreme Court's disposition of those questions correct, and **denies** relief on Claim 26.

XIV. Claim 27: Aggravation and Mitigation

Petitioner argues that California's statutory factors for assessing aggravation and mitigation are unconstitutionally unreliable and capricious. Petitioner's Opening Brief at 116. Petitioner claims that the prosecutor's penalty phase

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[11] Here, Petitioner argues that duress and putative moral justification arose when the surviving victim, Michael Wolbert, rose and came towards Petitioner after being shot in the chest and shoulder, figuring "where I was at, I'd already been shot twice," and that he had nothing to lose by trying. RT 2121. Petitioner, who recalled that Wolbert yelled at him as he came, RT 2474-75, then shot him in the head.

[12] Although there is a citation to the United States Reporter, pagination therein is not yet available.

argument mislead the jury to assume that the lack of mitigating factors was a circumstance in aggravation, and he was not prevented from so doing by either the trial judge or the statute. Specifically, Petitioner objects that the prosecutor cited the facts that Petitioner was not abused as a child, the lack of victim participation in the crime, the lack of moral justification, and Petitioner's age as potential aggravating factors. Petitioner blames the statutory system and the trial judge for not clarifying which statutory aspects were meant to be mitigating and which to be aggravating. Petitioner argues that some things, like drug use, can never be argued to be an aggravating factor. Petitioner's Opening Brief at 120. Because the prosecutor intended his closing argument to have the jury misweigh the mitigating and aggravating evidence in favor of the prosecution, Petitioner states that he was unconstitutionally sentenced to death by a jury's decision based upon "caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 360 (1977).

In Opposition, Respondent cites *Babbitt v. Calderon*, 151 F.3d 1170, 1178 (9th Cir. 1998), in which it noted that "Babbit [argues] that the prosecutor's comments misled the jury into considering his background as aggravating rather than mitigating.... Nothing in the Constitution limits the consideration of nonstatutory aggravating factors." Petitioner points to no statement of law or precedent requiring that factors must be either aggravating or mitigating; it appears that the intent was to allow the circumstances of the defendant's life and crime to be introduced and argued by either party so that the jury could assign whatever importance or meaning they collectively saw fit. While there are some circumstances may not be considered aggravating, such as race, religion, political affiliation, or mental illness, *Babbit*, 152 F.3d at 1179, fn. 3, none are implicated here.

The California Supreme Court found no state law violation. *Visciotti*, 2 Cal. 4th at 66, fn. 34. Although the California Supreme Court had ruled in a case

decided after trial of this case that such argument by the prosecution about the lack of mitigating factors was improper, *People v. Davenport*, 41 Cal.3d 247, 289 (1985), it did not grant relief. That finding is binding on this Court. *Estelle*, 502 U.S. at 67-68. Here, the aggravating evidence was overwhelming. If the argument of the prosecutor was, as in *Davenport*, "improper" and "should not be repeated in the future," 41 Cal. 3d at 290, it was not prejudicial to the defendant. Claim 27 is **denied**.

XV. Claim 28: "Triple-Counting" of Offenses

Petitioner now asserts that CALJIC 8.84.1 is constitutionally defective because its first three enumerated factors could each apply to the same act, thereby allowing "artificial inflation of aggravation." Petitioner's Opening Brief at 122.

> (A) the circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true.
> (B) the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence, or the expressed or implied threat to use force or violence.
> (C) the presence or absence of any prior felony conviction.

For example, Petitioner states that the shooting of Mr. Wolbert, committed at the same time as the murder of Mr. Dykstra, would count under all three factors. This, he contends, inserts an impermissible bias in favor of a death verdict, rendering his sentence unconstitutional. *Eddings v. Oklahoma,* 455 U.S. 104, 118 (1982) (O'Connor, J., conc.) (sentencer should not be precluded from considering any aspect of the defendant's background or the circumstances of the crime as mitigating). However, Petitioner has not provided any authority for his proposition that it is constitutionally required that jurors be barred from considering the same act under multiple factors.

Respondent argues that the United States Supreme Court has approved the use of the same fact multiple times as a factor in aggravation. *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988) ("the fact that the aggravating circumstance duplicated

one of the elements of the crime does not make this sentence constitutionally infirm.") Petitioner has not pointed to any statement of federal law supporting his conclusion, citing only *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (North Carolina Supreme Court, 1979), as persuasive authority. In opposition thereto, Respondent cited the California Supreme Court. "The 'prior convictions' encompassed in factor (c) do not include the offenses of which the defendant had been convicted in the current proceedings [citation omitted], and the circumstances of the current offenses which reflect violence and/or threats of violence are to be considered only under factor (a). Factor (b) relates to other unadjudicated criminal conduct. [Citation omitted.]" *Visciotti*, 2 Cal. 4th at 76. The California Supreme Court found "[t]he jury was not told it should or could 'double count' or 'triple count' evidence under these factors, however, and the court is not under a duty to instruct sua sponte that such consideration would be improper." Id. In addition, it also specifically found that the prosecutor "carefully and properly segregated the evidence":

> He told the jury that the first factor "deals specifically with the crime that you've heard about and convicted this man of, and the special circumstance involved." He then reminded the jury of the evidence concerning the shooting of Dykstra and Wolbert in the course of a robbery.
> Addressing factor (b), he told the jury that the factor involved prior violence, and reminded the jury it had heard evidence about the attack on Cusack. He then turned to factor (c), recalling that defendant had admitted that he had pled guilty to a felony, and discussing the evidence relevant to the1978 attack on Scofield.

Visciotti, 2 Cal. 4th at 76 n.40. The California Supreme Court did not agree that it was likely that the jury inflated the aggravating effect of the evidence. The California Supreme Court's denial of this claim was not contrary to, or an

unreasonable application of, clearly established federal law as determined by the United States Supreme Court, nor did it result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in state court. Relief is denied on Claim 28.

XVI. Claim 29: Sentencing Standards

Petitioner asserts that the trial court refused to instruct the jury that before it could return a death sentence it must find (a) that death is the appropriate penalty; (b) that the aggravating factors outweighed the mitigating factors beyond a reasonable doubt; and (c) that death is the appropriate penalty beyond a reasonable doubt. He argues that the California death penalty statute inadequate because these jury instructions are not required to be given. Petitioner's Opening Brief at 124. He notes that other interests are protected by findings "beyond a reasonable doubt," such as commitment as a mentally disordered sex offender, *People v. Feagley*, 14 Cal. 3d 338, (1975), or the appointment of a conservator. *People v. Thomas*, 19 Cal. 3d 630 (1977). He states that it is a violation of equal protection under the law to allow a sentencing determination, "the most important and sensitive factfinding process in all of the law," to be determined without a burden of proof. Petitioner's Opening Brief at 126, lns. 10-13.

California's death penalty law has been repeatedly upheld by the United States Supreme Court and the Ninth Circuit as constitutional. *Brown v. Sanders,* 546 U.S. 212; *Boyde v. California*, 494 U.S. 370; *Tuilaepa v. California*, 512 U.S. 967, 975-80 (1994). The Ninth Circuit has also found no constitutional infirmity from the absence of such a standard of proof for the determination of whether the aggravating circumstances outweigh the mitigating circumstances or death is the appropriate penalty. *Williams v. Calderon*, 52 F.3d 1465, 1481 (1995). The Court declines to create such a requirement. Claim 29 is **denied**.

XVII. Claim 31: Petitioner's Age as an Aggravating Factor

As previously argued in Claim 27, Petitioner here contends that the prosecution's "manipulation of the age factor to aggravate his sentence was unconstitutional under the Eighth and Fourteenth Amendments, and the prosecutor improperly capitalized on this opportunity created in part by the statutory ambiguity regarding whether sentencing factors are aggravating or mitigating." Petitioner's Opening Brief at 127. Because there is no automatic standard or mechanical test that states whether youth or maturity is aggravating or mitigating, Petitioner seems to suggest that leaving the determination to the jury's discretion renders sentences invalid and "threatens the orderly sentencing process as a whole." Petitioner's Opening Brief at 128, ln. 6. He states that the verdict must be overturned because the trial judge did not either delete consideration of the age factor or designate it as mitigating. Petitioner's Opening Brief at 129, ln. 15.

As in Claim 27, the decision of the California Supreme Court was not contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; nor did it result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in state court. Respondent notes that in *Tuilaepa* the defendant also challenged the age factor as unconstitutional. The United States Supreme Court stated that "[b]oth the prosecution and the defense may present valid arguments as to the significance of the defendant's age in a particular case. Competing arguments by adversary parties bring perspective to a problem, and thus serve to promote a more reasoned decision, providing guidance as to a factor jurors most likely would discuss in any event. We find no constitutional deficiency...." 512 U.S. at 977. Relief is **denied** on Claim 31.

XVIII. Claim 32: Failure to Consider all Mitigating Evidence

In passing sentence, the jury discretion was bounded by the terms of its instructions. Petitioner argues that five elements combined to undermine the

fairness of the penalty verdict. First, the cumulative effect of the "mechanical" weighing process and the use of "shall" in CALJIC 8.84.1, as set out in Claim 21, and the flaws in voir dire[13] blocked proper consideration of mitigating evidence. Next, the trial judge's failure to define terms in response to the jury's note, detailed in Claim 26. Third, the use of the modifiers "extreme" and "substantial" before the words "duress" and "domination" in the jury instructions attacked in Claim 26, and of "extreme" before "mental or emotional disturbance" in sentencing factor (d), improperly limited mitigating inferences. Additionally, the instructions and sentencing factors did not allow the jurors to consider the lesser sentence given to Petitioner's co-defendant as a mitigating factor, as raised in Claim 22 in connection with the motion to modify sentence. Lastly, Petitioner argues that he was in some unspecified way barred from the "full use" of the potential impact upon his family of his execution. Petitioner's Opening Brief at 130. He states that the existence of any barrier to the full consideration of his mitigating evidence renders his sentence invalid. *Mills v. Maryland*, 486 U.S. 367, 374 (1988).

Petitioner has gathered parts of his claims here and added to them the bare allegation that some barrier prevented him from "full use" of his family impact evidence. By this means he attempts to construct an argument that there was some structural impediment preventing him from making a full presentation in mitigation. Petitioner does not specifically identify any mitigating material he was prevented from putting before the jury or any ruling made which foreclosed any such presentation. To the extent that he is arguing that evidence of his co-defendant's sentence or other evidence concerning family impact did not fit within the statutorily enumerated facts, he fails to consider factor (k), the 'catch-all.' Petitioner has not demonstrated a violation of a constitutional right, and, to the

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[13] Petitioner is presumably referring to the "indoctrination" referenced in Claim 1.D.

degree he has presented a demonstration of cumulative error affecting his case in mitigation, the Court finds that he has suffered no prejudice because of the overwhelming weight of the evidence in aggravation. Claim 32 is **denied**.

XIX. Claim 33: Failure to Segregate Sentencing Factors

As presaged in Claim 27, Petitioner here contends California's death penalty statute fails to clarify whether a sentencing factor should be considered in aggravation or in mitigation, and thus allows an "unguided" jury to decide whether "chronic drug dependency is considered a reason for revulsion and death or sympathy and life... subject only to the limits of the prosecutor's creativity." Petitioner's Opening Brief at 132, lns. 16-18. Although Petitioner does not state any aspect of his own circumstances or of the crime that has been so misused,[14] he states that he has been prejudiced thereby in being denied a result more beneficial to him. On the same reasoning applied in the discussions of Claim 27, as well as Claims 4 and 31, relief is **denied** on Claim 33.

XX. California Death Penalty Claims

The claims referenced here are general objections to the charging process and administration of the death penalty in the state of California, and were presented without meaningful supporting case law. Such claims are "boilerplate," and have consistently been rejected elsewhere. The Court understands and appreciates the need for counsel to raise these claims in protection of the petitioner's rights. Because they bear little relation to the particular facts of Petitioner's case, they will not be detailed in this Order. The Court has read and considered these claims, but is unconvinced to create precedent by granting them:

Claim 34: Petitioner Was Denied His Constitutional Rights as the

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[14] Petitioner has previously argued that his age at the time of the offense was of undefined significance in terms of mitigation or aggravation. Petitioner was arguably either a very young adult, entitled to some mercy, or a 25-year-old ex-con directing a teenaged accomplice. The jury was the proper entity to resolve that dilemma.

California Sentencing Statute Is Constitutionally Defective

Claim 35: Petitioner Was Denied His Constitutional Rights Because the 1978 Death Penalty Statute Fails to Meet the Minimum Standards Necessary to Assure Rational and Consistent Application of the Death Penalty

Claims 34 and 35 are **denied**.

XXI. Claim 36: Instructions Regarding Mitigation and Aggravation

This claim repeats the argument included in Claim 21 that jurors may not pass a death sentence just because they find that the 'bad' outweighs the 'good.' Petitioner's submission in final briefing is a resubmission of numbered paragraphs 386 to 389 from, the First Amended Petition. The argument contained in final briefing has not benefitted from any of the improvement, amplification, and updating suggested to take place in paragraph 385 of the Petition. As a consequence, it is subsumed by and inferior to that presented in support of Claim 21. For the same reasons set out in its discussion of that claim, the Court **denies** relief on Claim 36.

XXII. Claim 37: Misdemeanor, Non-Violent, and Juvenile Offenses

Petitioner argues the evidence of non-violent offenses, including ones committed as a juvenile, was admitted during examination of Petitioner and his family members during both the guilt and penalty phases of trial. The jury was read part of CalJIC 8.84.1, which instructed that "[i]n determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case." A normally-included qualifying phrase stating "except as you may be hereafter instructed," meant to be used in cases such as this where a single jury was used for both guilt and penalty, was not given. RT 3353. Subsequently, the jurors were instructed that they "may not consider any evidence of any other crime [than Petitioner's conviction for the

Scofield assault] as an aggravating circumstance," RT 3356, which Petitioner argues was contradictory and confusing to the jury. The jury was also instructed that they could consider the criminal act of assault on Kathy Cusack if they found they were satisfied beyond a reasonable doubt that Petitioner had committed it, but that they could not consider "evidence of any other criminal act as an aggravating circumstance." RT 3356-3357.

Petitioner notes that the jury had heard direct testimony by Petitioner about juvenile offenses involving the sale of narcotics, truancy, and three escapes from juvenile facilities and an adult conviction for vandalism. RT 2408-2410. On cross-examination, Petitioner admitted trespassing and "three or four" juvenile parole violations. None of these, with the possible exception of the vandalism conviction, could permissibly be considered in setting a penalty as Penal Code 190.3 specifically limits the admission of evidence concerning criminal activity to three types: felony convictions, activity involving the use or threat of violence, and to the circumstances of the offense for which penalty is being set. Because of the conflict between the terms of their instructions, the jurors did not have clear direction whether they must consider the evidence which they had received or whether they could not do so. Further, in the penalty phase, the prosecutor raised Petitioner's escapes from the juvenile facilities in his cross-examination of Petitioner's father and told the jury in his final penalty argument that "You've heard about the fact that he's been in trouble for more than the last ten years" RT 3287, and commended Petitioner's family for standing "by someone who's had such a longstanding history of being a rotten person." RT 3290. Because of the possibility that the jury imposed the death sentence through consideration of improper factors, Petitioner argues that the verdict must be reversed.

Interpreting California's statutory scheme, the California Supreme Court denied this claim on the merits. *Visciotti*, 2 Cal. 4th at 72. That court found that

much of the evidence was introduced by Petitioner and that the trial court did limit consideration of the evidence by instructing the jury to consider the statutory factors (§ 190.3) in determining the penalty. In light of the facts that Petitioner has alleged, at most, that the jury received confusing instructions and that the juvenile offenses were, indeed, minor, the Court cannot find that Petitioner suffered any prejudice as a result of their admission. Further, there is no United States Supreme Court authority on the issue, thus the California Supreme Court's denial of the claim was not contrary to or an unreasonable application of clearly established federal law. Claim 37 is **denied**.

XXIII. Claim 39: Nexus Between Intent and Special Circumstance

According to Petitioner, California law requires the trial court to instruct the jury that specific intent to kill must be found unanimously and beyond a reasonable doubt before a special circumstance can be true. See *Carlos v. Superior Court*, 35 Cal. 3d 131 (1983), and *People v. Garcia*, 36 Cal. 3d 539 (1984). He argues that the trial court's failure to instruct as to this requirement commands reversal of the special circumstance finding and the resulting death sentence.

As a threshold matter, the Court finds that Petitioner is presenting an issue of state law without a federal constitutional dimension. There is no constitutional requirement of a finding of an intent to kill or of a deliberate, premeditated murder with express malice for a defendant to be sentenced to death. In *Cabana v. Bullock*, 474 U.S. 376, 386-387 (1986), the Supreme Court held that the Constitutional requirement of culpability for a sentence of death is that there must be a factual finding at some point in the state court proceedings that the defendant killed, attempted to kill, or intended that a killing take place or that lethal force be used. The Court held in *Tison v. Arizona*, 481 U.S. 137 (1987) overruled in part on other grounds, *Pope v. Illinois*, 481 U.S. 497 (1987), that "substantial participation in a

violent felony under circumstances likely to result in the loss of innocent human life may justify the death penalty even absent an 'intent to kill." *Tison*, 481 U.S at 154-55.

Petitioner's crime suffices to meet the federal standard, and the Court has not found and does not find the jury instructions insufficient to meet that standard. Accordingly, the decision of the California Supreme Court was not contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; nor did it result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in state court. Relief is **denied** on Claim 39.

4. Conclusion

The Court **DENIES** all relief requested in the First Amended Petition. Respondent shall prepare and submit a proposed judgment for the Court within **ten days** of the filing of this order.

5. Certificate of Appealability

The issuance of a Certificate of Appealability requires a showing that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). As this case is here on a remand to this Court, it is possible that reasonable jurists could find the Court's ruling to be debatable or wrong. Accordingly, the court finds that a certificate of appealability should issue on Claims 1.C and 12. On the Court's own motion, a Certificate of Appealability is **GRANTED** on those claims.

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6. Stay of Execution

Pursuant to Local Rule 83-17.6 (b), the Stay of Execution in this case shall continue until the Court of Appeals acts upon the appeal or the order of stay.

IT IS SO ORDERED.

Dated: June 30 2011

The Honorable Manuel L. Real
United States District Judge

537 U.S. 19, 154 L.Ed.2d 279

[19]**Jeanne WOODFORD, Warden, Petitioner,**

v.

John Louis VISCIOTTI.

No. 02–137.

Nov. 4, 2002.

Rehearing Denied Jan. 13, 2003.

See 537 U.S. 1149, 123 S.Ct. 957.

State prisoner filed petition for writ of habeas corpus, challenging murder conviction and death sentence, affirmed at 2 Cal.4th 1, 5 Cal.Rptr.2d 495, 825 P.2d 388, and following denial of state habeas relief, 14 Cal.4th 325, 58 Cal.Rptr.2d 801, 926 P.2d 987. The United States District Court for the Central District of California, Manuel L. Real, J., granted petition as to sentence but denied it as to conviction, and the United States Court of Appeals for the Ninth Circuit, Pregerson, Circuit Judge, 288 F.3d 1097, affirmed. On grant of state's petition for certiorari, the Supreme Court held that California Supreme Court's decision that trial counsel's assumed inadequate representation did not prejudice petitioner was not contrary to, or involve an unreasonable application of, Supreme Court's decision in *Strickland*.

Reversed.

1. Habeas Corpus ⇨486(5)

California Supreme Court's decision that trial counsel's allegedly inadequate representation "probably" did not prejudice petitioner during penalty phase of capital murder trial was not contrary to clearly established federal law under Strickland, as would warrant federal habeas corpus relief; California Court's use of term "probable" without the modifier "reasonably" in setting forth Strickland standard did not require petitioner to prove prejudice by preponderance of the evidence, but, rather, was shorthand reference to "reasonably probable" standard referred to elsewhere in opinion. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d)(1).

2. Habeas Corpus ⇨450.1

Under the "unreasonable application" clause, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied clearly established federal law, as determined by the Supreme Court, incorrectly; rather, it is the petitioner's burden to show that the state court applied federal law to the facts of his case in an objectively unreasonable manner. 28 U.S.C.A. § 2254(d)(1).

3. Habeas Corpus ⇨450.1

Under the "unreasonable application" clause of habeas corpus statute, an unreasonable application of federal law is different from an incorrect application of federal law. 28 U.S.C.A. § 2254(d)(1).

4. Habeas Corpus ⇨486(5)

California Supreme Court's decision that trial counsel's allegedly inadequate representation did not prejudice petitioner during penalty phase of capital murder trial was not an unreasonable application of clearly established federal law under *Strickland*, as would warrant federal habeas corpus relief, where California Court properly considered totality of available mitigating evidence and prejudicial impact of counsel's actions before determining that aggravating factors were overwhelming. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d)(1).

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[20]PER CURIAM.

The United States Court of Appeals for the Ninth Circuit affirmed the grant of habeas relief to respondent John Visciotti after concluding that he had been prejudiced by ineffective assistance of counsel at trial. 288 F.3d 1097 (2002). Because this decision exceeds the limits imposed on federal habeas review by 28 U.S.C. § 2254(d), we reverse.

I

Respondent and a co-worker, Brian Hefner, devised a plan to rob two fellow employees, Timothy Dykstra and Michael Wolbert, on November 8, 1982, their payday. They invited the pair to join them at a party. As the four were driving to that supposed destination in Wolbert's car, respondent asked Wolbert to stop in a remote area so that he could relieve himself. When all four men had left the car, respondent pulled a gun, demanded the victims' wallets (which turned out to be almost empty), and got Wolbert to tell him where in the car the cash was hidden. After Hefner had retrieved the cash, respondent walked over to the seated Dykstra and killed him with a shot in the chest from a distance of three or four feet. Respondent then raised the gun in both hands and shot Wolbert three times, in the torso and left shoulder, and finally, from a distance of about two feet, in the left eye. Respondent and Hefner fled the scene in Wolbert's car. Wolbert miraculously survived to testify against them.

Respondent was convicted by a California jury of first-degree murder, attempted murder, and armed robbery, with a special-circumstance finding that the murder was committed during the commission of a robbery. The same jury determined that respondent should suffer death. The California Supreme Court affirmed the conviction and sentence. *People v. Visciotti*, 2 Cal.4th 1, 5 Cal.Rptr.2d 495, 825 P.2d 388 (1992).

[21] Respondent filed a petition for a writ of habeas corpus in the California Supreme Court, alleging ineffective assistance of counsel. That court appointed a referee to hold an evidentiary hearing and make findings of fact—after which, and after briefing on the merits, it denied the petition in a lengthy opinion. *In re Visciotti*, 14 Cal.4th 325, 58 Cal.Rptr.2d 801, 926 P.2d 987 (1996). The California Supreme Court assumed that respondent's trial counsel provided constitutionally inadequate representation during the penalty phase, but concluded that this did not prejudice the jury's sentencing decision. *Id.*, at 353, 356–357, 58 Cal.Rptr.2d, at 818, 820, 926 P.2d, at 1004, 1006.

Respondent filed a federal habeas petition in the United States District Court for the Central District of California. That court determined that respondent had been denied effective assistance of counsel during the penalty phase of his trial, and granted the habeas petition as to his sentence. The State appealed to the Court of Appeals for the Ninth Circuit.

The Court of Appeals correctly observed that a federal habeas application can only be granted if it meets the requirements of 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."

The Court of Appeals found that the California Supreme Court decision ran afoul of both the "contrary to" and the [22] "unreasonable application" conditions of § 2254(d)(1), and affirmed the District Court's grant of relief. See 288 F.3d, at 1118–1119. The State of California petitioned for a writ of certiorari, which we now grant along with respondent's motion for leave to proceed *in forma pauperis*.

II

A

[1] We consider first the Ninth Circuit's holding that the California Supreme

Court's decision was "contrary to" our decision in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Strickland* held that to prove prejudice the defendant must establish a "*reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.*, at 694, 104 S.Ct. 2052 (emphasis added); it specifically rejected the proposition that the defendant had to prove it more likely than not that the outcome would have been altered, *id.*, at 693, 104 S.Ct. 2052. The Court of Appeals read the State Supreme Court opinion in this case as applying the latter test—as requiring respondent to prove, by a preponderance of the evidence, that the result of the sentencing proceedings would have been different. See 288 F.3d, at 1108–1109. That is, in our view, a mischaracterization of the state-court opinion, which expressed and applied the proper standard for evaluating prejudice.

The California Supreme Court began its analysis of the prejudice inquiry by setting forth the "reasonable probability" criterion, with a citation of the relevant passage in *Strickland;* and it proceeded to state that "[t]he question we must answer is whether there is a reasonable probability that, but for counsel's errors and omissions, the sentencing authority would have found that the balance of aggravating and mitigating factors did not warrant imposition of the death penalty," again with a citation of *Strickland. In re Visciotti*, 14 Cal.4th, at 352, 58 Cal.Rptr.2d, at 817, 926 P.2d, at 1003 (citing *Strickland*, *supra*, at 696, 104 S.Ct. 2052). Twice, the court framed its inquiry as [23]turning on whether there was a "reasonable probability" that the sentencing jury would have reached a more favorable penalty-phase verdict. 14 Cal.4th, at 352, 353, 58 Cal.Rptr.2d, at 817, 818, 926 P.2d, at 1003, 1004. The following passage, moreover, was central to the California Supreme Court's analysis:

> "In *In re Fields*, [51 Cal.3d 1063, 275 Cal.Rptr. 384, 800 P.2d 862 (1990)] (3)27 we addressed the process by which the court assesses prejudice at the penalty phase of a capital trial at which counsel was, allegedly, incompetent in failing to present mitigating evidence: 'What kind of evidentiary showing will undermine confidence in the outcome of a penalty trial that has resulted in a death verdict? *Strickland* (3)27 and the cases it cites offer some guidance. *United States v. Agurs*[, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)] (3)27, the first case cited by *Strickland*, spoke of evidence which raised a reasonable doubt, although not necessarily of such character as to create a substantial likelihood of acquittal .... *United States v. Valenzuela–Bernal*[, 458 U.S. 858, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982)] ..., the second case cited by *Strickland*, referred to evidence which is "material and favorable ... in ways not merely cumulative...."' " *Id.*, at 353–354, 58 Cal.Rptr.2d, at 818, 926 P.2d, at 1004.

"Undermin[ing] confidence in the outcome" is exactly *Strickland's* description of what is meant by the "reasonable probability" standard. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, *supra*, at 694, 104 S.Ct. 2052.

Despite all these citations of, and quotations from, *Strickland*, the Ninth Circuit concluded that the California Supreme Court had held respondent to a standard of proof higher than what that case prescribes for one reason: in three places (there was in fact a fourth) the opinion used the term "probable" without the modifier "reasonably." 288 F.3d, at 1108–1109, and n. 11. This was error. The California Supreme Court's opinion painstakingly describes the *Strickland* standard. Its occasional shorthand reference to that [24]standard by use of the term "probable" without the modifier may perhaps be imprecise, but if so it can no more be considered a repudiation of the standard than can this Court's own occasional indulgence in the same imprecision. See

Mickens v. Taylor, 535 U.S. 126, 166, 122 S.Ct. 1237, 1241, 152 L.Ed.2d 291 (2002) ("probable effect upon the outcome"); *Williams v. Taylor*, 529 U.S. 362, 393, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) ("probably affected the outcome").

The Court of Appeals made no effort to reconcile the state court's use of the term "probable" with its use, elsewhere, of *Strickland's* term "reasonably probable," nor did it even acknowledge, much less discuss, the California Supreme Court's proper framing of the question as whether the evidence "undermines confidence" in the outcome of the sentencing proceeding. This readiness to attribute error is inconsistent with the presumption that state courts know and follow the law. See, *e.g.*, *Parker v. Dugger*, 498 U.S. 308, 314–316, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991); *Walton v. Arizona*, 497 U.S. 639, 653, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), overruled on other grounds, *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); *LaVallee v. Delle Rose*, 410 U.S. 690, 694–695, 93 S.Ct. 1203, 35 L.Ed.2d 637 (1973) (per curiam). It is also incompatible with § 2254(d)'s "highly deferential standard for evaluating state-court rulings," *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), which demands that state-court decisions be given the benefit of the doubt.

B

[2, 3] The Court of Appeals also held that, regardless of whether the California Supreme Court applied the proper standard for determining prejudice under *Strickland*, its decision involved an unreasonable application of our clearly established precedents. 288 F.3d, at 1118. Specifically, the Ninth Circuit concluded that the determination that Visciotti suffered no prejudice as a result of his trial counsel's deficiencies was "objectively unreasonable." *Ibid.* Under § 2254(d)'s "unreasonable application" clause, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied [25] *Strickland* incorrectly. See *Bell v. Cone*, 535 U.S. 685, 698–699, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Williams*, *supra*, at 411, 120 S.Ct. 1495. Rather, it is the habeas applicant's burden to show that the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner. An "*unreasonable* application of federal law is different from an *incorrect* application of federal law." *Williams*, *supra*, at 410, 120 S.Ct. 1495; see *Bell*, *supra*, at 694, 122 S.Ct. 1843. The Ninth Circuit did not observe this distinction, but ultimately substituted its own judgment for that of the state court, in contravention of 28 U.S.C. § 2254(d).

[4] The Ninth Circuit based its conclusion of "objective unreasonableness" upon its perception (1) that the California Supreme Court failed to "take into account" the totality of the available mitigating evidence, and "to consider" the prejudicial impact of certain of counsel's actions, and (2) that the "aggravating factors were not overwhelming." 288 F.3d, at 1118. There is no support for the first of these contentions. All of the mitigating evidence, and all of counsel's prejudicial actions, that the Ninth Circuit specifically referred to as having been left out of account or consideration were in fact described in the California Supreme Court's lengthy and careful opinion. The Court of Appeals asserted that the California Supreme Court "completely ignored the mitigating effect of Visciotti's brain damage," and failed to consider the prejudicial effect of counsel's "multiple concessions during closing argument." *Ibid.* However, the California Supreme Court specifically considered the fact that an expert "had testified at the guilt phase that [Visciotti] had a minimal brain injury of a type associated with impulse disorder and learning disorder." *In re Visciotti*, 14 Cal.4th, at 354, 58 Cal.Rptr.2d, at 818, 926 P.2d, at 1004. And it noted that under the trial court's instructions, this and other evi-

dence that had been introduced "might have been considered mitigating at the penalty phase," despite trial counsel's concessions during closing argument. *Ibid.*

[26]The California Supreme Court then focused on counsel's failure to introduce mitigating evidence about respondent's background, including expert testimony that could have been presented about his "growing up in a dysfunctional family in which he suffered continual psychological abuse." *Id.,* at 355, 58 Cal.Rptr.2d, at 818, 926 P.2d, at 1005. This discussion referred back to a lengthy, detailed discussion about the undiscovered mitigating evidence that trial counsel might have presented during the penalty phase. See *id.,* at 341–345, 58 Cal.Rptr.2d, at 809–811, 926 P.2d, at 996–998. The California Supreme Court concluded that despite the failure to present evidence of respondent's "troubled family background," *id.,* at 355, 58 Cal.Rptr.2d, at 818, 926 P.2d, at 1005, which included his being "berated," being "markedly lacking in self-esteem and depressed," having been "born with club feet," having "feelings of inadequacy, incompetence, inferiority," and the like, moving "20 times" while he was growing up, and possibly suffering a "seizure disorder," *id.,* at 341–343, 58 Cal.Rptr.2d, at 809–811, 926 P.2d, at 996–998, the aggravating factors were overwhelming. In the state court's judgment, the circumstances of the crime (a cold-blooded execution-style killing of one victim and attempted execution-style killing of another, both during the course of a preplanned armed robbery) coupled with the aggravating evidence of prior offenses (the knifing of one man, and the stabbing of a pregnant woman as she lay in bed trying to protect her unborn baby) was devastating. See *id.,* at 355, 58 Cal.Rptr.2d, at 818, 926 P.2d, at 1005; see also *People v. Visciotti,* 2 Cal.4th, at 33–34, 5 Cal.Rptr.2d 495, 825 P.2d, at 402. The California Supreme Court found these aggravating factors to be so severe that it concluded respondent suffered no prejudice from trial counsel's (assumed) inadequacy. *In re Visciotti, supra,* at 355, 58 Cal.Rptr.2d, at 818, 926 P.2d, at 1005.

The Court of Appeals disagreed with this assessment, suggesting that the fact that the jury deliberated for a full day and requested additional guidance on the meaning of "moral justification" and "extreme duress" meant that the "aggravating factors were not overwhelming." 288 F.3d, at 1118. [27]Perhaps so. However, "under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly." *Bell,* 535 U.S., at 699, 122 S.Ct. 1843. The 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. It is not that here. Whether or not we would reach the same conclusion as the California Supreme Court, "we think at the very least that the state court's contrary assessment was not 'unreasonable.' " *Id.,* at 701, 122 S.Ct. 1843. Habeas relief is therefore not permissible under § 2254(d).

* * *

The judgment of the Court of Appeals for the Ninth Circuit is

Reversed.

Supreme Court of the United States

No. 02-137

JEANNE WOODFORD, WARDEN,

Petitioner

v.

JOHN LOUIS VISCIOTTI

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court is reversed, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further proceedings in conformity with the opinion of this Court.

November 4, 2002

No.

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden, *Petitioner,*

v.

JOHN LOUIS VISCIOTTI, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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"CAPITAL CASE"

QUESTIONS PRESENTED

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

2. In determining under AEDPA, whether a state court decision is an unreasonable application of United States Supreme Court precedent (28 U.S.C. § 2254 (d)(1)), may a federal court assume a state court did not consider relevant matters because the state court did not expressly state it considered the matters, even if the state court discusses the matters in another part of its written decision, such as in a review of the evidence from lower court proceedings or a review of the petitioner's allegations?

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IN THE SUPREME COURT OF THE UNITED STATES

No.

JEANNE WOODFORD, Warden, *Petitioner,*

v.

JOHN LOUIS VISCIOTTI, *Respondent.*

Jeanne Woodford, Warden, California State Prison at San Quentin [hereafter the State], respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, Appendix A at 1, is reported at 288 F.3d 1097 (9th Cir. 2002). The order of the District Court granting habeas corpus relief from Respondent Visciotti's death sentence, Appendix B at 75, is unreported. The opinion of the California Supreme Court finding no ineffective assistance of counsel at the guilt or the penalty phase trials and denying Visciotti's petition for a writ of habeas corpus is reported at 14 Cal. 4th 325, 926 P.2d 987, 58 Cal. Rptr. 2d 801 (1996), and is contained in Appendix D.

JURISDICTION

The judgment of the Court of Appeals granting habeas corpus relief was entered on April 24, 2002. The jurisdiction of this Court is timely invoked under 28 U.S.C. section 1254(1).

RELEVANT CONSTITUTIONAL PROVISION AND STATUTE

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. section 2254(d)(1):

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved in an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .

STATEMENT OF THE CASE

On November 8, 1982, Visciotti and his roommate, Brian Hefner, had been fired by their employer for whom they sold burglar alarms door to door. In order to get more money to cover future rent and to buy drugs, they planned to rob fellow employees. Visciotti lured Timothy Dykstra and Michael

Wolbert to drive them to a remote area of Orange County by telling Dykstra and Wolbert that there was a party with two extra girls. Visciotti directed Wolbert where to drive and asked him to stop so Visciotti could relieve himself. They stopped in a remote area and everyone got out of the car. Visciotti pulled a gun from his waistband and demanded Dykstra and Wolbert's wallets. After Hefner got their money from the car where they had hidden it, Visciotti raised the gun and shot Dykstra from approximately three to four feet away. The bullet grazed Dykstra's heart and penetrated his right lung. Dykstra fell immediately. Visciotti then approached Wolbert, raised the gun in both hands and shot Wolbert in the torso. Wolbert fell, and Visciotti stood at Wolbert's feet and shot Wolbert in the left shoulder from about three feet away. Visciotti started to walk away, and Wolbert rose and approached him. Visciotti turned and shot Wolbert through the left eye from approximately two feet away. Wolbert saw Visciotti make eye contact and pull back the hammer of the gun to cock it before he shot. Visciotti and Hefner drove away, leaving the two victims to die. Passers by later came to their assistance. When paramedics arrived Dykstra was dead. Wolbert was hospitalized and underwent surgery. He identified his assailants as fellow employees. The morning after the shooting, Wolbert identified both Visciotti and Hefner in a photographic line-up. He identified Visciotti as the shooter.

Approximately 9:00 a.m. the morning after the murder, Visciotti and Hefner were arrested. Later that day, Visciotti confessed on video tape and later participated in a video taped re-enactment of the crime at the crime scene. A sample of his blood was taken that same day and it revealed cocaine and benzoylecgonine, a metabolite of cocaine, and no other controlled substances.

Visciotti was represented at trial by retained counsel, Roger Agajanian. Following jury trial, he was convicted of the murder of Timothy Dykstra, the attempted murder of Michael Wolbert, and the robbery of both. Cal. Penal Code §§§ 187, 664/187, and

211, respectively. The jury also found that Visciotti personally used a firearm in the commission of the crimes, that he intentionally murdered Dykstra, and that he committed the murder during the commission of the crime of robbery. Three days later a penalty phase trial began. On the third day of that trial, the jury retired to deliberate. Two days later they returned a verdict of death.

Visciotti's convictions and death sentence were affirmed by the California Supreme Court. *People v. Visciotti*, 2 Cal. 4th 1, 825 P.2d 388, 5 Cal. Rptr. 2d 495 (1992). On October 5, 1992, this Court denied Visciotti's petition for writ of certiorari. *Visciotti v. California*, 506 U.S. 893 (1992). Visciotti subsequently filed a habeas petition in the California Supreme Court alleging, inter alia, ineffective assistance of counsel at both the guilt phase and the penalty phase trials. The California Supreme Court issued an order to show cause on the claim of ineffective assistance of counsel at the penalty phase trial and ordered an evidentiary hearing and appointed a Superior Court judge as a referee to take evidence and make findings of fact on seven questions. *In re Visciotti*, 14 Cal. 4th at 329, 335-36; Appendix D at 80, 95-97. At the evidentiary hearing, Visciotti presented the evidence which he argued should have been presented in mitigation at his penalty phase trial. Other evidence was presented as well. *In re Visciotti*, 14 Cal. 4th at 336-45; Appendix D. at 97-122.

The California Supreme Court decided the claim of ineffective assistance of counsel at the penalty phase pursuant to a method approved by this Court in *Strickland v. Washington*, 466 U.S. 668, 697 (1984), by determining the issue of prejudice without determining whether trial counsel's performance was deficient. The California Supreme Court found there was no prejudice from any deficient performance and denied the petition for writ of habeas corpus. *In re Visciotti*, 14 Cal. 4th at 330, 353, 356-57; Appendix D. at 82, 142, 150-51. On June 27, 1997, this Court denied Visciotti's petition for writ of certiorari. *Visciotti v. California*, 521 U.S. 1124 (1997).

Visciotti filed a federal habeas corpus petition in June 1998, alleging, inter alia, ineffective assistance of counsel at the guilt phase and the penalty phase of trial. The district court granted an evidentiary hearing on Visciotti's claim of ineffective assistance of trial counsel at the guilt phase of trial and on allegations of conflict of interest and incompetence to stand trial. No evidentiary hearing was granted on Visciotti's claim of ineffective assistance of counsel at the penalty phase of the trial, because there had been a full and fair hearing on that issue in the state court. Appendix C at 78-79. At the conclusion of the evidentiary hearing, the district court ruled the petition would be granted as to the claim of ineffective assistance of counsel at the penalty phase and denied as to all other claims. Judgment in accordance with that ruling was subsequently entered. Appendix B. Petitioner Woodford appealed the grant of the petition and Respondent Visciotti appealed the denial of the petition as to the claim of ineffective assistance of counsel at the guilt phase of the trial. The Ninth Circuit unanimously affirmed the district court's decision to grant habeas relief on the claim of ineffective assistance of counsel during the penalty phase, and by a vote of 2-1 affirmed the district court's decision to deny habeas relief on the claim of ineffective assistance of counsel during the guilt phase. *Visciotti v. Woodford*, 288 F.3d. 1097 (9th Cir. 2002); Appendix A at 1.

REASONS FOR GRANTING THE WRIT

A. Introduction

Petitioner Woodford asks this Court to grant this Petition for Writ of Certiorari to clarify that under 28 U.S.C. section 2254(d)(1) the mere use of a shorthand term for a legal standard under this Court's precedent, or failure to explicitly mention every possible relevant matter in the discussion of the determination of an issue under this Court's precedent, will not

jeopardize state court decisions. The Ninth Circuit Court of Appeals erroneously found the California Supreme Court's rejection of Visciotti's state habeas claim of ineffective assistance of counsel at the penalty phase was "contrary to," and "an unreasonable application of" the standard for prejudice in *Strickland.*

The only way the Ninth Circuit was able to find the California Supreme Court decision was "contrary to" the holding of *Strickland* was to completely ignore the California Supreme Court's recitation of the proper standard and citation to *Strickland* and to treat the California Supreme Court's use of a shorthand term for that standard as the California Supreme Court's sole statement of the standard. Likewise, the method by which the Ninth Circuit found the California Supreme Court unreasonably applied the prejudice standard of *Strickland* was to assume the California Supreme Court did not consider relevant matters if it did not expressly state it considered them in its discussion of prejudice. The Ninth Circuit made this assumption despite the fact the California Supreme Court discussed the matters in an earlier part of its written decision.

The Ninth Circuit's method in both instances was contrary to the deferential standard of review required under 28 U.S.C. section 2254(d)(1). Under that standard the Ninth Circuit should have accorded deference to the California Supreme Court's decision and looked at the entirety of the California Supreme Court decision to see if it could reasonably be construed in a way that upheld the decision. Instead the Ninth Circuit looked at only portions of the California Supreme Court's decision which the Ninth Circuit could use to find fault with it. Certiorari should be granted to clarify the deferential standard that must be applied by the federal courts under AEDPA. State court rejections of claims of violation of federal constitutional rights should not be jeopardized by the use of shorthand terms for a legal standard or by failure to explicitly mention every possible relevant matter in the discussion of the determination of an issue.

B. AEDPA Requires Deference To The State Court Adjudication On The Merits

Because Visciotti filed his federal habeas petition after April 24, 1996, it is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Lindh v. Murphy*, 521 U.S. 320, 336-38 (1997).

The relevant provision of that act, 28 U.S.C. section 2254(d)(1), states:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .

A state court's decision is "contrary to" Supreme Court precedent if the state court "arrives at a conclusion opposite to that reached" by the Supreme Court on a question of law. *Williams v. Taylor*, 529 U.S. 362, 405, 412-13 (2000); *Bell v. Cone*, ___ U.S. ___, 122 S. Ct. 1843, 1850, 152 L. Ed. 2d 914 (2002), slip op. at 7. A state court's decision is also "contrary to" Supreme Court precedent if the state court confronts a set of facts that is materially indistinguishable from a Supreme Court decision and nevertheless arrives at a result different from Supreme Court precedent. *Williams*, 529 U.S. at 405, 412-13; *Bell*, 122 S. Ct. at 1850, slip op. at 7.

A state court's decision may be an "unreasonable application" of Supreme Court precedent if the state court either (1) identifies the correct governing legal rule, but unreasonably applies it to a new set of facts in a way that is objectively

unreasonable; or (2) extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable. *Williams*, 529 U.S. at 407-08; *Bell*, 122 S. Ct. at 1850, slip op. at 7. A federal court may not grant habeas relief, even where it concludes a state court applied "clearly established federal law erroneously or incorrectly," unless the state court also applied the law unreasonably. *Williams*, 529 U.S. at 410; *Bell*, 122 S. Ct. at 1850, slip op. at 7.

This Court has noted that section 2254(d) constitutes a "new, highly deferential standard for evaluating state court rulings." *Lindh*, 521 U.S. at 333 n.7. The 1996 act modified the role of federal habeas courts to, inter alia, "ensure that state-court convictions are given effect to the extent possible under law." *Bell*, 122 S. Ct. at 1849, slip op. at 6, *citing Williams*, 529 U.S. at 403-04.

C. The Ninth Circuit Court Of Appeals Finds The California Supreme Court Decision Was "Contrary To" *Strickland* Only By Focusing Solely On The California Supreme Court's Use Of A Shorthand Term For The Prejudice Standard And Ignoring The California Supreme Court's Recitations Of The Proper Standard For Determining Prejudice

The California Supreme Court stated the proper standard for evaluating prejudice on a claim of ineffective assistance of counsel from this Court's decision in *Strickland v. Washington*, cited *Strickland*, and applied the correct standard. The Ninth Circuit ignores that expression of the proper standard, takes the California Supreme Court's shorthand term for that standard as the only standard expressed or used by the California Supreme Court, and consequently finds the California Supreme Court's decision was "contrary to" *Strickland*. By ignoring the California Supreme Court's citation and use of the proper

standard, and by misconstruing the California Supreme Court's shorthand term, the Ninth Circuit has seriously undermined the "highly deferential" standard mandated by AEDPA. *Lindh*, 521 U.S. at 333 n.7. It has not given the California Supreme Court's decision effect "to the extent possible under law." *Bell*, 122 S. Ct. at 1849, slip op. at 6. It has done just the opposite.

The Ninth Circuit holds that the California Supreme Court's rejection of Visciotti's claim of ineffective assistance of counsel at the penalty phase was "contrary to" this Court's *Strickland* precedent. *Visciotti v. Woodford*, 288 F.3d 1097, 1108-09 (9th Cir. 2002), Appendix A at 36-37. The Ninth Circuit finds the California Supreme Court "mischaracterized" the prejudice standard from *Strickland*, 466 U.S. 668 by using a standard of whether it was "probable" there would have been a different result absent deficient performance by trial counsel rather than the correct standard from *Strickland* of whether there was a "reasonable probability" of a different result. *Visciotti v. Woodford*, 288 F.3d at 1108-09, Appendix A at 36-37. In support of this finding, the Ninth Circuit quotes three instances of the use of the word "probable" in the state decision rather than "reasonable probability." *Id.* at 1109 n.11, Appendix A at 36.[1/] However, the Ninth Circuit completely ignores the fact that the California Supreme Court twice recited the "reasonable probability" standard while citing *Strickland*, made other references to *Strickland*, and quoted other expressions of the prejudice standard from *Strickland*.

The California Supreme Court identified *Strickland* as the controlling authority and correctly stated that Visciotti was required to show trial counsel rendered deficient performance and "a reasonable probability" that, but for such deficient performance, there would have been a "more favorable outcome." *In re Visciotti*, 14 Cal.4th at 352, citing *Strickland*

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1. In fact, the California Supreme Court used the term "probable" four times in this context. *In re Visciotti*, 14 Cal.4th at 330, 355 (twice), 356, App. D. at 82, 146, 146, 150.

466 U.S. at 694 and state court cases, Appendix D at 138-39. The California Supreme Court further correctly stated that prejudice required the petitioner to establish the trial was rendered "unreliable or fundamentally unfair" by counsel's deficient performance. *In re Visciotti*, 14 Cal.4th at 352 (citation omitted), Appendix D at 138-39. The decision then correctly quoted *Strickland* for the proposition that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *In re Visciotti*, 14 Cal.4th at 352, quoting *Strickland*, 466 U.S. at 686, Appendix D at 139. The California Supreme Court also referred to a standard of "'undermine confidence in the outcome,'" a term used in *Strickland*, 466 U.S. at 694. *In re Visciotti*, 14 Cal.4th at 354. Appendix D at 143. The California Supreme Court also correctly noted the issue was whether there was a "reasonable probability" that absent counsel's deficient performance, the sentencer "would have found that the balance of aggravating and mitigating factors did not warrant imposition of the death penalty." *In re Visciotti*, 14 Cal. 4th at 352, citing *Strickland*, 466 U.S. at 696, Appendix D at 139. The Ninth Circuit inexplicably and egregiously fails to mention this language and citations in the California Supreme Court decision. Moreover, the Ninth Circuit does not attempt to harmonize the California Supreme Court's use of the terms "probable" and "reasonable probability" in referring to the standard for determining prejudice under *Strickland*.

Under section 2254(d)(1)'s "highly deferential standard" of review, *Lindh*, 521 U.S. at 333 n.7, the Ninth Circuit should have considered the fact that the California Supreme Court decision stated the correct standard of "reasonable probability," and should have attempted to harmonize the California Supreme Court's use of the two terms. It is logical and, under AEDPA, required, that the entirety of the state court decision be considered. That decision should be construed in a manner to give effect to the decision "to the extent possible under law."

Bell, 122 S. Ct. at 1849, slip op. at 6, citing *Williams*, 529 U.S. at 403-04. The Ninth Circuit instead focused only on the shorthand term ("probable") used in the California Supreme Court decision, viewed that term in isolation, and misconstrued it as stating a standard "contrary to" *Strickland*. This method is both illogical and completely at odds with the deference requirement of section 2254(d)(1). Not surprisingly, the Ninth Circuit reaches an incorrect result.

The California Supreme Court quoted and applied the proper standard of "reasonable probability;" its use of the term "probable" was merely shorthand for the "reasonable probability" standard of *Strickland*. Use of such shorthand terms is common in written decisions. At one point in *Williams*, 529 U.S. 362, the Court's opinion expressed the prejudice standard for ineffective assistance of counsel as requiring that a petitioner show that counsel's deficient performance "*probably* affected the outcome of the proceeding." *Williams*, 529 U.S. at 393, emphasis added. Likewise, the *Strickland* opinion itself in one instance uses the term "reasonably likely" in referring to the prejudice standard. *Strickland*, at 696.[2/]

In *Mickens v. Taylor*, __ U.S. __, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002), the majority opinion used the term "probable" in discussing the prejudice standard under *Strickland*. The majority opinion in *Mickens* stated "defects in assistance that have no *probable* effect upon the trial's outcome do not establish a constitutional violation." *Mickens*, at 1240, slip op. at 3,emphasis added. The majority opinion then noted the general rule for prejudice is that there must be "'a reasonable probability'" of a different result. *Id.*, quoting *Strickland*, 466 U.S. at 694. The majority opinion used the term "*probable*

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2. The opinion stated that in determining prejudice, the question is whether the petitioner has shown "that the decision reached would *reasonably likely* have been different . . ." absent trial counsel's errors. *Strickland*, 466 U.S. at 696, emphasis added.

effect upon the outcome" twice more in referring to the test for prejudice. *Mickens*, at 1241, 1245, slip op. at 3, 11, emphasis added. These references in *Williams*, *Strickland*, and *Mickens* no more demonstrate an incorrect statement of the prejudice standard than the California Supreme Court's shorthand references at certain points to "probable."

Moreover, the majority opinion in *Mickens* noted this Court's earlier use of a shorthand term for a legal standard. The majority opinion in *Mickens* stated this Court's use of the term "'an actual conflict of interest'" in a remand order in *Wood v. Georgia*, 460 U.S. 261, 273 (1981) was shorthand for the language in *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980) that "'a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief.'" *Mickens*, 122 S. Ct. at 1243, slip op. at 8-9. The use of a shorthand term for a legal standard is proper; it does not constitute use of an improper standard or make the California Supreme Court's decision "contrary to" *Strickland* under AEDPA.

When this Court determined the state court decision in *Williams* was contrary to the *Strickland* standard, this Court discussed fully and fairly the state court's decision on the issue, *Williams*, 529 U.S. at 371-72, 391-94, 397. It did not take phrases out of context, or ignore other correct state court references, as the Ninth Circuit did here. In contrast, the Ninth Circuit concluded the California Supreme Court mischaracterized the standard as "probable" rather than "reasonable probability," and offered only a one paragraph footnote reference to the state court decision's discussion of the issue. In that single paragraph the Ninth Circuit neither quoted nor even mentioned the California Supreme Court's express statements of the proper standard. *Visciotti v. Woodford*, 288 F.3d at 1109 n.11.

Review of the California Supreme Court concurring and dissenting opinions also makes clear that that court applied the proper prejudice standard under *Strickland*. Both dissenting

opinions took issue with the majority as to whether a presumption of prejudice applied under this Court's decision in *United States v. Cronic*, 466 U.S. 648 (1984). *In re Visciotti*, 14 Cal.4th at 360-61 (Mosk, J., dissenting), 362-63 (Brown, J., dissenting), Appendix D at 161-65, 168. However, the dissenters did not take issue with the majority's characterization of the prejudice standard under *Strickland*. Had the dissenting justices believed that the majority was applying the wrong test of prejudice, they would have said so. Justice Mosk even noted that under *Strickland*, "a 'reasonable probability' is not a 'more likely than not' probability, . . ." *In re Visciotti*, 14 Cal.4th at 361, quoting *Strickland* at 693, 694 (additional citation omitted) (Mosk, J., dissenting), Appendix D at 163. Although he argued for a different result, Justice Mosk never suggested that the majority did not understand and apply the correct standard of prejudice under *Strickland*. Moreover, in her concurring opinion, Justice Kennard noted the standard for prejudice under *Strickland* was a "'reasonable probability'" of a different outcome. *In re Visciotti*, 14 Cal.4th at 358 (Kennard, J. concurring), Appendix D at 156. Had the majority opinion not used this standard, surely Justice Kennard would also have so noted in her concurring opinion. It is thus abundantly clear that all seven justices of the California Supreme Court correctly understood the "reasonable probability" standard under *Strickland*, and agreed the majority opinion applied that standard.

The California Supreme Court used the term "probable" four times as shorthand for the "reasonable probability" standard under *Strickland*. The Ninth Circuit fails to recognize this, ignores the California Supreme Court's expressions of the "reasonable probability" standard and other references and quotations from *Strickland*, and makes no attempt to harmonize the California Supreme Court's recitation of the "reasonable probability" standard with the shorthand reference to "probable." Such an approach is inexplicable and illogical. It ignores the "highly deferential standard for evaluating state-court rulings" of

28 U.S.C. section 2254(d)(1) (*Lindh*, 521 U.S. at 333 n.7), and the requirement to give effect to state-court convictions "to the extent possible under law" (*Bell*, 122 S. Ct. at 1849, slip op. at 6, citing *Williams*, 529 U.S. at 403-04).

Moreover, the Ninth Circuit's ruling imposes an unwarranted and unfair burden on state courts. State courts must abandon the use of shorthand terms for standards under this Court's precedents, or risk the decision being found "contrary to" this Court's precedent on federal habeas. State courts will need to take pains to avoid or explain any deviation from the precise language used by this Court to avoid that risk. This is unfair, penalizes brevity, and will unnecessarily consume a portion of the state courts' limited resources.

Certiorari should be granted to clarify that a state court's written decision is not "contrary to" Supreme Court precedent, and may not be overturned, merely because the state court decision uses a shorthand term to describe the appropriate standard which has been explicitly set forth under this Court's precedent.

D. The Ninth Circuit Conclusion That The California Supreme Court's Decision Was Also An "Unreasonable Application" Of *Strickland's* Prejudice Requirement Rests On The Improper Assumption That The California Supreme Court Did Not Consider Relevant Matters Because The California Supreme Court Did Not Expressly State It Considered Such Matters

In finding Visciotti was prejudiced by deficient representation at the penalty phase, the Ninth Circuit violates the requirements of section 2254(d)(1) in two ways. First, it determines it must let stand the District Court's reversal of the death sentence before it even discusses, let alone determines, whether the California Supreme Court unreasonably applied this

Court's precedent under section 2254(d)(1). Second, when the Ninth Circuit does consider the issue under section 2254(d)(1), it violates the requirements of the section by assuming state court error where none is affirmatively shown.

Early in its opinion the Ninth Circuit noted the standard of review under section 2254(d)(1). *Visciotti v. Woodford*, 288 F.3d at 1104, Appendix A at 21-22. However, in its discussion of prejudice under *Strickland*, the Ninth Circuit decides there was prejudice without reference to, or mention of AEDPA, or the California Supreme Court's adjudication of this very claim. The Ninth Circuit, quoting from one of its own pre-AEDPA cases, states it must affirm the district court's reversal of Visciotti's death sentence if it "'cannot conclude with confidence the jury would unanimously have sentenced him to death if [Agajanian] had presented and explained all of the available mitigating evidence.'" *Visciotti v. Woodford*, 288 F.3d at 1117, quoting *Mayfield v. Woodford*, 270 F.3d 915, 929 (9th Cir. 2001) (en banc), Appendix A at 64. The Ninth Circuit then finds prejudice because of the unpresented mitigating evidence, the inaccurate portrayal of Visciotti as the family's one bad seed, the failure to counter the prosecution's case in aggravation, and the closing argument which conceded several potential mitigating factors and gave no reason to spare Visciotti's life. *Visciotti v. Woodford*, 288 F.3d at 1117-18, quoting *Strickland* 466 U.S. at 700, and citing other cases, Appendix A at 64-68. This determination is totally outside of, and contrary to, the dictates of section 2254(d)(1). The Ninth Circuit decides there was prejudice before considering or even mentioning the state court decision on that issue or the requirements of section 2254(d)(1).

Only then does the Ninth Circuit purport to evaluate whether the California Supreme Court's rejection of the claim was an unreasonable application of this Court's holding in *Strickland*. However, that evaluation is also contrary to the requirements of section 2254(d)(1). The Ninth Circuit fails to apply section 2254(d)(1)'s "highly deferential" standard of

review (*Lindh*, 521 U.S. at 333 n.7) and fails to give effect to the state court conviction "to the extent possible under law" (*Bell*, 122 S.Ct. at 1849, slip op. at 6, citing *Williams*, 529 U.S. at 403-04).

Instead of assuming the California Supreme Court discussed only the most significant matters while taking all relevant matters into consideration, the Ninth Circuit assumes the California Supreme Court did not consider relevant matters which the California Supreme Court did not mention in its discussion of the determination of prejudice. The Ninth Circuit made this assumption despite the fact the California Supreme Court discussed the matters in its review of the record. The Ninth Circuit then uses the presumed failure to consider such matters as the basis for its finding that the California Supreme Court adjudication was objectively unreasonable under section 2254(d)(1). It then proceeds to effectively decide the claim de novo. This method is incompatible with the deference required under AEDPA.

The Ninth Circuit's approach means that if state courts do not expressly discuss and reject every possible relevant matter, a federal court may later find the matter was not considered, and on that basis conclude the state court's adjudication of the claim was an "unreasonable" adjudication under section 2254(d)(1). State courts will need to write their decisions not just in the manner that best resolves the issue, but also with an eye to every aspect of every issue that a federal court might possibly think was relevant. This is an unwarranted and unreasonable burden on the state courts.

The Ninth Circuit starts down its path of avoiding deference by stating the California Supreme Court failed to "'evaluate the totality of the available mitigation evidence - both that adduced at trial, and the evidence adduced in the habeas proceeding - in reweighing it against the evidence in aggravation.'" *Visciotti v. Woodford*, 288 F.3d at 1118, quoting *Williams*, 529 U.S. at 398, citation omitted, Appendix A at 65. The Ninth Circuit then quotes from one paragraph of the California Supreme Court

discussion of the prejudice determination, noting the California Supreme Court stated it found the failure to present evidence of Visciotti's "'troubled family background' was not prejudicial because it would not have outweighed the aggravating evidence of '[t]he circumstances of the crime' and 'the earlier knifing of William Scofield and the pregnant Kathy Cusack.' *In re Visciotti*, 14 Cal. 4th at 355." *Visciotti v. Woodford*, 288 F.3d at 1118, Appendix A at 66. The Ninth Circuit states the California Supreme Court "completely ignored the mitigating effect of Visciotti's brain damage or adjustment to incarceration," and "failed to consider the prejudicial impact" of trial counsel's inaccurate portrayal of Visciotti as the one bad seed of the family and trial counsel's "multiple concessions during closing argument." *Visciotti v. Woodford*, 288 F.3d at 1118, Appendix A at 65-67.

Contrary to the Ninth Circuit's assumption, the California Supreme Court considered the entire record in the case, including the evidence and proceedings at trial and the evidence from the state habeas evidentiary hearing, in its determination of prejudice. It noted it could assess prejudice because it had "reviewed the entire record on appeal." *In re Visciotti*, 14 Cal.4th at 349; Appendix D at 132.[3/] It also indicated it made an "independent review of the evidence" presented at the habeas evidentiary hearing.[4/] *Id.*, Appendix D at 132. The California Supreme Court's written decision summarized the evidence and proceedings at the guilt and penalty phases of trial (*Id.* at 330-31, Appendix D at 82-87), reviewed Visciotti's allegations of ineffective assistance of counsel at the penalty phase of trial (*Id.*

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3. This comment was in regard to Visciotti's complaint that the state habeas hearing referee made no recommendation regarding relief.

4. This comment was in response to Visciotti's complaint that the referee had made findings beyond the scope of the questions presented to it by the California Supreme Court.

at 331-34, Appendix D at 87-94), reviewed the state habeas hearing evidence of trial counsel's acts and omissions (*Id.* at 336-41, Appendix D at 97-110) and unpresented mitigating evidence (*Id.* at 341-45, Appendix D at 111-21), and reviewed the report of the state habeas evidentiary hearing referee, including Visciott's attacks on the report (*Id.* at 345-51, Appendix D at 122-37).

The California Supreme Court next discussed the law governing the determination of the claim of ineffective assistance of counsel at the penalty phase (*Id.* at 351-354, Appendix D at 137-44) and then evaluated the claim. It assumed, arguendo, deficient performance of trial counsel (*Id.* at 353), and determined the claim on "the ground of lack of prejudice" without determining whether there was deficient performance (a method approved in *Strickland*, 466 U.S. at 697).

In making the prejudice determination, the California Supreme Court expressly noted there had been mitigating evidence presented at the guilt and penalty phases of Visciotti's trial - the testimony of the psychologist regarding Visciotti's brain injury and its effects, and the testimony of family members regarding Visciotti's positive character traits (*In re Visciotti*, 14 Cal. 4th at 354) - and that trial counsel inappropriately conceded that the evidence of brain damage and its effects was not mitigating (*Id.* at 354-55 n.7). The California Supreme Court noted trial counsel failed to prepare for the aggravating evidence of the stabbing, but found no prejudice from this because Visciotti had not shown there was anything to rebut this evidence. *Id.* at 355. The California Supreme Court's "principal concern" was the unpresented mitigating evidence of Visciotti's "family background" and the expert testimony regarding it and relating it to his drug abuse and use of violence. *Id.* at 355. The California Supreme Court found the "family background" evidence would not have outweighed the aggravating evidence because the circumstances of the crimes and the stabbings of Scofield and Cusack were overwhelming, and because the family background evidence was "minimal" compared to the

aggravating evidence. *Id.* at 355-56. It also found that because the evidence did not show Visciotti was under the influence of drugs at the time of the crimes, there was no merit to his theory that his family background mitigated the crimes because they were a product of his drug abuse, which in turn was caused by his family background *Id.* at 355-56.

In addition to this discussion in the determination of prejudice portion of the decision, the California Supreme Court discussed matters in other portions of its decision which the Ninth Circuit claims were not considered by the California Supreme Court. The California Supreme Court described the evidence of minimal brain injury at the guilt phase of trial, the state habeas allegation of suspected brain damage, and the state habeas evidence that a psychiatrist appointed to examine Visciotti before trial for competence and sanity recommended medical tests for possible organic brain disorder. *In re Visciotti*, 14 Cal.4th at 331, 334, 338-39; Appendix D at 85, 93, 104. The California Supreme Court decision also discussed the unpresented evidence of Visciotti's adjustment to incarceration. It noted the allegation that Visciotti's behavior improved when in juvenile camp and the testimony of the psychiatrist at the state habeas evidentiary hearing that Visciotti's "behavior and schooling improved markedly" while he was in custody in the California Youth Authority. *In re Visciotti*, 14 Cal. 4th at 334, 343; Appendix D at 93, 117.

Although the California Supreme Court did not discuss all of the concessions in trial counsel's argument cited by the Ninth Circuit, it discussed the most significant concession and the one bad seed argument, and inadequacies in trial counsel's argument in general. The California Supreme Court noted trial counsel argued to spare Visciotti's life because "he was the only bad child of a loving family that would suffer if [he] were executed," the allegation that this was a misleading argument, and the evidence at the state evidentiary hearing which showed it was untrue because siblings had substance abuse criminal records and the father had a criminal record. *In re Visciotti*, 14 Cal. 4th at

331, 333, 345; Appendix D at 86-87, 92, 121. The California Supreme Court's decision also noted Visciotti's allegation that trial counsel improperly conceded in argument that there was no mitigation from mental and emotional problems, and found that trial counsel erred when he conceded in argument that the evidence of brain damage was not mitigating. *In re Visciotti*, 14 Cal. 4th at 333, 353, 354, 354 n.7; Appendix D at 90-91, 142-43, 145, 145-46. The California Supreme Court described trial counsel's argument as "'a rambling discourse, not tied to particular evidence'" in which he asked for a life sentence to prevent Visciotti's family from suffering from the execution of its only bad child. *In re Visciotti*, 14 Cal. 4th at 331; Appendix D. at 86-87, quoting *People v. Visciotti*, 2 Cal. 4th at 82.

The California Supreme Court applied the correct law. It provided Visciotti the opportunity to present evidence at a state evidentiary hearing on his claim of ineffective assistance of counsel at the penalty phase of trial. It considered that evidence, the evidence at trial, and Visciotti's allegations. It then made a reasoned decision finding any deficient performance by counsel was not prejudicial, under *Strickland*. There is no valid basis to find this was "an unreasonable application of" *Strickland*. The Ninth Circuit finds it unreasonable only by ignoring the deference required under section 2254(d)(1) and assuming the California Supreme Court did not consider certain relevant matters. The Ninth Circuit bases its assumption on the fact the California Supreme Court did not discuss all of these matters in its discussion of prejudice. Common sense and section 2254(d)(1) call for the contrary assumption, to wit, that the California Supreme Court discussed only those matters it deemed most important and worthy of discussion. This assumption is consistent with the highly deferential standard of review of section 2254(d)(1) and the section's call to give effect to the state court conviction "to the extent possible under law." *Bell*, 122 S. Ct. at 1849, slip op. at 6, *citing Williams*, 529 U.S. at 403-04. The Ninth Circuit ignores these requirements in making its assumption.

The Ninth Circuit also ignores the requirements of section 2254(d)(1) in concluding, contrary to the California Supreme Court's conclusion, that the aggravating evidence was not overwhelming. The Ninth Circuit relies on the fact the jury deliberated for one day and then asked for definitions of two terms ("moral justification" and "extreme duress") used in the penalty phase instructions. It also uses this fact to support its conclusion that the jury "struggled" with its penalty decision. *Visciotti v. Woodford*, 288 F.3d at 1118, Appendix A at 67.

Instead of giving deference to the California Supreme Court determination that the aggravating factors were overwhelming, the Ninth Circuit engages in pure speculation to justify its disagreement with the California Supreme Court. The jury's actions do not support the Ninth Circuit's conclusion that the aggravating factors were not overwhelming. The jury's decision was literally one of life or death. In any case, let alone a death penalty case, there can be countless reasons for the time taken in deliberations. One day of deliberations followed by a request for the definition of two instructional terms does not support the Ninth Circuit's conclusion that the jury struggled over whether to impose death or life. As stated by a California appellate court, the "length of deliberations could as easily be reconciled with the jury's conscientious performance of its civic duty, rather than its difficulty in reaching a decision." *People v. Walker*, 31 Cal. App. 4th 432, 436-39, 37 Cal. Rptr. 2d 167 (1995). Moreover, even one dissenting justice agreed with the California Supreme Court majority opinion that the aggravating factors were overwhelming and the mitigating factors were minimal compared to the aggravating factors. *In re Visciotti*, 14 Cal.4th at 366, quoting the majority opinion at 355, 356 (Brown, J., dissenting), Appendix D at 175. The Ninth Circuit used an improper basis to find the aggravating factors were not overwhelming; it ignored logic and the standards of section 2254(d)(1) in finding the California Supreme Court's rejection

of Visciotti's claim of ineffective assistance of counsel at the penalty phase trial was an "unreasonable application of" *Strickland.*

Under the Ninth Circuit's ruling, state courts must expressly mention, in the discussion of the determination of each issue involving this Court's precedent, every possible factor a federal court might later deem relevant on the issue. Otherwise the state court's decision is in jeopardy of being overturned on federal habeas as "an unreasonable application of" this Court's precedent for failure to consider any unmentioned factor a federal court subsequently deems relevant. This imposes an unreasonable burden on the state courts' limited resources. It adds another layer of consideration to the state court consideration process and penalizes brevity. Most importantly, the Ninth Circuit's approach is fundamentally at odds with the requirement of deference, which is central to AEDPA.

Certiorari is necessary to clarify that under 28 U.S.C. section 2254(d)(1) a federal court may not assume a state court did not consider relevant factors in evaluating an issue merely because the state court's written evaluation of the issue does not restate it has considered such factors when the state court has earlier discussed the factors, as the California Supreme Court did here.

CONCLUSION

For the foregoing reasons, certiorari should be granted by this Court.

Dated: July 18, 2002

Respectfully submitted,

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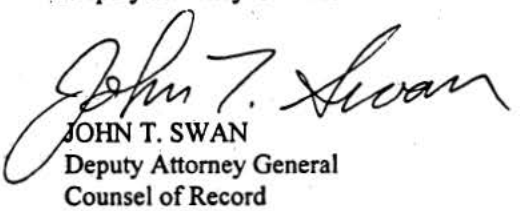

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ALL-PURPOSE

ACKNOWLEDGEMENT

STATE OF CALIFORNIA)

COUNTY OF San Diego)

On July 19, 2002 (DATE) before me, Lidia Hernandez, Notary Public (NAME, TITLE OF OFFICER - E.G., "JANE DOE, NOTARY PUBLIC")

personally appeared, Annette Aguilar

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

LIDIA HERNANDEZ
COMM. # 1300759
NOTARY PUBLIC • CALIFORNIA
SAN DIEGO COUNTY
Comm. Exp. APRIL 13, 2005

Lidia Hernández (SEAL)
NOTARY PUBLIC SIGNATURE

OPTIONAL INFORMATION

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DATE OF DOCUMENT July 19, 2002 NUMBER OF PAGES 1

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Attorney: No: _____

BILL LOCKYER
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the State of California
JOHN T. SWAN,
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110 West A Street, Suite 1100
P.O. Box 85266
San Diego, CA 92186-5266

JEANNE WOODFORD, Warden,

Petitioner,

v.

JOHN LOUIS VISCIOTTI,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 1100, San Diego, California 92186-5266.

I have served the within PETITION FOR WRIT OF CERTIORARI as follows: To William K. Suter, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and forty (40) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

William Forman, Esq.
Office of Federal Public Defender
321East Second Street
Los Angeles, CA 90012

Hon. Manuel L. Real
United States District Court
312 N. Spring Street, #G-8
Los Angeles, CA 90012

California Supreme Court
Frederick Ohlrich, Court Administrator
350 McAllister Street
San Francisco, CA 94102

Hon. Robert Fitzgerald
Orange County Superior Court
700 Civic Center Drive West
Santa Ana, CA 92701-4045

United States Court of Appeals
Ninth Circuit
P. O. Box 193939
San Francisco, CA 94119-3939
Circuit Judges Pregerson,
Tashima, Berzon

Anthony J. Rackaukas
Orange Co District Attorney
401 Civic Center Drive West
Santa Ana, CA 92701

Jeanne Woodford, Warden
San Quentin State Prison
San Quentin, CA 94964

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 19th day of July, 2002.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

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

Dated at San Diego, California, July 19, 2002.

ANNETTE AGUILAR

Subscribed and sworn to before me
this 19th day of July.

Notary Public in and for said County and State

the constitutional issue left that issue unexhausted—notwithstanding the court's addition of a few explanatory words. All the court did was to *consider whether to consider* the constitutional claim and decide that it "need not" do so (not that the claim was meritless); that degree of examination simply is not enough to satisfy the exhaustion requirement where an avenue of state court review (here, a PRP) remains open. *See Castille*, 489 U.S. at 351, 109 S.Ct. 1056 (concluding that a claim remained unexhausted when it was raised only in a petition for allocatur, a certiorari-like form of discretionary review by the Pennsylvania Supreme Court, and that petition was denied). Although a court necessarily "ha[s] thought about[a] new federal claim" when it chooses not to reach it, *supra* at 1087, that thought does not focus and that choice does not rest squarely on the merits. *Cf., e.g.*, Sup.Ct. R. 10; *United States v. Carver,* 260 U.S. 482, 490, 43 S.Ct. 181, 67 L.Ed. 361 (1923) ("The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.").

A decision not to decide an issue, even when accompanied by a few explanatory sentences, does not mean that the court "actually passes" on that issue; it means instead that it "takes a pass." And where, as here, the defendant retains the right to place his claim unambiguously before a state court simply by filing a petition for state postconviction relief, the exhaustion requirement demands that he do precisely that before coming to federal court. To hold otherwise is to "blue-pencil[ ] ... from the text of the statute" the requirement that the petitioner present his claim to the state courts by "any available procedure." *Castille,* 489 U.S. at 351, 109 S.Ct. 1056; 28 U.S.C. § 2254(c).

III

Far from a mere formality, the exhaustion requirement represents Congress's decision, rooted in respect for our federal system, that state judiciaries must be given the first opportunity to correct their own errors—even errors of federal law—and that federal habeas courts are to step in only if the state courts fail to do so.[7] In concluding that Greene complied with this requirement, the majority lowers the bar and undermines Congress's policy judgment.

I respectfully dissent.

John Louis VISCIOTTI, Petitioner–Appellee–Cross–Appellant,

v.

Jeanne WOODFORD, Warden of California State Prison at San Quentin, Respondent–Appellant–Cross–Appellee.

Nos. 99–99031, 99–99032.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 6, 2001.

Filed April 24, 2002.

Following affirmance of murder conviction and death sentence, 2 Cal.4th 1, 5

have an adequate opportunity to respond to the argument. Because the Defendant did not timely raise the state constitutional issue, we do not reach it.''). By contrast, the State has not only the opportunity but the obligation to respond to a PRP. Wash. R.App. P. 16.9.

7. *See, e.g., Duncan v. Walker,* 533 U.S. 167, 121 S.Ct. 2120, 2127–28, 150 L.Ed.2d 251 (2001) (citing cases); *Tillema v. Long,* 253 F.3d 494, 501 (9th Cir.2001).

Cal.Rptr.2d 495, 825 P.2d 388, state prisoner petitioned for habeas corpus. The United States District Court for the Central District of California, Manuel L. Real, J., granted the petition as to sentence but denied it as to conviction, and cross-appeals were taken. The Court of Appeals, Pregerson, Circuit Judge, held that: (1) California Supreme Court's decision was contrary to Supreme Court law where it mischaracterized *Strickland's* prejudice standard, and (2) in any event, California Supreme Court's conclusion that petitioner suffered no prejudice as a result of counsel's deficiencies at the penalty phase would be objectively unreasonable, so as to warrant habeas relief. The Court of Appeals, Tashima, Circuit Judge, further held that: (1) though it was likely that defense counsel's performance at the guilt phase was deficient, petitioner suffered no prejudice as a result, and (2) defense counsel's flawed performance at the guilt phase did not require the application of the per se prejudice rule.

Affirmed and remanded with directions.

Pregerson, Circuit Judge, filed an opinion dissenting in part.

Per Tashima, Circuit Judge.

1. Habeas Corpus ⚿450.1, 452

On habeas review, when there is no reasoned state court decision to review, federal court must conduct an independent review of the record to determine whether the state court clearly erred in its application of controlling federal law, and in doing so, federal court must focus primarily on Supreme Court cases in deciding whether the state court's resolution of the case constituted an unreasonable application of clearly established federal law. 28 U.S.C.A. § 2254(d).

2. Habeas Corpus ⚿452

Habeas relief cannot be granted simply because the state supreme court's disposition of the case was inconsistent with circuit precedent. 28 U.S.C.A. § 2254(d).

3. Criminal Law ⚿641.13(2.1)

Though it was likely that defense counsel's performance at the guilt phase of capital murder trial was deficient, defendant suffered no prejudice as a result of the alleged deficiencies since the strength of the prosecution's evidence against defendant made it highly unlikely that even a highly competent performance by counsel could have altered the jury's verdict, in light of identification testimony of a surviving attempted murder victim, who knew defendant from his workplace, videotaped confessions, and only minimal evidence supporting a defense of inability to form the requisite intent for the underlying robbery charge due to drug use. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⚿641.13(1)

To demonstrate prejudice from counsel's deficient performance, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. U.S.C.A. Const.Amend. 6.

5. Homicide ⚿18(1)

To convict defendant under the California felony murder rule, the jurors were not required to find malice or premeditation, and the only criminal intent required was the specific intent to commit the underlying felony.

6. Criminal Law ⚿641.13(2.1, 6)

Defense counsel's flawed performance at the guilt phase of capital murder trial, which included his insufficient investigation and preparation for trial and the limited range of his arguments, did not require the application of the per se prejudice rule, where there were at least some efforts by counsel to advocate defendant's case during the guilt phase, including putting on a defense mental health expert, making ob-

jections, and cross-examining the prosecution's witnesses, where there was nothing to indicate that counsel had a conflict of interest or was hostile to his client, and since counsel's closing argument, emphasizing the role of drugs and the evidence that the killings were not pre-meditated and that the defendant was not cold-blooded, was not an "abandonment" of defendant. U.S.C.A. Const.Amend. 6.

7. Criminal Law ⚿641.5(.5), 641.12(1), 641.13(1)

Presumed prejudice from deficient performance of counsel is limited to the complete denial of counsel and comparable circumstances, including: (1) where a defendant is denied counsel at a critical stage of his trial; (2) where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; (3) where the circumstances are such that the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial; and (4) where counsel labors under an actual conflict of interest. U.S.C.A. Const.Amend. 6.

8. Habeas Corpus ⚿486(2)

California Supreme Court's decision that petitioner failed to make a prima facie case of ineffective assistance of counsel at the guilt phase of his capital murder trial was not an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States, so as to warrant habeas relief, in light of overwhelming evidence of guilt, indicating lack of prejudice from any deficiencies in counsel's performance. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254(d).

Per Pregerson, Circuit Judge.

9. Criminal Law ⚿641.13(1)

A reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different, establishing prejudice prong of *Strickland*, is a probability sufficient to undermine confidence in the outcome and is less than a preponderance. U.S.C.A. Const.Amend. 6.

10. Habeas Corpus ⚿486(2)

The California Supreme Court's decision was contrary to Supreme Court law where it mischaracterized *Strickland's* prejudice standard by evaluating whether a more favorable result was probable absent counsel's deficient performance, but petitioner was not entitled to habeas relief unless the California Supreme Court reached an erroneous result that warranted the issuance of a writ. U.S.C.A. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

11. Habeas Corpus ⚿452

Although "clearly established law" for the purposes of standard for granting habeas relief is the holdings, as opposed to the dicta, of the Supreme Court's decision as of the time of the relevant state court decision, federal Court of Appeals still looks to its own law for its persuasive authority in applying Supreme Court law. 28 U.S.C.A. § 2254(d).

See publication Words and Phrases for other judicial constructions and definitions.

12. Criminal Law ⚿641.13(7)

Defendant suffered from ineffective assistance of counsel during the penalty phase of capital murder trial and suffered prejudice as a result, where counsel failed to investigate and discover mitigating evidence, chose not to pursue a sympathy defense without knowing what he might find if he did, failed to prepare, delivered an unfocused closing argument during which he undercut his client's own case, relied on a defense in mitigation that was factually unsupported and that portrayed

defendant in an inaccurate and unflattering light, and affirmatively conceded several mitigating factors, and where the aggravating factors were not overwhelming and the jury deliberated a full day and then requested additional guidance on the definitions of mitigating factors. U.S.C.A. Const.Amend. 6.

13. Criminal Law ⚿641.13(6)

Failure to conduct a reasonable investigation constitutes deficient performance by counsel. U.S.C.A. Const.Amend. 6.

14. Sentencing and Punishment ⚿1702, 1716

Evidence about the defendant's background and character is relevant to punishment in a capital murder case.

15. Criminal Law ⚿641.13(7)

Defense counsel's decision that it was more important to preserve the defendant's family's pride or dignity than it was to prevent his client from receiving the death penalty could not be viewed as a reasonable basis to forego investigation which would have revealed mitigating evidence of abusive family background. U.S.C.A. Const.Amend. 6.

16. Sentencing and Punishment ⚿1712, 1715

Jury could consider defendant's intoxication and brain damage during the penalty phase of California capital murder trial, even if the evidence was insufficient to establish a legal defense in the guilt phase. West's Ann.Cal.Penal Code § 190.3(d, h).

17. Habeas Corpus ⚿861

Court of Appeals must affirm the district court's reversal, in a habeas proceeding, of petitioner's death sentence if Court of Appeals cannot conclude with confidence that the jury would unanimously have sentenced petitioner to death if counsel had presented and explained all of the available mitigating evidence. U.S.C.A. Const. Amend. 6.

18. Habeas Corpus ⚿486(5)

Even if the California Supreme Court had correctly applied the prejudice prong of the *Strickland* standard, its conclusion that petitioner suffered no prejudice as a result of counsel's deficiencies at the penalty phase of capital murder trial would be objectively unreasonable, so as to warrant habeas relief, where it failed to evaluate the totality of the available mitigation evidence, both that adduced at trial and the evidence adduced in the habeas proceeding, in reweighing it against the evidence in aggravation. 28 U.S.C.A. § 2254(d).

John T. Swan, Deputy Attorney General, San Diego, CA, for the respondent-appellant-appellee.

William H. Forman and Statia Peakheart, Deputy Federal, Public Defenders, Los Angeles, CA, for the petitioner-appellee-cross-appellant.

Appeal from the United States District Court for the Central District of California, Manuel Real, District Judge, Presiding. D.C. No. CV 97–04591–R.

Before: PREGERSON,TASHIMA, and BERZON, Circuit Judges.

Opinion by Judges PREGERSON and TASHIMA; Dissent by Judge PREGERSON.

OPINION

PREGERSON, Circuit Judge, authored Sections I, II, and III–B, with which Judges TASHIMA and BERZON concur. TASHIMA, Circuit Judge, authored Section III–A, with which Judge BERZON concurs, and from which Judge PREGERSON dissents.

John Visciotti ("Visciotti"), a California state prisoner, was convicted of first de-

gree murder, attempted murder, and robbery, and sentenced to death. After exhausting his claims in state court, Visciotti brought a federal habeas petition alleging, among other claims, ineffective assistance by his counsel during the guilt and penalty phases of his trial. The district court granted Visciotti's habeas petition as to his sentence but denied habeas relief as to his conviction. Warden Woodford appealed and Visciotti cross-appealed the district court's decision. We affirm the district court's decision in its entirety.[1]

I.

The following events, as described by the California Supreme Court, led to Visciotti's prosecution and conviction.

> [Visciotti] and Brian Hefner, both of whom had been employed as burglar alarm salesmen by Global Wholesalers in Garden Grove [California], and who shared a motel room, were fired by their employer on November 8, 1982. Because their final paychecks were insufficient to cover future rent, they devised a plan to rob fellow employees who were also to be paid on that date. The pair waited in the company parking lot until another group of employees, among whom were [Timothy] Dykstra and [Michael] Wolbert, returned from their shifts. They invited Dykstra and Wolbert to join them at a party which, they claimed, was to be held at the home of friends in the Anaheim Hills area.
>
> Dykstra and Wolbert agreed to go to the party. They did not know [Visciotti] and Hefner well, however, and were cautious. They insisted on driving in Wolbert's car. They also removed most of their cash from their wallets and hid it behind the dashboard of their car. After leaving [Visciotti's] car at an apartment complex, the four drove to a remote area on Santiago Canyon Road where [Visciotti] asked Wolbert to stop so that defendant could relieve himself. It was then between 7 and 9 p.m.
>
> All four men left the car, Dykstra getting out first to permit [Visciotti] to leave. After the other three men left the car, Wolbert saw a gun in [Visciotti's] waistband. Wolbert then left the car and when he next looked at [Visciotti] he saw that [Visciotti] and Dykstra were standing face-to-face about two feet apart, with [Visciotti] holding the gun pointed at Dykstra. [Visciotti] demanded the victims' wallets. Wolbert told [Visciotti] where the money was hidden. Dykstra and Wolbert then stayed on an embankment, several feet apart, while Hefner searched for the money.
>
> [Visciotti] moved to stand by Wolbert, who asked [Visciotti] to let them go, told him to take the car and the money, and assured him that he would not identify him. When Hefner left the car, [Visciotti] moved back toward Dykstra who was sitting down. [Visciotti] then raised the gun in one hand and shot Dykstra from a distance of about three or four feet. . . .
>
> After [Visciotti] shot Dykstra, Wolbert stood up and stepped back. [Visciotti] approached Wolbert, who was backing up, raised the gun in both hands, and shot Wolbert three times. . . .
>
> In spite of his life-threatening wounds, Wolbert did not lose consciousness. He heard defendant and Hefner get into the car and drive back down the road. He was later able to attract the attention of passersby who summoned aid. He identified his assailants as fellow employees at Global Wholesalers. Dykstra was

1. We review a district court's decision to dismiss a petition for writ of habeas corpus de novo. *Miles v. Prunty,* 187 F.3d 1104, 1105 (9th Cir.1999).

dead when paramedics arrived. Wolbert was transported to the hospital where he underwent surgery. On the following morning, he identified both defendant and Hefner in a photographic lineup, identifying [Visciotti] as the person who had shot him and Dykstra.

[Visciotti] and Hefner were arrested as they left their motel room about 9 a.m. on the morning after the robbery and murder. The murder weapon, a .22 caliber single action revolver which still held six expended shell cases in the cylinder, was found hidden in a space behind the bathroom sink. [Visciotti] confessed his involvement and, at the request of the investigating officers, participated in a videotaped reenactment of those events that had taken place in Santiago Canyon.

Analysis of a sample of [Visciotti's] blood, taken at approximately noon on November 9, 1982, revealed no alcohol, amphetamines, opiates, barbiturates, or phencyclidine (PCP). Cocaine and benzoylecgonine, a metabolite of cocaine, were present, however.

People v. Visciotti, 2 Cal.4th 1, 28–30, 5 Cal.Rptr.2d 495, 825 P.2d 388 (1992).

Roger Agajanian ("Agajanian") was retained by Visciotti's father to represent Visciotti during pretrial proceedings, through trial, and on appeal. Agajanian was admitted to the California bar in July 1973. *In re Visciotti*, 14 Cal.4th 325, 336, 58 Cal.Rptr.2d 801, 926 P.2d 987 (1997). He had never tried a capital case that went to a jury or conducted a penalty phase trial before representing Visciotti, though he had represented clients charged with murder. *Id.* at 336, 58 Cal.Rptr.2d 801, 926 P.2d 987. Agajanian was suspended from the State Bar of California in 1990, 1991, and 1993, and resigned from the California bar in 1994.[2] *Id.* at 349 n. 6, 58 Cal.Rptr.2d 801, 926 P.2d 987.

Trial Proceedings

Visciotti was tried by a jury in July 1983 in the Superior Court of the State of California, County of Orange. During the guilt phase of Visciotti's trial, the surviving victim, Michael Wolbert, testified on behalf of the prosecution. The prosecution additionally introduced as evidence Visciotti's videotaped confession and reenactment.

Dr. Louis Broussard ("Dr.Broussard") testified as a witness for the defense. Dr. Broussard testified that Visciotti "had minimal brain injury of a type associated with impulse disorders and specific learning disorders." *Visciotti*, 2 Cal.4th at 32, 5 Cal. Rptr.2d 495, 825 P.2d 388. He admitted during cross-examination, however, that he had not reviewed Visciotti's videotaped confession and reenactment, and would have conducted additional psychological testing and additional interviews had he had enough time to do so.

Visciotti testified on his own behalf. During Agajanian's direct examination, Visciotti described the night of the crimes consistently with the videotaped confession and reenactment. Agajanian also elicited information from Visciotti about his prior juvenile and misdemeanor offenses. Visciotti also admitted that he had been convicted of assault with a deadly weapon, and described the facts underlying this felony conviction. Visciotti testified that the assault occurred after two men broke down

2. In December 1985, while representing Visciotti on appeal, Agajanian was convicted of two counts of criminal contempt in the District of Vermont. *In re Visciotti,* 14 Cal.4th at 349 n. 6, 58 Cal.Rptr.2d 801, 926 P.2d 987. "Evidence was admitted at the state habeas evidentiary hearing that during the time he represented Visciotti , Agajanian did not respond to client communications, failed to make court appearances, did not visit clients in jail or show up in court or other places as promised, and was distracted by a civil suit against a non-lawyer who shared his office." *Id.*

the door to his motel room and one, William Scofield ("Scofield"), cut Visciotti's roommate's throat with a knife, while a third man, armed with a gun, stood at the doorway. Visciotti testified that when the three men fled, Visciotti picked up the knife dropped by Scofield, ran after the men, and stabbed Scofield outside Scofield's motel room.

The prosecution contradicted Visciotti's description of the circumstances of the assault through its cross-examination of Visciotti and through the testimony of a police officer the prosecution called as a rebuttal witness. The prosecution elicited testimony from Visciotti and the police officer that Visciotti had broken into Scofield's room and stabbed both Scofield and Kathy Cusack ("Cusack"), a pregnant woman who was in Scofield's bed at the time.

The jury found Visciotti guilty of murder, attempted murder, and armed robbery, with a special circumstance finding that the murder was committed during the commission of a robbery.[3]

During the penalty phase of Visciotti's trial, Scofield and Cusack [4] testified for the prosecution in support of its case in aggravation. Scofield's and Cusack's descriptions of the circumstances underlying Visciotti's assault conviction were consistent with that of the police officer who testified during the guilt phase. Agajanian called Visciotti's parents and siblings to testify during the penalty phase. As Agajanian later explained, his mitigation strategy was to elicit sympathy for Visciotti's family "in an attempt to make it more difficult for the jury to decide this family's one stray, its son and brother, should be executed." *In re Visciotti*, 14 Cal.4th at 347, 58 Cal. Rptr.2d 801, 926 P.2d 987. Visciotti was sentenced to death.

On automatic appeal, the California Supreme Court affirmed Visciotti's conviction, with one justice dissenting. *People v. Visciotti*, 2 Cal.4th 1, 5 Cal.Rptr.2d 495, 825 P.2d 388 (1992).

Habeas Proceedings

Visciotti filed a petition for a writ of habeas corpus in the California Supreme Court. The California Supreme Court appointed a referee [5] to hold an evidentiary hearing and make findings of fact relating to Visciotti's claim that Agajanian provided ineffective assistance of counsel during the penalty phase. After the referee held the hearing and made findings of fact, and after briefing on the merits, the California Supreme Court denied Visciotti's petition in its entirety, with one justice concurring separately and two justices dissenting. *In re Visciotti*, 14 Cal.4th 325, 58 Cal.Rptr.2d 801, 926 P.2d 987. The California Supreme Court assumed that Agajanian provided constitutionally inadequate representation during the penalty phase, but concluded that these inadequacies did not prejudice the jury's sentencing decision.

Visciotti, with the assistance of court-appointed counsel, filed a federal habeas petition on June 23, 1998. Judge Real of the United States District Court for the

3. Under California law, a defendant who is found guilty of first degree murder will be sentenced to death or life imprisonment without the possibility of parole if one or more "special circumstances" are found. Cal.Penal Code § 190.2. The statute includes twenty-two "special circumstances," among them that " t he murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit" several felonies, including robbery. Cal.Penal Code § 190.2(17).

4. Cusack was called as a rebuttal witness during the penalty phase.

5. The referee was a judge of the Orange County Superior Court. *See In re Visciotti*, 14 Cal.4th at 329, 58 Cal.Rptr.2d 801, 926 P.2d 987.

Central District of California held a three-day hearing on Visciotti's claims (except for Visciotti's claim of ineffective assistance of counsel during the penalty phase, as the state court had already held a hearing on that claim). Following this evidentiary hearing, Judge Real determined that Visciotti had been denied effective assistance of counsel during the penalty phase, and granted Visciotti's habeas petition as to his sentence.[6] Judge Real also determined that Agajanian's performance during the guilt phase of the trial was not unconstitutionally deficient or prejudicial and denied Visciotti's other claims.

The state timely appealed Judge Real's decision to grant habeas relief on Visciotti's ineffective assistance of counsel claim as to Visciotti's sentence. Visciotti cross-appealed Judge Real's decision to deny habeas relief on Visciotti's ineffective assistance of counsel claim as to Visciotti's conviction. Visciotti does not appeal Judge Real's dismissal of Visciotti's other claims.

II. Standard of Review

A federal court may grant a writ of habeas corpus to a state prisoner only if the state court's rulings "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 were "based on an unreasonable determination of the facts in light of the evidence presented" in the state courts.[7] 28 U.S.C. § 2254(d). Under the "contrary to" clause, a state court's decision is contrary to federal law if it "failed to apply the correct controlling authority from the Supreme Court." *Shackleford v. Hubbard*, 234 F.3d 1072, 1077 (9th Cir.2000); *see also Williams v. Taylor*, 529 U.S. 362, 405–07, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *LaJoie v. Thompson*, 217 F.3d 663, 667–68 (9th Cir.2000); *Van Tran v. Lindsey*, 212 F.3d 1143, 1150 (9th Cir.2000). A state court decision is an "unreasonable application" of Supreme Court law if the state court "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Williams*, 529 U.S. at 407–08, 120 S.Ct. 1495. In order to warrant habeas relief, the state court's application of clearly established federal law must be "objectively unreasonable." *Id.* at 409, 120 S.Ct. 1495.

III. Discussion

A. Agajanian's Performance During the Guilt Phase

Unlike its lengthy discussion concerning Agajanian's performance at the penalty phase of the trial, the California Supreme Court denied Visciotti's claim of ineffective assistance of counsel at the guilt phase of his trial without providing a reasoned explanation. Instead, the state court simply stated that by issuing an order to show cause that was limited to counsel's penalty phase performance, it had "implicitly concluded" that the other claims failed to "state a prima facie case." *In re Visciotti*, 14 Cal.4th at 329, 58 Cal.Rptr.2d 801, 926 P.2d 987 (citing *People v. Miranda*, 44 Cal.3d 57, 119 n. 37, 241 Cal.Rptr. 594, 744 P.2d 1127 (1987) (noting that the issuance of a limited order to show cause in a habeas case is an implicit determination of petitioner's failure to make a prima facie

6. *Visciotti v. Calderon*, No. CV 97–4591 R (C.D. Cal. filed Oct. 8, 1999). The district court's opinion will be referred to as: "Dist. Ct."

7. Visciotti's petition is governed by the standards of 28 U.S.C. § 2254 because his habeas petition was filed after the effective date of the Anti–Terrorism and Effective Death Penalty Act, the statute which enacted the current standards governing the granting of the writ of habeas corpus. *See Lockhart v. Terhune*, 250 F.3d 1223, 1228 (9th Cir.2001).

case on the other claims in his petition); *People v. Bloyd*, 43 Cal.3d 333, 362–63, 233 Cal.Rptr. 368, 729 P.2d 802 (1987) (same)).

[1, 2] On habeas review, when there is no reasoned state court decision to review, we must conduct "an independent review of the record . . . to determine whether the state court clearly erred in its application of controlling federal law." *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir.2000) (citing *Van Tran*, 212 F.3d at 1153). In doing so, because there is no state court decision, we must "focus primarily on Supreme Court cases in deciding whether the state court's resolution of the case constituted an unreasonable application of clearly established federal law." *Fisher v. Roe*, 263 F.3d 906, 914 (9th Cir.2001). Habeas relief cannot be granted "simply because the California Supreme Court's disposition of the case was inconsistent with our own precedent." *Id.*

[3] To prevail on a claim of ineffective assistance of counsel, a petitioner must show that: (1) "counsel's performance was deficient;" and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In this case, although it seems likely that Agajanian's performance at the guilt phase of the trial was deficient, we need not resolve that issue because we conclude that Visciotti suffered no prejudice as a result of the alleged deficiencies. *See Mayfield v. Woodford*, 270 F.3d 915, 925 (9th Cir.2001) (en banc) (citing *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052).

[4] To demonstrate prejudice, a defendant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

[5] The strength of the prosecution's evidence against Visciotti for first degree murder under the felony murder rule and for attempted murder made it highly unlikely that even a highly competent performance by Agajanian could have altered the jury's verdict. To convict Visciotti under the felony murder rule, the jurors were not required to find malice or premeditation; the "only criminal intent required [was] the specific intent to commit the [robbery]." *People v. Dillon*, 34 Cal.3d 441, 475, 194 Cal.Rptr. 390, 668 P.2d 697 (1983) (internal quotation marks and citation omitted).

The prosecution adduced the testimony of the surviving victim, Wolbert, who knew Visciotti from his workplace and unambiguously identified him as the man who had robbed and shot Dykstra and Wolbert, killing Dykstra. The prosecution also introduced two videotapes in which Visciotti confessed to his plan and intent to rob the men and his knowing and intentional shooting of them during the course of that robbery. One of the videotapes, referred to by the state court as a "re-enactment," *see In re Visciotti*, 14 Cal.4th at 355, 58 Cal.Rptr.2d 801, 926 P.2d 987, featured Visciotti at the scene of the crime admitting to his involvement in the robbery and shootings, describing the chain of events, and even pointing out the locations where the individual events had transpired.

There was only minimal evidence supporting a defense that Visciotti lacked the ability to form the requisite intent for the underlying robbery charge due to his drug use. On the other hand, the evidence against such a claim, including Wolbert's testimony about Visciotti's demeanor at the time of the crime and Visciotti's own videotaped recollection of the details of his and Hefner's plans to rob and their subsequent robbery of Wolbert and Dykstra, was substantial and convincing. In light of this strong inculpatory evidence and the

weakness of any contrary evidence, we are confident that even a highly competent performance by Agajanian at the guilt phase would not have affected the verdict.

[6, 7] Visciotti contends, however, that Agajanian's flawed performance at the guilt phase of the trial requires the application of the per se prejudice rule. In Sixth Amendment right to counsel cases, the Supreme Court has presumed prejudice where there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *United States v. Cronic,* 466 U.S. 648, 658, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). *Strickland, Cronic,* and the cases that follow *Cronic* have made clear that this exception is limited to the "complete denial of counsel" and comparable circumstances, including: (1) where a defendant "is denied counsel at a critical stage of his trial"; (2) where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing"; (3) where the circumstances are such that "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial"; and (4) where "counsel labors under an actual conflict of interest." *Id.* at 659–61, 662 n. 31, 104 S.Ct. 2039; *see also Smith v. Robbins,* 528 U.S. 259, 120 S.Ct. 746, 764–65, 145 L.Ed.2d 756 (2000) (noting that there is no presumption of reliability where there has been a complete denial of counsel, where the state has interfered with counsel's assistance, or where counsel is burdened by a conflict of interest); *Penson v. Ohio,* 488 U.S. 75, 88–89, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988) (holding that a complete denial of counsel on appeal requires a presumption of prejudice); *Strickland,* 466 U.S. at 692, 104 S.Ct. 2052 (noting an assumption of prejudice where there is an "actual or constructive denial of ... counsel altogether"). Apart from circumstances of this nature and magnitude, "there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." *Cronic,* 466 U.S. at 659 n. 26, 104 S.Ct. 2039 (citing *Strickland,* 466 U.S. at 693–96, 104 S.Ct. 2052).

As noted above, Agajanian's overall performance at the guilt phase of the trial may well have been deficient. His shortcomings included his insufficient investigation and preparation for trial and the limited range of his defense arguments. The foregoing notwithstanding, the record demonstrates at least some efforts by Agajanian to advocate Visciotti's case during the guilt phase. Agajanian put on a defense mental health expert, Dr. Louis Broussard, made objections, and cross-examined the prosecution's witnesses. There is also nothing in the record to indicate that Agajanian had a conflict of interest, sympathized with the prosecution, was hostile to his client, or wanted him to be convicted. Under these circumstances, we cannot conclude that Agajanian's overall performance at the guilt phase "entirely failed to subject the prosecution's case to meaningful adversarial testing," *Cronic,* 466 U.S. at 659, 104 S.Ct. 2039, or that Agajanian left Visciotti "completely without representation at the guilt phase," *Penson,* 488 U.S. at 88, 109 S.Ct. 346.

The record also does not support the contention that Agajanian abandoned Visciotti "at a critical stage of his trial" by conceding in his closing argument that there was no reasonable doubt that Visciotti was guilty of first degree murder. In *United States v. Swanson,* 943 F.2d 1070 (9th Cir.1991), the case on which Visciotti and the dissent rely, this court concluded that the defense attorney's concession during closing arguments that there was no reasonable doubt that his client had

intimidated the victims and robbed the bank was an abandonment of the defense of his client "at a critical stage of his trial" and a breakdown in our adversarial system of justice. Unlike the defense attorney's closing argument in *Swanson,* however, Agajanian's closing argument, although it may be criticized as deficient and ineffective, cannot properly be characterized as an "abandonment" of his client, warranting application of the *Cronic* exception and a presumption of prejudice.

Although a few of Agajanian's statements can be interpreted as a concession of Visciotti's guilt as to the felony murder portion of the charges,[8] unlike *Swanson,* 943 F.2d at 1077, Agajanian did not assert that the evidence against his client was overwhelming, did not concede that his arguments failed to rise to the level of "reasonable doubt," and did not urge the jury to entertain no reservations or regrets about reaching a guilty verdict. Instead, Agajanian explicitly argued at closing that the evidence against his client was "not overwhelming" and that there were factors that could be decided "in favor of innocence" under the "reasonable doubt" standard.

Agajanian also argued that the murder was not premeditated and that Visciotti lacked the specific intent to kill. He argued that the murder weapon did not belong to Visciotti; that Visciotti had testified to being "scared," "paranoid," and "spaced out" at the time of the shootings; and that the evidence of planning, including efforts to fool the victims about the defendants' place of residence, suggested that there was no intent to kill. Agajanian also argued that Visciotti was not a cold-blooded killer by emphasizing the role that Visciotti's drug use probably played in the robbery and shootings; noting the fact that Visciotti claimed he was "loaded," that cocaine was found in his blood, and that there is a close link between crime and drug abuse; contending that Visciotti had shot Wolbert from a greater distance than Wolbert testified to; and pointing out that Visciotti had gotten sick and vomited after the shootings.

One can question Agajanian's closing argument strategy of arguing that the crime was not premeditated and that Visciotti was not a cold-blooded murderer, since the jury could convict Visciotti of first degree murder under the felony murder rule without finding premeditation or a specific intent to kill. It is important to keep in mind, however, the context in which Agajanian was lawyering. This was a death penalty case in which the prosecution was making a strong effort to portray the murder and attempted murder as cold-blooded, pre-meditated, and execution-like, and virtually no effective defense to the felony murder charge was available for defense counsel to argue. In that context, the focus of Agajanian's closing argument on disproving premeditation and the cold-blooded nature of the murder cannot fairly be characterized as an abandonment of the client, as a jury might be less likely to impose the death penalty on someone convicted of felony murder, as opposed to someone who set out to commit a premeditated murder.[9]

8. The dissent argues that Agajanian conceded Visciotti's guilt of felony murder twice in his closing argument. Both statements, however, were made in the context of Agajanian's efforts to distinguish felony murder from premeditated murder. Thus, the first statement was nothing more than counsel's statement of the law of felony murder, rather than an admission of what the evidence showed. In his second statement, Agajanian pointed out that even if the jury were to find Visciotti guilty of first degree murder, it must still conclude that the killing was ''not premeditated.''

. The dissent argues that we have inappropriately ''hypothesized'' a strategy on behalf of Agajanian by recognizing his efforts to distin-

Thus, Agajanian's closing argument, emphasizing the role of drugs and the evidence that the killings were not pre-meditated and that the defendant was not cold-blooded, was not an "abandonment" of Visciotti under *Cronic*, however deficient and ineffective it may have been. We thus conclude that Agajanian's guilt-phase representation did not "make the adversary process itself *presumptively* unreliable." *See Cronic*, 466 U.S. at 659 & n. 26, 104 S.Ct. 2039 (emphasis added). Visciotti must therefore satisfy the *Strickland* test in order to prevail on his claim of ineffective assistance of counsel at the guilt phase of his trial. *Id.* He has not done so.[10]

[8] Accordingly, we conclude that the California Supreme Court's decision that Visciotti failed to make a prima facie case of ineffective assistance of counsel at the guilt phase of the trial was not "objectively unreasonable." Because the record before us does not support a finding of clear error, we conclude that the state court reasonably applied clearly established federal law, as determined by the Supreme Court of the United States; therefore, we affirm the district court's denial of Visciotti's claim of ineffective assistance of counsel at the guilt phase of the trial.

B. Agajanian's Performance During the Penalty Phase

[9] *Strickland* also governs Visciotti's claim that he received ineffective assistance of counsel during the penalty phase. Accordingly, to prevail on his penalty phase ineffective assistance of counsel claim, Visciotti must show that Agajanian's performance was deficient and that his deficient performance prejudiced Visciotti's defense. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. To establish prejudice, Visciotti bears the burden of showing that "there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052. A "reasonable probability" is *less than* a preponderance: "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.*

[10–12] The California Supreme Court's decision was "contrary to" Supreme Court law because it mischaracterized *Strickland's* prejudice standard. Instead of evaluating whether there was a *reasonable probability* that, absent Agajanian's deficient performance, the result of the proceedings would have been different, the California Supreme Court evaluated whether a more favorable result was *probable* absent Agajanian's deficient perfor-

guish felony murder from premeditated murder as a not unreasonable strategy. We note that, after the verdict was returned, Agajanian attempted to ascertain whether the verdict was based on felony murder or premeditated murder. The trial judge, however, did not permit the jury to be polled on that question. Thus, we have simply made a "fair assessment of attorney performance" by considering the circumstances under which Agajanian's challenged conduct took place. *See Strickland*, 466 U.S. at 689, 104 S.Ct. 2052 (holding that because of the difficulty of making such a fair assessment, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy' " (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955))).

10. We note that, while we take *Swanson* into account in applying *Cronic*, *Swanson* does not independently qualify as "clearly established Federal law, as determined by the Supreme Court of the United States," as required by 28 U.S.C. § 2254(d)(1), in order to serve as a ground for issuance of the writ. *See Van Tran*, 212 F.3d at 1149.

mance.[11] The California Supreme Court's evaluation of Visciotti's ineffective assistance of counsel claim at the penalty phase was, therefore, contrary to Supreme Court law. As the Supreme Court recently explained:

> If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to [the Supreme Court's] clearly established precedent because [the Court] held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that ... the result of the proceeding would have been different."

Williams, 529 U.S. at 405–06, 120 S.Ct. 1495 (quoting *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052). Visciotti is not entitled to relief, however, unless the California Supreme Court reached an erroneous result that warrants the issuance of a writ. After considering the applicable Supreme Court and Ninth Circuit precedent,[12] we find that Visciotti suffered from ineffective assistance of counsel during the penalty phase and suffered prejudice as a result because "there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052.

1. Agajanian's preparation for and presentation during the penalty phase was deficient.

The California Supreme Court assumed that Agajanian's preparation for and presentation at the penalty phase was deficient because Agajanian:

> (1) failed to investigate and discover mitigating evidence as a result of his ignorance of the types of evidence a jury might consider mitigating; (2) failed to present readily available evidence that would have revealed to the jury the extent to which petitioner was subjected to psychological and physical abuse as a child, the impact the dysfunctional and peripatetic family life had on petitioner's development, and the correlation between these events and petitioner's resort to drugs; (3) failed to prepare, which left him unaware of the scope of the aggravating evidence to be introduced; and (4) delivered an unfocused closing argument, during which he undercut his client's own case by telling the jury that the evidence of petitioner's

11. *See Visciotti,* 14 Cal.4th at 330, 58 Cal. Rptr.2d 801, 926 P.2d 987 (Visciotti "ha d not demonstrated that ... absent Agajanian's failings *it is probable* that a more favorable result would have been reached by the penalty jury") (emphasis supplied); *id.* at 355, 58 Cal.Rptr.2d 801, 926 P.2d 987 ("We cannot conclude that *it is probable* that the jury would have found that the evidence of petitioner's troubled family background itself would have outweighed th e aggravating evidence") (emphasis supplied); *id.* at 356, 58 Cal.Rptr.2d 801, 926 P.2d 987 ("Under the circumstances *it is not probable* that the jury would have found evidence that petitioner's childhood was troubled or that he turned to drugs as a means of escape from an unbearable family situation mitigating or sufficiently so that the evidence would have affected the jury determination that the aggravating factors outweighed the mitigating in this case") (emphasis supplied).

12. Although "clearly established law" for the purposes of 28 U.S.C. § 2254, is the "holdings, as opposed to the dicta, of th e Court's decision as of the time of the relevant state court decision," *Williams,* 529 U.S. at 412, 120 S.Ct. 1495, "we still look to our own law for its persuasive authority in applying Supreme Court law," *Van Tran,* 212 F.3d at 1154.

mental and emotional problems was not mitigating.

In re Visciotti, 14 Cal.4th at 353, 58 Cal.Rptr.2d 801, 926 P.2d 987. Having reviewed the record, we conclude that Agajanian's performance was deficient for the reasons described by the California Supreme Court, and, in addition, because Agajanian relied on a defense in mitigation that was factually unsupported and that portrayed Visciotti in an inaccurate and unflattering light.

a. Agajanian failed to investigate and discover mitigating evidence about Visciotti.

[13] It is clearly established Supreme Court law that the failure to conduct a reasonable investigation constitutes deficient performance. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052. In satisfaction of this duty, Agajanian had an "obligation to conduct a thorough investigation of [Visciotti's] background." *Williams*, 529 U.S. at 396, 120 S.Ct. 1495; *see also Mayfield*, 270 F.3d at 927; *Ainsworth v. Woodford*, 268 F.3d 868, 874 (9th Cir.2001). As we have noted, " '[i]t is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase.' " *Wallace v. Stewart*, 184 F.3d 1112, 1117 (9th Cir.1999) (quoting *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir.1999) (brackets in original)).

Agajanian's performance during the penalty phase was deficient because he conducted essentially no investigation in search of potentially mitigating evidence about Visciotti. Agajanian did not conduct "any formal one-on-one interviews of witnesses familiar with Visciotti's background." Dist. Ct. at 8. Agajanian did not retrieve or review "any records having to do with John Visciotti's background, medical history, school history, history of drug use, juvenile probation, prior convictions, prior incarcerations, or any other material relevant to Visciotti's history." *In re Visciotti*, 14 Cal.4th at 347, 58 Cal.Rptr.2d 801, 926 P.2d 987. "Agajanian made virtually no effort prior to trial to determine whether friends, relatives, medical records, or institutional records could provide any additional evidence regarding when Visciotti began using drugs, what prompted him to become involved with drugs, what type of drugs he used, how often he used drugs, or whether his drug use could be classified as an addiction." Dist. Ct. at 7.

Agajanian's performance during the penalty phase was also deficient because he inadequately developed and presented expert testimony regarding Visciotti's mental health. Two psychiatrists, Dr. Seawright Anderson ("Dr. Anderson") and Dr. Kaushal Sharma ("Dr. Sharma") were appointed by the court to evaluate Visciotti's competence to stand trial and sanity at the time of the offenses, but Agajanian provided neither Dr. Sharma nor Dr. Anderson with the information they needed to provide a competent evaluation. Dist. Ct. at 10–12; *In re Visciotti*, 14 Cal.4th at 338, 58 Cal.Rptr.2d 801, 926 P.2d 987. Agajanian's failure to provide Drs. Sharma and Anderson with the information they requested was not the product of a tactical decision; he simply failed to do so.

Although Agajanian did have a mental health expert, Dr. Broussard, testify for the defense during the guilt phase, he was retained three days before he testified and was unprepared to provide a reliable conclusion about Visciotti's mental state at the time of the offenses. At their only meeting regarding this case, which lasted less than one hour, Agajanian and Dr. Broussard "discuss[ed] diminished capacity," but Agajanian did not give Dr. Broussard any

records or Visciotti's videotaped confession and reenactment to assist his evaluation. *In re Visciotti*, 14 Cal.4th at 339, 58 Cal. Rptr.2d 801, 926 P.2d 987. Dr. Broussard's interview and testing of Visciotti took "no more than two and one-half hours" and was performed "two days after the People rested in the guilt phase of the trial." *Id.* at 339–40, 58 Cal.Rptr.2d 801, 926 P.2d 987. Dr. Broussard testified at trial that Visciotti "had minimal brain injury of a type associated with impulse disorders," and "that [Visciotti] was not completely aware of what he was doing during the robbery/murder and could not judge the nature and consequences of his acts at the time." *Visciotti*, 2 Cal.4th at 32, 5 Cal.Rptr.2d 495, 825 P.2d 388. On cross-examination, however, "Dr. Broussard admitted to the jury that, in order to arrive at a reliable conclusion, he needed more time and should have met with Visciotti more than once." Dist. Ct. at 15. During the state habeas hearing, Agajanian acknowledged that he should have hired Dr. Broussard earlier.

In addition, Agajanian did not heed recommendations from both Dr. Anderson and Dr. Broussard that Agajanian should arrange for additional psychological testing and evaluation of Visciotti. In his report, Dr. Anderson wrote that Visciotti had repeatedly suffered head injuries, including one that resulted in a brief coma, and had been placed on anti-psychotic medications. Dr. Anderson concluded that Visciotti might have organic brain damage, and recommended that additional tests be performed to "rule out the possibility of organic brain disorder" and to "obtain more information about petitioner's basic personality structure." *Id.* Dr. Broussard also encouraged Agajanian to retain a licensed clinical social worker to conduct an extensive evaluation of Visciotti's social history. *In re Visciotti*, 14 Cal.4th at 340, 58 Cal.Rptr.2d 801, 926 P.2d 987. Dr. Broussard advised Agajanian that Visciotti's case "was a very serious case and would require comprehensive investigation and that the cost of the investigations would be approximately $2,500." *Id.* Agajanian told Dr. Broussard that he "was not willing to take the time for or to pay for" additional investigation, even though he later stated that he believed that "a court would find that [Visciotti] did not have sufficient resources to hire either counsel or expert witnesses or investigators" and would "very likely" declare Visciotti indigent as a matter of law. Dist. Ct. at 5. Agajanian's failure to develop and present testimony regarding Visciotti's mental health amounts to constitutionally deficient performance. *See, e.g., Turner v. Duncan*, 158 F.3d 449, 456 (9th Cir.1998) ("failure to arrange a psychiatric examination or utilize available psychiatric information ... falls below acceptable performance standards"); *Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir.1995) (failure to investigate defendant's mental condition as a mitigating factor after being notified that defendant may be mentally impaired constitutes ineffective assistance of counsel).

b. Agajanian failed to present readily available mitigating evidence about Visciotti's background.

As a result of his failure to investigate Visciotti's background, Agajanian did not uncover or present evidence during the penalty phase that was later described at Visciotti's state habeas proceeding as "overwhelming mitigating circumstances" in "an absolutely horrendous family history." *In re Visciotti*, 14 Cal.4th at 341, 58 Cal.Rptr.2d 801, 926 P.2d 987. Extensive mitigating evidence was presented at Visciotti's state habeas hearing by Shirley Reece ("Professor Reece"), a licensed clinical social worker and professor at the University of California at San Francisco, and Dr. Jay Jackman ("Dr. Jackman"), an expert in forensic psychiatry with experience

in substance abuse cases. Both Professor Reece and Dr. Jackman spoke with family members and reviewed Visciotti's "hospital, school, probation, Youth Authority and Department of Corrections records . . . all of which were available and could have been discovered by Agajanian with reasonable investigation." *Id.* at 342, 58 Cal. Rptr.2d 801, 926 P.2d 987. The mitigating evidence Professor Reece and Dr. Jackman uncovered—regarding Visciotti's family life, educational history, history of drug use, conduct while incarcerated, and possible brain damage—should have been presented to the jury in Visciotti's penalty phase proceeding.

Visciotti's parents' relationship was "extremely volatile, hostile, and mutually abusive, both physically and verbally." *Id.* at 341, 58 Cal.Rptr.2d 801, 926 P.2d 987. Visciotti and his siblings "were always frightened and worried that the parents would kill each other." *Id.* "The battles between petitioner's parents involved screaming that could be heard more than a block away." *Id.* at 343, 58 Cal.Rptr.2d 801, 926 P.2d 987. Visciotti's father held a gun to his mother's head and threatened to kill her in front of Visciotti and his two brothers. Visciotti's mother threw pots of hot coffee and other objects at his father. Visciotti and his siblings "lived a life of terror." *Id.* at 341, 58 Cal.Rptr.2d 801, 926 P.2d 987.

All of the children were "blamed for the family's difficulties, and some were beaten with a belt and slapped." *Id.* Visciotti's parents were particularly relentless in their abuse of Visciotti. *Id.* at 342, 58 Cal.Rptr.2d 801, 926 P.2d 987. Part of this abuse was related to the fact that Visciotti was born with club feet, a congenital abnormality. Because of his condition, Visciotti could not walk until he was three years old and had to wear splints and special shoes thereafter. *Id.* The treatments for Visciotti's condition strained the family financially and required Visciotti's father to borrow money from his parents, which "impacted on[Visciotti's] father's self image." *Id.* Visciotti's father threatened to break Visciotti's legs, "saying he had paid to have the legs fixed and would break them again." *Id.* Visciotti's siblings testified at the state habeas hearing that Visciotti's father "continually berated" Visciotti, and his parents called him "an 'asshole,' a 'mother' " *Id.* at 341, 58 Cal.Rptr.2d 801, 926 P.2d 987.

Visciotti's education suffered as a result of his family situation. "Economic problems and the number of children caused the family to move often which had a profound effect on the children. [Visciotti] left kindergarten after nine days and was not re-enrolled in school for the first grade for two years." *Id.* Visciotti's family moved at least twenty times when Visciotti was growing up, and the constant moves "impacted[Visciotti's] ability to function in school and in his social world. He was always an outsider." *Id.* at 343, 58 Cal. Rptr.2d 801, 926 P.2d 987.

Visciotti's family situation also took a toll on his self-perception. Visciotti "thought he could never do anything right and could never do anything to please his parents. He was highly self-critical and blamed himself for things for which he had no responsibility such as his parents' difficulties." *Id.* at 341, 58 Cal.Rptr.2d 801, 926 P.2d 987.

By the time he turned eight, Visciotti used drugs to escape his family situation. *Id.* at 343, 58 Cal.Rptr.2d 801, 926 P.2d 987. Visciotti first used marijuana, then began using alcohol and Seconal, a sedative hypnotic, and then amphetamines. *Id.* at 343–44, 58 Cal.Rptr.2d 801, 926 P.2d 987. At fifteen, Visciotti began using cocaine, which became his "drug of choice" by age eighteen. *Id.* at 344, 58 Cal. Rptr.2d 801, 926 P.2d 987. Visciotti also

began using PCP. *Id.* "Most of the criminal conduct in which [Visciotti] engaged occurred during a period when he had progressed to injecting PCP intravenously several times a day in order to have that detached experience." *Id.* Dr. Jackman testified that "[Visciotti's] criminal behavior was directly related to his drug use," and that Visciotti did not have a "criminal or antisocial personality." *Id.*

Visciotti was tested for a brain abnormality while at the California Youth Authority because he did not seem to be a "typical delinquent." *Id.* at 343, 58 Cal. Rptr.2d 801, 926 P.2d 987. An abnormal electroencephalogram reflected a possible seizure disorder. *Id.* Visciotti was prescribed Dilantin, an anti-seizure medication, and "[w]hile taking the medication [he] did not abuse drugs and his behavior was significantly improved." *Id.* Dr. Jackman testified that, throughout his time at the California Youth Authority, Visciotti "was not a behavior problem and did all jobs expected of him." *Id.*

Agajanian's failure to investigate and present any of this evidence was not the product of a reasoned tactical decision. Agajanian asserted that, after reviewing Visciotti's videotaped confession and reenactment, he concluded that he would not conduct the investigation necessary to pursue a "sympathy defense" based upon Visciotti's upbringing because he did not think that any jury could feel sympathy for Visciotti. As Agajanian explained:

> The bottom line is I could not imagine, no matter how terrible his childhood could have been, I could not imagine why a jury would care even a little bit about what happened to a person when he was born or what happened to a person when he was in school or whether he got to play little league or not or whether his father was physically abusive or mentally abusive to him or whether his mother was physically or mentally abusive.

Agajanian's decision not to pursue a sympathy defense based on Visciotti's background cannot be viewed as strategic because it was entirely unfounded. As Agajanian acknowledged, he "chose not to pursue a sympathy defense on behalf of John Visciotti individually ... without knowing what [he] might find if [he] did." Indeed, Agajanian shielded himself from information that might prove his strategy wrong. Agajanian specifically told Dr. Broussard that he "did not want an opinion on childhood abuse in the report or for Dr. Broussard to indicate that there was any problem in the family, no matter how important information about the family was." *Id.* at 340, 58 Cal.Rptr.2d 801, 926 P.2d 987. Agajanian's failure to conduct even a preliminary review of Visciotti's background in order to determine what mitigating evidence might exist is unjustifiable.

[14] Moreover, Agajanian's conclusion that information about Visciotti's background could not mitigate Visciotti's punishment is unreasonable. As the Supreme Court has recognized, " 'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.' " *Penry v. Lynaugh,* 492 U.S. 302, 319, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (quoting *California v. Brown,* 479 U.S. 538, 545, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring)). Agajanian's decision not to seek any mitigating evidence because of the seriousness of Visciotti's crime reflects that Agajanian "did not understand how evidence of a person's background could be used to call for a

sentence less than death when the crime was a serious homicide." Dist. Ct. at 49.

In sum, Agajanian was ineffective during the penalty phase because he did not "fulfill [his] obligation to conduct a thorough investigation of [Visciotti's] background," and failed to introduce the "voluminous amount of evidence that did speak in [Visciotti's] favor." *Williams,* 529 U.S. at 396, 120 S.Ct. 1495.

c. Agajanian relied on a strategy in mitigation that was factually unsupported and that portrayed Visciotti in an inaccurate and unflattering light.

Instead of investigating and presenting the wealth of available mitigating evidence about Visciotti's upbringing and history, Agajanian decided, after viewing Visciotti's videotaped confession, that his strategy during the mitigation phase would be to evoke sympathy for the Visciotti family. Agajanian pursued this "family sympathy" mitigation strategy because "[h]e believed that, although sympathy for petitioner could not be expected, sympathy for petitioner's parents might be" and "[h]is defense would therefore suggest that the parents were nice people whose son should not be killed." *In re Visciotti,* 14 Cal.4th at 336, 58 Cal.Rptr.2d 801, 926 P.2d 987.

Agajanian's family sympathy mitigation strategy had little factual support. At the time Agajanian decided to pursue the family sympathy strategy, Agajanian had not "conduct[ed] formal interviews with any members of petitioner's family," he had done "no investigation . . . to seek potentially mitigating evidence," and he had "no information about petitioner's background other than what appeared to him to be 'good aspects' of the family." *Id.* at 337, 58 Cal.Rptr.2d 801, 926 P.2d 987.

[15] Agajanian's family sympathy mitigation strategy was inconsistent with the little that Agajanian found out about the Visciotti family. When Agajanian decided that he would pursue a family sympathy strategy, he was aware that there was "some brutality in the family" and some "possible family discord" during Visciotti's youth. *Id.* He decided not to investigate these allegations, however, because, Agajanian declared, he "was not interested in making [Visciotti's] father or mother or brothers or sisters out to be monsters because they had sat through the entire trial and supported him throughout the trial." Agajanian's decision that it was more important to preserve the Visciotti family's pride or dignity than it was to prevent his client from receiving the death penalty cannot be viewed as a reasonable basis to forego investigation. As the California Supreme Court "assume[d] arguendo," "since Agajanian apparently was put on notice of possible family discord during petitioner's youth, his decision to present a 'family sympathy' defense without investigation to determine the nature of the evidence that was available was not a decision that a competent attorney representing a capital defendant would make." *Id.* at 348, 58 Cal.Rptr.2d 801, 926 P.2d 987.

As a result of his mitigation strategy, Agajanian portrayed Visciotti in an unflattering light that Agajanian knew to be inaccurate. Agajanian portrayed Visciotti as his family's only "bad seed," while knowing that Visciotti's brother had been arrested for drunk driving and Visciotti's sister had been arrested for possession of methamphetamine. Dist. Ct. at 7. Indeed, during Visciotti's state habeas hearing, members of Visciotti's family confirmed that, "contrary to the evidence offered at the penalty phase, [Visciotti] was not the only 'bad seed' in an otherwise loving family." *In re Visciotti,* 14 Cal.4th at 345, 58 Cal.Rptr.2d 801, 926 P.2d 987.

The Supreme Court has instructed that "strategic choices made after less than

complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690–91, 104 S.Ct. 2052. Agajanian's mitigation strategy was deficient because it was not the product of a reasonable investigation. Particularly in light of the extensive evidence of Visciotti's physical and mental abuse by his parents, Agajanian's portrayal of Visciotti as the one bad seed in the Visciotti family cannot be considered a reasonable penalty phase strategy.

d. Agajanian was unprepared to respond to the prosecution's aggravating evidence.

Agajanian's performance during the penalty phase was also deficient because he did not investigate and was not prepared to respond to the prosecution's case in aggravation. Five months before trial began, the prosecutor filed a notice that he intended to introduce, as evidence in aggravation, evidence related to the instant offense and Visciotti's prior conviction for assault with a deadly weapon. Dist. Ct. at 9. Despite this notice, and "[a]lthough it was the practice of the district attorney at the time of the Visciotti trial to make the case files of prosecutors available to defense counsel . . . Agajanian did not send for the police report or go through the prosecutor's file to read it in advance of trial." *In re Visciotti*, 14 Cal.4th at 340, 58 Cal.Rptr.2d 801, 926 P.2d 987. Agajanian's failure to investigate the assault in preparation for the penalty phase—*after learning the details of the assault during the prosecution's rebuttal in the guilt phase*—is even less defensible as a strategic decision. Agajanian explained that he did not investigate the assault in preparation for the penalty phase because Cusack was an extremely sympathetic victim. Although Agajanian's reasoning might have explained his decision not to pursue a certain line of questioning at trial, it does not justify his failure to investigate the circumstances of the assault.

Agajanian also failed to investigate or introduce any evidence during the penalty phase to mitigate the circumstances of the capital offense. Agajanian did not interview Wolbert, the surviving victim, or Hefner, Visciotti's co-perpetrator, nor did he review the transcript of Hefner's trial. Agajanian also failed to introduce—beyond that introduced at the guilt phase-mitigating evidence regarding the circumstances of the offense: that the gun used to shoot Dykstra and Wolbert belonged to Hefner, that Visciotti did not plan to shoot Wolbert or Dykstra, that Visciotti shot Dkystra only after Hefner gave Visciotti the gun and repeatedly encouraged him to shoot, and that Visciotti had injected himself with cocaine a few hours before the robbery and murder occurred. Dist. Ct. at 28. Agajanian has not offered a reasonable explanation for his failure to conduct this minimal investigation or marshal the available mitigating evidence regarding the circumstances of the capital offense.

Agajanian's failure to investigate Visciotti's prior felony assault conviction and his failure to investigate and present mitigating evidence regarding the circumstances of the capital offense cannot be justified as strategic decisions. *See, e.g., Turner,* 158 F.3d at 456 (attorney's failure to investigate the prosecution's case "falls below minimum standards of competent representation").

e. Agajanian undercut Visciotti's case during closing argument.

Agajanian "delivered an unfocussed closing argument, during which he undercut his client's case by telling the jury that the evidence of petitioner's mental and emotional problems was not mitigating." *In re Visciotti,* 14 Cal.4th at 353, 58 Cal.Rptr.2d 801, 926 P.2d 987. As the district court

found, Agajanian "conceded that nine of the eleven statutory sentencing factors in California Penal Code § 190.3 favored the prosecution without even mentioning the existence of evidence that would support a mitigating interpretation of several of those factors." [13] Dist. Ct. at 27.

In his closing argument, Agajanian told the jury that there was no mitigating evidence related to factor (a), the circumstances of the crime, because "there's no way to make light of any kind of murder, whether or not there's a robbery involved." Agajanian also told the jury that there was no mitigating evidence related to factors (g) and (j), as there was "no evidence" of "extreme duress," apparently referring to the jury's ability to consider whether Visciotti was acting "under the substantial domination of another," and no evidence that Visciotti was an accomplice because Visciotti was, "as the People said, the trigger man." These three concessions were contrary to evidence that the gun used to shoot Dykstra and Wolbert belonged to Hefner, that Visciotti did not plan to shoot Wolbert or Dykstra, that Visciotti shot Dkystra only after Hefner gave Visciotti the gun and repeatedly encouraged him to shoot, and that Visciotti had injected himself with cocaine a few hours before the robbery and murder occurred. Dist. Ct. at 28.

Agajanian also discounted the effect of mitigating evidence that was submitted during the guilt and penalty phases of Visciotti's trial. Agajanian told the jury that there was no evidence of factor (d), that "the offense was committed while the defendant was under the influence of extreme mental emotional disturbance." Agajanian said: "with respect to emotional disturbance, there's no evidence of that. That isn't even a factor to be considered." Agajanian also told the jury that they could disregard factor (h), which concerned whether Visciotti's capacity to appreciate the wrongfulness of his conduct "was impaired as a result of mental disease or defect or . . . intoxication" because:

> when you ladies and gentlemen returned this verdict of first degree murder and found special circumstances, you indicated to all of us that you did not find diminished capacity. So if you did not find diminished capacity, how can I argue that as a factor of aggravation or mitigation? It just does not apply. It's not there. I think when you ladies and gentlemen found that—you basically found that diminished capacity did not reduce the nature of the robbery to something less than a robbery, or the nature of the first degree murder to something less than first degree murder. So that's not a factor of mitigation.

Dist. Ct. at 29.

[16] Agajanian conceded the inapplicability of factors (d) and (h) despite evidence submitted at the guilt phase that

13. Among the eleven factors a jury is instructed to consider when deciding whether to impose life imprisonment or death are: (a) *" t]he circumstances of the crime* of which the defendant was convicted in the present proceeding"; . . . (d) *" w]hether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance"*; . . . (g) *" w]hether or not defendant acted under extreme duress or under the substantial domination of another person"*; (h) *" w]hether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication"*; (i) *" t]he age of the defendant* at the time of the offense"; (j) *"[w]hether or not the defendant was an accomplice to the offense* and his participation in the offense was relatively minor"; (k) *" a]ny other circumstance* which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Cal.Penal Code § 190.3 (emphases supplied).

Visciotti was intoxicated at the time of the offense and that Visciotti suffered from a minimal brain injury that caused an impulse and learning disorder. Dist. Ct. at 30. Agajanian's concessions reflect his failure to recognize that the jury could consider Agajanian's intoxication and brain damage during the penalty phase, even if the evidence was insufficient to establish a legal defense in the guilt phase. *In re Visciotti,* 14 Cal.4th at 354 n. 7, 58 Cal. Rptr.2d 801, 926 P.2d 987. *See also Hendricks,* 70 F.3d at 1043 ("[e]vidence of mental problems may be offered to show mitigating factors in the penalty phase, even though it is insufficient to establish a legal defense to conviction in the guilt phase") (citing Cal.Penal Code § 190.3(d),(h)).

Although Agajanian did not concede outright the inapplicability of two of the mitigating factors—"age" and "sympathy"—he hardly advocated for a sentence less than death on account of those factors. Regarding Visciotti's age, Agajanian said: "The age of the defendant. I happen to consider 26 years of age a rather young age." Regarding sympathy, Agajanian said that it "should be an issue to consider." As the District Court observed, however, "Mr. Agajanian did not argue that factor (k) was 'present' or that it 'favored the defense.' . . . Indeed, he did not identify any evidence that would warrant sympathy for Visciotti (or his family) and, if so, why the jurors should rely on such pity or sympathy as a basis for returning a sentence other than death." Dist. Ct. at 83.

Agajanian's failure to investigate and present extensive mitigating evidence about Visciotti's background was unreasonable, his decision not to pursue a mitigation strategy based on Visciotti's background was uninformed, and his failure to develop and present expert testimony regarding Visciotti's mental health was unjustified. The mitigation strategy Agajanian did pursue, based on sympathy for Visciotti's family, presented Visciotti in an unflattering light that Agajanian knew to be inaccurate. Agajanian was utterly unprepared to respond to the prosecution's case in aggravation. In his closing argument, Agajanian affirmatively conceded several mitigating factors that a reasonable juror might well have applied to the facts, while offering the jury no other reason not to impose the death penalty. In sum, Agajanian's performance throughout the penalty phase was deficient.

2. Visciotti was prejudiced by Agajanian's deficient performance during the penalty phase.

[17] In addition to showing Agajanian's deficient performance, Visciotti must show prejudice: that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings." *Id.* We must affirm the district court's reversal of Visciotti's death sentence if we "cannot conclude with confidence that the jury would unanimously have sentenced him to death if [Agajanian] had presented and explained all of the available mitigating evidence." *Mayfield,* 270 F.3d at 929.

We conclude that, in light of the abundant mitigating evidence that Agajanian failed to introduce, Agajanian's inaccurate portrayal of Visciotti as the one "bad seed" in his family, Agajanian's absolute failure to counter the prosecution's case in aggravation, and, perhaps most importantly as to prejudice, Agajanian's closing argument, which conceded several potential mitigating factors while providing the jurors essentially no reason not to impose the death penalty, there is a "reasonable probability

that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed." *Strickland*, 466 U.S. at 700, 104 S.Ct. 2052 . *See also, e.g., Williams*, 529 U.S. at 398, 120 S.Ct. 1495; *Karis v. Calderon*, 283 F.3d 1117, 1140 (9th Cir.2002); *Mayfield*, 270 F.3d at 933; *Hendricks*, 70 F.3d at 1045.

[18] As noted, the California Supreme Court did not apply the "reasonable probability" standard, so its decision as to prejudice was contrary to clearly established Supreme Court law. Even if the California Supreme Court had correctly applied the prejudice prong of the *Strickland* standard, however, its conclusion that Visciotti suffered no prejudice as a result of Agajanian's deficiencies would be objectively unreasonable, because it "failed to evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—in reweighing it against the evidence in aggravation." *Williams*, 529 U.S. at 398, 120 S.Ct. 1495 (citation omitted). The California Supreme Court concluded that Agajanian's failure to introduce additional evidence about Visciotti's "troubled family background" was not prejudicial because it would not have outweighed the aggravating evidence of "[t]he circumstances of the crime" and "the earlier knifing of William Scofield and the pregnant Kathy Cusack." *In re Visciotti*, 14 Cal.4th at 355, 58 Cal. Rptr.2d 801, 926 P.2d 987. The California Supreme Court did not, however, take into account the totality of the available mitigating evidence, and completely ignored the mitigating effect of Visciotti's brain damage or adjustment to incarceration. The California Supreme Court also failed to consider the prejudicial impact of: (1) Agajanian's portrayal of Visciotti as the one "bad seed" in the Visciotti family; and (2) Agajanian's multiple concessions during closing argument. Because the California Supreme Court failed to consider the potential impact of all of the mitigating evidence that was available to Agajanian, and failed to consider the prejudicial impact of Agajanian's representation—particularly his closing argument, which was more effective in persuading the jury to impose the death penalty than it was in convincing them to spare his life—its application of Supreme Court law was objectively unreasonable.

The state argues that the California Supreme Court's conclusion that no prejudice resulted was objectively reasonable because the aggravating evidence was overwhelming. The record reflects, however, that the aggravating factors were not overwhelming, as the jury deliberated a full day and then requested additional guidance on the definitions of "moral justification" and "extreme duress." *Cf. Bean v. Calderon*, 163 F.3d 1073, 1081 (1998) (the fact that the jury was initially divided over the appropriateness of the death penalty, despite the attorney's failure to present mitigating evidence, "undermine[s] confidence in the outcome" of the petitioner's penalty phase hearing). The fact that the jury struggled despite Agajanian's deficient performance reflects a reasonable probability that they would have returned a life verdict had they had the opportunity to hear and consider the available mitigating evidence, had Visciotti not been inaccurately portrayed as the one "bad seed" in the Visciotti family, and had Agajanian not advised the jury in his closing argument against considering mitigating factors that could have outweighed the aggravating factors.

Accordingly, having reviewed the applicable federal precedents, we conclude that Visciotti received ineffective assistance of counsel during the penalty phase and that he was prejudiced as a result. The California Supreme Court's conclusion that

Visciotti did not suffer prejudice as a result of Agajanian's deficient performance during the penalty phase is both contrary to clearly established Supreme Court law and is objectively unreasonable.

CONCLUSION

For the foregoing reasons, we affirm the district court's decision to deny habeas relief on Visciotti's ineffective assistance of counsel claim during the guilt phase and affirm the district court's decision to grant habeas relief on Visciotti's ineffective assistance of counsel claim during the penalty phase.

We remand to the district court with directions to issue the writ of habeas corpus vacating the sentence of death, and conditionally requiring the imposition of a sentence of life imprisonment without the possibility of parole, unless the state grants Visciotti a new penalty phase trial within a reasonable period of time to be set by the district court.

AFFIRMED and REMANDED.

PREGERSON, Circuit Judge, dissenting.

The majority denies Visciotti's claim of ineffective assistance of counsel during the guilt phase on the ground that Agajanian's performance, while arguably deficient, did not prejudice the outcome of Visciotti's trial. I believe that Agajanian's deficient performance during the guilt phase was per se prejudicial pursuant to the Supreme Court's decision in *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Accordingly, I dissent from Section III A of the majority opinion.

In *Cronic*, the Supreme Court identified certain circumstances where counsel's performance is "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified," including where a defendant "is denied counsel at a critical stage of his trial" and where counsel "fails to subject the prosecution's case to meaningful adversarial testing." *Id.* at 658–59, 104 S.Ct. 2039. I believe that Agajanian abandoned Visciotti at a "critical stage" of the guilt phase of trial and "fail[ed] to subject the prosecution's case to meaningful adversarial testing" because he conceded that Visciotti was guilty of first degree murder during his closing argument. *Id.* at 659, 104 S.Ct. 2039. Agajanian's concession merits a finding of prejudice per se.

Although Agajanian delivered an unorganized and at times incoherent closing argument, his concession that Visciotti committed first degree murder is unmistakable. Agajanian told the jury that Visciotti was guilty of first degree murder if they found that "an implied malice killing of a human being" occurred "during the course of a robbery," and then said: "*Ladies and Gentlemen, that is what the facts reflect. That is what the facts reflect in this particular case.*" (Emphasis supplied). Agajanian concluded his closing argument at the guilt phase by again acknowledging that Visciotti committed first degree murder. He said:

> *I think the bottom line in this case, ladies and gentlemen, if we evaluate it from the evidence,* if we evaluate it from what we have before us, the good, the bad, the ugly, I think that, plus the employment of the reasonable doubt standard in this particular case *will lead you to a verdict, even though it be first degree murder, that we have a killing which is not premeditated, which is not deliberated, which is not well thought out, which is not pondered, but, nevertheless, committed.*

(Emphasis supplied).

In *Swanson*, we found that *Cronic* applied when a lawyer conceded his client's guilt at trial, reasoning that "[a] lawyer who informs the jury that it is his view of

the evidence that there is no reasonable doubt regarding the only factual issues that are in dispute has utterly failed to 'subject the prosecution's case to meaningful adversarial testing.'" *United States v. Swanson*, 943 F.2d 1070, 1074 (9th Cir. 1991) (quoting *Cronic*, 466 U.S. at 659, 104 S.Ct. 2039). In this case, as in *Swanson*, the trial "los[t] its character as a confrontation between adversaries" when Agajanian conceded that Visciotti committed first degree murder. *Id.* at 1073.

The majority argues that Agajanian did not abandon Visciotti during his closing argument because Agajanian argued to the jury that "the crime was not premeditated" and "Visciotti lacked the specific intent to kill." However, once Agajanian conceded that Visciotti committed felony murder, these arguments about Visciotti's state of mind during the killing became irrelevant. As Agajanian explained to the jury during his closing argument, a killing during the commission of felony robbery is first degree murder regardless of the defendant's state of mind.

The majority also hypothesizes that Agajanian's concession was a strategic attempt to avoid the imposition of the death penalty, reasoning that "a jury might be less likely to impose the death penalty on someone convicted of felony murder, as opposed to someone who set out to commit a premeditated murder." This hypothesis is unsupported by Agajanian's closing argument during the penalty phase, in which he told the jury that there was *no* mitigating evidence related to the circumstances of the crime or Visciotti's mental state. This hypothesis is also unsupported by Agajanian's testimony, during the state habeas hearing, that the family sympathy mitigation strategy was his *only* strategy to avoid imposition of the death penalty. Just as we cannot evaluate the reasonableness of counsel's strategic decisions through the "distorting effects of hindsight," we cannot, in hindsight, attribute to counsel a strategy that he did not actually have in order to make sense of his otherwise inexplicable conduct. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052.

There is no doubt that this case was a difficult one to defend. However, as the Supreme Court instructed in *Cronic*, "even when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt." 466 U.S. at 656 n. 19, 104 S.Ct. 2039. In conceding that Visciotti was guilty of felony murder, Agajanian relieved the prosecution of this heavy burden.

Adonay MELENDEZ, Petitioner–Appellant,

v.

Cheryl PLILER, Warden; Attorney General of the State of California, Respondents–Appellees.

No. 01–55272.

United States Court of Appeals, Ninth Circuit.

Argued March 5, 2002.

Submitted March 11, 2002.

Filed April 24, 2002.

After petitioner's conviction in California state court of second degree murder and conspiracy to commit murder was affirmed on appeal, petition for writ of habeas corpus was filed. The United States District Court for the Central District of California, Margaret M. Morrow, J., de-

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHN LOUIS VISCIOTTI,

Petitioner,

v.

ARTHUR CALDERON, Warden of California State Prison at San Quentin,

Respondent.

CASE NO. CV 97-4591 R

DEATH PENALTY

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the petition for writ of habeas corpus is **CONDITIONALLY GRANTED** in part and **DENIED** in part.

Insofar as it challenges the judgment of conviction and the finding of a special circumstance in the case People v. John Louis Visciotti, Case No. C 50770 of the California Superior Court for the County of Orange, the petition for writ of habeas corpus shall be, and hereby is, **DENIED**.

The petition for writ of habeas corpus as to the judgment and sentence of death in the case People v. John Louis Visciotti, Case No. C 50770 of the California Superior Court for the County of Orange shall be, and hereby is, **GRANTED**. The judgment and sentence of death shall be **VACATED AND SET ASIDE**, as shall be

any proceedings relating to carrying out that sentence.

IT IS FURTHER ORDERED that the State of California shall, within 120 days from the entry of this Judgment, either grant Visciotti a new trial on the issue of the appropriate penalty or vacate the sentence of death and resentence him in accordance with California law and the United States Constitution. 28 U.S.C. § 2241.

IT IS FURTHER ORDERED that the Clerk of this Court shall immediately notify the Warden of San Quentin Prison of this Court's judgment.

IT IS SO ORDERED.

Dated: Oct. 19, 1999.

MANUEL L. REAL,
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHN LOUIS VISCIOTTI,

Petitioner,

v.

ARTHUR CALDERON, Warden of California State Prison at San Quentin,

Respondent.

CASE NO. CV 97-4591 R

DEATH PENALTY

FINDINGS OF FACT AND CONCLUSIONS OF LAW (Claim 1.C)

In July 1983, after a jury trial in the Superior Court of California, County of Orange, Petitioner John Louis Visciotti was convicted of murder, attempted murder, and armed robbery, with a special circumstance finding of robbery murder. After a penalty phase trial, Visciotti was sentenced to death on October 21, 1983. The California Supreme Court affirmed the conviction and sentence on direct appeal, with one justice dissenting. People v. Visciotti, 2 Cal.4th 1, 5 Cal.Rptr.2d 495, 825 P.2d 388 (1992).

Visciotti filed a petition for writ of habeas corpus with the California Supreme Court. The California Supreme Court appointed the Honorable Eileen G. Moore, Judge of the Orange County Superior Court, to serve as referee and ordered an evidentiary hearing on factual issues relating to Visciotti's claim of ineffective assistance of counsel at the penalty phase. The state hearing was conducted in October 1994. After briefing on the

merits, the California Supreme Court denied the petition, with one justice concurring separately, and two justices dissenting. In re Visciotti, 14 Cal.4th 325, 58 Cal.Rptr.2d 801, 926 P.2d 987 (1997).

Visciotti initiated federal habeas proceedings by filing a request for appointment of counsel in this Court on June 23, 1997. Through his attorneys of record, Visciotti filed a formal petition for writ of habeas corpus on June 23, 1998. Among the forty claims set forth in the petition, Visciotti alleged that Roger Agajanian's ineffective assistance of counsel in connection with the penalty phase of his trial violated his rights under the Sixth and Fourteenth Amendments to the United States Constitution. (Pet'n, 62-67 (Claim 1.C).)

On September 21, 1998, this Court ordered an evidentiary hearing in this case. On March 8, 1999, the Court issued a written order clarifying the scope of the claims to be litigated at the evidentiary hearing. The March 8, 1999 order excluded from the scope of the federal hearing Visciotti's claim of ineffective assistance of counsel at the penalty phase since the state court had already held a full and fair hearing on that claim. The federal hearing was held on June 8, 9, and 10, 1999.

After careful consideration of all the pleadings, documents, testimony, and argument, and after reviewing the state court record in this case, the Court finds that Visciotti was deprived of the effective assistance of counsel in connection with his penalty phase trial in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Therefore, the Court will grant the petition for writ of habeas corpus as to Visciotti's sentence of death and order that the State of California either grant Visciotti a new trial on the issue of the appropriate penalty in this case or resentence him in accordance with California law and the United States Constitution. In support of this order, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The following findings of fact are based upon the papers, pleadings and records filed and lodged in this action, including the reporter's transcripts from Visciotti's state court trial (R.T.), the reporter's transcript from the state evidentiary hearing (S.E.H.R.T.), the

clerk's transcript from Visciotti's state court trial (C.T.), the California Supreme Court's opinion on direct appeal, the California Supreme Court's opinion on Visciotti's state habeas petition, and the arguments of counsel. Any conclusions of law deemed to be a finding of fact are incorporated herein.

A. The Retention of Trial Counsel Roger Agajanian

1. The shooting that led to the trial, conviction, and sentence of death occurred on the evening of November 8, 1982. Visciotti and his co-defendant Brian Hefner were arrested the next morning and admitted their involvement in videotaped statements to deputy sheriffs at the sheriff's station. Shortly thereafter, Visciotti voluntarily participated in a videotaped interrogation at the scene of the crimes, referred to as a "re-enactment." The district attorney filed a criminal complaint on November 10, 1982. (C.T. 9.) Through his first two court appearances in Municipal Court, Visciotti was represented by the Orange County Public Defender. (Lodged Doc. 2, R.T. (M.C.) MC-2, MC-8.)

2. In the interim, Visciotti's father, Luigi Visciotti, decided to hire a lawyer for his son "to see if they can get him taken care of." At the time, Luigi Visciotti had no savings or job, and was surviving on social security and welfare. (S.E.H.R.T. 650.) Within a few days after Visciotti's arrest, Luigi Visciotti, his wife Catherine, and their daughter Ann Priddy contacted W. Michael Hayes, a local lawyer. (S.E.H.R.T. 650-51.) Mr. Hayes, who did primarily civil work, referred the case to Roger Agajanian. (S.E.H.R.T. 650-51, 1272, 1706-07.)

3. Visciotti's parents, Luigi and Catherine, along with his sisters Ann Priddy and Ida Descisciolo, met with Mr. Agajanian, who agreed to handle the case for the family's promise to pay a flat fee of $25,000.00. (S.E.H.R.T. 1274, 652.) In exchange for that fee, Mr. Agajanian agreed to represent Visciotti during pretrial proceedings, through trial, and on appeal. (S.E.H.R.T. 652, 1279-80.) Mr. Agajanian promised (and paid) Mr. Hayes, the lawyer who referred the case to him, a portion of the retainer fee paid to him by the Visciottis. (S.E.H.R.T. 1279.) The retainer agreement was not reduced to writing. (S.E.H.R.T. 656, 1274, 1278.)

4. At the time Mr. Agajanian accepted the Visciotti case, he had never before represented a capital defendant through trial. (S.E.H.R.T. 1261, 1373.) The penalty phase in Visciotti's case was the first penalty trial that Mr. Agajanian had ever litigated. (S.E.H.R.T. 1262.) While Mr. Agajanian's practice at the time included murder cases (S.E.H.R.T. 1417, 1261), Mr. Agajanian had not previously prepared a capital penalty case for trial. (S.E.H.R.T. 1261-62.)

5. Prior to trial, Mr. Agajanian was paid only a fraction of the $25,000 fee. Although the testimony at the state evidentiary hearing differed as to how much of the fee was eventually paid, the testimony was consistent that, at the time of trial, Mr. Agajanian was still owed a substantial sum of money.

6. Mr. Agajanian testified that Luigi Visciotti paid him about $5,000 total over the course of the representation. (S.E.H.R.T. 1274-75, 1277.) Luigi Visciotti testified that he paid "a few hundred dollars here and there over time," whenever he accumulated enough money, whether by collecting from relatives or, on one occasion giving Mr. Agajanian the $500 proceeds from a benefit dance. (S.E.H.R.T. 653-54, 656, 804.) Luigi Visciotti also performed some tile work for Mr. Agajanian which "ended up taking place [of a fee] because there was no money." (S.E.H.R.T. 1276.) In addition, the boyfriend of Visciotti's sister Ida "had an accident case going, and Agajanian put a lien on the accident case" in the amount of $17,000. (S.E.H.R.T. 654; Id., 230-31, 237, 1276-77.) Mr. Agajanian confirmed that no money was collected through the lien. (S.E.H.R.T. 1276-77.)

7. Mr. Agajanian estimated that he was owed in excess of $15,000.00 that was never paid. (S.E.H.R.T. 1277.) Luigi Visciotti's estimated that he and his family owed Mr. Agajanian approximately $7,000 at the time the trial began, that he did tile work during the trial, trimmed trees and cleaned Mr. Agajanian's office to pay off the remaining debt. (S.E.H.R.T. 657-60.) Letters written later confirm that a large sum of money was still owed after the trial was completed. (S.E.H.R.T. 1289-90, 1294-97, 1715-17.)

8. No specific arrangements were made for the payment of experts or investigators. Mr. Agajanian anticipated that the retainer fee would cover only the

attorneys' fees and that Luigi Visciotti would pay for court costs, experts' fees, and investigators. (S.E.H.R.T. 1280-81.) Mr. Agajanian testified that he informed Luigi Visciotti that of his estimate that an additional $10,000 would be needed to cover the cost of experts and investigators. (S.E.H.R.T. 1281-82, 1291.) Luigi Visciotti understood that the $25,000 fee would cover all costs and fees related to the litigation. (S.E.H.R.T. 652-56, 702.)

9. Although he was receiving money from Visciotti's family, Mr. Agajanian believed that, on request, "a court would find that he [Visciotti] did not have sufficient resources to hire either counsel or expert witnesses or investigators" and that, if requested, a trial court "was very likely" to declare Visciotti to be indigent as a matter of law. (S.E.H.R.T. 1321.) Mr. Agajanian did not seek funding from the trial court under California Penal Code §§ 987.1 or 987.9. Mr. Agajanian ignored Dr. Kaushal Sharma's suggestion that he apply for funding to enable Dr. Sharma to perform a complete evaluation. (S.E.H.R.T. 1322-23.) Mr. Agajanian did not consider seeking compensation from the trial court for Dr. Broussard because "he wasn't on the list" even though "I may have been able to get him appointed on that case under a special appointment." (S.E.H.R.T. 1323.)

10. Ultimately, the only expenses in addition to the retainer fee actually incurred was approximately $1,000 paid to Dr. Louis Broussard. Mr. Agajanian demanded this money from Luigi Visciotti during the trial. (S.E.H.R.T. 702-03, 1284-85, 1287.)

B. Pre-Trial Investigation and Preparation

1. General Approach to the Defense

11. Mr. Agajanian did not conduct formal interviews with any members of Visciotti's family in preparation for the penalty phase. He did no investigation and did not have a social worker or investigator do any work to seek potentially mitigating evidence. Mr. Agajanian claimed that he made a conscious decision to forego investigation of mitigating evidence relating to Visciotti's personal history and family background, although he acknowledges that, at the time he supposedly made this decision, he had virtually no

information about Visciotti's background. In re Visciotti, 14 Cal.4th at 337.

12. Mr. Agajanian asserted that, almost as soon as he was retained by Visciotti's family, he decided that he would not investigate mitigating evidence concerning Visciotti's background at all. Mr. Agajanian reported that, "[f]rom the very beginning," after seeing Visciotti's videotaped confession in the police station and the confession at the crime scene, he decided against pursuing mitigation in the form of "a sympathy defense on behalf of John Visciotti individually" even though he had no idea what could be found if an investigation were undertaken. In re Visciotti, 14 Cal.4th at 336, 346; (S.E.H.R.T. 1355-57, 1384). Mr. Agajanian confirmed that he "didn't care" about Visciotti's background. In re Visciotti, 14 Cal.4th at 346; (S.E.H.R.T. 1395). He allegedly abandoned mitigation relating to Visciotti's background without ascertaining the evidence available to support it even though he was aware that there was "some brutality in the family" and did not know the extent to which Visciotti might have experienced a traumatic childhood. In re Visciotti, 14 Cal.4th at 337. One of his alleged justifications for ignoring this theme of mitigation was that he did not understand how such evidence might influence a jury to exercise mercy notwithstanding the severity of the crime. (S.E.H.R.T. 1395.)

13. Instead, Mr. Agajanian purportedly hoped that the jury would ignore Visciotti and his criminal activity and focus instead on Visciotti's family. In re Visciotti, 14 Cal.4th at 331; (S.E.H.R.T. 1310, 1373, 1411). Mr. Agajanian claimed to have committed himself to this theory of defense even though he had not interviewed any of the family members at the time and never did do so prior to trial; in stating that he had not interviewed anyone, he meant not only Luigi, his primary contact with the family, but "that [also] included all family members but John." (S.E.H.R.T. 1324-25.) Indeed, even through trial, Mr. Agajanian did no investigation regarding the family other than asking them, in a group, "what their family was like." In re Visciotti, 14 Cal.4th at 346; (S.E.H.R.T. 1367; id., 1325, 1336, 1368). Yet, at the time he supposedly elected to focus on a "family sympathy" defense to the exclusion of other mitigation themes, Mr. Agajanian was "was put on notice of possible family discord during Petitioner's youth." In re Visciotti, 14 Cal.4th at 337, 346.

14. Mr. Agajanian's alleged decision to present a penalty phase defense focused on the vices of Visciotti and the virtues of Visciotti's family was made without giving any consideration to the potential risks of presenting such a defense. Mr. Agajanian's defense misrepresented John Visciotti as the only "bad seed," a source of nothing but misery for his "nice" family. Mr. Agajanian affirmatively elicited testimony that John Visciotti was the bad child of the family, and that he was the only child who had "any problem with the law." (R.T. 3215, 3211.)

15. Not only was this evidence untrue, but Mr. Agajanian knew that it was untrue. Mr. Agajanian admitted that he knew before trial that Ann Priddy, Visciotti's sister, had been arrested for possession of methamphetamine. He also knew that Louis Visciotti, Visciotti's brother, had been arrested for drunk driving. (S.E.H.R.T. 1362-64.)

16. Mr. Agajanian dismissed any investigation into Visciotti's juvenile record. He did not recognize the importance of informing himself of all the evidence that the prosecution might introduce in aggravation or regarding all reasonably available information relevant to his client and his client's background. (S.E.H.R.T. 1395.) Again, part of his explanation for disregarding such an investigation was that did not understand how such evidence could be used to mitigate the severity of the crime. (S.E.H.R.T. 1395.)

17. Mr. Agajanian did not attempt to investigate the extent or the history of Visciotti's drug use. Mr. Agajanian explained "He [Visciotti] said he was a drug addict and I took it for granted he was." (Agajanian Depo., at 21.) Although he ultimately elicited some evidence at the penalty trial about Visciotti's drug usage, Mr. Agajanian made virtually no effort prior to trial to determine whether friends, relatives, medical records, or institutional records could provide any additional evidence regarding when Visciotti began using drugs, what prompted him to become involved in drugs, what type of drugs he used, how often he used drugs, or whether his drug use could be classified as an addiction.

18. Mr. Agajanian did not procure or review any records having to do with John Visciotti's background, medical history, school history, history of drug use, juvenile probation, prior convictions, prior incarcerations, or any other material relevant to

Visciotti's history. In re Visciotti, 14 Cal.4th at 347, 353; (S.E.H.R.T. 1349-50, 1353-54, 1356-57, 1361).

19. Prior to trial, Mr. Agajanian did not conduct any formal one-on-one interviews of witnesses familiar with Visciotti's background. In re Visciotti, 14 Cal.4th at 337, 346; (S.E.H.R.T. 1324-25). Mr. Agajanian never met two of Visciotti's younger siblings, at least one of whom was still living at the parents' home. Nor did Mr. Agajanian contact any of the extended family such as aunts, nieces, nephews, or brothers-in-law.[1] (S.E.H.R.T. 1380.) Prior to trial, Mr. Agajanian had no real information about the family from any source other than Visciotti himself. (S.E.H.R.T. 1325-26.) The family members whom Mr. Agajanian had met — including sisters Ida, Ann, JoAnn, Rose, Lisa, and the parents — confirmed that Mr. Agajanian did not interview them regarding family background or Visciotti's childhood. (S.E.H.R.T. 86, 127, 161, 230-31, 378-79, 454, 663-64, 823-25, 1187-88.)

20. In sum, at the start of the penalty trial, Mr. Agajanian knew nothing about Visciotti's background or the Visciotti family other than what he gained from a few superficial observations of a portion of the family. In re Visciotti, 14 Cal.4th at 337.

2. Approach Regarding the Prosecution's Evidence

21. Mr. Agajanian's approach to the case in aggravation was similar. Prior to trial, the district attorney filed a notice of evidence in aggravation stating that he intended to introduce at the penalty phase, as evidence in aggravation, Visciotti's prior conviction for

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[1] At the time of trial, Visciotti's mother, father, and eight siblings lived in the Orange County area. While the trial was ongoing, Mr. Agajanian spoke with the family members who attended the trial, including Luigi, Catherine, Ann, and others. (S.E.H.R.T. 124-25, 161-62, 661.) These conversations occurred over lunch or at the courthouse during trial proceedings. (S.E.H.R.T. 125, 1335-36.) None of the conversations occurred prior to trial. (S.E.H.R.T. 1324-25.) There was at least one informal discussion where Mr. Agajanian asked some of the family, in a group setting, "what their family was like." (S.E.H.R.T. 1367-68, 1336.) Jeannie Visciotti Sallee and Tony Visciotti, a brother and a sister of Visciotti, never met or spoke with Mr. Agajanian. (S.E.H.R.T. 295, 333.) Mr. Agajanian never contacted Visciotti's niece Jennifer Priddy, nephew Thomas Priddy, or aunt Nancy Moreau. (S.E.H.R.T. 518, 522, 541.) Michael Taylor (a roommate and friend of Visciotti's sister JoAnn) and Albert Muesse (Visciotti's sister JoAnn's first husband) were also available but never contacted. (S.E.H.R.T. 588, 622.)

an assault with a deadly weapon (the "Scofield/Cusack incident"). (C.T. 107.) "Although it was the practice of the district attorney at the time of the Visciotti trial to make the case files of prosecutors available to defense counsel . . . , Agajanian did not send for the police report or go through the prosecutor's file to read it in advance of trial and thus was surprised and unprepared to face that evidence." In re Visciotti, 14 Cal.4th at 340; (S.E.H.R.T. 1348-49; R.T. 3089, 3174-80). Mr. Agajanian did not attempt to interview either victim of the assault. (Agajanian Depo., 44-46, 56-59.)

22. Mr. Agajanian did not attempt to interview the surviving victim, Michael Wolbert. (Agajanian Depo., at 93.) Nor did Mr. Agajanian attempt to interview the co-perpetrator of the capital offense, Brian Hefner. (Agajanian Depo., at 21.)

3. Consultation and Preparation of Experts[2]

23. At a pretrial hearing on May 2, 1983, Mr. Agajanian requested the appointment of two doctors to evaluate Visciotti's competence to stand trial and sanity at the time of the crimes. The trial court appointed two psychiatrists to evaluate Visciotti. Mr. Agajanian requested the appointment of Dr. Seawright Anderson; the prosecution requested the appointment of Dr. Kaushal Sharma. The trial court ordered the psychiatrists to conduct an evaluation under California Penal Code § 1026 and § 1368. (R.T. (Vol. "A") A12-A13; C.T. 109.)

24. Dr. Sharma and Dr. Anderson were required to assess only Visciotti's

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[2] The evidence regarding Mr. Agajanian's failure to communicate with the court-appointed psychiatrists, the limited scope of information available to them, his delayed consultation with the privately-retained psychologist, and his failure to provide Dr. Broussard with the information requested is relevant to establishing the extent to which Mr. Agajanian investigated or developed (or, more accurately, failed to investigate or develop) a possible mental health theory of mitigation. The evidence demonstrates the limited scope of evaluations that were conducted, Mr. Agajanian's failure to comply with the doctors' requests for information and further investigation, the basis for suspecting a viable mental health theory of mitigation based on limited information known to psychiatrists. The evidence also demonstrates the reasonableness (or, more accurately, unreasonableness) of foregoing a penalty-related investigation in light of the doctors' conclusions and recommendations, especially when based on the limited information available to them. The evidence also demonstrates Mr. Agajanian's general level of inattentiveness and complete lack of diligence in preparing for trial. The state court's opinion acknowledged the importance and relevance of this evidence. In re Visciotti, 14 Cal.4th at 337-40.

competency and sanity. They were neither requested nor expected to provide advice regarding any other mental state defense to guilt. The court-appointed psychiatric experts were not asked to identify whether any evidence existed that might be relevant as penalty mitigation. In re Visciotti, 14 Cal.4th at 337.

25. The psychiatrists were ordered to deliver their reports by May 31, 1983, but, due to Mr. Agajanian's inattentiveness and refusal to provide the psychiatrists with the information they requested, neither doctor was able to comply with this deadline.

26. On the date set for the competency hearing, June 20, 1983, Mr. Agajanian had not yet received any psychiatric evaluations from either Dr. Sharma or Dr. Anderson. Nonetheless, Mr. Agajanian did not appear and no hearing was held. (C.T. 109; R.T. (Vol. "A") A14-A16.) When Mr. Agajanian made his next court appearance on June 23, 1983, he had still not yet received any reports or evaluations from the court-appointed psychiatrists. (¶¶ 27-38, *post*; S.E.H.R.T. 1408-09.) Nonetheless, Mr. Agajanian made no mention of the unfinished inquiry into Visciotti's mental health and indicated his readiness to begin jury selection within ten days. (C.T. 109; R.T. (Vol. "A") A17-A22.) The question of Visciotti's competence to stand trial was never addressed at any subsequent court appearance. Visciotti, 2 Cal.4th at 35-36.

a. Dr. Kaushal Sharma, M.D.

27. Dr. Sharma, a forensic psychiatrist who had been on the approved panel of psychiatrists for orange county since 1978, received an appointment notification in the Visciotti case. (S.E.H.R.T. 1547, 1552-53.) Dr. Sharma had been appointed to perform an evaluation under California Penal Code §§ 1026, 1368 at the suggestion of the prosecutor. (R.T. (Vol. "A") A12-A13; S.E.H.R.T. 1553-54.) The standard rate for such an evaluation at the time was $200. (S.E.H.R.T. 1552.) Acting on the assumption that the Visciotti case was a routine matter, Dr. Sharma (who had not been contacted by any lawyer connected with the case) sent Mr. Agajanian a form letter, dated May 8, 1983, requesting "all relevant materials deemed significant to the psychiatric evaluation of your client," including an outline of the psychiatric-legal issues, the police reports, probation reports, and past

medical and psychiatric reports. Dr. Sharma's letter also noted the need for a telephone consultation and advised that "the quality of my reports is directly correlated with the breadth of data reviewed." (S.E.H.R.T. 1550-51, 1313.)

28. Dr. Sharma received no word from Mr. Agajanian, but nonetheless scheduled an interview with Visciotti. In re Visciotti, 14 Cal.4th at 339. After learning from Visciotti that the case was a capital case, Dr. Sharma ended the interview early because he was concerned that either the appointment was a ruse designed to make him unavailable as a witness for the prosecution or the defense attorney was "not doing what he's supposed to do." (S.E.H.R.T. 1557-58.) Dr. Sharma's interview with Visciotti lasted only 15 or 20 minutes. (S.E.H.R.T. 1557-59.)

29. As a result of Mr. Agajanian's failure to contact him prior to the interview, failure to provide him with necessary documents, and his surprise at learning that the Visciotti matter was a capital case, Dr. Sharma wrote a second letter to Mr. Agajanian on May 31, 1983. (S.E.H.R.T. 1557, 1559.) Dr. Sharma's letter explained that significantly more work was required in a capital case — such as interviews of the family and friends, a more in-depth interview of Visciotti, obtaining and reviewing additional reports and records — and requested that the information be provided and that Mr. Agajanian seek additional funding from the trial court. (S.E.H.R.T. 1314-15.) Although Mr. Agajanian claimed that he "started to do some of the things [Dr. Sharma] suggested, yes," he did not call, or write, or otherwise communicate to Dr. Sharma. (S.E.H.R.T. 1315-16, 1583.) Mr. Agajanian effectively failed to respond to Dr. Sharma's May 31 letter.

30. Dr. Sharma nonetheless persisted in his attempt to satisfy the court order requiring an evaluation of Visciotti. Dr. Sharma personally visited Mr. Agajanian's office and, although he did not speak to Mr. Agajanian, obtained a copy of Visciotti's arrest record and rap sheet. However, Dr. Sharma never received nor reviewed Visciotti's post-arrest videotaped statements and did not receive any other background information about Visciotti. In re Visciotti, 14 Cal.4th at 347.

31. Dr. Sharma wrote Mr. Agajanian a third and final letter on July 19, 1983,

notifying Mr. Agajanian that he was closing his file on the matter. (S.E.H.R.T. 1583-85.) By the time of the July 19 letter, the trial was already 2 weeks underway. (C.T. 116-29.) Dr. Sharma explained that the July 19 letter was not a psychiatric evaluation; rather, "I meant that my interview was extremely limited, you have not given me enough paperwork, I have talked to your client, but on what I have, I have nothing for you." (S.E.H.R.T. 1586.) The purpose of the letter was "so I can close my file because I felt that I was barking up the wrong tree and I did not have the time or the patience to keep on bugging him. It was not my task to chase the attorney . . . And I decided enough is enough." In re Visciotti, 14 Cal.4th at 339; (S.E.H.R.T. 1585).

32. Mr. Agajanian made only negligible efforts to follow up on some of Dr. Sharma's recommendations and made no effort to communicate with Dr. Sharma or provide him with the materials that Dr. Sharma informed him were necessary for a reliable psychiatric evaluation. (S.E.H.R.T. 1315-16.)

b. Dr. Seawright Anderson, M.D.

33. Like Dr. Sharma, Dr. Seawright Anderson received a formal appointment from the court to perform an evaluation of Visciotti pursuant to California Penal Code §§ 1026 and 1368. In re Visciotti, 14 Cal.4th 334; (S.E.H.R.T. 926-27). In response to the appointment order, Dr. Anderson's office manager contacted Mr. Agajanian's office for some information on the case and some documents were sent to Dr. Anderson's office. In re Visciotti, 14 Cal.4th 334; (S.E.H.R.T. 927-35). The records provided were the initial arrest reports on the shooting, a letter from the California Medical Facility at Vacaville containing a chronological history of Visciotti's prior assault with a deadly weapon conviction, and a "rap sheet." (S.E.H.R.T. 928-39.) Through notes taken by his office manager, Dr. Anderson was advised that the defense would be based on "defendant's past drug history and his prolonged use of cocaine and 'crack'." (S.E.H.R.T. 934.) Dr. Anderson did not receive any reports or information on John Visciotti's drug history. Nor was Dr. Anderson provided with transcripts or a videotape of Visciotti's post-arrest statements, follow-up police reports, police reports on the prior offense, psychological

reports, California Youth Authority ("CYA") reports or anything else. In re Visciotti, 14 Cal.4th at 338; (S.E.H.R.T. 931-35).

34. Dr. Anderson interviewed Visciotti for one hour and seven minutes without administering any formal tests. (S.E.H.R.T. 936.) Based on this interview and the materials available to him, Dr. Anderson felt that he had sufficient information to determine whether Visciotti was competent to stand trial within the meaning of California Penal Code § 1368 and whether he me the legal definition of insanity under California Penal Code § 1026. In re Visciotti, 14 Cal.4th at 338; (S.E.H.R.T. 937-38).

35. Dr. Anderson's report, dated July 13, 1983, was not prepared until a week after the Visciotti trial started; when completed, he sent a copy to Mr. Agajanian. In re Visciotti, 14 Cal.4th at 338, 347. Dr. Anderson's report concluded that Visciotti was competent to stand trial under California Penal Code § 1368 and that he was sane under California Penal Code § 1026.

36. Although concluding that Visciotti was sane and competent, Dr. Anderson's report noted that Visciotti had "ideas of suicide," occasional hallucinations, and a history of head injuries. In re Visciotti, 14 Cal.4th at 338. Dr. Anderson's report also noted that Visciotti had received psychotherapy and had been medicated with Thorazine while at the Ventura CYA facility. (Lodged Doc. 70 (Referee's Report), App. F.) Dr. Anderson also discussed Visciotti's extensive drug history, including his use of LSD, PCP, amphetamines, and cocaine. In re Visciotti, 14 Cal.4th at 338; (Lodged Doc. 70 (Referee's Report), App. F).

37. Although not ordered to report on legal issues other than competence or sanity, Dr. Anderson added that "[p]er defendant's prolonged drug abuse and his paranoid ideation, defendant at the time of [the] commission of [the] present offense was suffering from diminished capacity in that he was unable to meaningfully and maturely reflect upon the gravity of his contemplated acts." (Lodged Doc. 70 (Referee's Report), App. F); In re Visciotti, 14 Cal.4th at 339. Dr. Anderson also concluded that "at [the] time of commission of present offense, defendant was addicted to cocaine and amphetamines and marijuana"

are recommended that "this defendant should receive EEG and CAT Scan tests of brain to rule out the possibility of organic Brain Disorder because of his past history of head injury with coma and because of his prolonged substance abuse." (Lodged Doc. 70 (Referee's Report), App. F); In re Visciotti, 14 Cal.4th at 339. He also opined that "psychological tests would be of value[] to get more information concerning defendant's basic personality structure." (Lodged Doc. 70 (Referee's Report), App. F); In re Visciotti, 14 Cal.4th at 339.

38. Dr. Anderson would have assisted Mr. Agajanian in arranging for the medical and psychological testing but was never asked to do so. In fact, Dr. Anderson never had any conversation with Mr. Agajanian about Visciotti. In re Visciotti, 14 Cal.4th at 338; (S.E.H.R.T. 941-42). The state court reliably found that once Dr. Anderson sent his report to Mr. Agajanian, he heard nothing more about the case. In re Visciotti, 14 Cal.4th at 338.

c. Dr. Louis Broussard, Ph.D.

39. As the trial moved from jury selection into the prosecution's case in chief, Mr. Agajanian decided to contact Dr. Louis Broussard, Ph.D., a psychologist, to interview Visciotti and possibly testify. Although Dr. Broussard was not on the panel of psychologists approved by the Orange County Superior Courts, Mr. Agajanian had worked with Dr. Broussard on a number of cases, most of which were retained matters. (S.E.H.R.T. 1104, 1323.) None of those cases was a capital prosecution. (S.E.H.R.T. 1261.)

40. At some point, roughly a quarter of the way through the trial, Mr. Agajanian informed Luigi Visciotti that he needed an additional $1,000 to hire a "psychiatrist." (S.E.H.R.T. 702-03, 1280, 1284, 1298.) Five or six times as the trial progressed, Mr. Agajanian asked Luigi for the additional money, telling him that if he did not pay the additional fee, Dr. Broussard would not evaluate Visciotti and would not be used as a witness. (S.E.H.R.T. 702-03, 1284-85, 1297-99.) Mr. Agajanian related that Luigi would offer some "excuse" for not providing the money and that the "ongoing request" created a strain between them. (S.E.H.R.T. 1284, 1297-98.)

41. Eventually, Luigi came up with the funds and Dr. Broussard was hired "late

in the game." (S.E.H.R.T. 1285.) As the state court observed, Mr. Agajanian's testimony in state court that he postponed hiring Dr. Broussard because he planned to use the doctor only at the penalty phase is not credible because Dr. Broussard focused only on guilt-phase issues and "[i]n fact, Dr. Broussard testified only at the guilt phase." In re Visciotti, 14 Cal.4th at 340 & n.4 (S.E.H.R.T. 1143, 1153).

42. Because of Mr. Agajanian's delay, he had no expert witness at all prior to trial. The situation regarding payment to Dr. Broussard was not resolved until the week of July 18-22, after jury selection had been completed and in the middle of the prosecution's case in chief. (C.T. 129, 135, 137; S.E.H.R.T. 1127, 1108-09.) Because of the delay, Dr. Broussard was not even able to interview Visciotti prior to the close of the prosecution's case. (C.T. 135, 137.) Dr. Broussard did not have enough time to prepare for the evaluation and he informed Mr. Agajanian of this fact. (S.E.H.R.T. 1305.) Dr. Broussard interviewed Visciotti once, on Saturday, July 23, 1983, met with Mr. Agajanian, wrote a report, and testified at the guilt phase on the following Tuesday, July 26, 1983. (C.T. 137, 139; S.E.H.R.T. 1129-31.) Dr. Broussard focused solely on guilt-phase issues and was told not to inquire into Visciotti's family or childhood. In re Visciotti, 14 Cal.4th at 340; (S.E.H.R.T. 1143, 1153).

43. Dr. Broussard informed Mr. Agajanian that a licensed clinical social worker should be retained to obtain a social history from Visciotti. In re Visciotti, 14 Cal.4th at 340. He also "advised Agajanian that [Visciotti's case] was a very serious case and would require comprehensive investigation and that the cost of those investigations would be approximately $2,500." Id. Mr. Agajanian replied that a social history and further psychological testing would not be performed because he "was not willing to take the time or pay for" them. In re Visciotti, 14 Cal.4th at 340; (S.E.H.R.T. 1140-42.) Dr. Broussard admitted to the jury that, in order to arrive at a reliable conclusion, he needed more time and should have met with Visciotti more than once. (R.T. 711-12, 2772; S.E.H.R.T. 1132-35.)

44. Dr. Broussard's focus was limited to guilt phase considerations. Mr.

Agajanian did not want Dr. Broussard to consider anything other than present psychological factors, to offer an opinion on childhood abuse, or for Dr. Broussard to indicate that there was any problem in the family, no matter how important that information was. In re Visciotti, 14 Cal.4th at 340. Mr. Agajanian so directed Dr. Broussard even though Mr. Agajanian also told him that there was "some brutality in the family." Id.

C. The Guilt Phase Trial

45. The surviving victim, Michael Wolbert, testified as a witness on behalf of the prosecution. He unambiguously identified Visciotti as the man who shot him and who shot and killed Dykstra on the evening of November 8, 1982. Wolbert also testified to facts that would have led any reasonable jury to conclude, beyond a reasonable doubt, that the homicide occurred during the course of a robbery.

46. As part of its case-in-chief, the prosecution also introduced the videotape of Visciotti's confession to deputy sheriffs at the sheriff's station shortly after his arrest. The confession includes Visciotti's unambiguous admission that he planned to rob Dykstra and Wolbert, that he intended to rob Dykstra and Wolbert, and that, during the course of that robbery, he knowingly and intentionally shot both Dykstra and Wolbert several times using a handgun.

47. The prosecution also introduced a videotape of an interrogation of Visciotti by the investigating officers taken at the location where the robbery and homicide were committed. In that second interrogation, Visciotti again admitted his involvement and described the general course of events while walking around the vicinity and pointing out the locations where various episodes took place.

48. Visciotti testified as a witness in his own defense at the guilt phase. Visciotti's testimony essentially repeated the same facts that he had told the sheriff's investigators and which had already been introduced into evidence during the prosecution's case-in-chief. Visciotti admitted that the shooting was not accidental and confirmed every critical fact necessary for the jury to return a verdict of first degree felony murder under a

felony murder theory. Even independent of the existence of a robbery, the descriptive course of events admitted by Visciotti in his testimony provided the jurors with compelling evidence that, at a minimum, he had committed a second degree murder under either an express malice or an implied malice theory. Furthermore, if the jurors did find that Visciotti acted with the intent to kill (and they did), even if the jurors credited Visciotti's description of the course of events, Visciotti's testimony did not meaningfully undermine the probability that reasonable jurors would find that the intent to kill had been arrived at after premeditation and deliberation.

49. In the course of his direct examination during the guilt phase, Visciotti admitted that he had thrice escaped from juvenile detention facilities and was ultimately committed to the California Youth Authority.[3] He also admitted being involved in a fight while drinking, which altercation led to a conviction for vandalism. Visciotti further admitted that, on his plea of guilty, he had been convicted of assault with a deadly weapon.

50. In addition to eliciting the fact of his prior conviction for assault with a deadly weapon, Mr. Agajanian also elicited Visciotti's description of the details underlying the offense. Visciotti testified that two men broke down the door to his motel room, ran in, and cut his roommate's throat with a knife while a third person, armed with a gun, remained at the doorway. Visciotti claimed that he picked up the knife dropped by the person who stabbed his roommate, ran after the fleeing intruders, and in the hallway outside the other person's room, stabbed the person (Scofield) who had slashed his roommate's throat. Visciotti, 2 Cal.4th at 30 n.5; (R.T. 2414-18, 2544-53, 2555-60). In

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[3] Had Mr. Agajanian not brought these out during his direct examination, the prosecution would not have been able to use these episodes as the basis for impeachment in the course of cross-examination because (1) the escapes mentioned by Visciotti occurred while he was a juvenile and (2) there is no evidence that they led to the prosecution (let alone conviction) for any crime (let alone a felony). Cal. Evid. Code §§ 787, 788; Cal. Welf. & Inst. Code § 203; In re Ricky B., 82 Cal.App.3d 106, 114, 146 Cal.Rptr. 828 (1978); People v. Jackson, 177 Cal.App.3d 708, 711-12, 222 Cal.Rptr. 470 (1986). Furthermore, because there is no evidence that these episodes led to a felony conviction and because there was no evidence that the escapes involved any violence or threats of force or violence (R.T. 3213-14), the prosecutor would not have been entitled to introduce evidence of the escapes as part of its case in aggravation at the penalty phase. People v. Boyd, 38 Cal.3d 762, 776-77, 700 P.2d 782, 215 Cal.Rptr. 1 (1985).

rebuttal, the prosecution introduced the testimony of a police officer who investigated the assault charge. The officer saw Visciotti's roommate after the assault on Scofield. The officer recalled that Visciotti's roommate "did not have blood on his clothing or on his body;" the officer did not see "any kind of injuries on" Visciotti's roommate, including any injuries "in the neck area." (R.T. 2822-23.)

51. On cross-examination, Visciotti acknowledged that he and others went to Scofield's room, but denied that he or anyone with him kicked in the door to Scofield's room. Visciotti, 2 Cal.4th at 30 n.5; (R.T. 2552). The investigating officer, on the other hand, described the damage to Scofield's door that prompted him to conclude that the door had been opened by forced entry; he also identified pictures depicting detritus of a broken door on the floor immediately inside the doorway to Scofield's room. (R.T. 2815-18.)

52. Most critically, Visciotti denied seeing a woman in the room and, further, specifically and emphatically denied stabbing any woman. Visciotti, 2 Cal.4th at 30 n.5; (R.T. 2552-53, 2559, 2563-64; cf. id., at 2544-45). During the guilt phase, the prosecutor introduced photographs depicting the knife wounds sustained by Cusack and testimony by the investigating officer describing the wounds that he saw. (R.T. 2819-22, 2873.) During the penalty phase, the prosecutor was ultimately able to present Cusack's testimony attesting to the fact that she was present in Scofield's room and that Visciotti stabbed her.

53. Dr. Broussard testified as an expert on behalf of the defense. He opined, based on his examination of Visciotti and review of the limited materials available to him, that Visciotti "had minimal brain injury of a type associated with impulse disorders and specific learning disorders." Visciotti, 2 Cal.4th at 32; (R.T. 2621-22, 2679). Dr. Broussard admitted that he had not had an opportunity to view the videotapes of Visciotti's statements to police, but had only reviewed written transcripts. (R.T. 2623, 2725-27, 2780-81.) He admitted that he would have additional psychological testing and additional interview sessions would have been beneficial but he did not have enough time to do so. (R.T. 2710-13, 2743.) Dr. Broussard affirmed that he would have preferred to know more about Visciotti's background and childhood, but that the information was unavailable to

him. He explained that "the best way to find the degree of [an impulse disorder] is to take a comprehensive history" from both the defendant "and from the defendant's family, particularly his mother," but admitted that he "just talked to [Visciotti's] mother shortly" and had no information from the rest of the family. (R.T. 2623-24, 2716-17.) Dr. Broussard confirmed, on Mr. Agajanian's inquiry, that he was "operating with uncertain time constraints placed on [him]." (R.T. 2772, 2781.)

D. The Penalty Phase Trial

1. The Prosecution's Case in Aggravation

54. Approximately five months before trial, the prosecutor gave written notice to the defense, as required by California Penal Code § 190.3 ¶ 4, of his intent to introduce, as "evidence in aggravation of the penalty and wherever else admissible," evidence of Visciotti's prior conviction for assault with a deadly weapon. (C.T. 107.)

55. The prosecution's first (and as it turned out only) witness in support of the case in aggravation at the penalty phase was William Scofield. (R.T. 3056.) Scofield testified that, one day after he had a verbal altercation with Visciotti's roommate over the loss of a cat, Visciotti and others kicked down the door to his room, that the others dragged him out of the room, beat him with sticks and bats, and that Visciotti then ran out of Scofield's room and stabbed him in the back with a knife. (R.T. 3056-68.) Scofield testified that when he returned to his room, he saw that his roommate, Kathy Cusack, was laying on the bed and was also bleeding. (R.T. 3069.)

56. The prosecutor then introduced a copy of Visciotti's guilty plea and a packet of materials maintained by the California Department of Corrections relating to the conviction for assault with a deadly weapon. (R.T. 3081-82.)

57. After a recess, the prosecutor called Cusack to testify as a witness. Mr. Agajanian objected on the ground that Visciotti had only pled guilty to assaulting Scofield and that he was unaware of any evidence that Visciotti had stabbed Cusack. (R.T. 3083.) Mr. Agajanian was unaware that Visciotti had also been charged with assaulting Cusack. (R.T. 3083-85.) Mr. Agajanian's co-counsel later informed the trial judge that they had not

even obtained the police reports. (R.T. 3089.) On the prosecution's offer of proof that Cusack would testify that Visciotti stabbed her in the course of the same episode described by Scofield and the judge's explanation to Mr. Agajanian that the charges in the criminal complaint were not required to be repeated in the information, Mr. Agajanian conceded that his objection was without merit and the judge overruled the objection. (R.T. 3084-85; C.T. 164.)

58. Immediately after Cusack was sworn as a witness, acting *sua sponte*, the trial judge raised a question as to whether the prosecution's notice in aggravation was sufficiently clear as to notify the defense of the intent to introduce evidence of the stabbing of Cusack which, although part of the same criminal episode, was not the basis for "Defendant's prior conviction." (R.T. 3086-87; C.T. 107, 164.) After initial discussion, the trial judge indicated his inclination to exclude Cusack's testimony since it was not clearly within the scope of the notice in aggravation. (R.T. 3092-95.) After a recess and further argument, the trial judge ruled that he would exclude evidence of Visciotti's assault on Cusack but, because the defense had attacked Scofield's credibility through cross-examination, "the court shall allow the witness Cusack to testify as to the assault on Scofield." (R.T. 3101; C.T. 164-65.)

59. In the course of argument, the trial judge dismissed defense arguments that Cusack's testimony was inadmissible because Visciotti had not been convicted of the assault, that the testimony would raise "collateral problems," that the jury would have difficulty determining the truth of the assault beyond a reasonable doubt, and that evidence of the assault would itself be unfairly prejudicial. (R.T. 3088-89.) The trial judge made clear the foundation for his tentative (and eventual) ruling: "I could not and should not preclude the People from offering the witness. However, it appears that you offer — that the testimony may exceed the reasonable notice given to the defense." (R.T. 3089.) In announcing his ruling, the trial judge instructed the prosecutor to clearly advise Cusack as to the limited scope of her admissible testimony and to strongly caution her against the possibility of alluding to the assault perpetrated against her. (R.T. 3101.)

60. When proceedings resumed after the lunch recess, the trial judge announced "The court has reconsidered the problems with allowing the witness Miss Cusack to testify, and the court now exercises its authority under 352 of the Evidence Code and believes it's appropriate to exclude the entirety of that witness's testimony. [¶] People are no[w] precluded from offering the witness." (R.T. 3103; C.T. 165.)

61. The prosecutor then announced that he had no other evidence to offer in support of the case in aggravation. (R.T. 3103.)

2. The Defense Case in Mitigation

62. At the state court hearing, Mr. Agajanian claimed that he "had no intention of introducing any evidence in an attempt to draw sympathy to his client" at the penalty phase of Visciotti's trial. In re Visciotti, 14 Cal.4th at 346. Mr. Agajanian stated that, instead, his penalty phase strategy was to elicit sympathy for Visciotti's family in "an attempt to make it more difficult for the jury to decide this family's one stray, its son and brother, shouldn't be executed." Id.

63. Mr. Agajanian's assertion that he sought to focus exclusively on Visciotti's family and deliberately avoided presenting any evidence that might generate sympathy for Visciotti himself is flatly contradicted by the state court record. Mr. Agajanian's brief opening statement at the penalty phase and the scant evidence that he introduced in mitigation at the penalty phase convincingly refute Mr. Agajanian's state court testimony.

64. At the opening of the defense case, Mr. Agajanian informed the jurors that the defense's evidence in mitigation would focus on "the other side of John Visciotti;" he made no mention, or suggestion, of sympathy for Visciotti's family or the impact that an execution would have on them:

> Good morning ladies and gentlemen. We're going to be talking about the mitigating factors in this particular case. *We're going to, if you will, show the other side of John Visciotti.*
>
> As you recall, when we were conducting sequestered voir dire on this particular case we were talking about factors in aggravation and factors in

mitigation.

What the defense is going to do today is to show you factors in mitigation, the other side, if you will, of John Visciotti, and hopefully, after you have considered all the factors of aggravation and mitigation, you'll be in a better position to make a finding of whether the man dies or whether he spends the rest of his life in prison.

Thank you very much.

(R.T. 3114-15 (emphasis added).)

65. In the course of examining his first penalty phase witness, Mr. Agajanian asked Visciotti's sister Lisa "Can you just, in your own words, tell us the nice features about your brother, if you will, or your brother as you know him?" and elicited her response that "He's really nice. He's concerned, and he does a lot for my parents." (R.T. 3118.)

66. The defense's questioning of the remaining penalty phase witnesses proceeded similarly. As summarized by the state court on direct appeal, his parents and his siblings who testified all attested to "defendant's love and concern for family, his willingness to assist and counsel his siblings" and that he "ran errands and did favors for his parents, and never refused their requests." Visciotti, 2 Cal.4th at 34; (R.T. 3140-41, 3158-60, 3184-86, 3195-97, 3199, 3212-13, 3240.)

67. At no point during the questioning of Visciotti's sisters, brother, or girlfriend did defense counsel directly or indirectly ask about the witnesses' emotions or attachment to Visciotti, their emotions about the trial, or how they would be impacted by a sentence of death. Indeed, the overwhelming majority of the penalty phase evidence that could be said to support Mr. Agajanian's fabled family sympathy theory was actually elicited by the prosecutor during cross-examination. (R.T. 3123-24, 3144-45, 3148, 3168-69, 3234-35; cf. id. 3186, 3208-11.) Not until the defense had already presented the testimony of five siblings and former girlfriend (each offering some evidence of Visciotti's good qualities) did the defense elicit any evidence directly connected to a witness's emotional attachment to Visciotti. (R.T. 3214-19, 3239.)

68. Nearly every one of the witnesses for the defense at the penalty phase testified that they had seen Visciotti under the influence of drugs. Nearly every one of them further testified that, although Visciotti was generally a kind person, his personality, demeanor, and tendency to non-violence changed when he was under the influence of drugs. (R.T. 3146-56, 3160, 3163-68, 3188, 3192-93, 3197-99, 3199-3200, 3207-37.)

69. Initially, evidence that the defense witnesses had seen Visciotti when he was under the influence of drugs was elicited by the prosecutor on cross-examination. (R.T. 3122, 3130-32, 3144-56, 3163-68, 3192-93, 3199-3200.) After Visciotti's sisters Lisa and Rose had testified and the prosecutor elicited from them that they had seen Visciotti under the influence of drugs, as to witnesses called thereafter, the defense elicited from Visciotti's brother Louis, his girlfriend, and his sisters Ida and Antionette, that they had seen Visciotti while intoxicated by drugs. (R.T. 3139-40, 3157, 3160, 3187, 3196-99.)

70. Much of the testimony regarding Visciotti's personal qualities was presented only in vague generalities devoid of specific details. The few specific instances of "good conduct" that Mr. Agajanian did elicit were disturbingly insipid and pedestrian.[4] In light of the questions that were plainly aimed at eliciting testimony regarding positive aspects of Visciotti's personality, the lack of factual support for the witnesses' conclusions cannot plausibly be explained as evidence that was not sought by Mr. Agajanian but instead inadvertently blurted out by the witnesses. Rather, the lack of detail is most probably the result of Mr. Agajanian's failure to meet with the witnesses, discuss their anticipated testimony with them, explain the scope and purpose of the penalty phase, the relevance of their own testimony, convey to them the need to provide specific factual detail, or to focus them on particular incidents.

71. Mr. Agajanian's assertion that he consciously decided against investigating

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[4] For example, Visciotti's sister Rose testified that one example of positive behavior by Visciotti was that "He came over and watched T.V. during the day to make sure I was okay." (R.T. 3128.) When asked to describe instances of compassionate behavior, the first example offered by Visciotti's sister Ida was "Well, whenever he would come to my house he would kiss me hello, good-bye; the same with [my] girls." (R.T. 3186.)

facts relevant to generating sympathy for Visciotti personally is palpably false. Mr. Agajanian may have made such a decision at some point after the presentation of the mitigating evidence at trial, during the prosecution's rebuttal evidence, or at some other time prior to his penalty phase closing argument.[5] But he did not make any such decision prior to trial and, in foregoing any investigation prior to the penalty phase trial, his failure to investigate was not the result of a decision to rely on a "family sympathy" theory of mitigation or a decision to deliberately avoid any evidence that might generate sympathy for Visciotti personally. The suggestion that Mr. Agajanian forewent an investigation into various themes of mitigation because his strategy at the penalty phase was to avoid evidence designed primarily to generate sympathy for Visciotti personally is not an accurate explanation for his failure to conduct a competent investigation but is, instead, a post hoc rationalization for his professional malfeasance.

72. Similarly, Mr. Agajanian did not make a strategic or tactical decision not to provide Dr. Anderson or Dr. Sharma with the information they requested in order to arrive at a reliable diagnosis. Mr. Agajanian's only explanation for his failure to cooperate with Dr. Sharma and Dr. Anderson was his purported conclusion that they were biased in favor of the prosecution. However, he explained that his evaluation was based on the ultimate conclusions that the doctors arrived at — a factor that he obviously could not have known prior to receiving their reports.

73. Regardless of what could be said about Dr. Sharma's ultimate conclusion, Dr. Anderson's ultimate conclusions — voluntarily opining a basis for a diminished capacity defense even though the question was outside the reference order — calls into question the

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[5] The course of events at the penalty trial is consistent with Mr. Agajanian's testimony in this Court that the "introduction of the evidence dealing with Cusack was a surprise," and that the "strategy changed somewhat after that information was revealed." (Agajanian Depo., at 58.)

During the defense portion of the penalty trial, the defense clearly attempted to introduce evidence that cast Visciotti in a mildly sympathetic light. Evidence regarding the stabbing of Cusack was introduced during the prosecution's rebuttal phase of the penalty trial. Mr. Agajanian's penalty phase closing argument, as acknowledged by the state court, clearly lacks any coherent or intelligible focus. The record convincingly reflects that, by the time of closing argument, Mr. Agajanian had, in effect, given up his defense of Visciotti.

reasonableness of Mr. Agajanian's proffered explanation. Mr. Agajanian testified that he himself did not believe that any significant mental defect existed. Dr. Anderson's opinion was fully consistent with — and, indeed, more favorable than — his own evaluation of Visciotti and certainly not tilted toward the prosecution. Moreover, regardless of whether he could justifiably have been skeptical of Dr. Sharma prior to receiving Dr. Sharma's report, Mr. Agajanian had personally nominated Dr. Anderson. Moreover, Mr. Agajanian had little cause for concern about disclosure of potentially harmful information since, with the concurrence of the prosecutor, he had already obtained an order that Dr. Sharma's and Dr. Anderson's report be kept confidential. (R.T. (Vol. "A"), A-12 to A-13.)

74. Mr. Agajanian's proffered explanation for his failure to provide Dr. Sharma and Dr. Anderson with the information requested by them is a pretextual, post hoc rationalization rather than a statement of any actual decision made by him during the course of his consultation with the doctors.

75. Mr. Agajanian's lack of a coherent strategy and understanding of the penalty phase was apparent during the *voir dire* of prospective jurors, as he allowed the prosecutor and trial judge to misinform the panel. Throughout the *voir dire*, the sentencing process was portrayed as a mandatory mechanical weighing process, and the potential jurors were misled as to the scope of their discretion, in violation of the fundamental principle of individualized sentencing in capital cases. Mr. Agajanian did not object to the mischaracterization of the process but, instead, also occasionally misadvised the prospective jurors that the task would be a mechanical weighing process. (R.T. 1214, 1280, 1426.) Mr. Agajanian endorsed this misdescription of the process even though he had not yet conducted any investigation for mitigating evidence at the penalty phase and did not yet know what evidence the family members would be able to provide.

3. Prelude to the Prosecution's Rebuttal

76. Although limiting the prosecution's case in aggravation to matters about which the prosecution gave written notice to the defense, California Penal Code § 190.3 further provided that "[e]vidence may be introduced without such notice in rebuttal to

evidence introduced by the defendant in mitigation." Cal. Penal Code § 190.3 ¶ 4.

77. In the middle of Mr. Agajanian's penalty phase case in mitigation, the prosecutor sought a hearing outside the presence of the jury to revisit the trial court's ruling excluding the Cusack's testimony. (C.T. 173.) The prosecutor noted that each of the defense witnesses had offered "an opinion about what kind of a person this defendant is" and that, in effect, each had testified that "he's a non-violent person." (R.T. 3172; see R.T. 3118, 3129, 3140-41, 3160.) The prosecutor argued that "in light of this kind of character evidence, that rebuttal evidence is appropriate . . . and a proper way to do that would be through specific incidents of prior violence. Obviously, I'm referring to Kathy Cusack.." (R.T. 3172-73.) He asked that the trial judge "allow the testimony of a prior act of specific violence by this defendant on her person." (R.T. 3173.)

78. Mr. Agajanian's principal response was that Cusack's testimony did not relate to the Scofield conviction, that the defense would need a continuance in order to investigate possible sur-rebuttal, that the evidence was unreliable because it related to unadjudicated criminal activity, that the episode occurred outside the period of limitations, and that the jury would have difficulty applying the reasonable doubt standard to the testimony — all reasons that the trial judge had rejected in his initial ruling. (R.T. 3173-77.) Mr. Agajanian also complained that the prosecutor had not given the defense notice of its intent to introduce evidence during the penalty phase relating to the stabbing of Cusack.

79. After quoting from § 190.3 ¶ 4's specific exception for rebuttal evidence, the trial judge ruled: "It's certainly the court's observation that the evidence introduced by the defense is opinion evidence by every defense witness offered, all four of them, that the defendant is in fact a non-violent person. The People are entitled as a matter of law to rebut that by competent evidence. Specific acts of violence and rebuttal are relevant and are appropriate to rebut an opinion that the defendant is in fact a non-violent person, so the court shall allow the witness to testify as requested. [¶] If the People want to bring her back, that's fine." (R.T. 3179; C.T. 173.)

4. <u>The Prosecution's Rebuttal</u>

80. The prosecution called Cusack to testify in rebuttal. (R.T. 3244.) She testified that Visciotti and others broke into her motel room late one night, that Visciotti's cohorts dragged her roommate Scofield outside the room, and that Visciotti stayed behind and stabbed her several times with a knife. She testified that she said nothing to Visciotti before or as he was stabbing her until "he went to stab me in the stomach and I told him not to stab me in the stomach because I was pregnant. And he went to stab me in the stomach and I rolled over on my side and he stabbed me in the side." (R.T. 3252.) She reported that the attack was unprovoked by her. (R.T. 3244-56.)

5. Closing Argument through Verdict

81. As found by the California Supreme Court, Mr. Agajanian "delivered an unfocussed closing argument, during which he undercut his client's case by telling the jury that the evidence of petitioner's mental and emotional problems was not mitigating." In re Visciotti, 14 Cal.4th at 353. The state court accurately characterized it as "'a rambling discourse, not tied to particular evidence.'" In re Visciotti, 14 Cal.4th at 331, quoting Visciotti, 2 Cal.4th at 81. Indeed, Mr. Agajanian conceded that nine of the eleven statutory sentencing factors in California Penal Code § 190.3 favored the prosecution without even mentioning the existence of evidence that would support a mitigating interpretation of several of those factors. Instead, he informed the jury that there was no mitigating aspect in any of those nine factors on behalf of Visciotti. (R.T. 3332-52.)

82. With regard to factor (b), Mr. Agajanian conceded that "past violence" was a factor in aggravation. (R.T. 3338.) With regard to factor (c), he conceded that "[w]ith respect to the prior conviction for assault with a deadly weapon, there's no way to make light of that either." (R.T. 3345.) With regard to factor (e), whether or not the "victim participated or consented. That's not applicable. There's no evidence of that." (R.T. 3340.) He similarly conceded that there was no evidence that Visciotti had any reasonable belief of moral justification or extenuation for his conduct within the meaning of factor (f). (R.T. 3340.) Visciotti does not suggest that reasonably competent defense counsel could plausibly have urged the jury to consider factors (b), (c), (e), and (f) in any other light.

83. However, with regard to factor (a), even though the evidence showed that Visciotti initially intended only to take the victims' money, that he did not own or bring a gun, that he had previously encouraged Hefner to sell the gun, that he originally did not know Hefner had a gun and when he learned about it in the middle of their travels told Hefner to leave the gun behind, and that he killed Dykstra only after Hefner gave him the gun during the robbery itself and repeatedly encouraged Visciotti to shoot and reminded that they would be arrested and jailed, Mr. Agajanian simply conceded that "the facts and circumstances do not have to be reviewed. There is no way to make light of those tapes [sic, types?] of things just like there's no way to make light of any kind of murder, whether or not there's a robbery involved." (R.T. 3344.) In so arguing, Mr. Agajanian repeated his confusion about the concept of "mitigation" — i.e., circumstances about a crime that, although not a legal defense to the crime, make it "less severe or intense" or otherwise reduce or extenuate the moral culpability for the crime — that he had expressed at the outset of the argument. (R.T. 3332-33, 3336.)

84. With regard to factor (g), even though the evidence indicated that Hefner exerted psychological pressure on Visciotti to shoot the victims and stressed to Visciotti the threat of incarceration, Mr. Agajanian made no mention of the instruction's reference to acting "under the substantial domination of another," Cal. Penal Code § 190.3(g), and simply conceded "extreme duress, there was no evidence of that either. Although defense lawyers would like to have that present, it's not fair." (R.T. 3340.) Similarly, although the evidence indicated that Hefner clandestinely brought the gun along after Visciotti protested against the use of a weapon, and that Visciotti fired only after Hefner gave him the gun, repeatedly exhorting him to shoot, and reminded him of the threat of arrest and incarceration if the victims were not killed, in relation to factor (j), Mr. Agajanian argued only "accomplice, the indication here was that he was not an accomplice or that his participation was minor — exactly the opposite. He is, as the People said, the trigger man." (R.T. 3341.)

85. Most strikingly, however, although he had presented evidence at the guilt

phase that Visciotti suffered from mental deficits, although the jury was required to consider evidence at the guilt phase when resolving penalty, and although he knew additional evidence was available to reinforce the guilt phase mental state defense presentation, in connection with factor (d), Mr. Agajanian told the jury "with respect to emotional disturbance, there's no evidence of that. That isn't even a factor to be considered." (R.T. 3339-40.) Similarly, even though, in addition to the evidence of mental deficits, the jury also heard evidence that Visciotti was habitually using drugs and that he ingested cocaine throughout the day of the homicide prior to the robbery, Mr. Agajanian told the jury that they could freely disregard any mitigating aspect of factor (h)'s inquiry into whether Visciotti's capacity to appreciate the wrongfulness of his conduct "was impaired as a result of mental disease or defect or . . . intoxication." (R.T. 3340.)

86. Mr. Agajanian erroneously informed the jurors that rejection of factor (h), and implicitly factor (d) as well, was appropriate because "when you ladies and gentlemen returned this verdict of first degree murder and found special circumstances, you indicated to all of us that you did not find diminished capacity. [¶] So if you did not find diminished capacity, how can I argue that as a factor of aggravation or mitigation? It just does not apply. It's not there. [¶] I think when you ladies and gentlemen found that — you basically found, when you found him guilty of first degree murder and special circumstances, you found that diminished capacity did not reduce the nature of the robbery to something less than a robbery, or the nature of the first degree murder to something less than first degree murder. [¶] So that's not a factor of mitigation." (R.T. 3340-41.)

87. Mr. Agajanian conceded the inapplicability of factor (h), and implicitly factor (d), notwithstanding the fact that Mr. Agajanian had learned that the diminished capacity defense had been abrogated, that the verdict could well have rested on alternative grounds, and without due regard for the different evidentiary burdens at the two phases of the trial. Notwithstanding Visciotti's testimony that he was intoxicated at the time of the crimes and Dr. Broussard's guilt phase testimony that Visciotti suffered minimal brain injury of a type associated with an impulse disorder and learning disorder, substantial evidence — including

Visciotti's own confessions to police and testimony at trial — nonetheless supported a finding that the robbery was pre-planned and that Visciotti had the intent to rob the victims, thereby explaining the jury's rejection of the so-called diminished capacity defense at the guilt phase. Furthermore, to the extent admissible at the guilt phase, evidence of "diminished capacity" could be given effect by the jury only to the extent they found that it "prevented [Visciotti] from forming the specific intent to commit [robbery]." (C.T. 280.) At the penalty phase, by contrast, the jury could give mitigating weight to evidence of Visciotti's mental deficits and intoxication simply by finding that Visciotti's capacity was "impaired." Cal. Penal Code § 190.3. As the California Supreme Court reliably and correctly found, even after rejecting a guilt phase diminished capacity defense, Mr. Agajanian "failed to recognize that the jury could, nonetheless, consider the evidence of organic brain damage associated with lack of impulse control as mitigating." In re Visciotti, 14 Cal.4th at 354 n.7.

88. In conceding the inapplicability of factor (h), and factor (d), Mr. Agajanian acted without regard to Visciotti's testimony that he was intoxicated at the time of the crimes, Dr. Broussard's testimony that Visciotti suffered from a minimal brain injury that caused an impulse and learning disorder, without having given due consideration to whether he could reinforce that opinion through an expert who was provided with the information necessary to support that opinion, and despite his opinion that Visciotti was in a drug-induced psychotic state at the time of the offenses and was not completely aware of what he was doing during the robbery and murder. In re Visciotti, 14 Cal.4th at 354.

89. When, after a full day of deliberations, the jury requested guidance on the definitions of "moral justification" and "extreme duress," Mr. Agajanian continued his pattern of abdicating his role as an advocate for the defense. (C.T. 178-79, 204-05.) Rather than recognizing that the jurors were considering whether to give mitigating weight to two of the statutory sentencing factors, and suggesting further clarification of the terms (whether based on case law or, given the non-technical nature of the terms, a reference dictionary), requesting that the trial court inquire into the nature of the jury's confusion, or

proposing that the trial judge inform the jurors that any evidence or explanation could be treated as mitigating even if not "extreme" or giving rise to a "reasonable belief," Mr. Agajanian did nothing. He unflinchingly acceded to the trial court's proposal to tell the jurors that the terms that caused them confusion were "self-evident" and "mean what they say," a response that effectively refused to heed the jury's request for additional guidance. (C.T. 203.)

90. The state court correctly found "[t]he evidence offered at the state evidentiary hearing regarding trial counsel's lack of preparation and investigation was uncontradicted." In re Visciotti, 14 Cal.4th at 336.

E. The Evidence Available to Support a Case in Mitigation

91. Evidence concerning the possible case in mitigation was received at the state court evidentiary hearing. The overlooked mitigating evidence consisted principally of the social, medical, and family history of Visciotti. Mr. Agajanian did not discover any of this evidence at any time, let alone during a pre-trial investigation. The overlooked mitigating evidence was not presented at Visciotti's trial.

1. The Visciotti Household

92. As a summary of her parents relationship, the second oldest child, Antoinette Visciotti Priddy, testified "I don't think there was a day that went by there wasn't either a screaming match or hot coffee being thrown or something being broken." (S.E.H.R.T. 44.) The referee observed that the fact "that the mother threw things at the father was verified by most of the children." (Lodged Doc. 70 (Referee Report), App. D.) Visciotti's sisters Antoinette and Rose recalled that their "mother would scream to the point where they could hear her ten blocks down throwing things." (S.E.H.R.T. 54; id., 197-98, 355-56.) The arguments were frequently over financial issues, but also prompted by Luigi's absences or his involvement with other women. (S.E.H.R.T. 54, 355-56, 425.) While simultaneously denying that her father ever hit her mother, Antoinette explained that, on many occasions, her father held her mother's neck between his legs while threatening to snap it. (S.E.H.R.T. 54.) Although none of the other children recalled incidents of this nature, the referee

concluded that Antoinette "was convincing when she said it happened and that all of the children witnessed it." (Lodged Doc. 70 (Referee's Report), App. D.)

93. Visciotti's mother testified that, on one occasion, "when he [Luigi] was going out with this girl and we were fighting[,] . . . he took his gun and pointed it to my head and told me if I didn't shut up he would kill me." (S.E.H.R.T. 1227.) She recalled that the episode was "a very scary situation" because he had told her, "in a threatening way," that "it was loaded." (S.E.H.R.T. 1228.) This episode occurred in the presence of several of the children, including John Visciotti. She recalled that the children "got scared" and "were crying, they were upset." (S.E.H.R.T. 1227-28.)

94. The referee noted that both the father and the mother "remembered an incident involving a Christmas tree. Each claimed to be the one pushed to the ground with the tree by the other." (Lodged Doc. 70 (Referee's Report), App. D.) This episode was corroborated by one of the sons-in-law, Albert Muesse, who recalled seeing Luigi "throw her [Catherine] into the Christmas tree," knocking it to the ground. Mr. Muesse recalled that this, too, occurred in front of the Visciotti children. (S.E.H.R.T. 612-13.)

95. The "yell[ing] and fight[ing] and screaming and hitting went on constantly in the household" (S.E.H.R.T. 43), "sometimes it would be an everyday thing," at other times weekly (S.E.H.R.T. 44, 356). The fights would occasionally last "two, three hours" and they could erupt at "any time of the day" — breakfast time, dinner time, "sometimes at night, sometimes midnight" causing the children to be awakened, "it didn't matter." (S.E.H.R.T. 198-99, 419, 721, 871.) When asked, JoAnn was unable to estimate the number of times she was woken up by the parents' nocturnal fighting; she could only confirm that it occurred "several" times, and was probably more than 20. (S.E.H.R.T. 420.)

96. The children adopted various ways of coping with the turmoil. Antoinette would leave the house or hide in her room; Tony would hide in a bedroom closet, sometimes all night. (S.E.H.R.T. 43, 59, 277, 317-18.) JoAnn would "go take a bath so I could close the door" (S.E.H.R.T. 418) and later resorted to drugs as a means of "escape." (S.E.H.R.T. 450.) Rose would "turn on my radio, shut my door, cry, try not to listen to it."

(S.E.H.R.T. 359-60.) Once she was old enough, she too would flee the house to her sister JoAnn's during the fighting. (S.E.H.R.T. 359, 373.) Lisa would "go out to my friends and stay the night at their house"; she became active in sports in part to stay away from the house. (S.E.H.R.T. 153.) The children uniformly reported being "scared," "frightened," and "afraid" by their parents' clashes. (S.E.H.R.T. 57-58, 61, 151, 202, 275, 360, 417, 420, 444.) Ann, Ida, and JoAnn all reported marrying in their mid-teens and that part of their motivation in getting married at the time was to escape the Visciotti household. (S.E.H.R.T. 43-44, 187, 204, 229, 433, 460.)

97. Although there was substantial evidence of abuse perpetrated against nearly all of the children, several witnesses testified that Visciotti was singled out as the recipient of the most abuse. (S.E.H.R.T. 438, 467, 504.) Visciotti's sister JoAnn recalled being hit with a belt by her father "a couple times a month" from the earliest time of her memory until the time she moved out of the house. The beatings hurt, caused her to cry, and often left marks or welts on her. (S.E.H.R.T. 466-67.) As for Visciotti, JoAnn recalled that "I think he got beat more." The beatings were just as harsh and she saw welts on Visciotti as a result of them. (S.E.H.R.T. 467-68.) Visciotti's sister Rose recalled an incident when her father, angry at Visciotti for "being high and looking like he did . . . [,] pulled his hand back and hit John, punched him closed fist. I believe it was in the face, somewhere in the face, and he fell against the door to the ground." (S.E.H.R.T. 372.) Antoinette witnessed numerous similar episodes of physical abuse inflicted on Visciotti, perhaps as frequently as once a month; some of the violence was the father's response to Visciotti's use of drugs, other times it was in response to minor transgressions. (S.E.H.R.T. 90-92.)

98. Similarly, there was evidence that the emotional abuse was inflicted "especially to John, more than any of the other kids." (S.E.H.R.T. 504; id., at 438.) Many witnesses recalled that their father "constantly" told Visciotti, in reference to his birth defect, "I paid to fix those feet and I will be the one to break them so you never walk again." (S.E.H.R.T. 67; id., at 212-14, 286, 437, 471-72, 738, 897.) Visciotti's father admitted that he threatened Visciotti in this manner on more than one occasion.

(S.E.H.R.T. 738.)

99. As observed by the state court referee, "[m]ost told of the bed tying incident." Although the witnesses' recollections varied in the details such as who released Visciotti, most remembered an incident where Visciotti's father literally tied his arms and legs, "spread eagle," to the four corners of a bed. (S.E.H.R.T. 71-74, 739, 810-11, 904-06; Lodged Doc. 70 (Referee's Rpt.), App. D.) Luigi admitted the episode, but attempted to minimize the import of his actions by claiming that he was either attempting to persuade Visciotti to attend school or detaining him in the house until he could get dressed and take Visciotti to school; Luigi claimed that, upon getting dressed, he untied Visciotti and drove him to school. (S.E.H.R.T. 739, 786-87, 810-11.) Visciotti's mother and sister Ann, on the other hand, both denied that Luigi untied Visciotti and claimed to have been the one to have released him. (S.E.H.R.T. 71-74, 904-06.) Ann, who was then living in her own home nearby, recalled receiving a telephone call from her younger sister Rose, who was crying and begging her to come home to help pacify the situation. (S.E.H.R.T. 72-74.)

100. The witnesses, including the father Luigi, nearly uniformly recalled that Visciotti's parents (and particularly Luigi) frequently called Visciotti "stupid," "retarded," "asshole," "mother fucker," and other extremely demeaning vulgarities. In re Visciotti, 14 Cal.4th at 342-43; (S.E.H.R.T. 69, 210-11, 329, 438, 738, 896). Luigi admitted that he frequently told Visciotti that "he would never amount to anything and subjected [Visciotti] to a series of devaluing comments." In re Visciotti, 14 Cal.4th at 343.

101. The evidence clearly demonstrated that the Visciotti family was constantly changing residences while Visciotti was a child. Luigi recalled living in at least 24 different places during the 30-year period between 1947 and 1978. (S.E.H.R.T. 693-96.) The children confirmed that the peripatetic lifestyle was continuous throughout their, and Visciotti's, childhood and that it was "unusual" to spend an entire year at the same school. (S.E.H.R.T. 45-49, 189-92, 282-83, 425-27; id., at 693-98.) Antoinette, five years older than Visciotti, recalled attending at least nine schools between seventh and ninth grades; his younger sister Rose remembered attending at least six elementary and junior high schools.

(S.E.H.R.T. 48, 365.) The moves were often prompted by the family's poverty, Luigi's changes of employment, and landlords' displeasure over having so many people residing in a single unit. (S.E.H.R.T. 49-50, 191-92, 696-97, 844-46.)

102. The children uniformly testified that they despised the constant change of residences, along with change of schools, as it made them feel insecure, caused emotional stress, and generated a continual sense of instability. (S.E.H.R.T. 51, 193, 285, 362-66, 425-26.) The lack of a stable residence resulted in the children regularly losing friends, being considered "the new kid," and gave them an ever-present sense of being an "outsider." (S.E.H.R.T. 51, 193, 427-28, 366, 704.)

2. Additional Background Regarding Visciotti Personally

103. It is undisputed that Visciotti habitually abused drugs. (S.E.H.R.T. 1024.) The evidence was clear that, with the exception of his time in custody at the California Youth Authority, Visciotti was a regular drug abuser from his later teens up until the time of the crimes. Evidence was available to establish that Visciotti's drug use began when he was as young as 12 years old and, possibly, when he was only 8. (S.E.H.R.T. 78-79, 89-90, 217, 220, 370, 447, 474, 990.) Visciotti's oldest sister Ida described how John seemed to "quit" life when he immersed himself in drugs. (S.E.H.R.T. 218-220.) His younger brother Tony testified that Visciotti would tell him that he wished he could quit, but could not. (S.E.H.R.T. 301.) Indeed, several of Visciotti's siblings also confirmed their own resort to drug abuse. (S.E.H.R.T. 44, 81-82, 104, 376-77, 383-84, 450-51, 456-60, 469; cf. id., at 154.)

104. Antoinette testified that Visciotti confided in her his own thoughts of suicide: "He used to tell me that it would be peaceful to be dead and he wouldn't have to worry anymore, he wouldn't disappoint the family anymore." (S.E.H.R.T. 76.)

105. The state court referee observed that Visciotti's family was "quite dysfunctional." (Lodged Doc. 70 (Referee's Rpt.), App. B.) She reliably found that "there is no doubt that the parents have screamed and yelled at each other for their entire marriage and they inflicted a certain amount of physical abuse on each other. There is also little doubt the children were called filthy names and were sometimes afraid during their

parents' battles." (Lodged Doc. 70 (Referee's Rpt.), App. B.) The California Supreme Court correctly and reliably concluded that, although details were varied, "[t]he evidence that Visciotti's family life was chaotic and that he suffered verbal abuse from his parents throughout his childhood was uncontradicted." In re Visciotti, 14 Cal.4th at 336. The evidence clearly and consistently demonstrated that Visciotti was raised in an abusive family. In re Visciotti, 14 Cal.4th at 344-45, 351.

3. Instances of Positive Behavior

106. At the state hearing, "[t]he family members testified consistently with their trial testimony that Visciotti was a kind and considerate person when not under the influence of drugs." In re Visciotti, 14 Cal.4th at 344.

107. In addition, several of his sisters testified to specific incidents when Visciotti assisted in caring for them and their children when they were going through difficult times. (S.E.H.R.T. 77, 221, 267, 373, 521.)

108. Siblings also recalled that Visciotti was also kind to strangers. His sisters and mother recalled that Visciotti occasionally brought home strangers who seemed hungry and helpless. (S.E.H.R.T. 77, 159, 332, 907-08.)

109. Visciotti's younger brother remembered an incident where, when the two were driving on a rainy day, Visciotti stopped the car and gave his jacket to a homeless man sitting on the side of the road because "he needed it more than I did." (S.E.H.R.T. 290-92.) The truthfulness of this report could have been corroborated by family members who remembered hearing of this incident. (S.E.H.R.T. 222-24, 908-09.)

110. Visciotti's younger brother also could have testified that, even when Visciotti was incarcerated, Visciotti frequently counseled his younger brother to avoid his own mistakes, telling him to "keep your butt in school and don't follow my footsteps." (S.E.H.R.T. 269.)

4. Expert Testimony

111. Shirley Reece, a licensed clinical social worker and professor at the University of California at San Francisco, prepared a social history of Visciotti. She

described that history as offering "overwhelming mitigating circumstances" in "an absolutely horrendous family history." The family and social history was derived from hospital records, school records, probation records, Youth Authority and Department of Corrections records, and from information supplied by close family members. In re Visciotti, 14 Cal.4th at 341. She observed that the testimony of the family members was not only consistent in many respects, but also that the description of their chaotic family was supported by the records compiled much earlier when Visciotti was in the custody of the California Youth Authority. In re Visciotti, 14 Cal.4th at 351.

112. In recounting the factual basis for her conclusion that the interaction between Visciotti's parents as extremely volatile, hostile, and mutually abusive, both physically and verbally, Professor Reece repeated many of the facts that were testified to by the family members and which she had learned in the course of her evaluation. In re Visciotti, 14 Cal.4th at 351. She was also able to report that when she interviewed Visciotti's parents they "engaged in a heated argument during the interview," which she described as "'quite extraordinary,' testifying that the parents shouted and menaced one another to the point that a staff member came from another room to ask if they could 'tone it down.'" In re Visciotti, 14 Cal.4th at 341 n.5.

113. According to Professor Reece, the economic problems and the large number of children that resulted in the family's frequent moves also had a profound effect on the children. She noted that Visciotti left kindergarten after nine days and was not re-enrolled in school for the first grade until two years later. Professor Reece opined that the overall record of school attendance and withdrawal was appalling and destructive to Visciotti's development. In re Visciotti, 14 Cal.4th at 351. She detected that Visciotti had been frustrated by never having had an opportunity to become engaged in a learning environment in a positive way. (S.E.H.R.T. 1443.)

114. A witness such as Professor Reece could have testified to a penalty phase jury that Visciotti began to believe in the truth of, i.e., to "internalize," the epithets and aspersions inflicted by his father. She opined that the family situation, Visciotti's short

stature, and the barrage of criticism and abuse caused Visciotti to become depressed and markedly lacking in self-esteem. She believed that Visciotti thought he could never do anything right and could never do anything to please his parents. She noted that Visciotti was highly self-critical and blamed himself for matters over which he had no control and for which he was not responsible, such as his parents' difficulties. She opined that Visciotti believed he had no escape from his personal situation other than through drugs. In re Visciotti, 14 Cal.4th at 351. Also aware of Visciotti's suicide ideation, Professor Reece believed that Visciotti used drugs as a slow form of suicide to escape the dismalness of his life. (S.E.H.R.T. 1470-71.)

115. Professor Reece would have been subject to cross-examination and arguable impeachment of some of her opinions. The state court did not consider such impeachment to have completely undermined the credibility of her testimony. This Court similarly finds that her testimony was worthy of belief and that, while some jurors may have discounted some of her opinions, reasonable jurors could have afforded substantial weight to Professor Reece's testimony.

116. Dr. Jay Jackman, M.D., an expert in forensic psychiatry with extensive experience in substance abuse cases, reviewed the same background information. Prior to testifying, he had reviewed declarations by members of Visciotti's family, Visciotti's trial testimony, the videotapes of Visciotti being interviewed by the police at the station and at the crime scene, as well as numerous other medical, Department of Corrections, Youth Authority, probation, and school records relating to Visciotti, all of which were available and could have been discovered by Mr. Agajanian after a reasonable investigation.

117. Dr. Jackman interviewed Visciotti twice. Dr. Jackman opined that it was necessary to spend a minimum of 15 to 20 hours interviewing a capital defendant. He believed that that amount of time is particularly important in cases involving childhood abuse because it is necessary to develop a relationship of trust. He found that persons with a history of abuse are extraordinarily protective of their families. He believed that such persons were defensive about their own abuse history and were very reluctant to discuss it.

Dr. Jackman stated that, due to time and monetary restraints, he was able to spend only about 10 hours with Visciotti but that, if he were testifying before a jury, he would have devoted more time to the case. In re Visciotti, 14 Cal.4th at 342.

118. In establishing the foundation for his opinions, Dr. Jackman also repeated many of the facts regarding Visciotti's upbringing and family environment that the family members testified to at the evidentiary hearing and which he learned about in the course of his preparation. In re Visciotti, 14 Cal.4th at 342-43. Dr. Jackman also reported that only three of the Visciotti children remained in school to graduate from high school. He also considered the fact that, on three occasions, Visciotti's father abandoned the family and moved in with another woman. In re Visciotti, 14 Cal.4th at 343.

119. Dr. Jackman testified that Visciotti's birth defect of being born with club feet had a very negative effect on both Visciotti and his family in part because treatment for the condition was expensive and strained the resources of the family. Dr. Jackman noted that the corrective treatment prevented Visciotti from walking until he was three years old and required first Denis Browne splints and then special shoes which the family could not afford without help from Visciotti's grandparents, a factor that impacted on his father's self-image. In re Visciotti, 14 Cal.4th at 343.

120. While he agreed that children generally do not suffer permanent mental impairments as a result of the congenital deformity, Dr. Jackman observed that Luigi "took it out" on the children and, in particular, on Visciotti whom he resented. Even though Visciotti did not remember the condition and treatment, Dr. Jackman opined that Visciotti's birth handicap had a colossal and devastating effect on Visciotti's self-image because from his earliest self-awareness, he was aware that he was different from other children, causing him feelings of inadequacy, incompetence, inferiority, worthlessness and low self-esteem. Id.

121. With regard to the frequent changes of residence, Dr. Jackman opined that the constant moves affected Visciotti's ability to function in school and in his social world, in part because he was always an outsider. In re Visciotti, 14 Cal.4th at 343. Dr. Jackman

opined that the family's frequent moves caused Visciotti difficulty in making friends and establishing relations with his peers and, in his desperation for approval, led Visciotti to peers who were also negatively involved in drugs. (S.E.H.R.T. 991, 1010.)

122. In addition to the evidence establishing the parents' frequent fights, Dr. Jackman remarked that, when they were young, nearly all of the children remembered hiding in their bedrooms or closets when the fights occurred; when older, they left the house. Dr. Jackman observed that Visciotti's older sisters married in their midteens, noting that several admitted that they did so in part to escape the home environment. Dr. Jackman testified that Visciotti's reaction to his parents' battles was to hide in a dark place. He also found hiding places in abandoned cars where he could spend time away from the home situation. In re Visciotti, 14 Cal.4th at 343.

123. Additionally, Dr. Sharma, the psychiatrist selected by the prosecutor, would have been available to testify that Visciotti grew up in an extremely chaotic household, as manifested by abuse in the form of "the kids are being put-down, names are being called, temper tantrums are being thrown by the adults, pushing and shoving is going on and there is just a general chaos in the household. (S.E.H.R.T. 1630.)

124. Dr. Jackman noted Visciotti's behavior and schooling improved markedly while he was away from his family and in the custody of the California Youth Authority. Dr. Jackman observed that, in these situations, given "a structured environment which he desperately needed," Visciotti did not exhibit behavioral problems and did all the jobs expected of him. (S.E.H.R.T. 1014-15.) Dr. Jackman opined that "when [Visciotti] was in a structured environment he functioned reasonably well;" he was "able to function much more effectively, much more satisfactorily than he is in his home environment." (S.E.H.R.T. 1014, 1015); In re Visciotti, 14 Cal.4th at 343.

125. According to Dr. Jackman, CYA staff members believed that Visciotti was not a typical delinquent and had him tested for a brain abnormality. An EEG revealed a possibly abnormal seizure disorder prompting Dilantin to be prescribed on a trial basis. While taking the medication Visciotti did not abuse drugs and his behavior improved

significantly. Dr. Jackman noted that the Youth Authority staff did not consider Visciotti to be at risk for abusing drugs while in custody. Notwithstanding the family situation, Visciotti always expressed a desire to go home when in Youth Authority custody. Youth Authority staff noted however, that what appeared to be a close-knit family was at the point of falling apart, a problem that terrified Visciotti to the point that he stuttered when he talked about it. In re Visciotti, 14 Cal.4th at 343.

126. Dr. Jackman further noted that whenever Visciotti was released to the family's disorganized psychological environment, which he termed a "toxic environment," "all of the old negative behaviors and concomitant drug use . . . would re-emerge." (S.E.H.R.T. 1012.) Dr. Jackman opined that this change in behavior resulted Visciotti "was unable to withstand the culture at home." (S.E.H.R.T. 1012); In re Visciotti, 14 Cal.4th at 343-44.

127. Dr. Jackman believed that until Visciotti was eight his method of escaping the family situation was physical — he absented himself from the home. Dr. Jackman opined that, after Visciotti's first experimentation with drugs, Visciotti realized that "drugs provided him with another — an alternative route of escape." Between the ages of eight and twelve Visciotti used alcohol and Seconal, a sedative hypnotic. Dr. Jackman believed that Visciotti was experiencing a psychotic mood — "a painful, unpleasant mood state" caused by the "relentless, hostile abuse, [and] family chaos" — and that these drugs would relieve the discord so as to make him feel "mellow." Dr. Jackman described this drug use as a self-medication pattern often seen in children who use drugs to control the undesired, unpleasant moods they have, changing drugs as their mood changes. In re Visciotti, 14 Cal.4th at 344; (S.E.H.R.T. 1001-04).

128. Dr. Jackman noted that, in Visciotti's early teens, he began to use amphetamines, preferentially "uppers" to overcome depression, as the "downers" he had used before no longer had the desired effect. At that time Visciotti was doing very poorly in school and missed as many days as he attended. He had no social relationships and was described as "basically a depressed kid." At 15, Visciotti began using cocaine which, by the

time he was 18, became his drug of choice. In his later teens, Visciotti also used what he described as "cannabis," but which was actually phencyclidine or PCP, a drug that distances people from their experience so that they become dispassionate observers of what goes on in their world. Dr. Jackman opined that Visciotti resorted to this drug because it enabled him to see and participate in the family but not to feel what went on emotionally. According to Dr. Jackman, most of Visciotti's criminal conduct occurred during a period when he had progressed to injecting PCP intravenously several times a day in order to have that detached experience. In re Visciotti, 14 Cal.4th at 344; (S.E.H.R.T. 1021, 1025).

129. Dr. Jackman believed that Visciotti's criminal behavior was "directly related to his drug use." The episodes "tended to be impulsive behaviors on his part . . . and he would go very quickly from an impulse to an acting out of that impulse." (S.E.H.R.T. 1025.) Dr. Jackman believed Visciotti was not a criminal or antisocial personality because Visciotti had a number of "prosocial" behaviors which Dr. Jackman had not seen in antisocial personalities, including those who had killed others. In re Visciotti, 14 Cal.4th at 344; (S.E.H.R.T. 1027-30.) Referring to incidents where family members reported acts of warmth and caring toward other individual by Visciotti — such as "taking care of his sisters when they were ill or when they had kids and needed child care" — Dr. Jackman explained that, in contrast, people with an antisocial personality "have no real emotional bonds to anybody." (S.E.H.R.T. 1028-29.)

130. Dr. Jackman testified that it was not unusual for an abused child to still love and feel attached to the parents. In re Visciotti, 14 Cal.4th at 344; (S.E.H.R.T. 1021).

131. Consistent with the testimony of Professor Reece and Dr. Jackman, Visciotti's siblings testified about the chaotic family life brought about by the volatile nature of the relationship between their parents, the alleged physical and psychological abuse of Visciotti and his siblings by their parents, and the family's peripatetic existence. Evidence was also presented that, contrary to the evidence offered at the penalty phase, showing that Visciotti was not the "bad seed" in an otherwise loving family; his father and several of his siblings had criminal records. In re Visciotti, 14 Cal.4th at 344-45.

CONCLUSIONS OF LAW

132. Any findings of fact deemed to be conclusions of law are incorporated herein.

A. The Right to the Effective Assistance of Counsel

133. The Sixth Amendment to the United States Constitution provides in part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. Const., amend. VI.

134. The Attorney General concedes that the right to effective assistance of counsel was firmly established in state and federal law at the time of Visciotti's trial and certainly by the conclusion of Visciotti's appeal and that, as a result, Mr. Agajanian's performance is properly judged by the standards established in federal law through Strickland v. Washington, 466 U.S. 668 (1984) and its progeny.

135. The Supreme Court has confirmed that the fact that "a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command." Strickland, 466 U.S. at 685. Accord Frazier v. United States, 18 F.3d 778, 782 (9th Cir. 1994). Rather, "[a]n accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." Strickland, 466 U.S. at 685. "'It has long been recognized that the right to counsel is the right to the effective assistance of counsel.'" United States v. Cronic, 466 U.S. 648, 654 (1984), quoting McCann v. Richardson, 397 U.S. 759, 771 n.14 (1970). Accord Strickland, 466 U.S. at 686.

136. "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." Strickland, 466 U.S. at 687.

137. "The right to effective assistance of counsel applies with equal force at the penalty phase of a bifurcated capital trial" such as Visciotti's. Clabourne v. Lewis, 64 F.3d 1373, 1378 (9th Cir. 1995), citing Wade v. Calderon, 29 F.3d 1312, 1323 (9th Cir. 1994); and

Mak v. Blodgett, 970 F.2d 614, 617-19 (9th Cir. 1992). Accord Smith v. Stewart, 140 F.3d 1263, 1269 (9th Cir.), cert. denied, 119 S.Ct. 336 (1998); Strickland, 466 U.S. at 686-87. Although the Court does not apply a more exacting standard than the one set forth in Strickland, "[b]ecause of the potential consequences of deficient performance during capital sentencing, we must be sure not to apply a more lenient standard of performance to the sentencing phase than we apply to the guilt phase of trial." Mak, 970 F.2d at 619.

1. Standards for Evaluating Deficiency

138. To demonstrate deficient performance, a petitioner must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Strickland, 466 U.S. at 687. In generally describing the obligations of counsel, the Supreme Court affirmed that defense counsel have "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688. Disavowing any intent or ability to "exhaustively define the obligations of counsel []or form a checklist for judicial evaluation of attorney performance," the Supreme Court emphasized that "[i]n any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Strickland, 466 U.S. at 689.

139. Review of counsel's performance must be "highly deferential;" reviewing courts should resist the temptation to "secondguess" counsel's assistance once it has proven to be unsuccessful. Strickland, 466 U.S. at 689. "[A]n attorney's actions must be examined according to what was known and reasonable at the time the attorney made his choices." Hendricks v. Calderon, 70 F.3d 1032, 1036 (9th Cir. 1995).

140. In the context of a claim challenging counsel's failure to investigate, the Court confirmed:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words,

> counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690-91.

141. In essence, "'counsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client.'" Hendricks, 70 F.3d at 1036, quoting Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994). An attorney will be found to have acted deficiently "where an attorney neither conducted a reasonable investigation nor demonstrated a strategic reason for failing to do so." Hendricks, 70 F.3d at 1036.

142. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686.

2. Standards for Evaluating Prejudice

143. In order to demonstrate prejudice, "'the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Hendricks, 70 F.3d at 1036, quoting Strickland, 466 U.S. at 694. As applied to the penalty phase of a capital case, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Hendricks, 70 F.3d at 1036-37, quoting Strickland, 466 U.S. at 695.

144. In evaluating prejudice, the Court must "compar[e] the testimony at trial with the testimony at the evidentiary hearing, where the [witnesses] were fully prepared and examined by competent counsel." Clabourne, 64 F.3d at 1381. Accord Bonin, 59 F.3d at 834.

145. The Court's evaluation of prejudice is not confined to an assessment of the impact of each particular deficiency considered in isolation of other deficiencies. Rather, the Ninth Circuit has often recognized that "prejudice may result from the cumulative impact of multiple deficiencies." Harris ex rel. Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995). See also Wade, 29 F.3d at 1325; Mak, 970 F.2d at 622. "Multiple errors, even if harmless individually, may entitle a petitioner to habeas relief if their cumulative effect prejudiced the defendant." Ceja v. Stewart, 97 F.3d 1246, 1254 (9th Cir. 1996).

146. Since the "right to effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing . . . [,] if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." Cronic, 466 U.S. at 656-57. "In some cases the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided. Clearly, in such cases, the defendant's Sixth Amendment right to 'have Assistance of Counsel' is denied." Cronic, 466 U.S. at 654 n.11. Where circumstances establish the "constructive denial of counsel," the situation "is legally presumed to result in prejudice." Strickland, 466 U.S. at 692.

B. Mr. Agajanian's Pervasive Instances of Ineffective Assistance of Counsel

147. Through his repeated instances of inattention and neglect, Mr. Agajanian's representation in connection with the penalty phase amounted to a complete abandonment of his client.

1. The Absence of any Reasonable Strategic or Tactical Decisions Underlying Mr. Agajanian's Representation

148. Prior to addressing Mr. Agajanian's most critical failings at the penalty phase, it is important to note that Mr. Agajanian did not make a reasonably informed tactical or strategic decision to pursue the penalty phase in the manner that he did.

149. Subsumed within the question of whether counsel's performance was constitutionally deficient is the question whether counsel's conduct was based on a reasonable strategic or tactical decision. "Representation is an art, and an act or omission

that is unprofessional in one case may be sound or brilliant in another." Strickland, 466 U.S. at 693. Thus, whether an attorney's challenged conduct amounts to constitutionally deficient performance will often depend upon whether counsel made a reasonable tactical or strategic decision to pursue the case one way rather than another. Strickland, 466 U.S. at 690-91; Hendricks, 974 F.2d at 1109-10.

150. In the context of this case, Mr. Agajanian's multiple failings were not the result of reasonably informed strategic or tactical decisions.

151. First, Mr. Agajanian's failings spring not from his failure to present evidence, but his failure to ascertain what evidence was available. Thus, in this case, "[t]he choice that must be defended as strategic is not a decision about how best to present mitigating evidence, but one about whether to investigate mitigating evidence at all." Hendricks, 70 F.3d at 1043. "Failing to interview witnesses or discover mitigating evidence relates to trial preparation and not trial strategy." Bean v. Calderon, 163 F.3d 1073, 1079 (9th Cir. 1998). The case law clearly establishes that "[a] lawyer has a duty to investigate what information potential []witnesses possess, even if he later decides not to put them on the stand." Sanders, 21 F.3d at 1457 (brackets, ellipses, internal quotations omitted). Mr. Agajanian's alleged decision to renounce any inquiry into evidence of Visciotti's troubled background and mental deficiencies is not the type of decision that can be characterized as strategic.

152. Moreover, the evidence clearly demonstrates that, to the extent Mr. Agajanian made any decision about penalty phase tactics, he certainly did not make a reasonable, or a reasonably informed, tactical or strategic decision to pursue a penalty phase defense that would focus the jury on Visciotti's family rather than Visciotti.

153. As a factual matter, Mr. Agajanian did not make a strategic decision prior to trial that, during the penalty phase case in mitigation, he would avoid evidence designed to elicit sympathy for Visciotti. Similarly, Mr. Agajanian did not actually make a strategic decision prior to trial that, during the penalty phase, he would attempt to focus the case in mitigation on evoking sympathy for Visciotti's family.

154. To the extent that Mr. Agajanian might have made such a strategic decision,

as a matter of law, the decision was not reasonable or informed.

155. It is undisputed that Mr. Agajanian did not "make a thorough investigation of law and facts relevant to plausible options" prior to making any strategic decisions about how to defend Visciotti's case at the penalty phase. Cf. Strickland, 466 U.S. at 690. Thus, the relevant inquiry must be whether Mr. Agajanian "conduct[ed] a reasonable investigation enabling him to make informed decisions about how best to represent his client.'" Hendricks, 70 F.3d at 1036, quoting Sanders, 21 F.3d at 1456.

156. Mr. Agajanian asserted that he had settled on this "family sympathy" defense because of his prior success with the theme. To the extent Mr. Agajanian relied on his alleged experience in presenting a family sympathy defense, that basis was inadequate to provide an informed decision. Although reasonably competent counsel may properly rely on their prior litigation experience in forming strategic and tactical decisions, Mr. Agajanian did not do so in this case. In claiming to have selected a "family sympathy" defense as the most effective way to avoid a capital sentence, Mr. Agajanian was not relying on his prior success with such defenses in capital cases because (1) prior to representing Visciotti, Mr. Agajanian had never before represented a defendant in a capital penalty trial, (2) in none of his prior cases was so-called family sympathy evidence relevant to any issue in the case, and (3) in none of those cases could the effort accurately be described as "successful." In re Visciotti, 14 Cal.4th at 336-37; (S.E.H.R.T. 1373-78, 1401-06.)

157. Furthermore, the alleged decision was not even an informed decision. Mr. Agajanian claimed that he settled on the "family sympathy" theme at "the very beginning," at a time when he admittedly had little or no information as to (1) whether any evidence was available to support an alleged "family sympathy" theory of mitigation, (2) the strengths or weaknesses of the evidence that might be available regarding a "family sympathy" theory of mitigation, (3) whether any other theory of mitigation could be supported by any evidence, (4) the relative strengths and weaknesses of any other plausible theories of mitigation, or (5) whether the different theories would necessarily conflict or whether they could be harmonized.

158. Mr. Agajanian "can hardly be said to have made a strategic choice when [he] ha[d] not yet obtained the facts on which such a decision could be made." Sanders, 21 F.3d at 1457. "[A]n attorney's choice to eliminate a certain defense cannot be viewed as 'strategic' where counsel 'failed to conduct even the minimal investigation that would have enabled him to come to an informed decision." Seidel v. Merkle, 146 F.3d 750, 756 (9th Cir. 1998), quoting Sanders, 21 F.3d at 1456. Whatever decision Mr. Agajanian might have made about presenting mitigating evidence — whether relating to Visciotti's traumatic upbringing, the factors leading him to using and abusing illegal drugs, or the existence of brain damage or other mental deficiencies — the decision "was not an informed one and thus could not be deemed 'strategic.'" Sanders, 21 F.3d at 1457.

159. In repeatedly proclaiming that he could not imagine how a jury could give effect to mitigating evidence regarding (1) Visciotti's traumatic home environment, (2) the physical and emotional abuse specifically directed at Visciotti personally, (3) evidence of possible brain damage or other mental health deficits, (4) factors that led to, or explained, Visciotti's resort to use of drugs and criminal misconduct, Mr. Agajanian was acting in complete ignorance of the way in which jurors evaluate these types of mitigating evidence.[6]

160. "Even if this decision could be considered one of strategy, that does not render it immune from attack — it must be a *reasonable* strategy." Jones, 114 F.3d at 1010 (emphasis original). To the extent it was believable, Mr. Agajanian's testimony at the state court evidentiary hearing clearly conveyed that he limited his investigation because he did not understand how evidence of a person's background could be used to call for a sentence less than death when the crime was a serious homicide. As Justice Mosk observed in his dissent in this case, the state appellate reporters are replete with capitally-charged cases

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[6] Mr. Agajanian might arguably be understood to have been acting on his personal assessment of the proper penalty adjudication in this case. However, while a lawyer may entertain doubts as to the propriety of a non-capital sentence in a particular case, "an attorney who adopts and acts upon a belief that his client should be [sentenced to death] 'fails to function in any meaningful sense as the Government's adversary.'" United States v. Swanson, 943 F.2d 1070, 1074 (9th Cir. 1991) (brackets, citation, internal quotations omitted), quoting Cronic, 466 U.S. at 666.

that resulted in a non-death verdict even after a conviction for one or more first degree murders with special circumstances and a trial on the appropriate penalty. In re Visciotti, 14 Cal.4th at 362 (Mosk, J., dissenting). See also People v. Rodriguez, 50 Cal.App.4th 1013, 1019, 58 Cal.Rptr.2d 108 (1996); People v. Bills, 38 Cal.App.4th 953, 956, 45 Cal.Rptr.2d 364 (1995); People v. Tapia, 25 Cal.App.4th 984, 993, 1006, 30 Cal.Rptr.2d 851 (1994); People v. Pock, 19 Cal.App.4th 1263, 1267, 23 Cal.Rptr.2d 900 (1994). Mr. Agajanian could have found similar guidance through law reviews, practice guides, trade publications, and other resources available to capital defense attorneys.

161. Mr. Agajanian failed to consider the potential risks of a deceptive presentation based on adducing evidence of Visciotti's transgressions and ignoring evidence of family discord, abuse, and a possible explanation for Visciotti's transgressions. This supposed theory of mitigation did not materially advance the penalty defense in this case and only succeeded in providing the prosecution with evidence from which to argue an additional reason why Visciotti should be sentenced to death: Visciotti ostensibly had been given every opportunity and simply "went bad"; "out of nine children eight have grown up and have gotten jobs, have been productive members of society, have never been in trouble with the law and have never had any drug background, but for some reason this man, this defendant went bad, the proverbial bad seed." (R.T. 3290.) The prosecutor further argued: "This defendant had every benefit, every advantage that all the other children had. [¶] All the love. He was never physically abused nor was he ever sexually abused. [¶] For some reason he just went wrong where eight other children went right." (R.T. 3318-19.) This argument was possible only because Mr. Agajanian ignored any evidence of family dysfunction and was willing to receive evidence only on the positive attributes of the family and negative attributes of Visciotti. In essence, Mr. Agajanian's failure essentially resulted in the addition of false aggravation to the sentencing process.

162. In short, Mr. Agajanian failed to investigate and discover mitigation evidence as a result of his complete inattention to the case and ignorance of the kinds of evidence that a jury might consider mitigating. Characterizing Mr. Agajanian's conduct in this case

as "'strategic' strips that term of all substance." Bloom v. Calderon, 132 F.3d 1267, 1277 (9th Cir. 1997), quoting Sanders, 21 F.3d at 1456.

2. Mr. Agajanian's Failure to Investigate Mitigating Evidence Relating to Family Poverty and Transience, Traumatic Childhood, Factors Contributing to Drug Abuse, and Mental Health

163. Particularly in light of his knowledge that there was "some brutality in the family," In re Visciotti, 14 Cal.4th at 340, Mr. Agajanian's complete failure to conduct any inquiry into Visciotti's background, childhood environment, or upbringing amounts to constitutionally deficient performance. "Evidence of a difficult family history . . . is typically introduced by defendants in mitigation." Eddings v. Oklahoma, 455 U.S. 104, 115 (1982). Reasonably competent counsel representing a capitally-charged defendant would not have completely ignored the possibility that his client may have grown up in a traumatic environment. Hendricks, 70 F.3d at 1044.

164. Mr. Agajanian failed to conduct a reasonable investigation aimed at discovering evidence regarding the Visciotti family in general, regardless of whether such evidence pertained to Visciotti directly or to the family as a whole. Even though the family's transience and poverty would have been equally relevant to generating sympathy for the family (the theory of mitigation that Mr. Agajanian claimed to have been pursuing), Mr. Agajanian made no effort to determine information about any hardships that Visciotti and his family had endured. Mr. Agajanian's failure to investigate evidence of the family's impoverished state and constant dislocation was constitutionally deficient performance. Blanco v. Singletary, 943 F.2d 1477, 1505 (11th Cir. 1991); Armstrong v. Dugger, 833 F.2d 1430, 1433-34 (11th Cir. 1987). Indeed, even if Mr. Agajanian's purported explanation were true, his "cursory consultation [with Visciotti's family members] is especially shocking in light of the seriousness of [capital penalty phase proceedings] [and] the fact that the entire defense hinged on" evidence designed to allegedly generate sympathy for Visciotti's family. Turner v. Duncan, 158 F.3d 449, 457 (9th Cir. 1998).

165. Mr. Agajanian's failure to investigate and corroborate the nature, extent, and

history of Visciotti's drug usage was also constitutionally deficient. Having instructed Dr. Anderson to evaluate a mental state defense based on "defendant's past drug history and his prolonged use of cocaine and 'crack'" (S.E.H.R.T. 934), Mr. Agajanian could not blithely ignore the need to provide the doctor, or the jury, with the relevant historical background information that would be necessary to corroborate the proposed defense. Hendricks v. Vasquez, 974 F.2d 1099, 1110 (9th Cir. 1992). Furthermore, regardless of other theories of mitigation, reasonably competent trial counsel "would still have to investigate [a client's] . . . drug problems . . . as they are relevant mitigating factors." Hendricks, 70 F.3d at 1044. An investigation into Visciotti's use of drugs was also imperative since it was a predictably fertile ground for the prosecutorial cross-examination of Visciotti or any witnesses who testified regarding Visciotti's personality and behavior.

166. Mr. Agajanian's failure to investigate a possible mental state theory of mitigation fell below the standard of a minimally competent capital defense attorney in a variety of ways.

167. First, Mr. Agajanian's failure to consult with any expert witness regarding mental health issues that could serve as mitigating evidence amounted to constitutionally deficient performance. Dr. Anderson reported to Mr. Agajanian that Visciotti had a history of head injuries, including one that resulted in a brief coma, and had been placed on anti-psychotic medication. Had Mr. Agajanian performed a reasonably competent investigation, he would have known that an EEG examination performed when his client was 13 revealed a possible abnormality; he would have also known that Visciotti responded favorably when placed on anti-seizure medication. Moreover, Dr. Anderson and Dr. Broussard both recommended further testing was warranted in order to determine whether Visciotti suffered from some organic brain impairment.

168. Regardless of whether this evidence should have prompted a guilt-oriented mental health investigation, it was certainly more than sufficient to warrant an inquiry into possible mitigation for the penalty phase. "Where counsel is on notice that his client may be mentally impaired, counsel's failure to investigate his client's mental condition as a

mitigating factor in a penalty phase hearing, without a supporting strategic reason, constitutes deficient performance." Hendricks, 70 F.3d at 1043, citing Deutscher v. Whitley, 884 F.2d 1152, 1159 (9th Cir. 1989), vacated on other grounds, 500 U.S. 901 (1991), aff'd after remand, 16 F.3d 981 (9th Cir. 1994), and Evans v. Lewis, 855 F.2d 631, 636-37 (9th Cir. 1988). Mr. Agajanian's "failure to arrange a psychiatric examination or utilize available psychiatric information . . . falls below acceptable performance standards." Turner, 158 F.3d at 456, citing Seidel, 146 F.3d at 755. Mr. Agajanian's complete failure to seek the advice of any expert regarding mental health issues that might serve as mitigating evidence was constitutionally deficient.

169. Second, Mr. Agajanian was grossly deficient in failing to cooperate with the mental health experts. Dr. Anderson, Dr. Sharma, and Dr. Broussard all requested that Mr. Agajanian provide them with additional information in order to arrive at a reliable evaluation of Visciotti's mental condition; Dr. Broussard and Dr. Anderson both recommended that Mr. Agajanian arrange for psychological testing of Visciotti.

170. Mr. Agajanian did not make a professional decision — whether strategic, tactical, informed or reasonable — to deprive Dr. Sharma, Dr. Anderson, or Dr. Broussard of the background information they specifically requested. The failure to provide them with the requested information was the product of inattention, neglect, or, in the case of Dr. Broussard, unprofessional malfeasance.

171. "When experts request necessary information and are denied it, when testing requested by expert witnesses is not performed, and when experts are placed on the stand with virtually no preparation or foundation, a capital defendant has not received effective penalty phase assistance of counsel." Bean, 163 F.3d at 1079. Accord Bloom, 132 F.3d at 1278 ("When the defense's only expert requests relevant information which is readily available, counsel inexplicably does not even attempt to provide it, and counsel then presents the expert's flawed testimony at trial, counsel's performance is deficient.").

172. Although Bean and Bloom both involved instances where counsel ultimately presented the testimony of unprepared experts — such as Mr. Agajanian did with Dr.

Broussard — Mr. Agajanian's failure was even more devastating with regard to Dr. Anderson and Dr. Sharma because his inattention and neglect resulted in his complete failure to obtain any useful testimony from either of these experts. Dr. Broussard's testimony, of course, was critically undermined by his grossly inadequate preparation.

173. Third, Mr. Agajanian was constitutionally ineffective in his unreasonable and unjustified delay in securing the opinion of any defense expert prior to trial. Mr. Agajanian's failure to make any effort to obtain Dr. Sharma's and Dr. Anderson's evaluations of Visciotti — and failure to even consult Dr. Broussard — until well after the start of jury selection was constitutionally deficient. "The complete lack of effort by . . . trial counsel to obtain a psychiatric expert until days before trial, combined with counsel's failure to adequately prepare his expert and then present him as a trial witness, was constitutionally deficient performance." Bloom, 132 F.3d at 1277. Cf. Wade, 29 F.3d at 1317 (unreasonable delay in failure to obtain psychiatric evaluations before jury selection is "most troubling" but ultimately non-prejudicial).

174. On a more fundamental level, Mr. Agajanian was constitutionally deficient in failing to obtain at least a preliminary understanding of the various theories of mitigation that could plausibly be supported by the evidence. Mr. Agajanian made no effort to investigate the volatile, chaotic and abusive home environment in which Visciotti grew up as a child. Evidence of a traumatic childhood is a common theme of mitigation in capital penalty trials. Eddings, 455 U.S. at 115. A reasonably competent attorney "would . . . investigate [facts regarding Visciotti's] hard childhood . . . as they are relevant mitigating factors." Hendricks, 70 F.3d at 1044. In failing to obtain reasonably available records, and interview witnesses, regarding Visciotti's personal history, medical history, and social history, Mr. Agajanian fell far outside the "wide range of professionally competent assistance." Strickland, 466 U.S. at 690. "Absent tactical purpose or risk, such performance is deficient within the meaning of Strickland." Mak, 970 F.2d at 619. As noted above, Mr. Agajanian had no tactical purpose and knew of no risk regarding this aspect of the investigation. Mr. Agajanian either did not consider, or did not care about, the possible

mitigating effect of such evidence. (S.E.H.R.T. 1357, 1395 ("I didn't care what his juvenile record was or his childhood record was or anything else . . ."). Mr. Agajanian's complete failure to investigate "evidence of [Visciotti's] nightmarish upbringing . . . fell below constitutionally acceptable standards." Hendricks, 70 F.3d at 1043.

175. The final aspect of Mr. Agajanian's "preparation" for trial, his group interview of the family during the middle of trial, was yet another manifestation of his inattention and neglect. Mr. Agajanian's principal manner of obtaining information about the family — a single group setting conducted in the middle of trial in which he asked those who were present to tell him "what their family was like" — demonstrated at least indifference, if not outright ignorance, to the need to develop substantial, detailed information about Visciotti's background. As in Smith, "the record before us indicates that counsel asked nothing more than a few generalized questions and conducted none of the real probing for information that legal praxis assumes and even demands." Smith, 140 F.3d at 1269.

176. Reasonably competent counsel would have recognized that a single group meeting of this nature, unaided by follow-up interviews with individuals, was particularly unlikely to elicit information that might cause personal embarrassment to them, or to anyone else present in the group (or to others commonly known to people in the group) or that, if very embarrassing information was revealed, it would likely generate conflict among the others present. The method of interviewing may not be deficient per se, but when it is the only substantial fact-gathering method employed, it is employed only once, it is not employed until the penalty trial is well underway, and there is no credible explanation offered for the lack of other interviews, counsel's actions are strongly indicative of grossly inadequate preparation. E.g. Smith, 140 F.3d at 1269; United States v. Tucker, 716 F.2d 576, 583 (9th Cir. 1983).

177. Had he conducted a reasonable investigation, Mr. Agajanian would have discovered a wealth of credible evidence establishing that Visciotti grew up in an extraordinarily abusive environment, that Visciotti's family was wracked by poverty and

continual dislocation during Visciotti's childhood, that Visciotti likely suffered some form of mental deficiencies or brain injuries, that Visciotti suffered from an addiction to drugs and that Visciotti's mental deficiencies and home environment significantly contributed to his drug abuse. A reasonable investigation would also have uncovered credible evidence that, when incarcerated in a secure and structured environment, Visciotti's behavior markedly improved and that he adapted well to a prison environment. A reasonably competent interview with the family members would have enabled Mr. Agajanian to elicit specific acts of kindness, compassion, and self-sacrifice in order to support the family members' vague descriptions of positive aspects of Visciotti's personality.

178. As a result of his failure to obtain relevant records, Mr. Agajanian was unaware that, from an early age, official documents traced the dysfunction of Visciotti's family and its effect on Visciotti's development. (S.E.H.R.T. 1327-28, 1358.) Mr. Agajanian was not aware of Visciotti's birth handicap or its effect on his development. (S.E.H.R.T. 1327, 1349-51.) Mr. Agajanian was not aware of the family's poverty, transience and dislocation, or the periodic abandonment and infidelity of its breadwinner, Luigi. He also did not know about child abuse, spousal abuse, Luigi's criminal record, or the effect of these factors and episodes on the Visciotti children. (S.E.H.R.T. 1327-28, 1352-54, 1366-67, 1380-82.)

179. Had Mr. Agajanian performed an elementary investigation into the family circumstances in general, he would have uncovered compelling evidence of the family's ongoing struggle with poverty and frequent dislocation of residence caused by their limited financial means and the large number of children. This evidence had substantial mitigating value. Hitchcock v. Dugger, 481 U.S. 393, 397-99 (1987); Blanco, 943 F.2d at 1505; Armstrong, 833 F.2d at 1433-34. No one has ever suggested that Visciotti could have been prejudiced by presenting this evidence at the penalty phase or that there was any tactical or strategic reason for withholding evidence of difficulties associated with the family's poverty.

180. Reasonably competent counsel would have recognized that, if (as was likely) the case proceeded to a penalty phase, the jurors would be instructed that, in determining

the appropriate sentence, they "shall take into account . . . (d) whether . . . [Visciotti acted] under the influence of extreme mental or emotional disturbance . . . [and] (h) whether . . . [Visciotti's capacity] to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects [sic] of intoxication." Cal. Penal Code § 190.3.

181. Had Mr. Agajanian conducted a reasonable pretrial investigation into the full scope of mental health issues that could serve as penalty mitigation, he would have been able to introduce evidence establishing that CYA staff considered Visciotti to be atypical of most juvenile delinquents and, as a result, had him tested for brain damage when he was only 13 years old. He could have further demonstrated that the EEG revealed a possible abnormality associated with a seizure disorder. Evidence was also available that the EEG prompted doctors to place Visciotti on anti-seizure medications and that Visciotti responded favorably to the medication. (S.E.H.R.T. 994-1000.) The jury would also have learned that the suspected neurological impairment was of a type that would have caused a lowered tolerance for frustration, greater vulnerability to the effects of drug abuse, and an increased disorientation while under the influence of drugs. (S.E.H.R.T. 1000.)

182. The mental health evidence that Mr. Agajanian could have been presented at the penalty phase was materially different from the evidence that Mr. Agajanian did present at the guilt phase. Although Dr. Broussard testified during the guilt phase that Visciotti suffered from minimal brain injury, as the California courts have long recognized, "the opinion of an expert is no better than the reasons upon which it is based." People v. Bassett, 69 Cal.2d 122, 144, 70 Cal.Rptr. 193, 443 P.2d 777 (1968). "Unexplained medical labels — schizophrenia, paranoia, psychosis, neurosis, psychopathy — are not enough." Id., 69 Cal.2d at 141. Rather, "[t]he value of an expert's opinion depends upon the quality of the material on which the opinion is based and the reasoning used to arrive at the conclusion." People v. Marshall, 15 Cal.4th 1, 31-32, 931 P.2d 262, 61 Cal.Rptr.2d 84 (1997), citing People v. Samuel, 29 Cal.3d 489, 498, 174 Cal.Rptr. 684, 629 P.2d 485 (1981). "[I]t does not lie in his mere expression of conclusion." Bassett, 69 Cal.2d at 141. Accord

Carter v. United States, 252 F.2d 608, 617 (D.C. Cir. 1957).

183. Regardless of the ultimate diagnosis offered by Dr. Broussard, his opinion was disastrously undermined by Mr. Agajanian's failure to provide him with sufficient time to evaluate Visciotti and sufficient information upon which to base an opinion — including, among other things, such basic information as a copy of the videotape of Visciotti's confessions, an opportunity to conduct psychological testing (as both he and Dr. Anderson had suggested), and information regarding Visciotti's background and family (which all three mental health experts had requested). Although the ultimate conclusions may have been similar, Dr. Jackman's access to the family history information that all three experts had requested and his ability to identify historical evidence corroborating his opinion gave his testimony an aura of credibility that Dr. Broussard's could not attain. (R.T. 2912-14.)

184. It is undisputed that evidence of Visciotti's possible mental impairments could have been used as mitigating evidence. Penry v. Lynaugh, 492 U.S. 302, 322 (1989); Eddings, 455 U.S. at 116; Hendricks, 70 F.3d at 1044; Clabourne, 64 F.3d at 1384-86. The mitigating evidence that trial counsel could have developed regarding Visciotti's mental health was not compelling, but neither was it non-existent. Even if not convinced that Visciotti suffered from a detectable brain injury, in light of the long history of suspicions and test results that corroborated and reinforced the basis for those suspicions, the jurors may have had sufficient doubt about Visciotti's mental health as to persuade them to return a verdict less than death.

185. Moreover, in addition to possibly establishing the existence of a credible mental deficiency, "psychiatric evidence is normally relevant and admissible because it may suggest some reason other than the disorder itself why the defendant should be treated with leniency." Gerlaugh v. Stewart, 129 F.3d 1027, 1034 (9th Cir. 1997).

186. The mental health experts' testimony describing the psychological effect of Visciotti's congenital defect — being born with club feet — could have provided substantial mitigating evidence. Contrary to Visciotti's apparent contention, the physical deformity is not, on its own, an item of substantial independently-mitigating value. However, with the

benefit of minimal investigation, either the family members or a duly qualified expert witness could have explained how the medical treatments caused significant financial strain on an already-impoverished family, that Visciotti's father experience great shame and embarrassment in having to depend on his own parents (Visciotti's grandparents) for financial support, and that Visciotti's father often invoked Visciotti's birth defect in connection with his frequent tirades and threats of violence against Visciotti. Regardless of whether the threats were cruel and sadistic, or merely the product of parental frustration, the jury could easily have concluded that the impact of these threats on Visciotti's emotional development qualified as mitigating evidence warranting some degree of sympathy for Visciotti. This evidence "would be 'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death.'" Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986), quoting Lockett, 438 U.S. at 604. Although the birth defect itself had no independent mitigating value, the consequences of the defect and the family's response to it contained substantial mitigating value.

187. Had Mr. Agajanian undertaken a rudimentary investigation, he could have introduced evidence that Visciotti had told his younger brother Tony of his yearning, but inability, to stop using drugs. Mr. Agajanian also could have uncovered psychiatric evidence explaining how external factors — such as Visciotti's chaotic and tumultuous home environment — led him to use and abuse drugs. The fact that several of the older Visciotti children began using drugs early in life could well have persuaded reasonable jurors that the Visciotti family environment was in fact strongly conducive to prompting the children to use drugs as a means of psychological escape.

188. The case law firmly recognizes that evidence of a capital defendant's history of drug abuse can mitigate against a sentence of death, especially when evidence can be presented to explain how the drug use was prompted by external factors and environmental trauma. Smith, 140 F.3d at 1271; Parker v. Dugger, 498 U.S. 308, 314-16 (1991) (discussing drug and alcohol intoxication as nonstatutory mitigation); Hitchcock, 481 U.S. at 397-99 (reversing death sentence where jury prevented from considering history of drug use as

mitigating factor). See In re Avena, 12 Cal.4th 694, 717, 909 P.2d 1017, 49 Cal.Rptr.2d 413 (1996) (in California capital sentencing trials, "drug abuse could have comprised mitigating evidence at the penalty phase"); Bell v. Ohio, 438 U.S. 637, 641-42 (1978) (States must allow jurors to give mitigating weight to difficulties associated with a capital defendant's drug usage).

189. Furthermore, evidence that Visciotti was addicted to drugs, was using drugs as a form of self-medication, and had expressed his desire (and inability) to stop his drug use would have blunted the prosecutor's argument that Visciotti's motivation for the robbery and resort to drugs were "not because he was addicted to them — we don't have any evidence of that — but because he enjoyed taking them. He liked cocaine. It made him feel good." (R.T. 3292.) Depending on the prosecutor's evaluation of the strength of the mitigating evidence, the prosecutor may well have entirely abandoned such a contention.

190. In light of the fact that Mr. Agajanian had already introduced some evidence regarding Visciotti's history drug use and his association with other people who used and sold drugs, the State fails to explain how Visciotti could have been prejudiced by the presentation of evidence explaining the environmental factors that probably contributed to Visciotti's descent into the world of drugs. E.g. Parker, 498 U.S. at 314-16; Hitchcock, 481 U.S. at 397-99.

191. Furthermore, a reasonable investigation would have uncovered abundant information regarding the tumultuous home environment, the abusive relationship between the parents, the physical and emotional abuse inflicted on the children, and further evidence that Visciotti was singled out for a greater amount of the abuse than was inflicted on the other children.

192. The cases universally recognize that evidence of a defendant's abusive family environment can serve as powerful mitigating evidence when a jury is asked whether a defendant should be sentenced to death. Eddings, 455 U.S. at 115; Bean, 163 F.3d at 1081; Hendricks, 70 F.3d at 1043-44; Wade, 29 F.3d at 1324-25; Deutscher, 884 F.2d at 1161. The

extent of abuse that the Visciotti children were exposed to — the abuse they saw between the parents, the abuse they saw inflicted on their siblings, and the abuse inflicted on themselves — was extraordinary.

193. There is no suggestion that the introduction of mitigating evidence specifically focused on Visciotti's traumatic childhood, the factors that contributed to his drug abuse since age 13, and possible neurological deficits would have enabled the prosecution to introduce damaging evidence in rebuttal. People v. Ramirez, 50 Cal.3d 1158, 1192-93, 791 P.2d 965, 270 Cal.Rptr. 286 (1990) (evidence of misconduct is improper rebuttal to evidence of difficult childhood); In re Jackson, 3 Cal.4th 578, 613-614, 11 Cal.Rptr.2d 531, 835 P.2d 371 (1992) (same), disapproved on other grounds, In re Sassounian, 9 Cal.4th 535, 887 P.2d 527, 37 Cal.Rptr.2d 446 (1995). Cf. People v. Rodriguez, 42 Cal.3d 730, 792 & n.24, 726 P.2d 113, 230 Cal.Rptr. 667 (1986); People v. Fierro, 1 Cal.4th 173, 236-38, 821 P.2d 1302, 3 Cal.Rptr.2d 426 (1991).

194. Mr. Agajanian has claimed that, even if he had been aware of the various types of mitigating evidence that was available, he would not have presented it to the jury. He attempted to rationalize his conclusion by explaining that he "could not imagine, no matter how terrible his childhood could have been, I could not imagine why a jury would care even a little bit about what happened to a person when he was born or what happened to a person when he was in school . . . or whether his father was physically abusive or mentally abusive to him or whether his mother was physically or mentally abusive." (S.E.H.R.T. 1391-92.)[7] The short answer to Mr. Agajanian's claimed befuddlement has been repeatedly explained by the Supreme Court: "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, *may be less culpable than defendants who have no*

[7] Of course, Mr. Agajanian did not even know what evidence of this nature was available when he supposedly made the decision to avoid presenting evidence relating directly to Visciotti.

such excuse." Boyde v. California, 494 U.S. 370, 382 (1990) (emphasis original), quoting Penry, 492 U.S. at 319 (internal quotations omitted), quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

195. Of equal importance, regardless of what Mr. Agajanian now claims he would have done if he had known of the evidence he unprofessionally ignored, reasonably competent capital defense counsel would have given very serious consideration to presenting this type of evidence in Visciotti's case and, in the absence of any significant risk, there is a high probability that most lawyers would have presented this evidence.

196. The Attorney General has offered no explanation as to how Visciotti could have been prejudiced at the penalty phase by the introduction of the compelling evidence that his childhood was spent in an impoverished, unstable, and traumatic environment and evidence regarding his possible mental deficiencies. There is a very high probability that a jury would have given significant mitigating weight to that evidence when evaluating Visciotti's moral culpability.

197. Indeed, an investigation into Visciotti's childhood and mental health problems could have materially altered the penalty defense that was ultimately presented even though, as the record plainly demonstrates, Mr. Agajanian originally intended to present a mitigation case that included evidence of Visciotti's positive qualities. Evidence of Visciotti's troubled childhood and mental problems would not have been consistent with, but could have complemented, evidence of Visciotti's positive character traits. Yet, once the trial judge ruled that the defense had not been given fair notice of the prosecution's desire to introduce evidence that Cusack had been stabbed, reasonable trial counsel would have recognized that presenting evidence of Visciotti's positive character traits would likely enable the prosecution to introduce this damaging evidence as rebuttal to the defense case. In such circumstances, reasonable trial counsel would have given serious consideration to withholding the minimal evidence of Visciotti's positive characteristics and relied instead only on the other theories of mitigation that had been developed.

198. Even if he were still inclined to present evidence of Visciotti's positive

qualities, since he was completely ignorant of the facts that Cusack might testify to, Mr. Agajanian could not make an informed assessment of the risks associated with presenting a defense that would relieve the prosecution of its waiver and enable it to present Cusack's testimony in rebuttal. Oblivious to the various alternative themes of mitigation available, Mr. Agajanian was compelled to rely exclusively on a feeble case in mitigation that predictably opened the door to damaging rebuttal or to present no mitigating evidence at all.

199. In sum, "This is not a case where there were tactical reasons for failing to present available evidence of mitigation." Clabourne, 64 F.3d at 1385. The evidence adduced by Mr. Agajanian during the penalty phase, meager as it was, clearly attempted to focus the jury on Visciotti personally, as his opening statement informed them he would do. Expert testimony regarding Visciotti's traumatic childhood, the factors contributing to his drug abuse that began before age 13, and possible neurological deficits "would not open the door to hidden evidence of aggravating circumstances." Clabourne, 64 F.3d at 1385. Evidence of Visciotti's childhood, the factors contributing to his drug use, and evidence corroborating Dr. Broussard's hypothesis of brain injury was not already before the jury. There is a reasonable probability that jurors would have given substantial mitigating weight to the evidence of Visciotti's traumatic childhood, evidence relating to his drug use, and his possible neurological impairments. Strickland, 466 U.S. at 694.

3. Mr. Agajanian's Failure to Investigate Visciotti's Criminal History and the Prosecution's Evidence in Aggravation

200. Mr. Agajanian was constitutionally deficient in failing to conduct a reasonable investigation into Visciotti's criminal history and the prosecution's proposed evidence in aggravation.

201. Five months before trial, the prosecutor notified the defense of his intention to introduce as evidence in aggravation at the penalty phase, "and wherever else admissible," evidence that Visciotti had escaped from a California Youth Authority facility in 1972 and evidence that Visciotti had been convicted of an assault with a deadly weapon.

(C.T. 107.) Mr. Agajanian failed to conduct a reasonable investigation into either of these episodes.

202. "Few aspects of representation can be more critical than understanding the client's criminal history." Siripongs v. Calderon, 35 F.3d 1308, 1316 (9th Cir. 1994). This is particularly so in the context of a capital penalty trial where a sentencing jury being asked to make a life or death decision about the defendant is likely to be exposed to many facets of the defendant's prior crimes.

203. Other than obtaining Visciotti's "rap sheet" (which informed him of nothing more than the fact of arrest and/or conviction) and asking Visciotti (which informed him of nothing more than Visciotti's version of events), Mr. Agajanian did nothing to ascertain what evidence could be presented by the prosecution or whether Visciotti's version of events could be corroborated. Mr. Agajanian unreasonably failed to seek a discovery order from the court or to informally obtain police reports, case files, and other documents that the local prosecutors routinely provided to defense attorneys in all cases.

204. Mr. Agajanian, however, blames his own failings on Visciotti. Although he knew that Visciotti was sentenced to three years for the assault (R.T. 2413), and he knew of the prosecutor's "open file policy" and had never had a problem obtaining voluntary discovery from local prosecutors (S.E.H.R.T. 1346-47), Mr. Agajanian claims that he did not investigate the facts underlying the prior conviction "because [Visciotti] lied to me," relating a version of events that was more flattering to himself than the actual truth. In re Visciotti, 14 Cal.4th at 340. Mr. Agajanian claimed to have been duped by Visciotti's misrepresentation because the 3-year sentence for assault was consistent with "superficial injuries" and "[t]he discussion that I had with Mr. Visciotti jibed, if you will, or corresponded with the type of sentence that was given." (Agajanian Depo., at 46, 57.)[8] As a result, Mr. Agajanian "didn't do anything;" "I took his word for it." (S.E.H.R.T. 1347-48;

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[8] Mr. Agajanian's testimony correlating the sentence to the injuries was based on his mistaken recollection that Visciotti had been sentenced to less than one year in County jail. At the time of trial, he knew otherwise. (R.T. 2413.)

Agajanian Depo., at 46, 45.)

205. As a preliminary matter, Mr. Agajanian's assertion that a 3-year prison sentence for assault was consistent with "superficial injuries" does not appear to be supported by California law. Under the three-level sentencing procedure that was in effect in California in 1978, the base term for assault with a deadly weapon would have been either 2 years in state prison or up to 1 year in County jail; the upper term would have been four years, only one year more than Visciotti's sentence. Cal. Penal Code § 245(a). Visciotti's three-year sentence was the mid-range prison sentence. Cal. Penal Code § 245(a). In light of the lower term prison sentence and County jail alternatives, a middle term three year sentence does not appear to be indicative of superficial injuries. Nor could Mr. Agajanian have considered the three-year sentence lenient because it *de facto* related to two assaults; as Mr. Agajanian candidly admitted "I didn't even know the Cusack case existed." (S.E.H.R.T. 1349.)

206. Moreover, even if Visciotti's version of events turned out to be true, Mr. Agajanian's exclusive reliance on the information he learned from Visciotti was patently unreasonable. The ability to "have a witness corroborate [the defendant's] story is . . . substantial." United States v. Hobbs, 31 F.3d 918, 923 (9th Cir. 1994). Reasonably competent counsel would have recognized the importance of independently corroborating the basic facts underlying a capital defendant's criminal history. Hart v. Gomez, 174 F.3d 1067, 1070-71 (9th Cir. 1999). "Failure to pursue such corroborating evidence with an adequate pretrial investigation may establish constitutionally deficient performance." Hendricks, 70 F.3d at 1040. Accord Tucker, 716 F.2d at 594.

207. Although the scope of counsel's investigation may be "based, quite properly . . . , on information supplied by the defendant," Strickland, 466 U.S. at 691, the version of events described by Visciotti should have *prompted* investigation, not curtailed it. Upon learning of a version of events that was favorable to the defense, reasonable trial counsel would have recognized the critical importance of obtaining a witness, other than Visciotti, who could attest to those facts. Reasonable trial counsel would have recognized that "the

defendant's bias in his own behalf was self-evident." United States v. Dickens, 775 F.2d 1056, 1059 (9th Cir. 1985). As stated by the Supreme Court, a defendant's own testimony is precisely "the sort of evidence that a jury naturally would tend to discount as self-serving." Skipper, 476 U.S. at 8.

208. Reasonable trial counsel would have recognized that, when the jury was evaluating the verity of Visciotti's explanation, "[o]ne way to test credibility is to see how the testimony fits with known facts." Brown v. Borg, 951 F.2d 1011, 1016 (9th Cir. 1991). Minimally competent criminal defense counsel would have sought out witnesses who could have "added important corroboration to [defense] testimony by being sources not suspect of bias for the defendant." United States v. Wood, 57 F.3d 733, 739 (9th Cir. 1995).

209. Mr. Agajanian could not reasonably expect that jurors, untrained in law and presumptively unfamiliar with the details of the California Penal Code, would know (as he may have erroneously believed) that a three-year sentence for assault with a deadly weapon was consistent with superficial injuries and indicative of a favorable plea offered in light of a strong defense.

210. Furthermore, the unreasonableness of Mr. Agajanian's inaction is not based solely on the possibility that Visciotti might have been telling the truth. On the contrary, reasonably competent counsel would have recognized that investigating the defendant's version of events is important because criminal defendants may attempt to minimize their role in the offense or diminish the severity of their conduct. Cf. Johnson v. Baldwin, 114 F.3d 835, 840 (9th Cir. 1997) (an attorney is "not entitled to stop" upon learning the client's uncorroborated version of events). Furthermore, so long as Mr. Agajanian remained ignorant of the evidence available to the prosecutor, he could not evaluate whether the prosecutor's questions while examining the witnesses were based on a good faith interpretation of the information known to him or were, instead, objectionable as a partisan distortion of the evidence designed to unfairly inflate Visciotti's legal or moral culpability.

211. Regardless of whether Visciotti's story was inculpatory or exculpatory, Mr. Agajanian has identified no reasonable justification for failing to review the prosecutor's

file or obtain the police reports regarding a conviction for a violent felony that the prosecutor intended to introduce as evidence during the case in aggravation.

212. Mr. Agajanian was constitutionally deficient in failing to make any attempts to interview Scofield, Cusack, Wolbert, or Hefner. "It is difficult to see how [trial counsel] could make an informed assessment of the strengths and weaknesses of the government's case without attempting to ascertain specifically what the testimony of the government's witnesses would be." Tucker, 716 F.2d at 583. Mr. Agajanian was deficient since, without any supporting justification, he "failed to interview any of the witnesses that the government planned to call to testify, and therefore could not have known how they would testify and what information he should try to elicit on cross-examination or would otherwise need to present in response." Turner, 158 F.3d at 456, citing Tucker, 716 F.2d at 583.

213. Having been notified that the prosecution intended to introduce evidence of Visciotti's prior conviction for assault with a deadly weapon, reasonably competent counsel would have recognized that the victims of the assault, Scofield and Cusack, would likely be called as witnesses by the prosecution. Scofield did testify during the prosecutor's case in aggravation. Cusack would also have testified during the prosecutor's case in aggravation but for a prosecutorial misstep overlooked by Mr. Agajanian but raised, *sua sponte*, by the trial judge. (R.T. 3083-85, 3086-3103.) Cusack did ultimately testify in rebuttal.

214. Although the principal facts regarding the capital homicide were not in dispute, Mr. Agajanian had no basis for assuming that the details — such as Visciotti's claim that he did not bring the gun to the crime scene and that he fired the shots only after Hefner gave him the gun and repeatedly urged him to shoot the victims — would be embraced by the prosecution. Reasonably competent defense counsel would have recognized that Wolbert would be the prosecution's key witness at the guilt trial and that the prosecution's theory of the "circumstances of the crime," sentencing factor (a), would be based primarily on Wolbert's description of the events.

215. Although Hefner did not testify, Mr. Agajanian did not know, and had no basis for predicting whether, the prosecution might offer Hefner some benefit sufficient to

induce him to testify against Visciotti. In addition to the information that could be corroborated or refuted by Wolbert, without speaking to Hefner, Mr. Agajanian could not determine whether he could corroborate Visciotti's claim that he protested the bringing of a gun to aid in the robbery, that he objected when he saw Hefner carrying the gun and that he ordered Hefner to discard the gun.

216. By failing to seek a discovery order or to informally obtain documents prosecutors routinely provided to defense attorneys in all cases, by failing to ascertain the information known to Wolbert, Scofield, Cusack, and Hefner, and by relying on Visciotti as his sole source of information about Visciotti's criminal history, Mr. Agajanian essentially "did not make any effort to investigate the state's case [in aggravation]. This . . . falls below minimum standards of competent representation." Turner, 158 F.3d at 456, citing Kimmelman v. Morrison, 477 U.S. 365, 385 (1986). Accord Tucker, 716 F.2d at 583.

217. Mr. Agajanian's deficiency in failing to investigate his client's criminal history also encompasses his failure to investigate Visciotti's prior alleged escapes from juvenile detention facilities. Without reviewing the records, Mr. Agajanian had no way of knowing whether the escapes involved violent breakouts from maximum security institutions, a cunningly devised plan to depart under false pretenses, an unrestrained walking away from a camp, or perhaps, a failure to timely return from a lunch break during a work-release program. Without investigation Mr. Agajanian could not assess whether the evidence of Visciotti's alleged escapes could be neutralized or partially alleviated by evidence that the escapes were instigated by others or that they were the product of duress. Ignorant of the severity of the crimes, he was uninformed of the magnitude of the penalty phase case in aggravation that he would have to defend against; he could not determine whether the evidence of escapes could have been excluded, e.g., Boyd, 38 Cal.3d at 772-77 (if "the escape attempt did not involve violence or the threat of violence, the evidence is irrelevant to any of the specific aggravating and mitigating factors listed in section 190.3"); he could not determine what risks he created by eliciting the facts relating to those escapes. Without information about the nature of the escapes, he also remained uninformed of the risks of

presenting mitigating evidence that might entitle the prosecutor to present evidence of the escapes in rebuttal. Mr. Agajanian's failure to conduct an investigation into Visciotti's criminal history was, overall, deficient. Siripongs, 35 F.3d at 1316.

218. Although not the most prejudicial of his deficiencies, Mr. Agajanian's failure to conduct a reasonable investigation into Visciotti's criminal history had a pivotal effect on the course of the trial and its contributing effect to the ultimate sentencing verdict cannot be ignored. A reasonable investigation into the nature of Visciotti's criminal history would have dramatically altered the manner of presenting the defense.

219. It is clear beyond peradventure of doubt that a reasonable investigation into Visciotti's criminal history would have significantly affected reasonably competent counsel's advice — assuming Mr. Agajanian did offer advice — as to whether Visciotti should testify at the guilt phase.

220. As a legal matter, Visciotti's testimony did not materially advance the guilt phase defense. To the extent it was favorable to the defense, Visciotti's testimony did little more than duplicate the evidence that the prosecutor presented to the jury through the videotapes of Visciotti's confessions. Moreover, Visciotti's testimony, repeating his version of the events, simply confirmed the propriety of a first degree murder verdict: he admitted that he personally killed Dykstra, that he did so in the course of a robbery and that he knew and intended to steal money from Dykstra and Wolbert. Once the jury found that the homicide occurred in the course of a robbery, Visciotti's other excuses regarding the course of events were irrelevant to avoiding a verdict of first degree murder. People v. Coefield, 37 Cal.2d 865, 868, 236 P.2d 570 (1951). Accord People v. Perry, 195 Cal. 623, 638, 234 P. 890 (1925); People v. Witt, 170 Cal. 104, 108, 148 P. 928 (1915). To the extent the defense intended to rely on a mental state or mental health defense, Mr. Agajanian could have done so solely through expert testimony. E.g. Bloom, 132 F.3d at 1278.

221. Further, presenting Visciotti as a witness carried significant risks to the defense. As Mr. Agajanian knew, the prosecutor would be entitled to cross-examine Visciotti regarding Visciotti's prior felony convictions. Cal. Evid. Code §§ 787, 788.

Although the assault conviction likely would have remained admissible for impeachment purposes, Mr. Agajanian made no attempt to minimize the damage by seeking a ruling as to whether Visciotti's other prior offenses could be excluded. Ostensibly in an effort to blunt the impact of cross-examination, Mr. Agajanian brought out, during direct examination, a number of episodes of prior criminal behavior. (Inexplicably, he also elicited a number of juvenile, misdemeanor, and non-violent offenses — including escapes — that would have been excluded. In re Ricky B., 82 Cal.App.3d at 114; Jackson, 177 Cal.App.3d at 711-12.)

222. Since Visciotti's prior crimes were not independently admissible during the prosecution's case at the guilt phase, by calling Visciotti as a witness, Mr. Agajanian was forced to expose the jury to evidence of Visciotti's criminal history, including evidence that Visciotti had been convicted of an assault with a deadly weapon and (to his erroneous opinion) evidence that Visciotti had thrice before escaped from penal institutions.

223. Furthermore, by examining Visciotti regarding the details of the assault charge, Mr. Agajanian greatly exacerbated the potential prejudice to his client. Although California law permitted a party to use a felony conviction to impeach a witness, California law further provided that "[e]vidence of prior felony convictions offered for [impeachment] is restricted to the name or type of crime and the date and place of conviction." People v. Allen, 42 Cal.3d 1222, 1270, 729 P.2d 115, 232 Cal.Rptr. 849 (1985). Under California law, the impeachment of Visciotti with his prior felony convictions was "limited to identification of the conviction, and 'the courts will be zealous to insure that the prosecuting attorney is not permitted to delve into the details and circumstances of the prior crime." People v. Schader, 71 Cal.2d 761, 770-73, 80 Cal.Rptr. 1, 457 P.2d 841 (1969), quoting People v. Smith, 63 Cal.2d 779, 790, 48 Cal.Rptr. 382, 409 P.2d 222 (1966), quoting People v. David, 12 Cal.2d 639, 646, 86 P.2d 811 (1939).

224. Even though Visciotti testified, Mr. Agajanian did not necessarily risk exposing the jury to the facts underlying the prior assault conviction. However, reasonable trial counsel would have recognized that, by inquiring into the details of the criminal episodes on direct examination, the prosecutor would be entitled to go beyond the mere

fact of the convictions, and further question Visciotti regarding those details during the course of cross-examination.

225. Ignorant of the facts that might be elicited regarding Visciotti's prior crimes, Mr. Agajanian was in no position to provide Visciotti with informed advice as to the significance of the risks and minimal benefits to be gained by Visciotti's guilt phase testimony and, if he did testify, whether to volunteer a factual explanation for the prior assault conviction. As a result of his failure to ascertain readily available information, Mr. Agajanian was completely unable and ill-informed to "consult with and prepare his client to testify [and in this manner also] did not meet the standard of competent representation." Turner, 158 F.3d at 457.

226. Although Visciotti had an indisputable "privilege[] to testify in his own defense" even against the advice of his attorney, Harris v. New York, 401 U.S. 222, 225 (1971), Visciotti also had the right to his attorney's reasonably competent professional advice as to the risks and benefits of testifying at the guilt phase. Turner, 158 F.3d at 457; Johnson, 114 F.3d at 839-40. Because Visciotti's testimony was completely unhelpful to the guilt phase defense and posed significant risks, had counsel learned of the facts underlying Visciotti's conviction for assault with a deadly weapon, reasonably competent capital defense counsel probably would have advised Visciotti not to testify at the guilt phase and there is a reasonable possibility that Visciotti would not have testified.[9]

227. More critically, however, even if Visciotti had decided to testify, there is a reasonable probability that the very nature of his testimony would have been affected by the results of a reasonable investigation into Visciotti's criminal history.

228. First, in light of the presumptive prohibition on inquiring into the details underlying the prior felony convictions and the conflicting versions of events — most

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[9] The record does not contain sufficient evidence to establish, to a reasonable probability, that Visciotti would not have testified. The prejudice resulting from Mr. Agajanian's failure to investigate Visciotti's criminal history is not founded upon the fact that Visciotti did testify but, instead, the nature of the unsupportable testimony that he ultimately elicited.

significantly, whether Visciotti had, without provocation, assaulted an innocent bystander with a knife — once informed of the evidence rebutting Visciotti's explanation, when eliciting an admission to the prior assault conviction, reasonably competent counsel would have restricted their questioning to the bare fact of conviction and impressed upon Visciotti the importance of avoiding any discussion of the underlying details. Second, once Visciotti was asked to describe the underlying conduct, in testifying to facts that could not be corroborated — and in fact would be refuted — by photographs and physical evidence, Visciotti clearly "testified in a manner that suggests he was wholly unprepared to answer questions on cross-examination." Turner, 158 F.3d at 457.

229. Had Mr. Agajanian reviewed the police reports and other discovery that was freely available to him regarding the Scofield/Cusack assault, he would have learned that a woman, Cusack, likely was present during the assault on Scofield and that, contrary to what Visciotti told Mr. Agajanian, the woman was also stabbed and that evidence contradicted Visciotti's claim that he had been acting in response to an attack on his roommate. Armed with such information, reasonably competent counsel "[w]ould have confronted [Visciotti] with the difficulties of his story." Johnson, 114 F.3d at 840.

230. Visciotti was prejudiced by Mr. Agajanian's failing because, as the Ninth Circuit held in an analogous situation, when confronted with the contrary evidence, Visciotti most likely "[w]ould have elected to follow [a different] strateg[y]." Id. First, as discussed above, in the context of this case, Visciotti most probably would have elected not to testify at all during the guilt phase. Id. Second, if he did testify, in the course of the direct examination, Visciotti and Mr. Agajanian would have avoided any discussion of the details underlying the conviction.

231. Third, the circuit has found that a petitioner such as Visciotti can demonstrate prejudice because, when confronted with the inconsistencies before trial, even if he did ultimately testify regarding the episode, Visciotti's testimony would probably have conformed to the objectively verifiable truth — that a woman was present and that the woman was also stabbed. Johnson, 114 F.3d at 840 ("Had [counsel] confronted [the

defendant] with the lack of corroboration . . . , [the defendant] probably would have elected not to lie to the jury."). It is clear that "but for the ineffectiveness of [his] counsel, [Visciotti] would not have testified falsely. Viewed in that light, [his] testimony is a direct result of [his] counsel's incompetence." Morris, 966 F.2d at 454.

232. Once Visciotti testified that no woman was present during the course of the Scofield/Cusack assault and that he did not assault any woman, the truth of that testimony would undoubtedly have a significant impact on the jury's assessment of Visciotti's credibility and, at the penalty phase, a factor in evaluating Visciotti's worth as a human being. Once the jurors found that Visciotti was lying about the very fact of a prior assault victim, they could easily conclude that he was probably lying about other details relating to the Scofield/Cusack assault and, probably also, lying about details regarding the Dykstra robbery and homicide. (C.T. 243); cf. Johnson, 114 F.3d at 839.

233. Moreover, there can be little doubt that, when deliberating on the appropriate sentence in this case, the jury considered Visciotti's guilt-phase testimony which, the jurors likely concluded, included significant falsehoods. As the prosecutor urged the jurors to consider at the penalty phase, "It is clear that the defendant has told you repeated lies about that [the prior conviction for assault with a deadly weapon]. His version is absolutely, intentionally, maliciously untrue." (R.T. 3302.) "The defendant himself admitted he pled guilty to a felony although he said he wasn't really guilty, and that tells you a lot about the kind of person you're dealing with in this case." (R.T. 3300.) "The defendant said there wasn't even a woman there. I never stabbed a woman. . . . That never happened. [¶] Well, we know he's lying about that, absolutely lying about that, and I don't think there's any doubt in anybody's mind that Kathy Cusack was telling you the truth this morning." (R.T. 3306.) The prosecutor closed by repeatedly emphasizing to the jurors not to "waste your pity on someone who doesn't deserve it." (R.T. 3317; id., at 3317-22.)

234. Had Mr. Agajanian conducted a reasonable pre-trial investigation into his client's criminal history, his knowledge of the questions that the prosecution could ask in good faith when cross-examining Visciotti would have profoundly affected the manner and

degree of counsel's preparation of Visciotti prior to testifying, and, indeed, whether Visciotti testified at all. Johnson, 114 F.3d at 839-40; Turner, 158 F.3d at 457. It is reasonably probable that, had Mr. Agajanian performed a reasonable investigation into Visciotti's criminal history, Visciotti either would not have testified at the guilt phase, or, if he did, he would not have discussed the details underlying the conviction or, even if he did address the factual details, he would have been forewarned of the risks of denying or minimizing his involvement in the prior crimes or offering a justification that could have been easily contradicted. There is a reasonable probability that, if he addressed the details underlying his prior conviction, Visciotti's testimony would have more closely conformed to the objectively verifiable evidence; there is no doubt that Visciotti certainly would have been better prepared to respond to the prosecutor's questions. Contrary to Mr. Agajanian's supposition, "[t]he prejudice from failing to investigate [the client's version of events] and confer more fully with [his client] is not avoided by the fact that [Visciotti] misinformed his attorney." Johnson, 114 F.3d at 840.

4. Mr. Agajanian's Failure to Investigate the only Mitigation Theme Actually Presented — Positive Aspects of Visciotti's Character

235. It is beyond question that a minimally competent lawyer representing a capital defendant would attempt to determine whether the defendant could be said to have possessed any positive character attributes. E.g., Mak, 970 F.2d at 619; Siripongs, 35 F.3d at 1316. Mr. Agajanian has, in effect, conceded his deficiency in admitting that he made no effort to determine whether his client had demonstrated any positive character traits.

236. The testimony by Visciotti's family members and girlfriend clearly reflect Mr. Agajanian's failure to spend any meaningful time ascertaining what information they knew or could contribute or confirming what general type of information he would be focusing on. In failing to interview a number of people who could have provided an additional perspective on Visciotti and his family and, when interviewing those people whom he did call as witnesses, failing to ask "nothing more than a few generalized questions and conduct[ing] none of the real probing for information that legal praxis assumes and even

demands," Smith, 140 F.3d at 1269, Mr. Agajanian failed to conduct a reasonable investigation into potential mitigating evidence relating to Visciotti's positive attributes.

237. By exerting only slightly more effort when interviewing the family members (and perhaps interviewing them earlier than the day of their penalty phase testimony) would have revealed not only generic characterizations of Visciotti's positive traits but would also have unearthed specific instances of acts of kindness and self-sacrifice that could have been used to support the family members' characterizations of Visciotti. Although the family members had offered a few mild examples, these instances were "reported to the jury only in the vaguest of terms." Bean, 163 F.3d at 1081. Some examples — that he came to their house to watch television and that he kissed family members when greeting them — were so insipid as to suggest desperation in seeking to find something positive about Visciotti.

238. The evidence of Visciotti's positive character traits was not cumulative to the testimony adduced during the penalty trial. The descriptions of Visciotti offered at trial were principally broad subjective generalizations unsupported by any factual details. Whatever value those characterizations might have had was critically undermined by Mr. Agajanian's failure to elicit any factual justification for the conclusions, particularly in light of the prosecutor's cross-examination regarding acts of violence that were seemingly inconsistent with the descriptions offered by the witnesses. Mr. Agajanian's deficiency here contributed to a finding of prejudice because the "portrait painted at the [state] habeas hearing was far different from the unfocused snapshot handed the superior court jury." Bean, 163 F.3d at 1081. Like the situation in Smith, although some of the information was available to the jury in a mild form, "with a little effort it could have been developed through evidence or argument, and could have put [Visciotti] in a somewhat different light." Smith, 140 F.3d at 1271.

239. It is beyond dispute that evidence of a capital defendant's acts of kindness, compassion, loyalty and assistance to his siblings and parents, and fondness and affection toward his nieces, nephews, and children of his girlfriend would all be treated as mitigation,

Hitchcock, 481 U.S. at 397-99; Smith, 140 F.3d at 1271, in particular because it was evidence "that might serve 'as a basis for a sentence less than death.'" Skipper, 476 U.S. at 4-5, quoting Lockett, 438 U.S. at 604. Accord Mak, 970 F.2d at 620.

240. Reasonable defense counsel would have differed as to whether to present evidence of Visciotti's good character. Presenting the good character evidence could pose a significant risk to the defense. First and foremost, presenting evidence of Visciotti's good character — in the nature of acts of kindness and compassion — would open the door to rebuttal evidence relating to Visciotti's other acts of violence. However, the principal other act of violence — Visciotti's participation in the stabbing of Scofield — had already been presented to the jury by the prosecution as part of its case-in-aggravation. Yet, as a result of the prosecutor's misstep, the trial judge excluded evidence regarding the stabbing of Cusack for lack of notice to the defense. If the defense opted to present evidence of Visciotti's good character, defense counsel would have realized that the prosecution would then be able to present evidence that Visciotti had also stabbed Cusack as rebuttal. By avoiding evidence of Visciotti's good character traits and instances of good conduct, defense counsel could ensure that Cusack's testimony would never come before the jury.

241. In addition, the defense was likely to obtain only a limited benefit by presenting evidence of Visciotti's positive social attributes. The testimony at the evidentiary hearing demonstrated that, although specific acts of good conduct on the part of Visciotti were not wholly absent, they were relatively limited in number. And, while some of the acts reflected a concern for others, only one involved any self-sacrifice, and none was particularly extraordinary. Given the relatively few instances of good conduct and the absence of a recurrent pattern of compelling selflessness, reasonable defense counsel might have considered this evidence to be of only marginal benefit and outweighed by the risks of presenting it.

242. Nonetheless, regardless of what reasonably competent counsel would have ultimately concluded, it is clear that Mr. Agajanian would not have considered the risks of presenting such testimony as outweighing its benefits. After ultimately succeeding in

excluding the testimony of Cusack (based on errors that the trial judge raised *sua sponte*), Mr. Agajanian immediately proceeded to present the testimony of three siblings and a girlfriend, each of whom, during the course of their brief testimony, was asked to inform the jury of Visciotti's positive attributes and disposition to non-violent behavior. (R.T. 3116-18, 3127-29, 3137-42, 3156-60.) There is no doubt that Mr. Agajanian would have presented more detailed evidence of Visciotti's acts of kindness and compassion if he had learned of them.

243. Evidence of Visciotti's few acts of kindness and compassion for others would not have conflicted with any of the other themes of mitigation that reasonable trial counsel would have developed. Evidence of the abuse inflicted on Visciotti and ongoing turmoil would have explained, rather than detracted from, evidence of the support Visciotti gave to his siblings. Furthermore, evidence of Visciotti's home environment would not have contradicted evidence of Visciotti's his kindness to children and continual devotion to his parents; it would have made the acts of selflessness and compassion all the more poignant.

5. Mr. Agajanian's Failure to Investigate Visciotti's History of Adjustment to Incarceration

244. Mr. Agajanian was also deficient in failing to either conduct a reasonable investigation, or make a reasonable strategic decision to disregard investigation, of his client's prior adjustment to incarceration settings as potential mitigating evidence. "[E]vidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating." Skipper, 476 U.S. at 5. Mr. Agajanian knew that Visciotti had spent a substantial amount of his time as a teenager incarcerated in juvenile detention. A reasonably competent attorney would have ascertained not only the potential facts in aggravation that might be introduced as a result of Visciotti's incarcerations, but also whether the defense could credibly argue Visciotti adapted well to prison and that, if incarcerated for life, he would pose no threat of harm to any other person. Mr. Agajanian's failure to do so, unsupported by any strategic or tactical decision, is another manifestation of deficient performance.

245. In addition to the four principal themes of mitigation discussed above, a reasonable investigation would have uncovered substantial credible evidence that Visciotti adapted well to a prison environment and that Visciotti's criminal behavior outside prison — including his regular use of drugs — ceased once he was detained in a structured environment.

246. As with the evidence of Visciotti's acts of kindness, reasonable capital defense counsel would have differed as to whether to present evidence of Visciotti's adjustment to prison. Dr. Jackman's testimony regarding Visciotti's adaptation and the CYA's staff evaluation of Visciotti as being unusually cooperative in comparison to other delinquents could have provided a forceful theme in mitigation. Skipper, 476 U.S. at 5.

247. Nonetheless, evidence of Visciotti's positive adaptation to the CYA would likely have been subject to rebuttal evidence that, when detained in lesser-security juvenile detention facilities, Visciotti repeatedly escaped. In light of the obvious importance that capital sentencing juries place on the possibility that a defendant may eventually return to society, Simmons v. South Carolina, 512 U.S. 154 (1994), reasonably competent capital defense counsel would be very hesitant of opening the door to the introduction evidence of prior escapes by the defendant. Indeed, having been provided with the ammunition, both through his questioning of the defense's mitigation witnesses (R.T. 3130, 3143, 3151-52, 3166-67, 3221-24) and throughout his closing argument (R.T. 3288-89, 3298, 3310), the prosecutor frequently emphasized Visciotti's prior escapes.

248. However, in light of the fact that the jurors had already learned of Visciotti's prior escapes, Mr. Agajanian created no other risk to the defense by introducing evidence that staff members at the CYA documented Visciotti's remarkable adaptation to the structured environment of prison and that, while incarcerated, Visciotti ceased his anti-social behavior and use of drugs.

249. If Mr. Agajanian had conducted a reasonable investigation into potential mitigation, he would have learned of Visciotti's successful adaptation to the structured environment at the California Youth Authority and he would have introduced such

evidence. As a result, whether through the testimony of CYA staff members, institutional records, or through the testimony of mental health experts, the jurors would have learned of the radical change in Visciotti's behavior when he was away from the chaotic family environment.

6. Mr. Agajanian's Complete Abandonment of Visciotti in Closing Argument

250. Mr. Agajanian's ultimate act of abandonment occurred during the penalty phase closing argument. Mr. Agajanian's closing argument ostensibly on behalf of his client was a complete abdication of his role as an advocate for the defense. As found by the California Supreme Court, Mr. Agajanian "delivered an unfocussed closing argument," In re Visciotti, 14 Cal.4th at 353, which, as the state court repeated in each of its opinions, "was a rambling discourse, not tied to particular evidence." Id., 14 Cal.4th at 331, quoting Visciotti, 2 Cal.4th at 82 n.45. In his closing argument, Mr. Agajanian failed to discuss any of the evidence presented to the jury; he failed to discuss the critical legal principles governing the jury's decision; to the extent he did address legal issues, he either misstated them in a way detrimental to the defense or entirely conceded that they supported the prosecution's position in the case; he failed to provide any support for the few sentencing factors which he suggested "could" be perceived as mitigating; and he unreasonably conceded to the prosecution a number of sentencing factors which he could have argued supported a finding in mitigation and had no conceivable tactical or strategic advantage in failing to so argue.

251. Mr. Agajanian commenced his argument with the most striking of concessions — that the jurors could properly return a verdict of death so long as they were convinced that the sentencing factors in aggravation outweighed, by a mere preponderance, the sentencing factors in mitigation. The state supreme court had previously held that the reasonable doubt standard did not apply to the ultimate sentencing determination in capital cases, but left unresolved the issue of what standard should govern. People v. Hawthorne, 4 Cal.4th 43, 79, 841 P.2d 118, 14 Cal.Rptr.2d 133 (1992), citing Rodriguez, 42 Cal.3d at 777-

79, citing People v. Frierson, 25 Cal.3d 142, 180, 599 P.2d 587, 158 Cal.Rptr. 281 (1979).

252. Three years before Visciotti's trial, in identifying the many unresolved issues relating to California's death penalty statute, Justice Mosk observed that, although a death verdict was permissible only if the factors in aggravation "outweighed" those in mitigation, it remained unclear "[b]y how much must the aggravating factors 'outweigh' the mitigating factors: is it enough that the former outweigh the latter by a 'slight' or 'mere' preponderance, or is a heavier burden required (e.g., 'substantially' outweigh) in view of the nature of the penalty?" Frierson, 25 Cal.3d at 194 (Mosk, J., concurring). The state court eventually concluded, while Visciotti's case was on appeal, that "death may be imposed only where aggravation 'so substantially' outweighs mitigation that death, rather than life imprisonment, is appropriate." People v. Tuilaepa, 4 Cal.4th 569, 593, 842 P.2d 1142, 15 Cal.Rptr.2d 382 (1992) (citing People v. Brown, 40 Cal.3d 512, 230 Cal.Rptr. 834, 726 P.2d 516 (1985), rev'd on other grounds, 479 U.S. 538 (1987)).[10]

253. To this day, capital defense attorneys are routinely urging the state court to reverse course and hold that jurors should be required to be convinced beyond a reasonable doubt of the propriety of a capital sentencing decision. Yet, although the prosecutor made no comment on the burden of persuasion (other than to say that neither side had the burden of proof (R.T. 3284-85, 3295)), with the issue still unsettled, Mr. Agajanian specifically highlighted the inapplicability of the reasonable doubt standard and encouraged the jurors to resort to a mere preponderance standard. After reminding the jurors of their application of reasonable doubt standard during guilt phase, Mr. Agajanian continued:

> The unfortunate part about the penalty phase is we do not have that reasonable doubt standard. We have a weighing of aggravation and mitigation and although there's a lot of euphemisms used like weighing, like evaluating, the bottom line is

[10] The state court explained in Brown: "[T]he weighing of aggravating and mitigating circumstances must occur within the context of those two punishments; the balance is not between good and bad but between life and death. Therefore, to return a death judgment, the jury must be persuaded that the 'bad' evidence is so substantial in comparison with the 'good' that it warrants death instead of life without parole." Brown, 40 Cal.3d at 541 n.13.

we're making value judgments on a 51 percent basis . . .

We're not making that decision beyond a reasonable doubt applicable in this stage of the proceedings, because that's what the law says. At least as of today, it does. That's what the law says.

(R.T. 3335.)

254. He reinforced the minimal burden again near the end of his summation. "[W]hat the prosecution is asking you to do, and anyone else who is sitting here on a death penalty case, is he's saying forget about whatever is good in that person. He's got 49 percent good. Kill him anyway, because that's what the law says." (R.T. 3348.) Although Mr. Agajanian expressed his disagreement with a mere preponderance standard and repeatedly stressed the seriousness of the jury's task, he nonetheless acknowledged that "that's what the law says" and never suggested that a standard more stringent than a mere preponderance of the sentencing factors would be required before returning a death verdict.

255. "[E]ven when no theory of defense is available, if the decision to stand trial has been made, [defense] counsel must hold the prosecution to its heavy burden of proof" and burden of persuasion. Cronic, 466 U.S. at 656 n.19. Although the prosecutor clearly was not required to persuade the jurors of any ultimate facts or conclusions beyond a reasonable doubt, it is difficult to conceive of "what kind of strategy, other than an ineffective one, would lead a lawyer to deliberately" encourage the jurors to apply a burden of persuasion less stringent than what was unambiguously required by law and suggest to them that they could justifiably return a death sentence if persuaded of any conclusion by a mere preponderance. United States v. Span, 75 F.3d 1383, 1390 (9th Cir. 1996); cf. Smith, 140 F.3d at 1274. Mr. Agajanian's extraordinary concession certainly did not benefit the defense.

256. At a time when the governing burden was in doubt, acting in ignorance of the law and encouraging the jurors to apply a less stringent standard, Mr. Agajanian "cannot be said to have been functioning as counsel within the meaning of the Sixth Amendment."

Risher v. United States, 992 F.2d 982, 984 (9th Cir. 1993). Accord Morris v. State of California, 966 F.2d 448, 454-55 (9th Cir. 1991) (ignorance of law is deficient). Cf. Smith, 140 F.3d at 1274 (contrasting imperfect closing argument with attorney's misstatement of applicable burden).

257. However, Mr. Agajanian abandoned his client during the penalty phase closing argument in many other ways as well. Effective closing argument "serves to sharpen and clarify the issues for resolution by the trier of fact . . . [f]or it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions" and the strengths of their own position. Herring v. New York, 422 U.S. 853, 862 (1975). The Court observed that "no aspect of [criminal trial] advocacy could be more important than the opportunity finally to marshal the evidence for each side before sumission of the case to judgment." Id.

258. Mr. Agajanian's "rambling discourse" at the end of the penalty phase was a constitutionally inadequate substitute for minimally competent closing argument due to his total failure to connect his disjointed thoughts to any evidence, his failure to identify any strengths in the defense position, and near total concession that the prosecution's position suffered from no weaknesses at all, all of which were unreasonable under the circumstances of this case.

259. In addressing the only two sentencing factors that Mr. Agajanian did not concede were aggravating or absent, he gave little more than cursory reference and perfunctory support.

260. Mr. Agajanian apparently intended to argue that one of the sentencing factors favoring Visciotti was his age. However, even though the prosecutor offered several plausible reasons why Visciotti's age should not be considered mitigating (R.T. 3314-15), Mr. Agajanian made little more than a passing reference to the factor: "The age of the defendant. I happen to consider 26 years of age a rather young age." (R.T. 3341.) Nor did

this isolated comment, which consumed no more than five to ten seconds, respond to any of the reasons offered by the prosecutor as to why "his age doesn't help him here." (R.T. 3315.)

261. The only other sentencing factor invoked by Mr. Agajanian was the "sympathy" factor. Cal. Penal Code § 190.3(k). In its entirety, his argument regarding factor (k) was that "sympathy and pity should be an issue to consider. It should be an issue to consider because there's nothing more serious than what you're being asked to do." (R.T. 3350.) Mr. Agajanian did not argue that factor (k) was "present" or that it "favored the defense." Mr. Agajanian did not suggest that the only penalty phase testimony he had adduced — testimony that, when not under the influence of drugs, Visciotti was caring, helpful, and exhibited many positive character traits. Indeed, he did not identify any evidence that would warrant sympathy for Visciotti (or his family) and, if so, why the jurors should rely on such pity or sympathy as a basis for returning a sentence other than death. Instead, the sum total of his invocation of factor (k) was to remind the jurors that sympathy "should be an issue to consider." Mr. Agajanian made no other mention of the sentencing factor regarding sympathy.

262. No different than his treatment of the age factor, although the prosecutor highlighted the unfavorable evidence regarding Visciotti's personality and background, beyond commenting that sympathy "should be considered," Mr. Agajanian devoted only a few seconds to the sentencing factor and made no attempt to respond to the prosecutor's encouragement that the jurors not "waste [their] pity on someone who doesn't deserve it" (R.T. 3317; id., at 3317-22)

263. It cannot be denied that Mr. Agajanian's dwelled on the seriousness and gravity of the sentencing question that the jury was being asked to decide. No one, however, denied the gravity of the sentencing task. Reasonably competent counsel would have made some attempt to explain to the jurors, based on the law and the evidence, why they could and should return a verdict other than death. While acknowledging the serious consequences of their decision, Mr. Agajanian never suggested to the jurors any reason —

other than by shirking their oaths — that the appropriate verdict would be anything other than death.

264. And, indeed, his own remarks reminded the jurors of their obligation to approach their sentencing task within the limits of the law.

> You're being asked to take somebody's life. That's the bottom line. You're being asked to do it because it's legal, because it's a noble purpose, and because of all those other reasons that we've gone through [i.e., the statutory sentencing factors]. [¶] But the bottom line is you're being asked to do that and you're being asked to do it within the confines of the jury instructions that will be given to you.

(R.T. 3351.)

265. The jurors could not have failed to understand the import of Mr. Agajanian's point: that they had been given a weighty responsibility but that the prosecutor had proven his case and the verdict was inevitable. Regardless of whether the jurors would ultimately sympathize with his expressed distaste for a death verdict (and, in light of the death qualification process were highly unlikely to be moved by it), reasonably competent counsel would have recognized the importance of suggesting to the jurors some way in which they could apply those philosophical ideas "within the confines of the jury instructions."

266. However, Mr. Agajanian's closing argument was unreasonable not only for what he failed to do (identify some basis in the law and evidence on which the jurors could return a non-death sentence), but also for what he affirmatively did: effectively concede, without any reasonable justification, that nine of the eleven sentencing factors simply had no mitigating aspect and could not be viewed in a manner favorable to the defense.

267. As a preliminary matter, the Court finds no constitutional deficiency in Mr. Agajanian's concession that sentencing factors (b), (c), (e), and (f) were either aggravating or neutral. There is no indication that reasonably competent defense counsel could plausibly have urged the jury to consider these factors in any other light.

268. Critically, however, as the California Supreme Court observed, Mr. Agajanian explicitly "undercut his client's case by telling the jury that the evidence of

petitioner's mental and emotional problems was not mitigating." In re Visciotti, 14 Cal.4th at 353. Mr. Agajanian erroneously and unreasonably suggested to the jurors "if you did not find diminished capacity [during the guilt phase], how can I argue that as a factor of aggravation or mitigation? It just does not apply. It's not there." (R.T. 3340.)

269. This argument not only reflects how Mr. Agajanian "undercut his client's case" but it also demonstrates Mr. Agajanian's fundamental misunderstanding of the law during the guilt phase as well as the operative legal principles governing the penalty phase.

270. As noted by the California Supreme Court, the jury could have rejected the proposed diminished capacity defense during the guilt trial since Mr. Agajanian certainly knew by the time of the penalty trial, regardless of the supporting evidence,"that the defense of diminished capacity had been abolished." In re Visciotti, 14 Cal.4th at 354 n.7. Second, as the California Supreme Court also noted, regardless of the evidentiary support for a diminished capacity defense in the abstract, as applied to a robbery felony murder, Mr. Agajanian had to recognize that "there was substantial evidence, including petitioner's confession, that the robbery had been preplanned and that intent to rob existed, [a fact] which would explain the jury's rejection of that defense at the guilty [sic] phase." Id.

271. The argument also reflected Mr. Agajanian's confusion about the legal standards governing the penalty phase. "Evidence of mental problems may be offered to show mitigating factors in the penalty phase, even though it is insufficient to establish a legal defense to conviction in the guilt phase." Hendricks, 70 F.3d at 1043, citing Cal. Penal Code § 190.3(d), (h). As found by the state court, even after the guilt phase verdicts, Mr. Agajanian unreasonably "failed to recognize that the jury could, nonetheless, consider the evidence of organic brain damage associated with lack of impulse control as mitigating." In re Visciotti, 14 Cal.4th at 354 n.7.

272. Mr. Agajanian's invitation to the jury that they could freely disregard any mitigating impact of sentencing factors (d) and (h) is all the more striking in light of the prosecutor's earlier explicit concession that jurors did have evidence on which to find that these two factors did exist and were mitigating. When discussing factor (d) — whether

Visciotti was acting under extreme mental or emotional disturbance — the prosecutor candidly acknowledged that the defense had, in fact, "given you a couple of ways that you could find that." (R.T. 3307.) Notwithstanding the prosecutor's concession — followed by an identification of the supporting evidence favorable to the defense — when Mr. Agajanian addressed factor (d), he encouraged the jurors to summarily reject it: "With respect to emotional disturbance, there's no evidence of that. That isn't even a factor to be considered." (R.T. 3340.) In light of Dr. Broussard's favorable guilt phase testimony, Mr. Agajanian concession was patently unreasonable.

273. Equally deficient was Mr. Agajanian's encouragement to the jury to disregard any possible mitigating impact of factor (h). In reviewing the statutory sentencing factors that he had written on a board or easel for ease of reference (R.T. 3382, 3294), when the prosecutor arrived at factor (h) — whether Visciotti's mental capacity was "impaired as a result of mental disease or defects or the affects [sic] of intoxication" — after arguing that the evidence established Visciotti's mental competence, the prosecutor conceded that factor (h) was "the only one that might be mitigating so we'll write mitigating up there." (R.T. 3313.) Advancing a stronger defense argument than even Mr. Agajanian was to deliver, the prosecutor explained "if you believe he didn't know what he was doing, he didn't appreciate the criminality of his acts, didn't have the capacity to conform his conduct to the legal requirements, based on what he's told you and what Dr. Broussard told you, you find that one to be mitigating. [¶] So, just to give him the benefit of the doubt, we'll write mitigating on there, although I don't agree that's a mitigating factor." (R.T. 3314.) Indeed, at the conclusion of his argument, the prosecutor encouraged the jury to find that "[e]very factor that applies is overwhelmingly aggravated, with that one exception, the diminished capacity due to intoxication." (R.T. 3322.)

274. By contrast, unlike the prosecutor, Mr. Agajanian, Visciotti's own defense counsel was not even willing to give Visciotti "the benefit of the doubt." Mr. Agajanian never mentioned Dr. Broussard's or Visciotti's guilt phase testimony and, as noted, informed the jury that evidence of mental disease, defect, or intoxication is "not a factor of

mitigation or aggravation. It's just not there at all." (R.T. 3341.)

275. As a final death knell, Mr. Agajanian unjustifiably conceded the inapplicability or aggravating nature of factors (a), (g), and (j). The jurors had received evidence that Visciotti's co-defendant Hefner, and not Visciotti, brought the gun to the robbery, that Visciotti protested Hefner's use of a gun, and that Visciotti shot Dykstra and Wolbert only after Hefner gave him the gun and repeatedly urged him to shoot the victims. Mr. Agajanian could have urged the jurors to take this evidence into account when evaluating the "circumstances of the crime," factor (a), whether Visciotti acted under duress or the substantial domination of another, factor (g), or Visciotti's role in the offense, factor (j). As the prosecutor had acknowledged in addressing the duress factor, Visciotti "talked about Brian Hefner making him do it." (R.T. 3308.) "The defendant tries to convince you folks that he acted the way he did because Brian Hefner convinced him he should. Thereby impliedly suggesting that he was in some sort of duress or something." (R.T. 3310.) Mr. Agajanian could have urged the jurors to consider this evidence as establishing a mitigating aspect to factors (a), (g), and (j) or, at least, mollifying their aggravating nature.

276. "[I]n some cases a trial attorney may find it advantageous to his client's interests to concede certain elements of an offense or his guilt of one of several charges." Swanson, 943 F.2d at 1075-76. Given the strength of the prosecution's argument questioning the dubious and self-serving nature of Visciotti's pre-trial statements and testimony that the killing was instigated by Hefner, reasonably competent counsel could have made a reasonable tactical decision to concede the neutrality or aggravating nature of factors (a), (g), and (j), if they were otherwise able to argue the existence of substantial mitigating evidence under some other sentencing factors. However, after invoking only weak support for two factors and having conceded the aggravating nature or inapplicability of nearly every other sentencing factor, no reasonably competent capital defense attorney would have conceded factors (a), (g), and (j) since evidence could have been mustered to provide a mitigating aspect to one or all of those factors. Moreover, there was certainly no

tactical advantage gained by disavowing the mitigating nature of the few sentencing factors that even the prosecutor agreed could be found as favoring the defense. Swanson, 943 F.2d at 1074-76.

277. "'The constitutional right of a defendant to be heard through counsel necessarily includes his right to have his counsel make a proper argument on the evidence and the applicable law in his favor, however simple, clear, unimpeached, and conclusive the evidence may seem.'" Herring, 422 U.S. at 860.

278. Before the jury retired for deliberations to determine whether Visciotti should be sentenced to death or, instead, life imprisonment without the possibility of parole, he had a constitutional "right to be heard in summation of the evidence from the point of view most favorable to him." Herring, 422 U.S. at 864. Even at closing argument — indeed, especially in closing argument — defense counsel is constitutionally obligated "to function as the Government's adversary during his summation to the jury." Swanson, 943 F.2d at 1074. Mr. Agajanian's unfocussed, rambling musings clearly conveyed to the jury his subjective belief that Visciotti should, under the law, be sentenced to death. Given the existence of evidence in the record that could have been relied upon to support a number of the sentencing factors, Mr. Agajanian's remarks at the close of the penalty phase resulted in an effective "denial of the basic right of the accused to make his defense." Herring, 422 U.S. at 859.

279. In the context of an ordinary criminal trial, the Ninth Circuit has held that "[a] lawyer who informs the jury that it is his view of the evidence that there is no reasonable doubt regarding the only factual issues that are in dispute has utterly failed to 'subject the prosecution's case to meaningful adversarial testing.'" Swanson, 943 F.3d at 1074, quoting Cronic, 466 U.S. at 659. As applicable in the context of this penalty phase, case, in conceding that the facts and law necessitated a sentencing verdict adverse to his client, Mr. Agajanian "utterly failed to 'subject the prosecution's case to meaningful adversarial testing.'"

280. Mr. Agajanian's complete abandonment of Visciotti during closing argument

"caused a breakdown in our adversarial system of justice in this case that compels an application of the Cronic exception to the Strickland [prejudice] requirement." Swanson, 943 F.2d at 1074.

281. Mr. Agajanian's summation at the penalty phase surpassed mere deficience. It manifested a complete failure to function as an advocate for the defense. This failing was presumptively prejudicial. Swanson, 943 F.2d at 1074-76.

C. Conclusion

282. As the Supreme Court and the Ninth Circuit have both expressly recognized, "the trial process generally does not function properly 'unless defense counsel has done some investigation into the prosecution's case and into various defense strategies.'" Siripongs, 35 F.3d at 1314, quoting Kimmelman, 477 U.S. at 384. This case is an unfortunate paradigm of that truism.

283. In the ordinary case, where the defendant was represented by otherwise competent counsel who made reasonable and informed decisions about how best to defend the case, some of the individual deficiencies identified above — in particular, the manner of interviewing family members and the substance of portions of the closing argument — might not have amounted to constitutionally deficient performance had they been the only error made by trial counsel. However, in the context of this case, these episodes reflect additional manifestations of Mr. Agajanian's complete dereliction and abandonment of his client and, therefore, are additional instances of his complete failure to "bring such skill and knowledge as will render the trial a reliable adversarial testing process," Strickland, 466 U.S. at 688, and to perform "the role necessary to ensure that the trial is fair," id., at 685. These instances also corroborate that, instead of making professional judgments about how to best represent Visciotti, Mr. Agajanian effectively abandoned his client and served as counsel in name only.

284. In sum, Mr. Agajanian essentially "refused to perform any investigation into leads directly related and of potentially great benefit to the defense." Hendricks, 70 F.3d at 1040. Mr. Agajanian utterly failed to, "at a minimum, conduct a reasonable investigation

enabling him to make informed decisions about how best to represent his client.'" Hendricks, 70 F.3d at 1036, quoting Sanders, 21 F.3d at 1456. In addition, his failure to muster any evidentiary support for the two mitigating factors relied upon and his concession that every other sentencing factor — including those highlighted by the prosecutor as possessing some mitigating aspect — were either aggravating or absent reflected a complete "fail[ure] to subject the prosecution's case to meaningful adversarial testing." Swanson, 943 F.2d at 1074. In brief, he effectively "failed to function as the Government's adversary during his summation to the jury." Swanson, 943 F.2d at 1074.

285. Even more compelling than the failings in Clabourne, which involved a deficiency limited to the investigation and preparation of mental health experts, Mr. Agajanian's "representation at the sentencing hearing amounted in every respect to no representation at all and the total absence of advocacy falls outside Strickland's 'wide range of professionally competent assistance.'" Clabourne, 64 F.3d at 1387 (internal citations and quotations omitted).

286. At the sentencing phase of a capital trial, "[t]he issue for the jury is whether the defendant will live or die. The sentencing hearing is defense counsel's chance to show the jury that the defendant, despite the crime, is worth saving as a human being. To fail to present important mitigating evidence in the penalty phase — if there is no risk in doing so — can be as devastating as a failure to present proof of innocence in the guilt phase." Mak, 970 F.2d at 619 (quotation and ellipses omitted). Accord Siripongs, 35 F.3d at 1315.

287. Even "overwhelming evidence of guilt does not ameliorate the failure to present mitigating evidence at the penalty phase." Caro v. Calderon, 165 F.3d 1223, 1227 (9th Cir. 1998), citing Hendricks, 70 F.3d at 1044. See also Smith, 140 F.3d at 1269-71; Clabourne, 64 F.3d at 1378-87. Yet, here, the aggravating factors were strong, but hardly overwhelming. The homicide was callous and depraved, but no more so than most first degree murders. Although the Scofield/Cusack assault did not result in a homicide, this episode was equally significant as the Dykstra homicide because it reflected Visciotti's capacity for extreme unprovoked violence. The aggravating nature of that episode, which

included Visciotti's unprovoked stabbing of Cusack as she was lying in bed defenseless and despite her pleas for mercy because she was pregnant, was undoubtedly compounded by the fact that Visciotti had lied to the jury about the episode. Yet, had he been represented by minimally competent counsel, Visciotti probably would not have testified and almost certainly would not have lied about the stabbing episode (in part because the underlying facts never would have been addressed by him at all). Nonetheless, despite the strength of the prosecution's case, despite the minimal evidence in mitigation, despite Mr. Agajanian's concession that the mitigating evidence was virtually non-existent and that nearly all the sentencing factors favored the prosecution, the jurors nonetheless spent more than a day and a half deliberating on the proper sentencing verdict and, as reflected by the notes they sent out after a full day of deliberations, were carefully evaluating the mitigating effect of sentencing factors that both the prosecutor and defense argued were devoid of any mitigating aspect.

288. Although the Attorney General identifies instances where the witnesses disagreed on details, or did not recall an episode that others claimed they were present at, these were matters for a jury to evaluate in determining the extent and severity of the abuse or the credibility of the different witnesses's recollection. The variations were not so extreme as to make inherently unbelievable the episodes that many claimed to have witnessed. In addition, regardless of the excuses Visciotti's father offered as a justification for resorting to extreme violence, as the state court referee and the California Supreme Court did, so too a reasonable jury could have credited the testimony that the Visciotti household was in fact violent and chaotic and that, John Visciotti, as well as the other children, was subjected to extreme physical and emotional abuse. The Attorney General overlooks that, "[i]n assessing prejudice . . . , we are not asked to imagine what the effect of certain testimony would have on us personally. We are asked to imagine what the effect might have been upon a sentencing [jury], who was following the law, especially one who had heard the testimony at trial." Smith, 140 F.3d at 1270.

289. Moreover, the Attorney General's proposal of summarily rejecting the

mitigating nature of this evidence "would deny [Visciotti] the chance to ever have a jury, [California's] death penalty arbiter, fully consider mitigating evidence in his favor. Instead, second hand bits and pieces of mitigation evidence would be analyzed and rebutted based only on speculation about what might have happened if dozens of important variables had been different." Deutscher, 884 F.2d at 1161. To disregard the significant impact that would likely result from the substantial available credible mitigating evidence would "create[] the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." McDowell v. Calderon, 130 F.3d 833, 837 (9th Cir. 1997) (en banc), quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978). Accord Penry, 492 U.S. at 328.

290. Trial counsel Roger Agajanian failed to provide Visciotti a level of representation that was remotely proportional to the seriousness of a capital trial. Mr. Agajanian's failure to investigate Visciotti's criminal history resulted in a gross distortion of the evidentiary presentation than would have occurred if Visciotti were represented by reasonably competent counsel. Mr. Agajanian's failure to conduct a reasonable investigation into various penalty defenses left him uninformed about volumes of available mitigating evidence. There is a high probability that the overwhelming majority of this mitigating evidence would have been introduced by reasonably competent counsel. Under the circumstances of this case, Mr. Agajanian had no reasonable tactical or strategic decision for refraining from presenting the mitigating evidence. Mr. Agajanian's almost complete inaction, inattention, and indifference stripped the penalty phase trial of any meaningful legitimacy.

291. The extensive evidence overlooked and the strength of that evidence establishes a reasonable probability that the result of the sentencing trial would have been different if Mr. Agajanian had conducted a reasonable investigation into available mitigating evidence. Visciotti has demonstrated that there is a reasonable probability of a different sentencing verdict but for Mr. Agajanian's failure to investigate and make a

reasonably informed decision as to whether to present available mitigating evidence, failure to investigate Visciotti's criminal history, failure to interview the prosecutor's probable witnesses for the penalty phase, failure to investigate the case in aggravation, failure to provide materials and information to consulting mental health experts as requested by them, failure to identify any meaningful evidentiary support for the two factors in aggravation half-heartedly relied on, concession of the lack of any mitigating aspect to a number of sentencing factors that were supported by evidence in the record, and the myriad other instances of inattentiveness and failures to bring the skill and knowledge necessary to render the trial a reliable adversarial process. There is a reasonable probability that the mitigating evidence unreasonably ignored by Mr. Agajanian would have made a difference in the sentencing verdict.

292. Under 28 U.S.C. § 2254(d) "[a]n application for writ of habeas corpus on behalf a person in custody pursuant to a 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."

293. It is undisputed that Visciotti's claim was adjudicated on the merits in state court and that the claim is founded on legal authority that was clearly established by the Supreme Court.

294. In arriving at a different conclusion, the state court unreasonably misapplied the governing legal standard. Hendricks, 70 F.3d at 1044; cf. Strickland, 466 U.S. at 699-700 (prejudice as to capital sentence where overlooked mitigating evidence would have materially altered the sentencing profile presented to the sentencer). The state court focused only on whether Visciotti had sufficiently "proved" that his criminal activity was "a product of petitioner's drug abuse." In re Visciotti, 14 Cal.4th at 356. While this inquiry may have been appropriate for a guilt-phase defense based on drug use, the state court erred in applying such rigid limitations during the penalty phase. The state court ignored

the fact that Visciotti's addiction to drugs was the font of Visciotti's motivation in perpetrating the robbery that led to the homicide. Because it was not convinced that Visciotti did commit the homicide while under the influence of drugs, the state court effectively disregarded the overall humanizing effect of the wealth of overlooked mitigation evidence relating to Visciotti's turbulent childhood, the physical and emotional abuse inflicted on Visciotti, and his mild neurological impairments, as well as the possibility of a sympathetic response to evidence explaining Visciotti's resort to use of drugs and criminal misconduct. Mak, 970 F.2d at 619; Siripongs, 35 F.3d at 1316; Hendricks, 70 F.3d at 1044. In doing so, the state court ignored the jury's "broad latitude to consider amorphous human factors, in effect, to weigh the worth of one's life against his culpability." Hendricks, 70 F.3d at 1044.

295. The state court also erroneously applied an improper legal standard. Visciotti established prejudice by demonstrating that Mr. Agajanian unreasonably overlooked substantial, credible mitigating evidence. "The missing testimony . . . would have altered significantly the evidentiary posture of the case." Brown v. Myers, 137 F.3d 1154, 1157 (9th Cir. 1998). This is sufficient to demonstrate prejudice. Id.; Hendricks, 70 F.3d at 1044. Cf. Strickland, 466 U.S. at 700 (prejudice possible where evidence would "have altered the sentencing profile presented to the sentencing [jury]"). Faced with the wealth of available mitigating evidence, "it is reasonably likely that the jury 'would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" Bean, 163 F.3d at 1081, quoting Strickland, 466 U.S. at 695-96. "'Confidence in the outcome' has been undermined." Smith, 140 F.3d at 1270, quoting Strickland, 466 U.S. at 694.

296. The state court's adjudication was manifestly contrary to, and also involved a manifestly unreasonable application of, Strickland and its progeny. 28 U.S.C. § 2254(d).

ORDER

For the foregoing reasons, the petition for writ of habeas corpus as to the judgment

and sentence of death in the matter of People v. John Louis Visciotti, Case No. C-50770 in the California Superior Court for County of Orange is **GRANTED**. The judgment and sentence of death shall be **VACATED AND SET ASIDE**, as shall be any proceedings relating to carrying out that sentence.

It is further **ORDERED** that, within 120 days of the date of this order, the State of California shall either grant Visciotti a new trial on the issue of the appropriate penalty or resentence Visciotti in accordance with California law and the United States Constitution.

IT IS SO ORDERED.

Dated: Oct. 8, 1999.

MANUEL L. REAL,
United States District Judge

COPY

IN THE SUPREME COURT OF CALIFORNIA

JOHN LOUIS VISCIOTTI,	)	
	)	
on Habeas Corpus.	)	S031247
	)	

Petitioner John Visciotti was convicted by a jury in the Orange County Superior Court of first degree murder of Timothy Dykstra with a robbery special circumstance (Pen. Code, §§ 189, 190.2, subd. (a)(17)(i)), attempted murder of Michael Wolbert (Pen. Code, §§ 664/187),[1] and robbery of both men (§ 211). The jury also found that he had personally used a firearm in the commission of the offenses (§ 12022.5) and that he intended to kill the murder victim, Timothy Dykstra. The same jury determined that petitioner should be sentenced to death. This court affirmed the judgment in its entirety. (*People* v. *Visciotti* (1992) 2 Cal.4th 1.)

In a subsequently filed petition for writ of habeas corpus, petitioner asserts ineffective assistance of counsel, relying on both the record of the trial and evidence outside the record. This court issued an order to show cause limited to

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1 All statutory references are to the Penal Code unless otherwise indicated.

SEE CONCURRING AND DISSENTING OPINIONS

the issue of ineffective assistance of counsel at the penalty phase of the trial. In so doing we implicitly concluded that allegations that petitioner received prejudicially ineffective assistance of counsel at the guilt phase and was denied the right to trial before an impartial tribunal failed to state a prima facie case. (*People* v. *Miranda* (1987) 44 Cal.3d 57, 119, fn. 37; *People* v. *Bloyd* (1987) 43 Cal.3d 333, 362-363.)

After the filing of respondent's return and petitioner's traverse, we determined that disputed facts necessitated an evidentiary hearing. (See *People* v. *Romero* (1994) 8 Cal.4th 728, 737-740; *In re Lawler* (1979) 23 Cal.3d 190, 194.) The Honorable Eileen C. Moore, Judge of the Orange County Superior Court, was appointed referee with directions to take evidence and make findings of fact on the several questions that will be discussed below.

After an independent review of the appellate record and record of the evidentiary hearing, we conclude that, assuming petitioner's trial afforded inadequate representation in some respects, petitioner has not demonstrated that those failings were prejudicial. Because he has not established that absent those failings it is probable that a more favorable result would have been reached by the penalty jury, he is not entitled to relief. We shall, therefore, discharge the order to show cause and deny the petition for writ of habeas corpus.

I

Background

The events leading to the murder conviction and imposition of the death penalty are set forth in *People* v. *Visciotti*, *supra*, 2 Cal.4th 1. Briefly, petitioner and Brian Hefner, who had been employed as salesmen by a company which also employed victims Timothy Dykstra and Michael Wolbert, lured the victims to a remote area of the Anaheim Hills on Santiago Canyon Road in Orange County in a preplanned robbery scheme. There the victims were robbed, shot, and abandoned.

Dykstra died at the scene. Wolbert survived, notwithstanding bullet wounds in the torso and face, and testified against petitioner whom he identified as the shooter.

Wolbert described petitioner's methodical execution of Dykstra and attempt to murder Wolbert. Petitioner directed Wolbert, in whose car the four were driving, to the site where the crimes were committed. Before leaving with petitioner and Hefner, Wolbert and Dykstra had hidden the pay they had just received behind the dashboard of Wolbert's car. Petitioner asked Wolbert to stop, claiming a need to relieve himself. Dykstra got out to let petitioner out of the back seat. Hefner followed. At that point Wolbert saw a gun in petitioner's waistband. Wolbert left the car also and saw petitioner pointing the gun at Dykstra. The pair were face to face, less than two feet from each other, next to the passenger side of the car.

As Wolbert walked to the back of the car he ran into Hefner who said "he's not fucking around." Petitioner then demanded the victims' wallets and threatened Dykstra. Dykstra and Wolbert sat on an embankment at the side of the road, Dykstra near the front of the car, Wolbert a few feet behind the car. Wolbert told Hefner where the money was hidden. Hefner went to the car and returned with the money. Wolbert asked petitioner to take the car and the money, but to let him and Dykstra go, promising not to identify petitioner. While Hefner was in the car, petitioner had moved closer to Wolbert, but when Hefner returned petitioner moved back to the location at which Dykstra was seated, raised the gun, and shot and killed Dykstra. Wolbert arose and took several steps back as petitioner approached him with the gun. Petitioner raised the gun, holding it with two hands extended out from his chest, and shot Wolbert. The first shot was from a distance of about six feet. It hit Wolbert in the rib cage. Wolbert fell. As Wolbert lay on the ground and looked at petitioner, petitioner stepped closer to Wolbert. Standing at Wolbert's feet, about three feet from him, petitioner raised the gun and shot

Wolbert again. This shot hit Wolbert in the left shoulder. When petitioner began to walk away, Wolbert got up. Petitioner turned as Wolbert approached, and from a distance of two feet put the gun to Wolbert's head and shot him again. This shot hit Wolbert in the left eye. Petitioner and Hefner then abandoned the victims, taking Wolbert's car, and fled the crime scene. Each time petitioner fired the gun he had to pull the hammer back to manually cock it.

Petitioner and Hefner, who was separately tried and sentenced to life imprisonment without possibility of parole, were quickly apprehended. Petitioner confessed and participated in a videotaped reenactment of the crime.

The defense presented evidence at trial that petitioner had learning disorders attributed to a minimal brain injury, had ingested drugs prior to the crimes, was not completely aware of his actions during the offenses, and was unable to judge the nature and consequences of his actions. Evidence of petitioner's history of drug and alcohol abuse was also presented in support of an expert's conclusion that petitioner was in a drug-induced psychotic state at the time of the murder and attempted murder.

The defense offered mitigating evidence at the penalty phase in testimony by petitioner's parents, siblings, and girlfriend about petitioner's love and concern for his family, his helpfulness, and his musical and artistic talent. The family members testified that petitioner's personality changed when he was under the influence of drugs, and his father testified about his efforts to persuade petitioner to cease using drugs—efforts that included "punching" petitioner across the room, and bribing him. The penalty phase argument by defense counsel Roger Agajanian was, as we described it in the decision on appeal "a rambling discourse, not tied to particular evidence" (*People* v. *Visciotti*, *supra*, 2 Cal.4th at p. 82, fn. 45) during which counsel asked the jury to spare petitioner's life because he was

the only bad child of a loving family who would suffer if petitioner were to be executed.

II

The Ineffective Assistance of Counsel Claim

The claim on which the order to show cause issued is petitioner's assertion that he received constitutionally ineffective assistance of his counsel, Roger Agajanian, at the penalty phase of the trial. In a related claim that we deem part of the ineffective assistance of counsel claim, petitioner alleges that counsel labored under a conflict of interest which affected counsel's ability to forcefully and competently represent him. We decline petitioner's request that we reconsider our conclusion that his other claims do not state a prima facie case for relief.

A. Penalty Phase Representation/Conflict of Interest Claim

Petitioner's allegations in support of his claim of constitutionally inadequate representation by trial counsel extend to counsel's preparation for and performance at the penalty phase of the trial. He attributes counsel's tactical decisions and deficient performance at this stage to both incompetence and the assertedly prejudicial impact of a conflict of interest.

Allegedly counsel labored under a conflict of interest that existed because of financial arrangements between counsel and petitioner's family, who retained Agajanian, agreeing to pay $25,000 for representation at trial and to pay for experts and investigation. Petitioner claims the family paid only $5,000 to $7,500. Agajanian did not seek public funds for investigation or experts, although petitioner was indigent, apparently believing that such funds were not available when a defendant has retained counsel.

Petitioner also alleges that Agajanian's investigator, Grasso, performed only "minimal tasks," including a visit to the scene of the offenses, group interviews with family members, and one interview with petitioner's girlfriend. Petitioner

alleges that no other investigation was undertaken, no records obtained, and no nonfamily witnesses were interviewed. He also alleges that counsel did not act competently in interviewing the witnesses and in inspecting the physical evidence, and did not prepare properly for trial. Counsel did not ensure that his expert, Dr. Broussard, was adequately prepared, with the result that Dr. Broussard did not have access to crucial information and was not given important evidence. Dr. Broussard interviewed petitioner only once and, allegedly, did not conduct a meaningful examination of petitioner.

At the penalty phase counsel's theory was to invoke jury sympathy for petitioner's family.

Petitioner alleges that counsel's failings at the penalty phase are attributable in part to the conflict of interest which arose because counsel could not "bite the hand that feeds him." Agajanian was dependent on the family to pay the unpaid balance of his fee. Petitioner claims that, as a result of the conflict, counsel did not present available evidence that, far from being a child of a loving family, petitioner was raised in a dysfunctional family in which both physical and psychological abuse were inflicted on petitioner by his parents. Petitioner implies that counsel was concerned that if evidence of this mistreatment were presented the remaining fee would not be paid.

Incorporating all of the above allegations of inadequate representation by trial counsel at the guilt phase into his assertion of penalty phase incompetence, petitioner alleges that trial counsel failed to offer a viable penalty phase defense, failed to make appropriate objections and motions, and stipulated to an improper response to a jury inquiry. Allegedly, counsel failed to investigate and attack or impeach aggravating evidence and witnesses. He did not take the advice given, or undertake the steps recommended, by Dr. Sharma, a forensic psychiatrist, which steps were necessary to adequate penalty phase representation. Instead, he

presented an allegedly "inadequately developed, ill-conceived and ineffective" theory of invoking sympathy for petitioner's family, gave a rambling argument not tied to any evidence, and mistakenly argued that impaired mental state, a mitigating factor, was not present. Moreover, counsel did not request a limiting instruction regarding consideration of the evidence of past arrests and criminal conduct so as to reduce the prejudicial impact of "inadmissible" evidence; did not sufficiently object and make an offer of proof to support a continuance to prepare to rebut the testimony regarding a 1978 knife assault on Kathy Cusack; did not object to the testimony of William Scofield about that assault; stipulated to what he claims was an incomplete and prejudicial response by the court to juror questions regarding the mitigating factors of extreme duress and moral justification; did not object to instructions permitting the jury to consider nonviolent conduct in aggravation; and did not object or seek admonishment regarding allegedly improper penalty phase argument which included reference to possible unproved escapes, personal insights and background of the prosecutor, excuses for "distasteful" prosecution witnesses, a suggestion that "phantom" mitigating evidence could be considered aggravating, a misleading assertion that coperpetrator Hefner had no criminal record, misleading argument that petitioner was the "bad seed" in a "nice" family, use of age as an aggravating factor, and portrayal of the sentencing process as a mechanical mandatory weighing process.

Petitioner's principal claim is, however, that counsel failed to investigate, discover, and use mitigating evidence regarding petitioner's upbringing in conditions which, he claims, would have explained to the jury his resort to drugs and alcohol and, ultimately, to these offenses. He alleges that his family was not supportive and loving, that his parents engaged in interspousal conflict, physical battering, verbal abuse, labeling and mistreatment. Petitioner was the fifth child. He was born with severe club feet which required that he wear splints and braces

for three years. He was stigmatized and isolated as a result. His condition caused severe financial problems and stress in the family.

The family moved at least 20 times by the time petitioner was 16 years old. This disrupted and undermined his education and social development, and contributed to feelings of insecurity and low self-esteem. When petitioner was 13, a potential seizure disorder was diagnosed and brain damage was suspected as a cause of his problems. He first experimented with drugs in grammar school when his father abandoned the family. During adolescence petitioner experimented with a wide variety of street drugs. His long-term drug use affected his ability to concentrate and impaired his mental functions.

Petitioner allegedly suffers from a mild neuropsychological impairment and has a significant discrepancy between verbal and nonverbal memory. He has mild motor function deficits and difficulty in complex/abstract thinking. In the structured environment of juvenile camp his behavior improved. Notwithstanding his problems, he was capable of and performed altruistic acts of sincere kindness.

Petitioner contends that this, and other mitigating evidence would have demonstrated that the evidence offered by the prosecution was inaccurate and misleading. The prosecution evidence could have been impeached and its impact diminished.

Our issuance of an order to show cause on these allegations reflected a preliminary determination that, if true, they stated a prima facie case for relief. (*In re Hochberg* (1970) 2 Cal.3d 870, 876, fn. 4.)

Director of Corrections filed a return to the order to show cause accompanied by a declaration by trial counsel Roger Agajanian in which trial counsel states that while he had extensive contact and conversations with members of petitioner's family, there was no mention of petitioner having been abused by his parents, of his childhood deformity, or of a dysfunctional family environment.

Counsel declared that even had he known of petitioner's family background and the abuse he would not have presented the evidence. It was his opinion that any attempt to gain sympathy for petitioner would have failed. Had he presented the evidence, he could not have had petitioner's parents present at the trial and would have given the jury the impression that petitioner's family had abandoned him. His strategy of garnering sympathy for family members had been successful in prior murder cases in which the jury returned not guilty verdicts. He did not follow up with the two court-appointed experts, as their testimony would not have been consistent with that of counsel's own expert regarding petitioner's mental state at the time of the offense. Counsel said his ignorance that petitioner had stabbed Kathy Cusack during the 1978 assault on Scofield was due to petitioner's failure to tell him about Cusack.

After reviewing the return and petitioner's traverse, we concluded that it would be necessary to resolve several disputed factual matters in order to determine whether petitioner is entitled to relief. The referee was therefore ordered to take evidence on and make findings of fact on the following questions, the relevance of which to petitioner's claims will be explained below:

1. Did trial counsel Roger Agajanian interview members of defendant's family and/or family friends, and, if so, what information did he obtain from them which did or should have alerted him to the existence of potentially mitigating penalty phase evidence?

2. Did trial counsel conduct any other investigation of penalty phase defenses or become aware of potentially mitigating evidence from any other source?

3. Did the court-appointed psychiatric experts, Dr. Kaushal K. Sharma and Dr. Seawright Anderson, view any postarrest videotape of petitioner; did trial counsel review reports by those experts regarding defendant's mental condition;

and did counsel receive and respond to the requests made by Dr. Kaushal K. Sharma on May 8, 1983, and May 31, 1983, for additional background information regarding defendant?

4. What was the content of the report to the court by Dr. Seawright Anderson?

5. In preparation for trial did trial counsel review any medical and/or psychiatric/psychological records; school records; juvenile court records; or other materials relevant to defendant's history?

6. Was trial counsel's decision to forego presentation at the penalty phase of evidence regarding defendant's childhood and adolescence an informed and knowledgeable decision?

7. Was trial counsel's penalty phase strategy affected in any way by the fee arrangement between counsel and defendant's parents?

III

Evidence Received at the Hearing Before the Referee

Petitioner presented evidence to support the factual allegations of the petition related to trial counsel's lack of preparation and investigation of potentially mitigating evidence. He also presented evidence to support his claim that mitigating evidence was available. That evidence, discussed in greater detail below, included the testimony of family members and friends regarding the discordant atmosphere in the Visciotti family home created by an unending series of physical and verbal confrontations between petitioner's parents; physical punishment of petitioner and his siblings; threats of violence; impermanence caused by the family's numerous moves and its impact on school attendance and the ability to make lasting friendships; the children's efforts to escape the household turmoil by hiding, leaving the house, early marriage, and resort to drugs as "self-medication." Social workers, psychologists, and other witnesses testified

regarding the impact of these events on petitioner's development and ability to function in society.

Petitioner's theory is that all of this evidence might have been presented to the jury had counsel discovered it and elected a penalty phase tactic other than an attempt to elicit sympathy for petitioner's family – the "family sympathy" defense. The evidence offered at the evidentiary hearing regarding trial counsel's lack of preparation and investigation was uncontradicted. The recollections of family members regarding some occurrences during petitioner's childhood differed in some respects, but the evidence that the family life was chaotic and that petitioner suffered parental verbal abuse throughout his childhood was uncontradicted. The evidence offered at the hearing before the referee is summarized below.

A. Trial counsel's investigation and preparation for penalty phase trial.

Roger Agajanian was admitted to the bar in this state in July 1973. He had never tried a capital case that went to the jury before the Visciotti case, and had never conducted a penalty phase trial. He had tried several murder cases between 1981 and 1983, however. He decided prior to jury selection in the Visciotti trial, when he saw petitioner's videotaped reenactment of the murder, that he would attempt to elicit sympathy for petitioner's family as his penalty phase strategy. He believed that, although sympathy for petitioner could not be expected, sympathy for petitioner's parents might be. His defense would therefore suggest that the parents were nice people whose son should not be killed.

Evidence was also presented that when he made that decision Agajanian had never represented a client at the penalty phase of a capital case and in none of his self-described successful presentations of a family sympathy defense in prior

cases was family sympathy evidence relevant to any issue in the case and in none could the effort be accurately described as "successful."[2] The other basis for counsel's hope that family sympathy might sway the jury was his belief that, in a widely reported case in which Agajanian had no involvement, a jury acquitted the defendant of a narcotics-related charge and in doing so was influenced to accept an entrapment defense by the loyalty displayed by the defendant's wife who was regularly in attendance at the trial.[3]

Agajanian testified that he did not conduct formal interviews with any members of petitioner's family in preparation for the penalty phase. He did no investigation and did not have a social worker or investigator do any investigation to seek potentially mitigating evidence. He conceded that when he made his decision regarding trial of the penalty phase he had no information about petitioner's background other than what appeared to him to be "good aspects" of the family. The decision that no effort would be made to pursue a sympathy defense based on petitioner himself was made without knowing what other evidence for a defense he might find if an investigation was pursued. While he

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2 In one of the four cases in which counsel claimed to have relied successfully on eliciting juror sympathy for the family of the defendant, there were no jurors. In another, the defendant was convicted as charged.

3 The court has not considered whether family sympathy is within any statutory factor (§ 190.3) or an aspect of the defendant's character or record which the jury must be allowed to consider. (See *People* v. *Cooper* (1991) 53 Cal.3d 771, 844.) Inasmuch as we assume arguendo that petitioner's trial counsel's decision to rely on this penalty phase strategy was not competently made, we need not do so here.

was aware that petitioner had abused drugs, he had never had a jury return a favorable verdict when the defense was based on drug use.

Agajanian testified that he had no information about petitioner's family when he made his decision on penalty phase tactics. That testimony was contradicted by his expert, Dr. Louis Broussard, who testified that Agajanian told him that there was some "brutality" in the family. Dr. Broussard also testified that Agajanian had explained the limited scope of the examination Broussard was asked to perform and report on was appropriate because the "DeLorean case" had convinced Agajanian that a jury was less likely to convict if there was substantial family support.

At the request of Agajanian, the trial court appointed two experts in the mental health field, but only to assess petitioner's competence to stand trial and sanity at the time of the offenses. Neither testified at the trial. Both testified at the evidentiary hearing.

Dr. Seawright Anderson, a psychiatrist who had been appointed in approximately 25 capital cases prior to his appointment in the Visciotti case, testified that in such appointments defense counsel usually contacts him to advise him of the things in which the attorney is particularly interested. It is his practice to await such contacts until the attorney provides him with the arrest report and background information which the court does not provide. His staff contacts the attorney if the attorney has not already provided the information needed.

Dr. Anderson was appointed to evaluate petitioner only under sections 1026 and 1368, i.e., to determine if petitioner was sane at the time the offenses were committed and whether he was competent to stand trial. In evaluating petitioner, Dr. Anderson read the arrest report and documents from the Youth Authority and Department of Corrections compiled at the time of petitioner's prior commitment after conviction of assault with a deadly weapon. His staff obtained those

documents for him from Agajanian's office. He reviewed no other documents. The notes of his office manager indicated that Agajanian wanted Dr. Anderson to consider petitioner's drug history, his prolonged use of cocaine, and the "new diminished capacity." Dr. Anderson did not review the videotaped reenactment of the offense or the videotape of petitioner confessing to the crimes. He was provided with no previous drug history, no probation reports, and no psychological reports from the Youth Authority or Department of Corrections.

Dr. Anderson interviewed petitioner for slightly over one hour. He did not administer any psychological tests, although they would have been useful if diminished capacity were in issue. They were not necessary to determine sanity and competence. Dr. Anderson recommended that an electroencephalogram (EEG) and computer assisted tomography (CAT) scan be administered to rule out the possibility of organic brain disorder, as petitioner had a history of head injury and prolonged substance abuse. He would have assisted Agajanian in arranging for those tests, but was not asked to do so. Once his report was sent to Agajanian, he heard nothing more about the case.

During the interview with Dr. Anderson, petitioner did not state that he had been mistreated by his parents. Dr. Anderson testified that it is not unusual for a patient to omit this as such reference brings up uncomfortable feelings and the patient is depressed. In Dr. Anderson's experience it is not unusual for a patient to minimize abuse, especially when it is inflicted by the patient's parents.

In his report, Dr. Anderson concluded that petitioner was competent to stand trial and was sane at the time of the offense. He also reported, however, that as a result of prolonged drug abuse and paranoid ideation, petitioner suffered from diminished capacity at the time the charged offense was committed and was unable to meaningfully and maturely reflect on the gravity of the contemplated acts. He also concluded that petitioner was addicted to cocaine, amphetamines, and

marijuana, and recommended that an EEG and a CAT scan be performed to rule out the possibility of organic brain disorder, and that psychological tests be administered to obtain more information about petitioner's basic personality structure.

Dr. Kaushal K. Sharma, a forensic psychiatrist, was the second expert appointed by the court. Agajanian did not supply him with any background information regarding petitioner and did not reply to a letter asking for that information. Dr. Sharma went personally to Agajanian's office and obtained some documents. He never spoke with Agajanian. He examined petitioner and, on July 19, 1993, wrote to Agajanian stating that he had not detected any psychiatric impairment. The letter explained, however, that the statement was based on a very limited interview and a rather superficial examination of the documents supplied to him. The letter was not intended to be a report. Instead it was a means of closing Dr. Sharma's file because he did not have the time or patience to continue "bugging" Agajanian for the information he had requested from him.

Based on these reports, Agajanian concluded that neither of these experts would be helpful to the defense. He therefore contacted Dr. Louis Broussard, a psychologist who had undertaken examinations for him in approximately 20 prior cases, two or three times under appointment, and had testified for Agajanian two or three times. Dr. Broussard testified that Agajanian often contacted him after a case was already in trial in order to deprive the prosecution of access to his reports.

In the Visciotti case, Agajanian told Broussard only that he wanted testing and findings, and that it was a murder trial. Dr. Broussard spent no more than one hour with Agajanian and did receive some information about "brutality" in the family from Agajanian, but he did not receive any social or family history. They did discuss diminished capacity. Agajanian was aware that the defense had been

abolished, but Agajanian believed that evidence of diminished capacity could come in nonetheless and "the jury could make up its mind."

Dr. Broussard's testing and interview took no more than two and one-half hours. It was performed on July 22, 1983, two days after the People rested in the guilt phase of the trial.[4] He did not obtain a comprehensive social history from petitioner, and told Agajanian that he should obtain a licensed clinical social worker to do that. His interview was only to find out what happened when the crimes were committed and to ascertain why from the defendant's point of view. He did not obtain a drug history as the defendant was "a little bit out of it" on that day and was not terribly responsive. Dr. Broussard first explained his failure to attempt a further interview with defendant on the basis that he had the information he needed for his report and did not think he would obtain more information in a further interview because, based on the tests he had administered, he believed that the defendant was then operating at his capacity. He later testified that the reason he did not see the defendant again and perform additional tests was the time problem. He was hired late in the case and was told that he would testify in the week after he first saw Agajanian about the case. Agajanian said that Dr. Sharma had advised Agajanian that it was a very serious case and would require comprehensive investigation and that the cost of those investigations would be approximately $2,500, which Agajanian was not willing to take the time for or to pay for.

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[4] Agajanian explained his delay in contacting Dr. Broussard by stating that he planned to use the expert only at the penalty phase. In fact, Dr. Broussard testified only at the guilt phase.

Dr. Broussard testified that his focus was limited to guilt phase considerations. Agajanian did not want more than present psychological factors to be considered, as his strategy was to show family solidarity. He did not want an opinion on childhood abuse in the report or for Dr. Broussard to indicate that there was any problem in the family, no matter how important information about the family was.

Additional lack of preparation for the penalty phase of the trial was offered in evidence that Agajanian did not review the prosecutor's file. Although it was the practice of the district attorney at the time of the Visciotti trial to make the case files of prosecutors available to defense counsel, Agajanian was not aware that during petitioner's 1978 assault with a deadly weapon on William Scofield, petitioner had also repeatedly stabbed Kathy Cusack who was pregnant. Agajanian did not send for the police report or go through the prosecutor's file to read it in advance of trial and thus was surprised and unprepared to face that evidence. He stated that he had not seen the report and was not aware of the Cusak incident because petitioner lied to him.

Agajanian testified that at the time of trial petitioner's father, Luigi Visciotti, had paid only a fraction of the $25,000 fee, and that over the course of the representation Luigi had paid a total of approximately $5,000 and done some tile work for Agajanian because he had no more money. Agajanian believed he was owed about $15,000. Luigi testified that a boyfriend of his daughter Ida had given Agajanian a $17,000 lien on the friend's anticipated accident settlement. Luigi believed that he owed Agajanian $7,000 when the trial began and had paid off the debt with tile work, tree trimming, and cleanup work.

B. Undiscovered mitigating evidence.

The evidence that counsel did not discover and present consisted principally of the social, medical, and family history of petitioner. One of petitioner's experts,

Shirley Reece, M.S.W., a licensed clinical social worker and professor at the University of California at San Francisco, prepared a social history of petitioner. She described that history as offering "overwhelming mitigating circumstances" in "an absolutely horrendous family history." The family and social history came from hospital, school, probation, Youth Authority, and Department of Corrections records and from information supplied by close family members.

Professor Reece testified that the interaction between petitioner's parents was extremely volatile, hostile, and mutually abusive, both physically and verbally. Without exception the children described the family as chaotic, stating that they lived a life of terror. They were always frightened and often worried that the parents would kill each other. Petitioner's father continually berated him, called him stupid and retarded, and threatened to break his legs. The children were blamed for the family's difficulties, and some were beaten with a belt and slapped. Economic problems and the number of children caused the family to move often which had a profound effect on the children. Petitioner left kindergarten after nine days and was not re-enrolled in school for the first grade for two years. The overall record of school attendance and withdrawal was appalling and destructive to petitioner's development. That family situation, petitioner's short stature, and the epithets used by his father which petitioner "internalized" and began to believe were true, led to a person who was markedly lacking in self-esteem and depressed. He thought he could never do anything right and could never do anything to please his parents. He was highly self-critical and blamed himself for things for which he

had no responsibility such as his parents' difficulties. He had suicidal ideation and had nowhere to turn other than drugs for a way out.[5]

Jay Jackman, M.D., an expert in forensic psychiatry with extensive experience in substance abuse cases, reviewed the same background information. Prior to his testimony, he had reviewed declarations by members of petitioner's family, the trial testimony of petitioner, the videotapes in which petitioner reenacted the crime and was interviewed by police, as well as numerous other medical, Department of Corrections, Youth Authority, probation, and school records related to petitioner, all of which were available and could have been discovered by Agajanian with reasonable investigation. He examined petitioner twice.

In the opinion of Dr. Jackman, it is necessary to spend a minimum of 15 to 20 hours interviewing a capital defendant. That time is particularly important in cases of childhood abuse because it is necessary to develop a relationship of trust. Persons with a history of abuse are extraordinarily protective of their families. They are defensive about their own abuse history and are very reluctant to talk about it. He was able to spend only about 10 hours in interviews with petitioner because of time and monetary constraints, but if he were testifying before a jury he would do a longer workup.

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[5] Professor Reece interviewed petitioner's parents, who engaged in a heated argument during the interview. She described the event as "quite extraordinary," testifying that the parents shouted and menaced one another to the point that a staff member came from another room to ask if they could "tone it down."

Petitioner was born with club feet, a moderately severe congenital abnormality. Dr. Jackman testified that this had a very negative effect on both petitioner and his family. Treatment for the condition was expensive and strained the resources of the family. Petitioner's mother, Catherine, never worked outside the home and his father, Luigi, was a marginal wage earner. Corrective treatment prevented petitioner from walking until he was three years old and required first Dennis Brown splints and then special shoes which the family could not afford without help from petitioner's grandparents, a factor that impacted on his father's self-image. Luigi "took it out" on the children and in particular on petitioner whom he resented. He used threats to break petitioner's legs to terrorize him, saying he had paid to have the legs fixed and would break them again. Although petitioner had no memory of the condition and treatment, Dr. Jackman believed that the birth handicap had a colossal and devastating effect on petitioner's self-image because from his earliest self-awareness, he was aware that he was different from other children. The result was feelings of inadequacy, incompetence, inferiority, worthlessness and low self-esteem.

Petitioner told Dr. Jackman that he began to experiment with drugs at age eight when he was exposed to marijuana, apparently by boyfriends of his sisters. The materials supplied to Dr. Jackman and the declarations from family members described the Visciotti home at that time, and throughout petitioner's childhood, as chaotic, a battle zone, hostile and nasty, where the parents continuously verbally and physically abused each other and the children. There were no expressions of love between the parents or from the parents to the children. Petitioner's parents called him an "asshole," a "mother fucker," "stupid," and "retarded." His father told him he would never amount to anything and subjected him to a series of devaluing comments.

The family moved at least 20 times while the children were growing up. The children changed schools often, were never up with their classes, and had few friends in school. As a result most of the children disliked school and attended sporadically. The constant moves impacted petitioner's ability to function in school and in his social world. He was always an outsider.

The battles between petitioner's parents involved screaming that could be heard more than a block away. His mother threw objects at his father. The fighting was so intense that the children feared that their parents would kill each other. When they were young the children hid in their bedrooms or closets when the fights occurred. When older they left the house. Petitioner's older sisters married in their midteens, in part to escape the home environment. Only three of the children remained in school to graduate from high school. On three occasions, petitioner's father abandoned the family and moved in with women friends.

Petitioner's first use of drugs coincided with the birth of his younger brother Tony, one of the occasions on which his father abandoned the family.

Petitioner's reaction to his parent's battles was to hide in a dark place. He also found hiding places in abandoned cars where he could spend time away from the home situation.

While in Youth Authority custody and away from the family, petitioner's behavior and his schooling improved markedly. He was not a behavior problem and did all jobs expected of him. Staff members believed that he was not a typical delinquent and had him tested for a brain abnormality. An EEG was abnormal and suggested a seizure disorder so Dilantin was prescribed. While taking the medication petitioner did not abuse drugs and his behavior was significantly improved. He was not considered by Youth Authority staff to be a drug abuse problem. Notwithstanding the family situation, petitioner always expressed a desire to go home when in Youth Authority custody. Youth Authority staff noted,

however, that what appeared to be a close-knit family was at the point of falling apart, a problem that terrified petitioner to the point that he stuttered when he talked about it. Whenever petitioner was released to the family's disorganized psychological environment, which Dr. Jackman termed a "toxic" environment, the negative behavior and drug abuse returned. Dr. Jackman testified that it was not unusual for an abused child to still love and feel attached to the parents.

Dr. Jackman believed that until petitioner was eight his method of escaping the family situation was physical – he absented himself from the home. Later, drugs afforded him an alternative means of escape. Between the ages of eight and twelve petitioner used alcohol and Seconal, a sedative hypnotic. The drug relieved a psychotic mood, a painful, unpleasant mood state caused by the family situation, and made him feel "mellow." Dr. Jackman described this drug use as a self-medication pattern often seen in children who use self-medication to control the undesired, unpleasant moods they have, changing drugs as their mood changes.

In his early teens, petitioner began to use amphetamines, preferentially "uppers" to overcome depression as the "downers" he had used before no longer had the desired effect. At that time he was doing very poorly in school and missed as many days as he attended. He had no social relationships and was what Dr. Jackman described as "basically a depressed kid." At 15 petitioner began using cocaine which became his drug of choice by the time he was 18. In his later teens, petitioner also used what petitioner described as "cannabis," but which Dr. Jackman testified was actually phencyclidine or PCP, a drug that distances people from their experience so that they become dispassionate observers of what goes on in their world. This drug enabled petitioner to see and participate in the family but not feel what went on emotionally. Most of the criminal conduct in which petitioner engaged occurred during a period when he had progressed to injecting PCP intravenously several times a day in order to have that detached experience.

Dr. Jackman believed that petitioner's criminal behavior was directly related to his drug use. The behavior was impulsive. Petitioner was not a criminal or antisocial personality. He had a number of "prosocial" behaviors which Dr. Jackman had not seen in antisocial personalities who were killers.

Additional potentially mitigating evidence of which counsel had no knowledge was offered in the testimony of family members whose declarations had been reviewed by Professor Reece and Dr. Jackman.

The family members testified consistently with their trial testimony that petitioner was a kind and considerate person when not under the influence of drugs. Petitioner's siblings also testified, consistent with the social history recited by Professor Reece, about the chaotic family life brought about by the volatile nature of the relationship between their parents, the alleged physical and psychological abuse of petitioner and his siblings by their parents, and the family's peripatetic existence. On cross-examination, however, the siblings conceded that the instances of "physical abuse" by their mother that they had described occurred when the children were being punished for misbehavior. Their testimony suggested that, contrary to the evidence offered at the penalty phase, petitioner was not the only "bad seed" in an otherwise loving family. Several of his siblings had criminal records related to substance abuse. His father also had a criminal record. It also appeared, however, that the family was a loving family in which petitioner's older sisters, although they left the home to marry in their midteens in order to avoid the turmoil, returned home regularly on Sundays for family meals.

IV

Referee's Report/Petitioner's Exceptions/Findings of this Court

After an evidentiary hearing, Judge Moore filed her final report on November 17, 1994. Petitioner has filed exceptions to the report and both petitioner and respondent have filed briefs on the merits.

In this proceeding, the referee's conclusions of law and resolution of mixed questions of law and fact are subject to independent review. The findings of fact are not binding on this court, but are given great weight if supported by substantial evidence since the referee has had the opportunity to observe the demeanor of the witnesses and the manner in which they testified. (*In re Hitchings* (1993) 6 Cal.4th 97, 109; *In re Marquez* (1992) 1 Cal.4th 584, 603.)

The findings of Judge Moore in response to the court's questions are summarized below:

Question 1. Yes, Roger Agajanian interviewed most of petitioner's very large family, largely with the family as a whole as his intention was to ensure consistency in their testimony. He asked them what the family was like. The information he obtained was that the family gave the appearance of being cohesive, concerned, supportive and close to each other. He did not uncover information that the family was dysfunctional. It was his decision to utilize the positive image of the family as mitigating penalty evidence by going forward with the defense of sympathy toward the family so the jury would conclude petitioner, as the one stray, was worth saving because the family was so good. Even had petitioner been abused by his family, counsel would not have introduced such evidence in an attempt to garner sympathy for petitioner since he consciously decided not to delve into those areas. He knew that once the jury heard about the senseless and heinous nature of the case and the stabbing of a pregnant woman, they would not care how terrible petitioner's childhood may have been. He

wanted the jurors to focus on someone other than petitioner. He saw the positive appearance the family portrayed. Having seen other situations where jurors were lenient toward a defendant because they liked the defendant's family, he made the choice to focus on petitioner's family, believing the jury would reject any attempts to place petitioner in a sympathetic position.

Petitioner objects to the referee's finding that Agajanian interviewed members of the family. He claims, and the record supports the claim, that Agajanian did not conduct formal interviews with any members of petitioner's family other than petitioner. He met with some of them when he was retained and conversed with some of them at luncheon meetings during the trial. No matters of substance were discussed in those conversations. Petitioner's background and the family history were not discussed. Agajanian did not question any family members, individually or together, with the purpose of gathering evidence or information that might be used at the penalty phase of the trial.

We conclude that, while Agajanian did not "interview" members of petitioner's family as this court intended the word to be understood, he did speak with them and obtained information about the mitigating evidence that he subsequently elicited from the family members during the penalty phase of the trial.

Petitioner also objects that the referee's response goes beyond the question put by the court, erroneously states that at the time in question petitioner had been "convicted" of a heinous crime, and erroneously assumes that Agajanian was aware that evidence of the stabbing of Kathy Cusack would be presented at the time he elected to present only a family sympathy defense. These claims have merit. Agajanian made his penalty phase decision before the trial. He conceded at trial and in this proceeding that he did not know evidence of the Cusack stabbing was to be presented.

Question 2. No, trial counsel did not conduct any other investigation of penalty phase defenses or become aware of potentially mitigating evidence from any other source. He did not care what a social history of the family and petitioner demonstrated in that, because of the heinous nature of the crime and the lack of remorse demonstrated in police videos by petitioner, he had no intention of introducing any evidence in an attempt to draw sympathy to his client. Instead trial counsel chose to attempt to draw sympathy to the family of defendant in an attempt to make it difficult for the jury to decide this family's one stray, its son and brother, should be executed.

Petitioner does not object to the referee's finding, which is supported by the evidence.

Question 3. Neither court-appointed expert (Dr. Kaushal K. Sharma and Dr. Seawright Anderson) viewed any post-arrest videotapes. Trial counsel did review the formal written report of Dr. Anderson, and a letter of Dr. Sharma which stated that on the basis of a very limited interview with petitioner, Dr. Sharma was not able to detect any information which would suggest psychiatric impairment in the defendant for the purpose of a psychiatric legal defense. Counsel decided not to use either doctor based on those reports. Instead he hired Dr. Broussard, a licensed psychologist with whom he had worked in the past and with whom he was confident he could work. Counsel received and did not personally respond to the requests made by Dr. Sharma. Most likely counsel's office staff provided the police reports and other documents Dr. Sharma had requested in his letters of May 8 and May 31 to counsel.

Petitioner does not object to the finding that the experts did not view the videotapes. That finding is supported by the evidence. He points out, however, that the record establishes that the "other documents" eventually supplied to Dr.

Sharma were limited to an arrest record and "rap sheet." They did not include any other background information about petitioner. We agree.

Question 4. The report of Dr. Anderson was submitted as an exhibit to the referee's report.

Petitioner does not object to this finding. Dr. Anderson's conclusions have been summarized above.

Question 5. No, counsel did not review any records or other material relevant to petitioner's history.

Petitioner does not object to this finding which is supported by the evidence.

Question 6. Yes, trial counsel's decision to forego presentation of evidence at the penalty phase was an informed and knowledgeable decision. Counsel was an experienced criminal trial attorney who used his knowledge, experience, professional instinct and intuition in making his decision.

Petitioner objects that this finding, which is a conclusion of law or resolution of a question of mixed fact and law, is not supported by the evidence. The term "informed and knowledgeable decision" has a specific meaning when used in assessing the adequacy of counsel in the representation of a defendant charged with a crime. An attorney's exercise of discretion in making tactical decisions regarding trial strategy must be both reasonable and informed. An informed decision is one made on the basis of reasonable investigation. (*People* v. *Ledesma* (1987) 43 Cal.3d 171, 215.) Although counsel has "wide latitude and discretion . . . that discretion must be a reasonable and informed one in the light of the facts and options reasonably apparent to counsel at the time of trial, and *founded upon reasonable investigation* and preparation." (*People* v. *Frierson* (1979) 25 Cal.3d 142, 166, italics added; see also, *In re Marquez*, *supra*, 1 Cal.4th 584, 606; *In re Fields* (1990) 51 Cal.3d 1063, 1069; *In re Cordero* (1988) 46

Cal.3d 161, 180.) "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." (*Strickland* v. *Washington* (1984) 466 U.S. 668, 690-691.)

The referee apparently concluded that Agajanian's decision that presentation of a "family sympathy" defense at the penalty phase was preferable to an attempt to offer mitigating evidence was reasonable and justified his failure to undertake any investigation. We need not decide here whether counsel representing a capital defendant must investigate all potential sources of mitigating evidence, including avenues of investigation which counsel has no reason to believe may be fruitful. We assume arguendo that, since Agajanian apparently was put on notice of possible family discord during petitioner's youth, his decision to present a "family sympathy" defense without investigation to determine the nature of the evidence that was available was not a decision that a competent attorney representing a capital defendant would make.

Question 7. No, trial counsel's penalty phase strategy was not affected in any way by the fee arrangement. Petitioner's father had fully paid by way of cash, a $17,000 lien on a personal injury case of his daughter's friend, and some tile work done by the father at counsel's office. The lien proceeds never materialized. There is no indication that counsel withheld any services, investigation or use of experts because of the fee arrangement.

Petitioner objects to this finding on the ground that the delay in retaining Dr. Broussard was attributable to the failure of petitioner's father to respond to Agajanian's demands for money.

The record supports the findings of the referee. While the lien proceeds had not yet materialized and may never have done so, the fee had otherwise been paid. This court's question was in response to petitioner's allegation that counsel suffered from a conflict of interest engendered by the fee arrangement that made it impossible for him to offer evidence that the family was dysfunctional and that petitioner's parents had abused him. The fee arrangement had nothing to do with the retention of Dr. Broussard and there is nothing in the record to suggest that when Agajanian elected the family sympathy strategy he had any reason to consider engaging another expert.

Petitioner also complains that the referee made other findings she was not asked to make, and did not make any recommendation regarding his entitlement to relief. Because this court has access to and has reviewed the entire record on appeal, and is therefore able to make an assessment of prejudice, the court did not request that a recommendation be made regarding relief. The findings of the referee are broader in some respects than the questions submitted by this court. Nonetheless, as petitioner recognizes, when this court appoints a referee to take evidence and make findings, the findings are not binding on this court which will make an independent review of the evidence and of the referee's resolution of mixed questions of law and fact. Ultimately, therefore, the findings on which resolution of petitioner's claims depend, are made by this court. The possibly extraneous findings of the referee are irrelevant.

Petitioner also complains that the referee excluded evidence regarding State Bar proceedings which led to the suspension of trial counsel from practice, evidence petitioner asserts was relevant to counsel's credibility, and would have

revealed a pattern of indifference and inattentiveness to the needs of his clients. Petitioner fails to identify how any material in those records is relevant to specific questions on which the referee was ordered to take evidence and make findings of fact, however. To the extent that there may be relevance to the ultimate question of whether counsel provided ineffective assistance in the murder prosecution, this court may take judicial notice of the records of this court in the State Bar proceedings (Evid. Code, §§ 452, subds. (c)&(d), 453), and we have granted petitioner's request that we do so.[6]

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[6] Agajanian was first suspended for four years by a July 10, 1990, order in Bar. Misc. 5560. The order was stayed, probation granted, and an actual suspension of two years made a condition of probation. On October 16, 1991, an actual suspension of three years to be concurrent with the former suspension was ordered in a matter in which eight additional complaints relating to matters occurring between 1980 and 1989 were consolidated (see *In re Agajanian*, S022257), and a third suspension was ordered on June 17, 1993, on a finding that probation had been violated. Agajanian resigned from the bar, with additional disciplinary charges pending, on June 30, 1994.

During the time that Agajanian represented petitioner on appeal from this conviction, he filed a 30-page opening brief, purported to adopt the amicus curiae brief filed by counsel from the California Appellate Project, and filed no reply brief. While representing petitioner he was convicted of two counts of criminal contempt (18 U.S.C. § 401(3)) in the United States District Court for the District of Vermont in December 1985. That judgment was affirmed on appeal. (*United States* v. *Agajanian* (2d Cir. 1988) 852 F.2d 56.)

The bases for the disciplinary proceedings that followed the proceeding related to the contempt conviction were complaints that Agajanian had abandoned clients, failed to respond to client communications, made false representations and misrepresentations, lost files, and failed to perform promised services. Evidence was admitted at the evidentiary hearing that during the time he represented petitioner, Agajanian did not respond to client communications, failed to make court appearances, did not visit clients in jail or show up in court or other places as

(footnote continued on next page)

Petitioner also complains that the referee prevented inquiry into the relationship between counsel and the trial judge, and into counsel's lack of knowledge of Judge Fitzgerald's past knowledge of petitioner and the judge's comments about accomplice Hefner. Petitioner argues that this inquiry would have exposed additional evidence of trial counsel's inadequate preparation for trial, including his failure to procure a transcript of the Hefner trial in order to review the testimony of the witnesses at that trial. We find no error or impropriety. Again, the evidence was not related to the specific questions put to the referee. Only disputed issues of fact whose resolution is necessary to disposition of the petition are the subject of the reference order. Counsel's failures in this regard are not disputed issues of fact.

Petitioner also objects to appendices to the referee's report in which she offers comments on some of the evidence, and asks that the comments be disregarded. To the extent that these comments offer insights into the referee's assessment of witness credibility, they may be considered and we have done so where appropriate.

Respondent urges the court to adopt the findings and conclusions of the referee, noting that the referee concluded that petitioner's family was a paradox. It was dysfunctional, but was also close-knit. Respondent also notes that some of the testimony of petitioner's siblings was inconsistent. They did not all recall the same incidents. Moreover, some offered reasonable explanations for what

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(footnote continued from previous page)

promised, and was distracted by a civil suit against a nonlawyer who shared his office and was accused of fraudulent sales of trust deeds.

otherwise appeared to be unreasonable or arbitrary infliction of physical and verbal abuse on the children.

The testimony of the family members was consistent in many respect and their description of chaotic family life is supported by the records compiled much earlier when petitioner was in Youth Authority custody. The experts who relied on those records as well as statements by the siblings concluded that their parents' verbal and physical abuse of the children, and of petitioner in particular, had a marked impact on him and contributed to his use of drugs. However, the evidence also showed that the family was close-knit in many ways – the children who had left the home returned for family dinners on some Sundays and holidays, they visited petitioner while he was in custody in youth and adult facilities, and all supported one another in times of need.

Moreover, as we discuss below, petitioner's effort to show that if the jury had been made aware that his family background led to his substance abuse and assaultive conduct while under the influence of drugs a different penalty verdict would have been reached is unpersuasive. It is so because the underlying assumption that petitioner committed the assault and murder because he was under the influence of drugs is not supported by either the record in the habeas corpus proceeding or the record on appeal.

V

Relief on Habeas Corpus

A habeas corpus petitioner bears the burden of establishing that the judgment under which he or she is restrained is invalid. (*People* v. *Duvall* (1995) 9 Cal.4th 464, 474.) To do so, he or she must prove by a preponderance of the evidence, facts that establish a basis for relief on habeas corpus. (*People* v. *Ledesma*, *supra,* 43 Cal.3d 171, 243.) When the basis of a challenge to the validity

of a judgment is constitutionally ineffective assistance by trial counsel, the petitioner must establish either:

(1) As a result of counsel's performance, the prosecution's case was not subjected to meaningful adversarial testing, in which case there is a presumption that the result is unreliable and prejudice need not be affirmatively shown (*United States* v. *Cronic* (1984) 466 U.S. 648, 658-659; *In re Avena* (1996) 12 Cal.4th 694, 726-727); or

(2) Counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's unprofessional errors and/or omissions, the trial would have resulted in a more favorable outcome. (*Strickland* v. *Washington*, *supra*, 466 U.S. at p. 694; *In re Avena*, *supra*, 12 Cal.4th at p. 721; *In re Alvernaz* (1992) 2 Cal.4th 924, 936.) In demonstrating prejudice, however, the petitioner must establish that as a result of counsel's failures the trial was unreliable or fundamentally unfair. (*In re Avena*, *supra,* 12 Cal.4th at p. 721.) "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (*Strickland* v. *Washington*, *supra*, 466 U.S. at p. 686.)

The question we must answer is whether there is a reasonable probability that, but for counsel's errors and omissions, the sentencing authority, would have found that the balance of aggravating and mitigating factors did not warrant imposition of the death penalty. (466 U.S. at p. 696.) While the court must often be deferential to a tactical decision made by criminal defense counsel in order to avoid chilling vigorous advocacy and to avoid second-guessing counsel, we may not abdicate our role in assessing competence.

It is not true, as petitioner asserts, that Agajanian elected the penalty phase strategy of seeking sympathy for petitioner's family without doing any investigation whatsoever. His examination of the family members who testified at the penalty phase of the trial confirms that he had learned from them before they testified some information regarding petitioner's acts of kindness and generosity and his artistic skill. And, although he described his penalty phase theory as an attempt to elicit sympathy for the family, mitigating evidence was presented through their testimony. Nonetheless, as indicated earlier, we will assume arguendo that counsel's performance in this regard fell below the objective standard of reasonableness under prevailing professional norms demanded as an essential aspect of a criminal defendant's Sixth Amendment right to competent representation.

Notwithstanding Agajanian's multiple failings, however, this is not a case in which there was a total breakdown of the adversarial process within the meaning of *United States* v. *Cronic*, *supra*, 466 U.S. 648. The failure of counsel to present the mitigating evidence petitioner has now identified, or any specific type of mitigating evidence, does not reflect such a breakdown of the adversarial process as to render the verdict presumptively unreliable. (*People* v. *Bloom* (1989) 48 Cal.3d 1194, 1228, fn. 9; *People* v. *Williams* (1988) 44 Cal.3d 1127, 1152.) And, as we explained in *In re Avena*, *supra*, 12 Cal.4th at page 727, notwithstanding the broad language in the *Cronic* opinion (*supra,* 466 U.S. at p. 659) to the effect that when "counsel entirely fails to subject the prosecutions' case to meaningful adversarial testing," the right to competent counsel has been denied and the result of the trial is presumptively unreliable, the actual application of *Cronic* has been much more limited. Defendants have been relieved of the obligation to show prejudice only where counsel was either totally absent or was prevented from assisting the defendant at a critical stage. Neither factor is present

here. In other circumstances, the petitioner must show how specific errors undermined the reliability of the verdict. (*United States* v. *Cronic*, *supra*, 466 U.S. 648; *In re Avena*, *supra*, 12 Cal.4th 694.) Therefore, while petitioner argues that he is entitled to relief without a showing of prejudice, we conclude that he must satisfy the standards established in *Strickland* v. *Washington, supra,* 466 U.S. 668.

As noted earlier, we will assume arguendo that Agajanian failed to afford constitutionally adequate representation because he allegedly (1) failed to investigate and discover mitigating evidence as a result of his ignorance of the types of evidence a jury might consider mitigating; (2) failed to present readily available evidence that would have revealed to the jury the extent to which petitioner was subjected to psychological and physical abuse as a child, the impact the dysfunctional and peripatetic family life had on petitioner's development, and the correlation between these events and petitioner's resort to drugs; (3) failed to prepare, which left him unaware of the scope of the aggravating evidence to be introduced; and (4) delivered an unfocussed closing argument, during which he undercut his client's own case by telling the jury that the evidence of petitioner's mental and emotional problems was not mitigating, prejudiced petitioner at the penalty phase of the trial.

Is it reasonably probable that the jury would have reached a more favorable penalty phase verdict had Agajanian represented him with greater competence? Petitioner argues that it is, and that without knowledge of petitioner's background the jury was not able to understand and assess his true character and thus could not truly assess his moral culpability. Respondent argues that petitioner has failed to prove prejudice.

In *In re Fields*, *supra*, 51 Cal.3d at pages 1078-1079, we addressed the process by which the court assesses prejudice at the penalty phase of a capital trial at which counsel was, allegedly, incompetent in failing to present mitigating

evidence: "What kind of evidentiary showing will undermine confidence in the outcome of a penalty trial that has resulted in a death verdict? *Strickland* [v. *Washington*], *supra*, 466 U.S. 668, and the cases it cites offer some guidance. *United States* v. *Agurs* (1976) 427 U.S. 97, the first case cited by *Strickland*, spoke of evidence which raised a reasonable doubt, although not necessarily of such character as to create a substantial likelihood of acquittal. (See p. 113, fn. 22.) *United States* v. *Valenzuela-Bernal* (1982) 458 U.S. 858, 873, the second case cited by *Strickland*, referred to evidence which is 'material and favorable . . . in ways not merely cumulative . . . .' In *Strickland* itself the majority found trial counsel's failure to investigate additional mitigating evidence nonprejudicial, citing the weight of the aggravating evidence and the fact that the essence of the mitigating evidence had already been presented to the trier of fact through defendant's own words."

Here, as we have noted, some mitigating evidence was presented in the testimony of petitioner's family members who made the jury aware of the positive aspects of petitioner's character. In addition, petitioner's expert, Dr. Broussard, had testified at the guilt phase that petitioner had a minimal brain injury of a type associated with impulse disorder and learning disorder, and that in his opinion petitioner was in a drug-induced psychotic state at the time of the offenses and was not completely aware of what he was doing during the robbery and murder. Under the court's instructions, that evidence might have been considered mitigating at the penalty phase even though petitioner's counsel stated in closing argument that

because the jury had rejected the guilt phase diminished capacity defense, the evidence was not mitigating.[7]

Petitioner has not shown that Agajanian's failure to prepare to meet or counter the evidence about his assault on Kathy Cusack was prejudicial. He does not suggest that this evidence could have been rebutted. Our principal concern therefore lies in Agajanian's failure to present the additional mitigating evidence

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[7] In reviewing the statutory factors relevant to the penalty decision, Agajanian argued: "And ladies and gentlemen, with respect to diminished capacity, when you ladies and gentlemen returned this verdict of first degree murder and found special circumstances, you indicated to all of us that you did not find diminished capacity.

"So if you did not find diminished capacity, how can I argue that as a factor of aggravation or mitigation. It just does not apply. It's not there.

"I think when you ladies and gentlemen found that – you basically found him guilty of first degree murder and special circumstances, you found that diminished capacity did not reduce the nature of the robbery to something less than a robbery, or the nature of the first degree murder to something less than first degree murder.

"So that's not a factor of mitigation or aggravation. It's just not there at all.

"The age of the defendant. I happen to consider 26 years of age a rather young age, especially to lock a man in a cage for the rest of his life.

"Accomplice, the indication here was that he was not an accomplice or that his participation was minor – exactly the opposite. He is, as the People said, the triggerman."

This argument was made notwithstanding counsel's knowledge that the defense of diminished capacity had been abolished, and there was substantial evidence, including petitioner's confession, that the robbery had been preplanned and that intent to rob existed, both of which would explain the jury's rejection of that defense at the guilty phase. Counsel failed to recognize that the jury could, nonetheless, consider the evidence of organic brain damage associated with lack of impulse control as mitigating.

about petitioner's family background, the expert testimony about that background, and the expert opinion that petitioner's drug abuse and assaultive conduct while under the influence of drugs, were a product of growing up in a dysfunctional family in which he suffered continual psychological abuse.

We conclude that this omission did not prejudice petitioner. It is not probable that had this evidence been presented a more favorable result would have resulted at the penalty phase. The aggravating factors were overwhelming. The circumstances of the crime — an execution of one and attempted execution of the other, victims of a preplanned robbery — and the earlier knifing of William Scofield and the pregnant Kathy Cusack as she lay in bed trying to protect her fetus, were devastating. We cannot conclude that it is probable that the jury would have found that the evidence of petitioner's troubled family background itself would have outweighed that aggravating evidence.

Whatever the merit of petitioner's theory that if the jury understood why he was a drug abuser that knowledge might mitigate a crime committed while under the influence of illegal drugs, petitioner failed to establish that the theory had any relevance here. Apart from his trial testimony that he was "a little bit loaded" and the opinion offered by Dr. Broussard at the guilt phase of the trial, there is simply no evidence that petitioner was so affected by drugs that he was not fully aware of what he was doing when he planned and carried out the robbery and murder of Timothy Dykstra and attempted murder of Michael Wolbert.

The contrary is true. Unlike Dr. Broussard, we have reviewed the videotape of petitioner's post-arrest statement and his subsequent reenactment of the crime. There is no suggestion in the evidence before the jury that petitioner was so affected by drugs that he was unable to think clearly when the crimes were planned or at the time they were carried out. In his statement and reenactment, apart from self-serving attempts to minimize the extent of his own participation in the crimes,

petitioner manifested a detailed recollection, not only of the planning stages of the crimes, but also of their commission. Indeed, he testified that he had a "pretty clear" recollection of the events.

Moreover, petitioner testified at trial that he had taken a quarter gram of cocaine before going to pick up his paycheck between 5 and 6 p.m. on the night of the murder and had taken some earlier on that day and on the prior day, but he offered no evidence at trial or in the habeas corpus hearing regarding the impact of the drug on his reasoning ability except his testimony that the cocaine made him "more wired" and "more spaced out." Cocaine did not make him more alert, but it did make him more "hyperactive." He conceded that he knew exactly what was going on, however, and uncontradicted evidence at trial established that he had the reasoning ability to plan the means by which he and Hefner would lure their victims to Santiago Canyon, with petitioner selecting the location for the robbery in a fairly remote area where he had once been in a county youth camp. He and Hefner selected a place to leave Hefner's car to mislead the victims as to their actual residence. Petitioner apparently selected the site of the crime under the pretense of having to relieve himself.

Michael Wolbert, who was with petitioner from the time the group left Garden Grove until they reached Santiago Canyon, testified that petitioner was not under the influence of drugs. Wolbert testified that during the time he was with petitioner he saw no indication that petitioner was under the influence of anything. He had heard petitioner speak before and on that evening heard nothing different about his voice. He saw nothing different about the way petitioner walked from the times he had seen petitioner at work. There was nothing in petitioner's face or eyes that was different and nothing to make Wolbert believe petitioner was under the influence of either alcohol or any drug. Wolbert saw petitioner cock the gun each time before petitioner shot Wolbert. Petitioner's actions when he shot

Dykstra and Wolbert were not, as petitioner claimed, a sudden, irrational and impulsive reaction to a command by Hefner to shoot the victims.

In short there is no persuasive evidence that these crimes were a product of petitioner's drug abuse. The mitigating evidence that petitioner claims should have been offered did not support that theory and was minimal in comparison with the aggravating evidence. Under the circumstances it is not probable that the jury would have found evidence that petitioner's childhood was troubled or that turned to drugs as a means of escape from an unbearable family situation mitigating or sufficiently so that the evidence would have affected the jury determination that the aggravating factors outweighed the mitigating in this case. Petitioner has not established that Agajanian'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." (*Strickland* v. *Washington*, *supra*, 466 U.S. at p. 686.)

The order to show cause is discharged and the petition for writ of habeas corpus denied.

BAXTER, J.

WE CONCUR:

GEORGE, C.J.
WERDEGAR, J.
CHIN, J.

C O P Y

JOHN LOUIS VISCIOTTI ON HABEAS CORPUS

S031247

CONCURRING OPINION BY KENNARD, J.

I agree with the majority that the failure of petitioner's trial counsel to present certain mitigating evidence at the penalty phase of petitioner's capital trial did not prejudice petitioner, and that therefore petitioner is not entitled to habeas corpus relief. I write separately to point out certain findings that were made by the referee at the evidentiary hearing and that, in my view, are of particular importance on the question of prejudice.

I find the issue of prejudice to be quite close. After a thorough review of all of the referee's findings and the supporting evidence, however, I am persuaded that petitioner suffered no prejudice from his trial counsel's failings. A referee's factual findings, although not binding on this court, "are given great weight when supported by substantial evidence," because only the referee "had the opportunity to observe the demeanor of witnesses" in order to assess their credibility. (*In re Marquez* (1992) 1 Cal.4th 584, 603; accord, *In re Hitchings* (1993) 6 Cal.4th 97, 109.) What I consider to be the most pertinent of the referee's findings will appear in the course of the discussion below.

After luring Timothy Dykstra and Michael Wolbert to a remote area of Orange County, petitioner and a cohort robbed them, and petitioner shot them both at close range. Dykstra died, Wolbert survived. Following a jury trial, petitioner was found guilty of the first degree murder of Dykstra, the attempted murder of Wolbert, and the robbery of both. The jury also found the existence of the special circumstance of robbery murder, and it returned a verdict of death. On petitioner's automatic appeal, this court affirmed the death judgment. (*People* v. *Visciotti*

(1992) 2 Cal.4th 1.) In this proceeding, petitioner seeks a writ of habeas corpus in this court, asserting ineffective assistance of trial counsel.

Petitioner faults his attorney for not presenting at the penalty phase of the capital trial mitigating evidence of family violence and dysfunction. We ordered an evidentiary hearing on this issue.

After hearing testimony of various witnesses, the referee, Superior Court Judge Eileen C. Moore, found the evidence of family dysfunction to be in conflict. For instance, although some of petitioner's siblings testified at the reference hearing that their parents inflicted physical abuse on each other, and yelled and screamed at each other throughout a long marriage, there was also testimony by family members that the family was warm, loving, and supportive. As to evidence that the family moved between 12 and 18 times during petitioner's childhood, that was countered by evidence that the family displayed many characteristics of stability: the children raised pets, went on family outings and camping trips, learned to play musical instruments, and lived in a clean home where the family regularly had dinner together. With respect to testimony that some of petitioner's sisters had married in their teens to escape family conflict, there was also testimony that these same sisters would come to the family home to have Sunday dinner and to celebrate birthdays and holidays, and that they would often telephone home.

The referee also found discrepancies in the evidence presented at the reference hearing regarding claims of parental physical abuse of the children, the extent and seriousness of such abuse, and whether petitioner was singled out for such abuse. And with respect to opinions testified to by defense expert witnesses psychiatrist Jay Jackman and social worker Shirley Reece (for instance, that a birth defect corrected before petitioner reached school age had "a colossal and devastating effect" on his self-image, and that petitioner's home environment had

caused petitioner's drug use), the referee found their opinions unsupported by the evidence and therefore lacking in "a certain amount" of credibility.

A petitioner seeking habeas corpus relief for ineffective assistance of trial counsel must establish not only that counsel's performance "fell below an objective standard of reasonableness," but also that the claimed deficiencies had a prejudicial effect on the outcome of the trial. (*Strickland* v. *Washington* (1984) 466 U.S. 668, 688, 694.) Prejudice is shown only when it can be said that absent shortcomings in trial counsel's performance there exists "a reasonable probability" that the outcome would have been different. (*Id.* at p. 694.)

Here, because of the conflicting evidence on the issue of family dysfunction, as shown in the referee's findings, presentation of such evidence at the penalty phase of petitioner's capital trial would not have been particularly effective. I see no reasonable probability, given the deliberate and ruthless manner in which petitioner committed the murder, that the jury's verdict of death would have been different had trial counsel pursued the "dysfunctional family" approach instead of, as counsel did, presenting a case in mitigation based on petitioner's relationship with his loving and supportive family, and asking the jury to spare petitioner's life in consideration of petitioner's family.[1]

KENNARD, J.

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[1] To counter the prosecution's penalty phase case, petitioner's trial counsel presented mitigating evidence of petitioner's loving relationship with his family (Pen. Code, § 190.3, subd. (k)) in an effort to persuade the jury not to condemn petitioner to death and, through argument, counsel tried to diminish the significance of aggravating evidence of petitioner's felony convictions and prior acts of violence. I therefore do not share the view of Justices Mosk and Brown that trial counsel failed to subject the prosecution's penalty phase case to "meaningful adversarial testing," which would warrant reversal under *United States* v. *Cronic* (1984) 466 U.S. 648, 659 for ineffective assistance of counsel without a need by petitioner to show prejudice.

C O P Y

VISCIOTTI ON HABEAS CORPUS

S031247

DISSENTING OPINION BY MOSK, J.

I dissent.

I continue to adhere to the view that I set out in dissent in *People* v. *Visciotti* (1992) 2 Cal.4th 1, and therefore reiterate it here.

At petitioner's capital trial, at both guilt and penalty phases, his attorney Roger James Agajanian "provided [him] with ineffective assistance in violation of his rights under the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution.

"Agajanian's deficiencies as trial counsel were pervasive and serious. The point is established by the record. . . . Examples of Agajanian's failings are hard to select, each competing with the rest for egregiousness. By way of illustration only, I note the following. At the guilt phase, Agajanian relied on the defense of diminished capacity. Much to the surprise he expressed at trial, this defense had previously been abolished and rendered a nullity for all relevant purposes. At the penalty phase, Agajanian presented a summation asking the jury to spare [petitioner's] life. The argument he made in support was worthless. . . .

"Agajanian's deficiencies at trial compel this conclusion: his failings resulted in a breakdown of the adversarial process . . . ; that breakdown establishes a violation of [petitioner's] federal and state constitutional right to the effective

assistance of counsel; and that violation mandates [vacation] of the judgment even in the absence of a showing of specific prejudice. (See *United States* v. *Cronic* (1984) 466 U.S. 648, 653–662 [speaking of the federal constitutional guaranty only]; *People* v. *Leeds* (1987) 43 Cal.3d 171, 242–245 (conc. opn. of Grodin, J.) [speaking of both the federal and state constitutional guaranties].)

" 'The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.' (*Herring* v. *New York* (1975) 422 U.S. 853, 862; accord, *United States* v. *Cronic*, *supra*, 466 U.S. at p. 655.) In other words, 'The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness.' (*Polk County* v. *Dodson* (1981) 454 U.S. 312, 318.) It follows that the system requires 'meaningful adversarial testing.' (*United States* v. *Cronic*, *supra*, 466 U.S. at p. 656.) 'When' — as here — 'such testing is absent, the process breaks down and hence its result must be deemed unreliable as a matter of law.' (*People* v. *Bloom* (1989) 48 Cal.3d 1194, 1237 (conc. & dis. opn. of Mosk, J.); see *United States* v. *Cronic*, *supra*, 466 U.S. at p. 659; see also *Rose* v. *Clark* (1986) 478 U.S. 570, 577–578 [to similar effect].)" (*People* v. *Visciotti*, *supra*, 2 Cal.4th at pp. 84–85 (dis. opn. of Mosk, J.), fns. omitted.)

In attempting to justify their refusal to set aside the sentence of death — they do not explain their salvaging of the other parts of the judgment — the majority simply assert that Agajanian did *not* provide petitioner with ineffective assistance.

Insofar as it is the law that stands in their way, the majority choose to renounce its substance.

Thus it is with ineffective assistance of counsel under a theory of constructive denial of representation.

The majority follow *In re Avena* (1996) 12 Cal.4th 694, over *United States* v. *Cronic* (1984) 466 U.S. 648. *Avena* tried to deconstruct *Cronic*, but did not, and could not, succeed. (See *In re Avena*, *supra*, 12 Cal.4th at pp. 775–782 (dis. opn. of Mosk, J.).) Notwithstanding *Avena*'s sophistry, *Cronic* declares that "[t]he right to the effective assistance of counsel" under the Sixth Amendment is "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted — even if defense counsel may have made demonstrable errors — the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." (*United States* v. *Cronic*, *supra*, 466 U.S. at pp. 656–657, fns. omitted.) It follows that, "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." (*Id.* at p. 659.) In such a situation, "[n]o specific showing of prejudice [is] required . . . ." (*Ibid.*)

Insofar as it is the facts that stand in their way, the majority try to deny their force.

Thus it is with ineffective assistance of counsel under a theory of incompetent representation.

Such a theory, of course, entails deficient performance by counsel under an objective standard of professional reasonableness. (*Strickland* v. *Washington* (1984) 466 U.S. 668, 687–688 [under U.S. Const., Amend. VI only]; *People* v.

Ledesma (1987) 43 Cal.3d 171, 216 [under both U.S. Const., Amend. VI, and Cal. Const., art. I, § 15].) It also entails prejudice arising from counsel's deficient performance under a test of reasonable probability of a more favorable outcome. (*Strickland* v. *Washington*, *supra*, 466 U.S. at pp. 687, 693–694 [under U.S. Const., Amend. VI only]; *People* v. *Ledesma*, *supra*, 43 Cal.3d at pp. 217–218 [under both U.S. Const., Amend. VI, and Cal. Const., art. I, § 15].) But, one must hasten to add, a "reasonable probability" is not a "more likely than not" probability, but simply "a probability sufficient to undermine confidence in the outcome." (*Strickland* v. *Washington*, *supra*, 466 U.S. at pp. 693, 694 [under U.S. Const., Amend. VI only]; see *People* v. *Ledesma*, *supra*, 43 Cal.3d at p. 218 [under both U.S. Const., Amend. VI, and Cal. Const., art. I, § 15].)

The majority do not seriously dispute that Agajanian's performance — or better, nonperformance — at the penalty phase was deficient. Nor could they. *Res ipsa loquitur*.

Instead, the majority claim that from Agajanian's deficient performance at the penalty phase no prejudice arose. The mitigating evidence of petitioner's background and character, which was readily available but was not introduced at trial, was extensive and of substantial weight. The majority assert that this evidence would not have justified or excused his crimes. Obviously not. Even petitioner himself concedes the point. The fact remains, this evidence would have humanized him and hence would have helped explain how he was led to commit his crimes — and might well have gained him life imprisonment without possibility of parole instead of death. I do not overlook the aggravating evidence. Not at all. But I recognize, as the majority refuse to, that even substantial aggravating evidence does not compel the ultimate sanction. (See, e.g., *People* v.

Von Villas (1992) 11 Cal.App.4th 175 [life imprisonment without possibility of parole for each of two police officers who conspired to commit, and did commit, a murder for hire]; *People* v. *Scott* (1991) 229 Cal.App.3d 707 [life imprisonment without possibility of parole for a defendant who, with others, developed and carried out a plan to rob the residents of a house and leave no witnesses, resulting in four murders]; *People* v. *Talamantez* (1985) 169 Cal.App.3d 443 [life imprisonment without possibility of parole for a defendant with several prior felony convictions who went "nigger hunting" and proceeded to kidnap, torture, and murder an African-American victim].)

For the reasons stated above,[1] I would vacate the judgment in its entirety.

MOSK, J.

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1 Which I am confident the United States District Court for the Central District of California will find persuasive when it considers petitioner's soon-to-be-filed petition for writ of habeas corpus.

C O P Y

VISCIOTTI ON HABEAS CORPUS

S031247

DISSENTING OPINION BY BROWN, J.

I respectfully dissent.

Relying on this court's recent decision in *In re Avena* (1996) 12 Cal.4th 694, 726-728, the majority concludes that notwithstanding the "multiple failings" of petitioner's trial counsel, Roger Agajanian, this is not a case in which there was a total breakdown of the adversary process within the meaning of *United States* v. *Cronic* (1984) 466 U.S. 648 (hereafter *Cronic*). (Maj. opn., *ante*, at pp. 34-35.) According to the majority, "[d]efendants have been relieved of the obligation to show prejudice only where counsel was either totally absent or was prevented from assisting the defendant at a critical stage." (*Id.*, at p. 34.) In my view, this reading of *Cronic* is inconsistent with both the express language of the high court's opinion and the application of that opinion by other courts.

In *Cronic*, the United States Supreme Court observed that although courts ordinarily "presume that the lawyer is competent to provide the guiding hand that the defendant needs, ... [t]here are . . . circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." (*Cronic*, *supra*, 466 U.S. at p. 658.) The court offered examples of *two* such circumstances. The first circumstance was "the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." (*Id.*, at p. 659, fn. omitted.) In a footnote elaborating on this first

circumstance, the court noted that it had "uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding. [Citations.]" (*Id.*, at p. 659, fn. 25.) The court then identified a second circumstance in which a showing of prejudice is not required, stating that "[s]imilarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." (*Id.*, at p. 659.) It is apparent from even a cursory reading of *Cronic* that the footnote the majority now seizes on to limit the *Cronic* holding has nothing whatsoever to do with the circumstance in which "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing . . . ." (*Ibid.*) Nor has "the actual application of *Cronic* been much more limited." (Maj. opn., *ante*, at p. 34; see generally, *In re Avena*, *supra*, 12 Cal.4th at pp. 777-782 (dis. opn. of Mosk, J.) [federal and state cases applying *Cronic*].) As Justice Mosk previously recognized, "[t]he devil may often be in the details, but the rule of *Cronic* is not in its footnotes." (*Id.*, at p. 776 (dis. opn. of Mosk, J.).)

The rationale for requiring reversal when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing" (*Cronic*, *supra*, 466 U.S. at p. 659) is one of institutional integrity. " '[T]ruth,' Lord Eldon said, 'is best discovered by powerful statements on both sides of the question.' This dictum describes the unique strength of our system of criminal justice. 'The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.' *Herring* v. *New York*, 422 U.S. 853, 862 (1975). It is that 'very premise' that underlies and gives meaning to the Sixth Amendment. It 'is meant to assure fairness in the adversary criminal process.' *United States* v.

Morrison, 449 U.S. 361, 364 (1981). Unless the accused receives the effective assistance of counsel, 'a serious risk of injustice infects the trial itself.' *Cuyler* v. *Sullivan*, 446 U.S. [335,] 343 [(1980)]. [¶] Thus, the adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate.' *Anders* v. *California*, 386 U.S. 738, 743 (1967). The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. As Judge Wyzanski has written: 'While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.' *United States ex rel. Williams* v. *Twomey*, 510 F.2d 634, 640 (CA7), cert. denied *sub nom. Sielaff* v. *Williams*, 423 U.S. 876 (1975)." (*Cronic*, *supra*, at pp. 655-657, fns. omitted.)

The penalty phase proceedings against petitioner, the subject of this court's order to show cause, are a textbook example of a process gone awry. Simply put, Agajanian failed petitioner at *every* stage of the proceedings. I offer several of many, many examples that could be given.

During his pretrial preparation, Agajanian "did not send for the police report [of the Cusack incident] or go through the prosecutor's file to read it in advance of trial and thus was surprised and unprepared to face that [aggravating] evidence." (Maj. opn., *ante*, at p. 17.) Likewise, he "failed to investigate and discover mitigating evidence as a result of his ignorance of the types of evidence a jury might consider mitigating." (*Id.*, at p. 35.)

During the penalty phase of the trial itself, Agajanian "failed to present readily available evidence that would have revealed to the jury the extent to which petitioner was subjected to psychological and physical abuse as a child, the impact the dysfunctional and peripatetic family life had on petitioner's development, and the correlation between these events and petitioner's resort to drugs." (Maj. opn., *ante*, at p. 35.) Also during the penalty phase of the trial, Agajanian "delivered an unfocussed closing argument, during which he undercut his client's own case by telling the jury that the evidence of petitioner's mental and emotional problems was not mitigating." (*Ibid.*)

During the direct appeal, "the sole act of any significance that [Agajanian] performed on behalf of [petitioner] over the course of almost seven years of representation before this court was the filing of a single thirty-page brief raising only two insubstantial penalty claims." (*People* v. *Visciotti* (1992) 2 Cal.4th 1, 84, fn. 2 (dis. opn. of Mosk, J.); see also maj. opn., *ante*, at p. 30, fn. 6.) Thankfully, at this stage, Agajanian was suspended from the practice of law; not surprisingly, this case had not been his only misstep. (*Ibid.*)

Even after Agajanian was replaced by new counsel, however, he continued to fail petitioner. During the evidentiary hearing on this petition, Agajanian was less than candid regarding his decision to rely on a family sympathy defense. (See maj. opn., *ante*, at pp. 11-12, fn. omitted ["[I]n none of his self-described successful presentations of a family sympathy defense in prior cases was family sympathy evidence relevant to any issue in the case and in none could the effort be accurately described as 'successful.' "]; *id.*, at p. 13 ["Agajanian testified that he had no information about petitioner's family when he made his decision on penalty phase tactics. That testimony was contradicted by his expert, Dr. Louis Broussard, who testified that Agajanian told him that there was some 'brutality' in the family."].)

In the context of the penalty phase of the trial, it is clear that Agajanian "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." (*Cronic*, *supra*, 466 U.S. at p. 659.) This court had it all wrong when, on direct appeal, it characterized Agajanian's penalty phase closing argument as "a rambling discourse, not tied to particular evidence." (*People* v. *Visciotti*, *supra*, 2 Cal.4th at p. 82, fn. 45.) In fact, during the course of the so-called "rambling discourse," Agajanian systematically conceded nine of the eleven aggravating and mitigating factors set forth in Penal Code section 190.3 (section 190.3) to the prosecution.

Agajanian conceded "[t]he facts and circumstances of the case in my opinion do not have to be reviewed. [¶] There is no way to make light of those tapes of things just like there's no way to make light of any kind of murder, whether or not there's a robbery involved . . . ." (§ 190.3, factor (a).) He conceded "past violence" was a factor in aggravation. (§ 190.3, factor (b).) He conceded "[w]ith respect to the prior conviction for assault with a deadly weapon, there's no way to make light of that either." (§ 190.3, factor (c).) He conceded "[w]ith respect to emotional disturbance, there's no evidence of that. That isn't even a factor to be considered." (§ 190.3, factor (d).) He conceded "[w]ith respect to the next one . . . victim participated or consented. That's not applicable. There's no evidence of that." (§ 190.3, factor (e).) He conceded "same situation" with respect to justification. (§ 190.3, factor (f).) He conceded "[e]xtreme duress, there was no evidence of that either. Although defense lawyers would like to have that present, it's not fair." (§ 190.3, factor (g).) He conceded "with respect to diminished capacity, when you ladies and gentlemen returned this verdict of first degree murder and found special circumstances, you indicated to all of us that you did not find diminished capacity. [¶] So if you did not find diminished capacity, how can I argue that as a factor of aggravation or mitigation? It just does not

apply. It's not there."[1] (§ 190.3, factor (h).) And he conceded "the indication here was that [petitioner] was not an accomplice or that his participation was minor -- exactly the opposite. [Petitioner] is, as the People said, the trigger man." (§ 190.3, factor (j).)

Certainly, as the majority states, "[t]he aggravating factors were overwhelming" and the mitigating factors were "minimal in comparison." (Maj. opn., *ante*, at pp. 38, 40.) Even in such a case, though, counsel must hold the prosecution to its heavy burden. (*Cronic*, *supra*, 466 U.S. at pp. 656-657, fn. 19.) Agajanian did not rise to the occasion. Although his abortive attempts to construct a family sympathy defense exposed some of the mitigating evidence to the jury, Agajanian undermined its effectiveness by "conceding that the jury could find that all of the possibly aggravating factors were present, and none of the mitigating." (*People* v. *Visciotti*, *supra*, 2 Cal.4th at p. 66, fn. 35.) Indeed, the referee specifically found, and the majority agrees, that Agajanian "had no intention of introducing any evidence in an attempt to draw sympathy to his client." (Maj. opn., *ante*, at p. 26.)

" '[W]ith respect to the process of sentencing from among that class [of defendants who have already been found eligible for the death penalty] those defendants who will actually be sentenced to death, "[w]hat is important . . . is an individualized determination on the basis of the character of the individual and the circumstances of the crime.["] [Citation.] It is not simply a finding of facts which resolves the penalty decision, " 'but . . . the jury's moral assessment of those facts

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1 During the guilt phase of the trial, Agajanian had erroneously attempted to rely on diminished capacity, which had been abolished as a guilt phase defense over a year earlier in a widely publicized initiative measure. (*People* v. *Visciotti*, *supra*, 2 Cal.4th at p. 56 & fn. 23.)

as they reflect on whether the defendant should be put to death . . . .' " ' [Citation.] Consideration of statutory aggravating and mitigating factors as part of the jury's normative function of determining the appropriate punishment is, therefore, distinguishable from the factual determination made when the jury finds that a special circumstance allegation is true." (*People* v. *Visciotti*, *supra*, 2 Cal.4th at p. 74.)

Agajanian's abysmal across-the-board performance rendered the penalty phase of the trial a complete and utter farce. Under these circumstances, this court can have no confidence that the jury was actually able to perform its normative function of determining the appropriate punishment. "[T]here has been a denial of Sixth Amendment rights that makes the adversary process itself *presumptively unreliable*." (*Cronic*, *supra*, 466 U.S. at p. 659, italics added.) Therefore, I would grant petitioner a new penalty phase trial without requiring a specific showing of prejudice.

BROWN, J.

I CONCUR:

MOSK, J.

See next page for addresses and telephone numbers for counsel who argued in Supreme Court.

Unpublished Opinion
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Original Proceeding XXX
Review Granted
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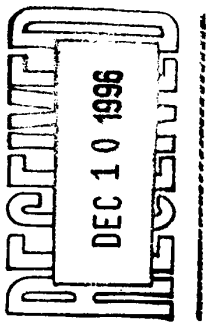

THE PEOPLE, Plaintiff and Respondent,
v.
JOHN LOUIS VISCIOTTI, Defendant and Appellant.

No. S004597.

Supreme Court of California
Mar 12, 1992.

SUMMARY

Defendant was convicted of the first degree murder (Pen. Code, §§ 187, 189) of one victim, the attempted murder (Pen. Code, §§ 187, 664) of another victim, and robbery (Pen. Code, § 211) of both victims. The jury found true the special circumstance that the murder was committed during the commission of robbery (Pen. Code, § 190.2, subd. (a)(17)(i)), and that defendant personally used a firearm in the commission of the offenses (Pen. Code, § 12022.5). The same jury found that the killing was intentional, and returned a penalty verdict of death. (Superior Court of Orange County, No. C-50770, Robert R. Fitzgerald, Judge.)

The Supreme Court affirmed. The court held that the trial court did not lack jurisdiction due to its failure to hold a hearing on defendant's competence to stand trial (Pen. Code, § 1368). The court also held that the trial court did not commit reversible error by departing from Code Civ. Proc., § 222 (random jury selection), or in its rulings on challenges to jurors based on their views of the death penalty. Defendant's voluntary waiver of the right to be present during voir dire, the court held, did not result in reversible error, and the trial court did not err in excluding the press and the public from the death-qualifying voir dire. The court further held that the trial court properly permitted the prosecution to cross-examine defendant concerning his prior stabbing of a pregnant woman and to introduce photographs of the scene of the attack. The court also held that although the trial court erred in failing to limit instructions on implied malice to the murder count, and in failing to instruct the jury that intent to kill is an element of attempted murder, the error was harmless, and that the jury was properly instructed that it could consider evidence of defendant's flight.

As to the penalty phase, the court held that the jury was not misled concerning the scope of its sentencing discretion. The court further held that the trial court properly admitted evidence of defendant's attack on the pregnant woman as an aggravating factor under Pen. Code, § 190.3, factor (b) (prior violent criminal conduct). The court also held that the trial court's instructions did not impermissibly permit the jury to consider evidence of defendant's prior nonviolent and juvenile offenses. The court further held that neither the mitigating factors set forth in Pen. Code, § 190.3, factor (f) (perceived moral justification for act), and Pen. Code, § 190.3, factor (g) (commission of act under extreme duress), nor the age factor of Pen. Code, § 190.3, factor (i), is unconstitutionally vague. (Opinion by Baxter, J., with Lucas, C. J., Panelli, Kennard, Arabian and George, JJ., concurring. Separate dissenting opinion by Mosk, J.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Criminal Law § 211--Trial--Proceedings on Issue of Insanity--At Time of Trial--Failure to Hold Hearing on Defendant's Competence to Stand Trial.

In a capital homicide prosecution, the trial court did not lack jurisdiction to proceed to trial despite its failure to hold a hearing to determine defendant's competence to stand trial (Pen. Code, § 1368). The trial court's granting of defense counsel's motion to appoint experts to determine whether defendant should enter a plea of not guilty by reason of insanity (Pen. Code, § 1026) and whether defendant was competent to stand trial was not an expression of doubt by the trial court as to defendant's competency, which would have required the court to ask defense counsel's opinion on defend-

ant's competence and to order a hearing on the question if defense counsel believed defendant might be incompetent. The request for appointment of experts was preliminary, and was not a statement that the trial court presently had a doubt as to defendant's competence. Moreover, defense counsel did not appear at the hearing date set by the order granting the motion for appointment of experts, the issue was never raised again in subsequent proceedings, and no psychiatric reports appeared in the record.

(2) Jury § 28--Selection and Formation of Jury--Drawing, Summoning, and Impaneling Jurors--Random Selection of Jurors--Irregularity in Procedures-- Defendant's Ability to Waive Objection.

In a capital homicide prosecution in which the trial court, with the agreement of both counsel, departed from the statutory procedure for randomly filling the jury box to initiate the general voir dire following the sequestered death-qualification voir dire, defendant waived his argument that the trial court's approach denied him his constitutional right to a randomly selected jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16). Although former Code Civ. Proc., § 197, which was in effect at the time of defendant's trial, and present Code Civ. Proc., § 191, declare a state policy of random jury selection, and the parties may not waive, or the court forego, compliance with the statutory procedures designed to further that policy, equally important policies preclude the overturning of criminal convictions on the basis of irregularities in jury selection to which the defendant did not object or in which the defendant acquiesced.

(3) Jury § 28--Selection and Formation of Jury--Drawing, Summoning, and Impaneling Jury--Random Selection of Jurors--Irregularity in Procedures-- Standard of Review.

Although there is a statutory policy of randomly selecting juries and giving an equal opportunity to all qualified persons to serve on a jury, not every departure from the statutory procedures constitutes reversible error. Pen. Code, former § 1059, provided that a challenge to the jury panel could be founded only on a material departure from the selection procedures, which demonstrates that the Legislature did not intend that minor deviations from the procedures be grounds for reversing a judgment of conviction. Thus, a defendant may not claim error on appeal if the procedure utilized in jury selection did not depart materially from the statutory procedures established to further the purpose of random selection.

(4a, 4b, 4c) Jury § 28--Selection and Formation of Jury--Drawing, Summoning, and Impaneling Jury--Random Selection of Jurors--Irregularity in Procedures--Choosing Jurors From Lists Prepared by Counsel.

In a capital homicide prosecution, the manner of selecting prospective jurors for the general voir dire did not materially depart from the statutory procedures requiring random selection so as to require reversal of defendant's conviction, where the trial court, following the death- qualification voir dire, obtained a stipulation from both counsel that the court would choose the initial 12 jurors from 2 lists of 20 jurors chosen by each counsel. While the trial court should have followed the statutory procedure for a random draw, it did not completely abandon that procedure, since the jurors had been selected by a random draw before the death- qualification voir dire, and only the first 12 jurors to be seated for the general voir dire were chosen by the agreed-upon method. Moreover, defendant failed to establish that the stipulation resulted in a jury not drawn from a true cross-section of the population, especially since 19 jurors were subsequently chosen by random to replace those excused for cause or peremptorily challenged.

(5) Jury § 30--Selection and Formation of Jury--Exclusion of Certain Persons and Classes--Resulting From Failure to Use Statutory Random Selection Procedures--Standard of Review.

Although the statutory procedure for random jury selection (Code Civ. Proc., § 222) does serve to ensure a defendant the constitutional right to a

jury selected from a representative cross-section of the population (U.S. Const., 6th Amend.; Cal. Const., art. I, § 16), not every departure from that procedure, even if deemed material, necessarily denies a defendant that right. To warrant reversal of a judgment of conviction on this ground, the defendant must demonstrate that the departure from the statutory procedure affected his or her ability to select a jury drawn from a representative cross-section of the population.

(6) Jury § 30--Selection and Formation of Jury--Exclusion of Certain Persons and Classes--Resulting From Unwarranted Excusals for Hardship.

In a capital homicide prosecution, the trial court's action in excusing jurors for hardship did not deny defendant a jury from a representative cross-section of the population (U.S. Const., 6th Amend.; Cal. Const., art: I, § 16). Code Civ. Proc., § 204, subd. (b), expressly permits excusals on the basis of a sufficient showing of hardship, and defendant did not identify any cognizable sector of the population that was underrepresented as a result of the excusals, or that the trial court abused its discretion in granting any particular excusal. Although some jurors were excused unnecessarily because they expressed reluctance to sit on the case, all of those jurors were removed either by stipulation, by prosecutorial peremptory challenge, or, in one instance, without objection by defendant.

(7a, 7b) Jury § 43--Challenges--For Cause--Voir Dire--Inquiry as to View on Capital Punishment--Excusal--Propriety.

A defendant's right to an impartial jury is not compromised by the excusal of a prospective juror whose views about capital punishment give the definite impression that those views would prevent or substantially impair the performance of the juror's duties. Thus, during jury selection in a capital homicide prosecution, the trial court did not err in excluding a prospective juror who expressed opposition to the death penalty. The juror initially stated that he did not think he could impose the death penalty for a mass murder. Upon further questioning, he stated that although he did not disagree with the legal principle that the state could take life, he personally could not vote to impose the death penalty. He then confirmed that he was taking the position that under no circumstance would he ever vote for the death penalty.

[Beliefs regarding capital punishment as disqualifying juror in capital case-post-Witherspoon cases, note, 30 **A.L.R.3d** 550. See also 5 **Witkin & Epstein,** Cal. Criminal Law (2d ed. 1989) §§ 2839-2843, 2854.]

(8a, 8b) Jury § 43--Challenges--For Cause--Voir Dire--Inquiry as to View on Capital Punishment--Excusal--Standard.

In deciding whether a prospective juror should be excused due to the juror's views on capital punishment, the question is whether the juror's views would prevent or impair his or her return of a verdict of death in the case before the juror. The impact those views might have in actual or hypothetical cases that are not before the juror are irrelevant to that determination.

(9a, 9b, 9c) Jury § 43--Challenges--For Cause--Voir Dire--Inquiry as to View on Capital Punishment--Inquiry as to Willingness to Impose Death Penalty.

During voir dire of prospective jurors in a capital homicide prosecution, the prosecutor did not commit reversible error or misconduct when he asked two prospective jurors, on the basis of hypothetical questions that were factually similar to the case being tried, whether they could vote in favor of the death penalty. Because the purpose of death penalty voir dire is to determine if a prospective juror would be unable to impose the death penalty without regard to the evidence produced at the trial, it was not necessary for the trial court to permit extensive questioning regarding the juror's willingness to impose the death penalty based on the anticipated facts of, or a hypothetical set of facts based on, the case to be tired. Defendant, however, did not object to the prosecutor's questions, thus waiving the claim of error on appeal.

(10) Criminal Law § 601--Appellate Review--Scope of Review--As Affected by Record--Incompetence of Defense Counsel--Inadequacy of Record to Reveal Reasons for Counsel's Failure to Object.

Because a reviewing court is unable to ascertain the reasoning of trial counsel from the appellate record, a conclusion that a failure to object reflects incompetence is unwarranted. Where the record does not illuminate the basis for the challenged acts or omissions of trial counsel, a claim of ineffective assistance is more appropriately made in a petition for a writ of habeas corpus.

(11a, 11b) Jury § 41--Challenges--For Cause--Voir Dire--Scope of Inquiry--Trial Court's Discretion.

Although voir dire is not a platform from which counsel may educate prospective jurors about the case, or compel them to commit themselves to a particular disposition of the matter, to prejudice them for or against a party, or to indoctrinate them, the scope of the inquiry permitted during voir dire is committed to the discretion of the trial court. Absent a timely objection to questions that arguably exceed the proper scope, any claim of abuse of discretion is deemed to have been waived.

(12) Jury § 43--Challenges--For Cause--Voir Dire--Inquiry as to View on Capital Punishment--Juror's Willingness to Impose Death Penalty.

During voir dire in a capital homicide prosecution, it was not improper for defense counsel to ask questions aimed at convincing jurors who were reluctant to impose the death penalty that there might be some circumstances in which they would vote for such a penalty. At the time of the trial, both the trial court and counsel could have reasonably believed, on the basis of existing case law, that excusal of a prospective juror for cause related to scrupled opposition to the death penalty was permissible only if the juror would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at trial. The questions asked by defense counsel reflected an attempt to retain jurors who were reluctant to impose capital punishment, a purpose to which defendant could have no legitimate objection on appeal.

(13) Jury § 43--Challenges--For Cause--Voir Dire--Inquiry as to View on Capital Punishment--Juror Biased in Favor of Death Penalty.

During the death-qualification portion of voir dire in a capital homicide prosecution, the trial court properly denied a challenge for cause to a prospective juror who stated that he was more inclined to be pro-death than pro-life, and that there would have to be a lot of mitigating evidence to convince him to return a verdict of life imprisonment without possibility of parole, since he was afraid that a person sentenced to life without parole might escape or be released, and since he did not feel he could support such a person for the rest of his life. The responses did not make it unmistakably clear that the prospective juror would impose the death penalty in all cases. More importantly, the prospective juror was not selected as a juror or even seated during the general voir dire.

(14a, 14b) Criminal Law § 48--Rights of Accused--Fair Trial--Presence at Trial--Waiver--Absence During Voir Dire.

In a capital homicide prosecution, defendant's absence from voir dire did not result in reversible error. A defendant's presence at all stages of a capital case is not indispensable and unwaivable. Defendant and his attorney executed a written waiver of defendant's right to be present, in the language prescribed by Pen. Code, § 977, subd. (b), which permits a defendant to waive his right to be present at certain felony proceedings. While the minute order regarding defendant's waiver did not state that the waiver was executed in open court as required by the statute, it must be presumed, absent evidence to the contrary, that the court's judicial duty was regularly performed. Moreover, one week after acceptance of the written waiver, defense counsel advised the court that defendant did not want to be present during further voir dire, at which time the court noted the prior written waiver and then agreed

to acquiesce in the defendant's request upon receiving an oral waiver and a statement that defendant volitionally and personally made making the request.
[See **Cal.Jur.3d (Rev),** Criminal Law, §§ 2106, 2107.]
(15) Criminal Law § 644--Appellate Review--Harmless and Reversible Error-- Requirement of Prejudice--Irregularity in Executing Waiver of Right to Be Present at Trial.

An irregularity in the procedure by which a defendant executes a waiver of the right to be present at certain portions of a felony prosecution (Pen. Code, § 977, subd. (b)) is not a ground for reversal of a judgment of conviction in the absence of a showing both that the irregularity affected the voluntary and intelligent nature of the waiver and that the defendant suffered prejudice as a result of his or her absence from the proceedings.

(16) Criminal Law § 49--Rights of Accused--Fair Trial--Public Trial-- Exclusion of Press and Public From Death-qualifying Voir Dire.

In a capital homicide prosecution, the public and the press were properly excluded from the sequestered death-qualifying voir dire. Defense counsel did not object to the sequestered voir dire, and there was no indication that he was not afforded an opportunity to do so. Moreover, no such inhibition could be inferred, particularly since the right to a sequestered voir dire has been recognized in response to the concerns of capital defendants over the potentially prejudicial effect of an open voir dire on jurors' views on capital punishment and their willingness to reveal those views. In the year defendant was tried, there was active litigation of the issue, and the fact that sequestered voir dire is for the benefit of the defendant made it doubtful that any competent defense counsel would have objected to it. Moreover, the record did not suggest that defendant may have been incompetent to waive the right to an open voir dire.

(17) Homicide § 53--Evidence--Admissibility--Proof of Other Crimes--Cross-examination Concerning Facts Underlying Prior Convictions Introduced by Defendant.

In a capital homicide prosecution, the trial court did not err in permitting the prosecution to cross-examine defendant with leading questions, the truth of which defendant denied, by which the prosecutor sought to elicit evidence not only about defendant's prior assault on a man, for which defendant had been convicted, but also evidence of his alleged attack on a pregnant woman during the same incident. Defendant's failure to object to the questions barred reversal on that ground. In any event, the questions were proper. Defendant himself introduced evidence of his prior conviction to support his defense theory that prior drug use caused his violent behavior and that it was not premeditated, seeking to minimize the impact of the prior conviction by arguing that it was based on conduct he took in self- defense. Once defendant introduced such evidence and put his character in issue, the prosecution was entitled to rebut it by bringing out all the circumstances of the incident (Evid. Code, §§ 773, 780).

(18) Criminal Law § 449--Argument and Conduct of Counsel--Prosecutor-- Cross- examination of Defendant--Details Regarding Prior Convictions Introduced by Defendant.

In a capital homicide prosecution, the prosecutor did not commit misconduct by cross-examining defendant with leading questions, the truth of which defendant denied, by which the prosecutor sought to elicit evidence not only about defendant's prior assault on a man, for which defendant had been convicted, but also evidence of his alleged attack on a pregnant woman during the same incident. Although a prosecutor may not examine a witness solely to insinuate the truth of the facts about which questions are posed, the prosecutor's inquiry was predicated on admissible evidence available to the prosecution. Thus, it was not a case in which the evidence would have been inadmissible but for the fact that defendant's answers may have been untruthful. Moreover, although defendant denied the

questions, a prosecutor is not under compulsion to anticipate that a witness will suffer sudden memory failure on cross-examination regarding additional details of events about which the witness testified on direct examination. The prosecutor's questions were leading, but such questions are not improper when asked in good faith of a presumptively hostile witness on cross-examination (Evid. Code, § 767, subd. (a)(2)).

(19a, 19b) Homicide § 58--Evidence--Admissibility--Documentary Evidence--Photographs of Scene of Prior Assault and Victim's Wounds.

In a capital homicide prosecution, the trial court properly admitted into evidence photographs of wounds suffered by a woman defendant had allegedly previously stabbed, and photographs of the door to the room from which another assault victim had been dragged and in which the woman had been stabbed. The prejudicial impact of the photographs did not outweigh their probative value under Evid. Code, §§ 350, 352. They were relevant to impeach defendant's testimony, during which he denied that he and his companions had kicked in the door to the room, that a woman had been in bed in the room, and that he had ever seen the woman. The photographs were tied to the assault by the testimony of a police officer, who had arrived at the crime scene shortly after the stabbings occurred, had photographed the scene, and then had gone to the hospitals where the victims had been taken and photographed their wounds, which the officer described in his testimony without objection. The record confirmed that the trial court properly weighed the probative value of the photographs against their prejudicial impact before admitting them.

(20) Criminal Law § 566--Appellate Review--Presenting and Reserving Objections--Evidence at Trial--Witnesses--Trial Court's Failure to Exclude Evidence on Own Motion.

In a capital homicide prosecution, a police officer's testimony, to which defendant had not objected, regarding the wounds suffered by a woman defendant had allegedly previously stabbed with a knife was properly admitted by the trial court. While a court may exercise authority under Evid. Code, § 352, to exclude irrelevant testimony on its own motion, the failure to do so could not be urged as error on appeal, because neither the reviewing court nor defendant could avoid the command of Evid. Code, § 353, which provides that a judgment cannot be reversed due to the erroneous admission of evidence unless an objection or a motion to exclude or strike the evidence appears in the record. Moreover, the testimony was not irrelevant.

(21a, 21b) Criminal Law § 559--Appellate Review--Presenting and Reserving Objections--Argument and Conduct of Prosecutor--Reference to Inadmissible Evidence.

In a capital homicide prosecution, defendant, by failing to object, waived, for purposes of appeal, his contention that it was improper for the prosecutor, during closing argument, to refer to defendant's alleged stabbing of a woman in connection with an admitted prior assault on another individual. To the extent the argument lacked a basis in the evidence, any resulting harm could have been cured by an objection and an admonition by the court.

(22) Criminal Law § 452--Argument and Conduct of Counsel--Prosecutor-- Closing Argument--Inferences and Deductions--Extent of Prosecutor's Right to Comment on Evidence.

The prosecutor has a wide-ranging right to discuss a case in closing argument, including the right to fully state his or her views as to what the evidence shows and to urge whatever conclusions he or she deems proper. Defense counsel may not complain on appeal if the reasoning is faulty or the deductions are illogical, because these are matters for the jury to determine. The prosecutor may not, however, argue facts or inferences not based on the evidence presented.

(23) Homicide § 41--Evidence--Admissibility--Confessions and Admissions-- Videotaped Reenactment of Crime--Sufficiency of Advice as to Constitutional Rights.

In a capital homicide prosecution, defendant's failure to object to the introduction of a videotaped reenactment of the crime, on the ground that the investigating officers failed properly to advise him of his constitutional rights before making the videotape, constituted a waiver of the issue for purposes of appeal. Moreover, defendant had agreed to participate in the reenactment during the initial interrogation, at which time he had voluntarily waived his rights. Defendant cited no authority for the proposition that a second warning and waiver were necessary at the time of the actual videotaping. Further, when a subsequent interrogation is reasonably contemporaneous with the first, it is not necessary to repeat a full advisement of constitutional rights given before the first interrogation. Thus, given that the videotaping took place only a few hours after the initial interview, it sufficed that before the videotaping began, defendant was told that his statements could be used against him and was reminded of the rights he had waived earlier that day, and one of the officers clearly implied that those rights were still available to defendant.

(24) Criminal Law § 246--Trial--Instructions--Duty to Instruct Sua Sponte-- Limited Admissibility of Evidence of Past Criminal Conduct.

In the guilt phase of a capital homicide prosecution, the trial court did not err in failing to instruct the jury sua sponte that it could not consider offenses defendant committed as a juvenile or a misdemeanor conviction of vandalism in determining his guilt. Although the trial court may, in an appropriate case, instruct sua sponte on the limited admissibility of evidence of past criminal conduct, it is under no duty to do so. No exception to that rule was warranted, since defendant himself offered evidence of his past criminal conduct in an effort to persuade the jury that his present offense, like his earlier ones, was the product of his drug abuse. Since defendant invited the jury to consider those offenses in determining his guilt, he could not complain on appeal that it did so.

(25a, 25b) Homicide § 90--Instructions--Defenses--Intoxication-- Relevance to Existence of Specific Intent.

In a capital homicide prosecution, the trial court adequately instructed the jury concerning how defendant's alleged drug-induced psychosis, sleep deprivation, and near automated response to his accomplice's commands were relevant to whether defendant harbored the requisite mental state when committing the offenses of murder, attempted murder, and robbery. The trial court instructed the jury that specific intent was a necessary element of each of the crimes, that intoxication should be considered in determining whether defendant harbored the requisite intent, and that any doubt should be resolved in his favor. The court also instructed the jury that if it found that defendant killed while unconscious as a result of voluntary intoxication, thus making him unable to form the specific intent to kill or to harbor malice aforethought, the killing was involuntary manslaughter.

(26) Homicide § 110--Appeal--Harmless and Reversible Error--Instructions-- Failure to Instruct on Voluntary Manslaughter.

In a capital homicide prosecution in which the jury found, under properly given instructions, that the murder was intentional and was committed in the perpetration of a robbery, thus establishing that the killing was first degree murder under the felony-murder rule and Pen. Code, § 189 (degrees of murder), without the necessity of proving malice, any error the trial court committed in failing to instruct the jury on voluntary manslaughter was harmless.

(27) Homicide § 90--Instructions--Defenses--Intoxication--Relevance to Existence of Provocation.

In a prosecution for capital murder, attempted murder, and robbery, the trial court properly instructed the jury that specific intent was a necessary element of each of the crimes charged, that intoxication should be considered in determining whether defendant had the requisite specific intent, and that the killing was involuntary manslaughter if it was

committed while defendant was unconscious and unable to form the specific intent to kill as a result of voluntary intoxication. The instructions did not prevent the jury from considering whether defendant was provoked by drug use or impulse to kill his victim, even though the trial court failed to give a voluntary manslaughter instruction. Defendant's robbery conviction undercut defendant's argument that the killing was motivated by provocation, and the instructions did not render the robbery conviction itself suspect, as defendant claimed, since defendant's own statements established beyond any question the existence of an intent to rob.

(28a, 28b) Homicide § 110--Appeal--Harmless and Reversible Error-- Instructions--Inapplicability of Implied Malice Theory to Attempted Murder.

In a prosecution for capital murder, attempted murder, and robbery, the trial court erred in failing to limit instructions on implied malice to the murder count, and in failing to instruct the jury that intent to kill is an element of attempted murder. The error, however, was harmless. The jury was instructed that defendant must have had a specific intent to commit the crime, and the crime of murder had been defined. The prosecutor, in his argument, stated that the implied malice/felony murder instructions were inapplicable to attempted murder, which required express malice and an intent to kill, and emphasized the evidence that defendant shot the victim of the attempted murder three times, once in the face at point-blank range, thus establishing an intent to kill a second victim. Defense counsel, in his attempt to persuade the jury that defendant had not intended to kill the first victim, referred to the shootings of the two victims. Thus, the jury was unquestionably aware that specific intent to kill was an element of attempted murder.

(29) Homicide § 78--Instructions--Nature and Elements of Offense--Intent-- Implied Intent--Attempted Murder.

Once a defendant intends to kill, any malice the defendant may harbor is necessarily express malice. Implied malice cannot coexist with a specific intent to kill. Thus, to instruct on implied malice in that setting may confuse the jury by suggesting that it can convict the defendant without finding a specific intent to kill. This rule against instructing on implied malice applies both to assault with intent to commit murder (former Pen. Code, § 217), and to attempted murder (Pen. Code, §§ 187, 664), since both offenses require an intent to kill.

(30) Homicide § 96--Instructions--Jurors, Verdict, and Punishment--Jury's Consideration of Lesser Included Offense.

In a capital homicide prosecution, the trial court properly instructed the jury that it must unanimously agree upon and sign a verdict finding that defendant was not guilty of first degree murder before it could find him guilty or not guilty of second degree murder. The instruction did not preclude consideration of lesser offenses. A trial court may instruct the jury that it may not return a verdict on a lesser offense until it has agreed beyond a reasonable doubt that the defendant was not guilty of the greater crime charged, but such an instruction does not prohibit the jury from considering or discussing the lesser offense before returning a verdict on the greater offense. This approach adequately protects the defendant's interest in preventing improperly restricted jury deliberations.

(31) Criminal Law § 48--Rights of Accused--Fair Trial--Presence at Trial-- Waiver--Absence During Discussions in Judge's Chambers.

In a capital homicide prosecution, defendant's absence during discussions in chambers between the trial judge and counsel concerning instructions and moving admission of exhibits did not constitute reversible error, since defendant voluntarily waived the right to be present. Neither Pen. Code, § 977 (defendant's presence at arraignment), nor constitutional authority supports the claim that it is impermissible for a defendant to be absent during some proceedings, even in a capital case.

(32a, 32b) Homicide § 94--Instructions--Evidence--Flight--Propriety of Instruction Where Evidence Reflects Consciousness

of Guilt.

In a capital homicide prosecution, the trial court properly instructed the jury that although evidence of flight alone was insufficient to establish guilt, it could be considered with other proven facts in deciding the question of guilt or innocence. The jury could have inferred from defendant's actions immediately following the crime that his flight with his accomplice reflected his consciousness of guilt. This conclusion was not affected by defendant's decision to contest only the mental state with which he acted. Even if it could be concluded that the instruction should not have been given, however, it was harmless, since the instruction did not assume that flight was established, leaving that factual determination and its significance to the jury.

(33) Criminal Law § 244--Trial--Instructions--Flight--Propriety of Instruction Where Evidence Reflects Consciousness of Guilt.

An instruction on flight is properly given if the jury could reasonably infer that the defendant's flight reflected consciousness of guilt. Flight requires neither the physical act of running nor the reaching of a faraway haven. Flight manifestly does require, however, a purpose to avoid being observed or arrested.

(34) Homicide § 94--Instructions--Evidence--Accomplice's Concealment of Murder Weapon.

In a capital homicide prosecution, the trial court's instruction on concealment of evidence was not improper simply because it was defendant's accomplice who concealed the gun used to shoot the victims. The evidence permitted an inference that the accomplice had acted on behalf of defendant as well as himself in concealing the weapon, and that he did so with defendant's encouragement. If there was error, however, it was harmless beyond a reasonable doubt.

(35) Homicide § 81--Instructions--Grades and Degrees of Offense--Murder.

In a capital homicide prosecution, the trial court properly instructed the jury that the degree of the offense of murder is not an element of that crime, since the degree is not an element of first or second degree murder. The trial court also correctly instructed the jury that all murder perpetrated by a willful, deliberate, or premeditated killing with express malice aforethought is first degree murder, and that the unlawful killing of a human being, whether intentional, unintentional, or accidental, is first degree murder if it resulted from the commission of or attempt to commit robbery, and if the perpetrator specifically intended to commit robbery. These instructions required the jury to find all of the elements of first degree murder. The jury was also properly instructed that the state bore the burden of proving each element of murder beyond a reasonable doubt. The instructions did not shift the burden to defendant, and would not have confused the jury as to the elements that had to be proven beyond a reasonable doubt. The record revealed that the order of the instructions was logical and could not reasonably have resulted in confusion. In any event, the order in which instructions are given is generally immaterial and is left to the sound discretion of the trial court.

(36) Homicide § 78--Instructions--Nature and Elements of Offense--Intent-- Felony-murder Special Circumstance--Specific Intent to Kill.

In a capital homicide prosecution, the trial court did not err in failing to instruct the jury, pursuant to a 1984 California Supreme Court decision, that a specific intent to kill is a necessary element of a felony-murder special-circumstance finding (Pen. Code, § 190.2, subd. (a)(17)). The 1984 case applies only to murders committed between December 12, 1983, the date on which the Supreme Court case was decided, and October 13, 1987, the date on which it was overruled by a 1987 California Supreme Court case holding that intent to kill is not necessary to a felony-murder special-circumstance finding if a defendant convicted of first degree murder personally killed the victim. The jury did find that defendant personally killed his victim. Al-

though the jury, in finding that the killing was intentional, did not also find that the murder was committed with express malice, premeditation, and deliberation, felony-murder special circumstances are not limited to premeditated and deliberate murders, and such a requirement is not mandated by U.S. Const., 8th Amend., or other constitutional provisions.

(37a, 37b, 37c) Criminal Law § 523--Judgment, Sentence, and Punishment--Penalty Trial--Instructions--Weighing Aggravating and Mitigating Factors.

In the penalty phase of a homicide prosecution, the trial court's instruction that if the jury found that the aggravating factors outweighed the mitigating factors, it must impose a death sentence, but that if it found the opposite to be true, it must impose a sentence of life imprisonment without parole, together with the prosecutor's argument, did not mislead the jury into believing it must use a mechanical weighing process in determining defendant's penalty. The prosecutor's argument informed the jury that the weighing process was not arithmetical or mechanical. He impressed on the jurors that they had the discretion and responsibility to determine the appropriate penalty in light of all the evidence, that they were to give each factor the weight they deemed appropriate, that their sympathy for defendant could be enough to save his life, and that they had a tremendous responsibility in sitting in life or death judgment of a human being. He also stated that the jurors had an obligation to return a verdict of death if that was what defendant deserved. Thus, the jury was impressed with the scope of its discretion and its responsibility to determine the appropriate penalty.

(38a, 38b) Criminal Law § 521--Judgment, Sentence, and Punishment-- Penalty Trial--Evidence--Jury's Entitlement to Consider Any Mitigating Evidence.

In the penalty phase of a homicide prosecution, the judgment of death was not subject to reversal on the ground that the record did not affirmatively demonstrate that the jury properly considered all mitigating evidence and inferences in that it was not aware of the full extent of its discretion to consider any mitigating evidence. Although the trial court's instructions, based on the language of Pen. Code, § 190.3 (aggravating and mitigating factors), referred only to "extreme" mental or emotional disturbance and "extreme" duress, that language did not impermissibly restrict the jury's exercise of discretion. The prosecutor's argument did not suggest that the jury could not consider whether defendant acted under duress. Indeed, the arguments of both counsel assumed that the jury would consider all of the mitigating evidence and inferences that might be drawn therefrom. Although defense counsel did not rely on the mitigating evidence because he was concerned the jury would not find it persuasive, the jury was aware that it was, in fact, free to consider any evidence presented in mitigation.

(39) Homicide § 104--Appeal--Death Penalty Determination--Errors Concerning Jury's Exercise of Discretion.

In addressing claims that the jury in the penalty phase of a homicide prosecution was misled concerning the scope of its discretion to consider aggravating and mitigating factors, the reviewing court examines the entire record, including the instructions and the arguments, to determine whether the jury was misled to the prejudice of the defendant. The reviewing court must ascertain whether, overall, the jury was adequately informed of the full nature of its sentencing responsibility, both as to the manner in which the various factors were to be weighed and as to the scope of its sentencing discretion.

(40) Criminal Law § 522--Judgment, Sentence, and Punishment--Penalty Trial--Argument--Absence of Mitigating Factor as Aggravating Factor.

In a death penalty case, an argument that the absence of some statutory mitigating factors should be considered aggravating is improper because it is likely to confuse the jury as to the meaning of the terms "aggravating" and "mitigating." It is not im-

proper, however, for the prosecutor to review each factor and the possible relevance of the evidence to finding it present. Thus, in the penalty phase of a homicide prosecution, the prosecutor's argument followed this permissible pattern and was not improper, where he used the absence of a mitigating factor as a springboard for his discussion of the evidence precluding a finding that the factor was present. The prosecutor relied on the aggravating nature of the evidence, not on the absence of mitigating factors, to persuade the jury that death was appropriate. Thus, he permissibly argued, for purposes of Pen. Code, § 190.3, factor (e) (participation or consent by victim), that the victims, who were lured to the crime scene, had nothing to do with the crime; that defendant's age was not mitigating, but might be aggravating under Pen. Code, § 190.3, factor (i); and that there was no mitigating evidence under Pen. Code, § 190.3, factor (j) (minor participation in offense), since defendant was the triggerman, which was an aggravating factor.

(41) Homicide § 101--Trial and Punishment--Death Penalty--Failure to Give Instruction on Lesser Included Offense During Guilt Phase.

In a capital homicide prosecution, the reliability of the verdict of death was not undermined by the trial court's failure to give an instruction during the guilt phase on the lesser included offense of voluntary manslaughter. The omission did not prevent the jury from understanding the distinction between the degrees of murder and manslaughter and between voluntary and involuntary manslaughter, so as to prevent the jury from properly considering the relevance of defendant's intoxication to his culpability and the proper penalty. The jury had been aware that intent to kill was an element of attempted murder and had rejected the evidence that defendant's intoxication negated the existence of that intent. Moreover, the jury had been instructed that it should take into account evidence of both defendant's abnormal mental state and his drug-induced intoxication, and rejected defendant's attempt to establish reduced culpability on that basis when it returned the guilt verdict.

(42) Robbery § 14--Instructions--Specific Intent and Intoxication.

In a capital homicide prosecution, the jury received adequate instructions concerning the relevance of defendant's intoxication to determining whether he committed larceny or auto theft rather than robbery. The trial court adequately instructed the jury that robbery was a specific intent crime, that the specific intent to commit robbery had to be proven beyond a reasonable doubt, and that defendant's intoxication should be considered in determining if he had the requisite specific intent. Instructions on larceny were given, and the jury was told that if it was not satisfied that defendant was guilty of the charged offense, it could convict him on any lesser included offense. Moreover, defendant misstated his trial testimony in claiming prejudicial error on the ground that he had testified that he had not intended to rob the victims. Although defendant had refused to characterize his intent as an intent to "rob," he admitted that he had intended to take the victims' money, and that he used a gun with that intent.

(43) Criminal Law § 523--Judgment, Sentence, and Punishment--Penalty Trial--Instructions--Necessity of Instruction on Reasonable Doubt.

In the penalty phase of a homicide prosecution, the trial court did not err in refusing to instruct the jury that before it could impose the death penalty, it was required to find beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors and that death was the appropriate penalty. The reasonable doubt standard, which is required in determining guilt and making factual determinations, is not appropriate to assessing the penalty to be imposed in a capital case.

(44a, 44b, 44c) Criminal Law § 521--Judgment, Sentence, and Punishment--Penalty Trial--Evidence--To Rebut Defendant's Good Character Evidence.

In the penalty phase of a homicide prosecution, evidence that defendant had previously attacked

and stabbed a pregnant woman while she was in bed, continuing to stab her several times even after being told of her condition, was not inadmissible on the ground that it was more prejudicial than probative (Evid. Code, 352). The evidence was proper rebuttal to defendant's mitigating evidence of his goodness to family members. Moreover, defendant's mitigating evidence, being limited to evidence of his conduct when he was not under the influence of drugs, did not preclude rebuttal evidence of his assaultive conduct while he was under the influence of drugs. A prosecutor is entitled to rebut mitigating character evidence with evidence related to a character trait raised by the defendant, and numerous witnesses had testified to defendant's kind, loving, and compassionate behavior. Once defendant offered such evidence, he could not restrict the prosecutor's rebuttal evidence by arguing that he was kind and considerate under limited circumstances or to particular people.

(45a, 45b) Criminal Law § 521--Judgment, Sentence, and Punishment-- Penalty Trial--Evidence--Prior Criminal Conduct--Prejudicial Effect.

Pen. Code, § 190.3, factor (b), expressly makes admissible, in the penalty phase of a homicide prosecution, evidence of a defendant's prior assaultive conduct as an aggravating factor. It is a matter that the state believes to be particularly relevant to the penalty determination. While a trial court has authority under Evid. Code, § 352 (probative value versus prejudicial effect of evidence), to control the manner in which evidence of past criminal conduct is offered, it has no discretion to exclude all evidence related to such a statutory sentencing factor.

(46) Criminal Law § 521--Judgment, Sentence, and Punishment--Penalty Trial--Evidence--Prior Criminal Conduct--Facts Regarding Prior Charges Dismissed Under Plea Bargain.

In the penalty phase of a homicide prosecution, a prior plea bargain by which defendant had agreed to plead guilty to assault with a deadly weapon of one victim did not preclude consideration of defendant's attack, during the same incident, on another victim, even though the charges with respect to that victim had been dismissed as part of the plea bargain. The attack was an instance of prior assaultive conduct (Pen. Code, § 190.3, factor (b)). Although it has been held that a sentencing court, in sentencing a defendant for a charge to which the defendant has pled guilty, cannot consider the facts underlying any charges dismissed under a plea bargain, nothing in that rule precludes consideration of all incidents of assaultive conduct in sentencing for a subsequent offense, including a capital offense. Such prior incidents may be considered irrespective of whether or not the defendant was charged for them, or the charges were dismissed as part of a plea bargain.

(47) Criminal Law § 521--Judgment, Sentence, and Punishment--Penalty Trial--Evidence--Character Trait.

The relevance of evidence of character or a character trait to the penalty determination in a capital case is not whether the defendant acted in conformity therewith, but whether the defendant's character or character trait should be considered a mitigating factor. Therefore, whether prosecution evidence is proper rebuttal must be determined in light of the peculiar circumstance of a penalty trial, not under Evid. Code, § 1102, which permits the prosecution to admit evidence of a character trait in the form of an opinion or evidence of reputation in order to rebut evidence the defendant has offered to prove that the defendant's conduct was in conformity with a particular character trait.

(48) Criminal Law § 521--Judgment, Sentence, and Punishment--Penalty Trial--Evidence--Prior Criminal Conduct--Constitutionality of Admitting Evidence of Prior Unadjudicated Crimes.

In the penalty phase of a homicide prosecution, admission of evidence of defendant's prior unadjudicated criminal activity was constitutionally permissible, nothwithstanding defendant's claims, made without elaboration, that introduction of such evidence denied defendant his rights to due process,

equal protection, confrontation of witnesses, a reliable penalty determination, and a presumption of innocence, and violated his right against self-incrimination.

(49a, 49b) Criminal Law § 521--Judgment, Sentence, and Punishment-- Penalty Trial--Evidence--Prior Criminal Conduct--Pretrial Notice of Aggravating Evidence--Necessity of Pretrial Notice as to Prosecution's Rebuttal Evidence.

In the penalty phase of a homicide prosecution, the trial court did not abuse its discretion in admitting the testimony of a woman, whom defendant had allegedly previously attacked, to rebut his good character evidence. While the prosecution did not give pretrial notice of the aggravating evidence under Pen. Code, § 190.3, that provision expressly excepts rebuttal evidence from the notice requirement. The trial court also did not err in refusing to grant defendant a continuance to prepare for the testimony. The prosecution's earlier abortive effort to introduce it should have alerted defense counsel that the woman might be called in rebuttal. He also had pretrial notice that another victim of the same incident would testify. The court did order production of all police reports related to the incident, and the rebuttal witness was not called until the next day. Moreover, there was no danger that the death penalty would be imposed on the basis of materially inaccurate evidence concerning the unadjudicated offense, since the jury was instructed that it could consider the evidence only if defendant's commission of the acts was proven beyond a reasonable doubt.

(50) Criminal Law § 521--Judgment, Sentence, and Punishment--Penalty Trial--Evidence--Prior Criminal Conduct--Pretrial Notice of Aggravating Evidence--Notice of Evidence of one Crime as Covering Entire Course of Criminal Conduct.

Notice that the prosecution, during the penalty phase of a homicide prosecution, will present evidence regarding a prior specific crime as aggravating evidence should alert defense counsel that evidence of all crimes committed as part of the same course of conduct will be offered. Therefore, such notice substantially complies with Pen. Code, § 190.3, which requires the prosecution to give pretrial notice of aggravating evidence that will be presented at the penalty trial.

(51) Criminal Law § 521--Judgment, Sentence, and Punishment--Penalty Trial--Evidence--Prior Felony Convictions--Applicability of Double Jeopardy and Speedy Trial Principles.

The trial court, during the penalty phase of a homicide prosecution, did not err in permitting the prosecution to introduce a victim's testimony regarding the details of a prior assault, for which defendant had been convicted of assault with a deadly weapon. Defendant did not object to the evidence. Moreover, the introduction of evidence of a prior felony conviction under such circumstances does not offend double jeopardy and speedy trial principles, since the defendant, at the sentencing hearing on a later conviction, is not on trial for the past offense, and is not subject to conviction of, or punishment for, that offense.

(52) Criminal Law § 523--Judgment, Sentence, and Punishment--Penalty Trial--Instructions--Prior Criminal Conduct--Juvenile and Noncriminal Conduct.

In the penalty phase of a homicide prosecution, the trial court's instruction that the jury could consider all of the evidence received at any phase of the trial did not impermissibly permit the jury to consider evidence of nonviolent and juvenile offenses that otherwise would have been inadmissible at the penalty phase. Defendant failed to request a limiting instruction, and evidence of violent juvenile conduct is admissible under Pen. Code, § 190.3. Although evidence of nonviolent criminal activity not resulting in a felony conviction is not admissible as an aggravating factor, defendant himself had introduced the evidence of which he complained, in an effort to establish that his criminal conduct was attributable to drug use and that he was otherwise a good person. The trial court did limit consideration of the evidence by instructing the jury to consider

the statutory factors (Pen. Code, § 190.3) in determining the penalty. Having introduced the evidence himself, defendant could not complain that the jury might have concluded it was aggravating rather than mitigating.

(53a, 53b) Criminal Law § 523--Judgment, Sentence, and Punishment-- Penalty Trial--Instructions--Aggravating and Mitigating Factors--Jury's Request for Clarification of "Moral Justification" and "Extreme Duress":Words, Phrases, and Maxims--Moral Justification--Extreme Duress.

During jury deliberations in the penalty phase of a homicide prosecution in which the jury requested clarification of the terms "moral justification" and "extreme duress," the trial court did not err in responding, with the approval of both counsel, that the definitions of the terms were self- evident, and that they were to be construed by their common meanings. Pen. Code, § 190.3, factor (f) (moral justification), and Pen. Code, § 190.3, factor (g) (extreme duress), set forth only two of an unlimited number of matters the jury may consider in mitigation, and neither is impermissibly vague. Moreover, the jury's inquiry did not reflect confusion as to whether it could consider evidence that defendant fired the gun in response to a command by his accomplice. The jury had been instructed that it could consider any factor offered in mitigation, and it was highly improbable that a jury would consider the accomplice's command to be evidence of duress of any sort. Moreover, no evidence that defendant believed he was morally justified was offered. Thus, defendant suffered no prejudice from the trial court's failure to respond differently to the requests for clarification.

(54) Homicide § 100--Trial and Punishment--Special Circumstance Findings-- Purpose.

The function of a statutory special circumstance (Pen. Code, § 190.2) is to narrow the class of defendants who are eligible for the death penalty.

(55) Criminal Law § 520--Judgment, Sentence, and Punishment--Penalty Trial--Aggravating and Mitigating Factors--Nature of Jury's Assessment:Words, Phrases, and Maxims--Aggravating Factor.

Under the California death penalty law, an aggravating factor (Pen. Code, § 190.3) identifies a matter that the jury may consider in deciding whether a defendant found eligible for the death penalty should receive it. With respect to the process of sentencing, from among the class of defendants found eligible for the death penalty, those defendants who will actually be sentenced to death, what is important is an individualized determination based on the character of the individual and the circumstances of the crime. It is not simply the finding of facts that resolves the penalty decision, but the jury's moral assessment of those facts as they reflect on whether the defendant should be put to death. Thus, the jury's consideration of statutory aggravating and mitigating factors is part of its normative function of determining the appropriate punishment, and is, therefore, distinguishable from the factual determination made when the jury finds that a special circumstance allegation is true.

(56) Criminal Law § 520--Judgment, Sentence, and Punishment--Penalty Trial--Aggravating and Mitigating Factors--Definition of Extreme Duress:Words, Phrases, and Maxims--Extreme Duress.

Pen. Code, § 190.3, factor (g), is a mitigating factor predicated on duress, which is generally understood to mean force or compulsion, as modified by "extreme," which is generally understood as being the farthest end or degree of a range of possibilities.

(57) Criminal Law § 523--Judgment, Sentence, and Punishment--Penalty Trial--Instructions--Aggravating and Mitigating Factors--Multiple Counting of Factors.

In the penalty phase of a capital homicide prosecution, the trial court's instructions concerning aggravating and mitigating factors under Pen. Code, § 190.3, factor (a) (circumstances of crime), Pen. Code, § 190.3, factor (b) (violent criminal activity), and Pen. Code, § 190.3, factor (c) (prior felony convictions), which tracked the statutory

language without further clarification, did not permit the jury to consider the same evidence under more than one of the factors. The prior convictions referred to in Pen. Code, § 190.3, factor (c), do not include the offenses of which the defendant had been convicted in the current proceeding, and the circumstances of the current offenses that reflect violence or threats of violence are to be considered only under Pen. Code, § 190.3, factor (a). Pen. Code, § 190.3, factor (b), by contrast, relates to other unadjudicated criminal conduct. The jury was not told that it could double- or triple-count evidence under these factors, the trial court was not under a duty to instruct sua sponte that such consideration would be improper, and the prosecutor did not mislead the jury or suggest the evidence was more damning because it related to more than one factor.

(58) Criminal Law § 520--Judgment, Sentence, and Punishment--Penalty Trial--Aggravating and Mitigating Factors--Defendant's Age--Constitutionality.

Pen. Code, § 190.3, factor (i), which permits a jury, in assessing the proper penalty in a capital case, to consider the defendant's age at the time of the offense, is not unconstitutionally vague under U.S. Const., 8th & 14th Amends. The factor does not fail to offer guidance to the jury or invite arbitrary and capricious sentencing. Although chronological age alone may not be considered an aggravating factor, the jury is entitled to determine the relevance, if any, of the defendant's age to the appropriate penalty, as long as neither the prosecutor in argument, nor the court in its instructions, suggests that age is to be considered aggravating. No constitutional principle is contravened by permitting the jury to make this decision as part of its essentially normative task of determining the appropriate penalty after weighing the evidence and applying its own moral standard.

(59) Homicide § 101--Trial and Punishment--Death Penalty--Proportionality.

Defendant's death sentence was not arbitrary, discriminatory, or disproportionate under the due process, equal protection, and cruel and unusual punishment clauses of the United States or California Constitutions, notwithstanding that defendant had a chemical dependency, his accomplice did not receive the death penalty even though he was a full participant in the event, and defendant stood convicted of only one murder and had no prior arrests for murder. Unless a defendant shows that a state's capital punishment system operates in an arbitrary and capricious manner, the fact that the defendant has been sentenced to death, while others who may be similarly situated have not been so sentenced, does not establish unconstitutional disproportionality. The jury's conclusion that the death penalty was warranted for defendant's intentional killing of one victim during a $70 robbery in which an attempt was made to kill a second victim to prevent identification, where defendant had a past history of other drug-related assaults, was not aberrant and did not demonstrate arbitrary or capricious sentencing.

(60a, 60b) Homicide § 101--Trial and Punishment--Death Penalty-- Modification Motion--Judge's Consideration of Probation Officer's Report.

In a capital homicide prosecution, the trial court properly denied defendant's motion for modification of the verdict of death. While the record supported defendant's assertion that the judge had improperly reviewed a probation report prior to ruling on the motion, the judge set out in great detail the evidence on which he relied in concluding that the aggravating factors overwhelmingly outweighed the mitigating factors, and did not mention evidence other than that before the jury. The judge also expressly stated that he had considered all of the evidence that had been presented to the jury, and that this included the totality of the penalty phase evidence. It must be assumed, therefore, that the judge considered only evidence that had been before the jury in making his ruling. It was also clear that the judge was aware of and understood why the jury might have discounted the potentially mitigating evidence, and that he himself considered all of that evidence.

(61) Homicide § 101--Trial and Punishment--Death

Penalty--Modification Motion--Impropriety of Judge's Consideration of Probation Officer's Report.

A judge should not consider the probation officer's report before ruling on a motion for modification of a death penalty verdict. In ruling on such a motion, the judge is limited to consideration of the evidence that was before the penalty jury.

(62) Homicide § 101--Trial and Punishment--Death Penalty-- Constitutionality--Prosecutorial Discretion in Seeking Death Penalty.

The 1978 death penalty law satisfies the constitutional requirements of a law that narrows the class of murderers eligible for the death penalty while avoiding arbitrary and capricious imposition. Neither empirical evidence nor case authority supports the conclusion that prosecutors are arbitrary in exercising their discretion in seeking the death penalty in murder prosecutions in which special circumstances appear to be present.

(63) Criminal Law § 444--Argument and Conduct of Counsel--Prosecutor-- Defendant's Failure to Object.

A defendant who does not object and seek an admonition to disregard improper statements or argument by the prosecutor is deemed to have waived any error unless the harm could not have been corrected by appropriate instructions. Because a trial court cannot be expected to recognize and correct all possible or arguable misconduct on its own motion, the defendant bears the burden of seeking an admonition if he or she believes that the prosecutor has overstepped the bounds of proper comment, argument, or inquiry.

(64) Criminal Law § 449--Argument and Conduct of Counsel--Prosecutor-- Cross- examination of Defendant--Defendant's Change of Physical Appearance for Trial.

In a capital homicide prosecution, the prosecutor did not commit prejudicial misconduct in attempting to impeach defendant's credibility by asking if defendant had changed his appearance for the benefit of the jury. While it was questionable whether defendant's possibly improved appearance was relevant to his veracity, defendant waived the claim of error, since the misconduct, if any, could easily have been cured by an admonition had defendant objected.

(65) Criminal Law § 448--Argument and Conduct of Counsel--Prosecutor-- Examination of Witnesses--Defendant's Expert--Denigrating Comments Concerning Psychological Test Results.

In a capital homicide prosecution, the prosecutor did not commit misconduct during his cross-examination of defendant's expert when he referred to some of the results of tests performed on defendant as "little squiggles" that gave some insight into defendant's personality. Defendant offered no basis on which to conclude that this term was anything other than descriptive of the marks in question, which were copies of drawings made by defendant. The expert himself agreed that the marks would look like squiggles to persons not trained in interpreting the test.

(66a, 66b, 66c) Criminal Law § 448--Argument and Conduct of Counsel-- Prosecutor--Examination of Witnesses--Defendant's Expert--Questions Concerning Study Not in Evidence.

In a capital homicide prosecution, the prosecutor committed misconduct when he questioned defendant's expert about a study, the import of which was that psychiatrists were unable to accurately diagnose schizophrenia and paranoia, since the expert had not relied on the study in the formulation of his opinion and to allow its use would be to circumvent the hearsay rule. The misconduct, however, made up only a small part of the cross-examination of the witness regarding the results of a test administered to the defendant by the expert, and proper questions elicited a concession by the expert that there was a very good possibility that if 50 psychologists reviewed the same test results, they would not be unanimous in their opinions. Since an admonition to the prosecutor and to the jury would have cured any prejudice resulting from the improper conduct, defendant waived the claim

of error by failing to object.

(67) Criminal Law § 407--Evidence--Admissibility--Opinion Evidence--Expert Witnesses--Inquiry Into Relevant Material of Which Expert Is Unaware.

It is proper to question an expert in a criminal case about matters on which the expert has based his or her opinion and the reasons for that opinion. A party attacking the credibility of the expert may bring to the jury's attention material about which the expert is unaware, if that material is relevant to the issue about which the expert has testified, although that party may not, by questions, give his or her own testimony regarding the content of such material.

(68) Criminal Law § 522--Judgment, Sentence, and Punishment--Penalty Trial--Argument--Comment on Witnesses--Derogatory Reference to Defendant's Expert.

In the penalty phase of a homicide prosecution, even if the prosecutor's statement during argument that defendant's expert was a “prostitute” exceeded the bounds of permissible argument, it was not so potentially prejudicial that a prompt objection and admonition could not have averted any prejudice. Thus, defendant's failure to object precluded consideration of his claim of misconduct on appeal.

(69) Criminal Law § 522--Judgment, Sentence, and Punishment--Penalty Trial--Argument--Opinion on Defendant's Guilt--Lack of Substance of Defense.

In the penalty phase of a homicide prosecution, the prosecutor did not commit misconduct during his rebuttal argument when he commented that the defense lacked substance, and that defendant's penalty phase argument was an attempt to distract, pound the table, and make smoke. Defense counsel's argument was a rambling discourse, not tied to any particular evidence, and the prosecutor's description of it was not inaccurate.

(70) Criminal Law § 522--Judgment, Sentence, and Punishment--Penalty Trial--Argument--Inferences and Deductions--Defendant's Lack of Veracity.

In the penalty phase of a capital homicide prosecution, the prosecutor did not commit misconduct during closing argument where, in addressing inconsistencies between defendant's extrajudicial statements and his testimony at trial, the prosecutor accused defendant of lying. A comment based on a reasonable inference drawn from the evidence is not improper even when the inference is that a witness has lied.

(71) Criminal Law § 522--Judgment, Sentence, and Punishment--Penalty Trial--Argument--Comment on Evidence of Prior Charges or Convictions--Where Defendant Alleges Evidence Erroneously Admitted.

In the penalty phase of a capital homicide prosecution, the prosecutor did not commit misconduct during closing argument by referring to evidence concerning defendant's misdemeanor, juvenile, and nonviolent offenses, which defendant contended had been improperly admitted. The evidence was, in fact, properly admitted; however, defendant's claim would have failed even if the evidence had not been properly admitted. Regardless of whether an appellate court may later conclude that a piece of evidence was erroneously admitted, argument directed to the evidence does not become misconduct by hindsight. Such references may be considered in determining the prejudicial effect of the trial court's error in admitting the evidence, but they are not misconduct.

(72) Criminal Law § 522--Judgment, Sentence, and Punishment--Penalty Trial--Argument--Prosecutor's Comment on Accomplice's Lack of Police Record.

In the penalty phase of a capital homicide prosecution, the prosecutor did not commit misconduct by stating in his argument that defendant's accomplice had never been arrested or convicted. The statement was made in the context of assessing whether the jury should find mitigation under Pen. Code, § 190.3, factor (g) (commission of act under duress), and defendant's attempt to shift principal responsibility to his accomplice. The prosecutor's comment was not an improper means of putting be-

fore the jury damaging facts that were not in evidence, since defendant himself had testified that as far as he knew the accomplice had not been to prison or been arrested for any crimes of violence. The prosecutor did misspeak when he said that the accomplice had never been arrested at all, since defendant testified that the accomplice told defendant that he had been arrested. Had defendant objected to this discrepancy, however, it could easily have been clarified by the court.

(73) Criminal Law § 522--Judgment, Sentence, and Punishment--Penalty Trial--Argument--Inferences and Deductions--Comment That Instruction Does Not Support Only Lesser Included Offenses.

In the penalty phase of a capital homicide prosecution, the prosecutor did not commit misconduct by anticipating the trial court's instructions on lesser included offenses and by arguing that those instructions were required by law and should not be taken as an indication that the trial court necessarily believed that the instructions applied. A prosecutor is entitled to argue that the evidence shows beyond a reasonable doubt that the defendant committed the charged offenses, and that the evidence does not support conviction of only a lesser included offense. The prosecutor's argument was fully consistent with the standard instructions the judge gave the jury, during which the judge stated that he did not intend by anything he said to suggest how the jury should find on any question, that the jury was to determine whether some of the instructions were applicable, and that the jurors must not conclude from the fact that an instruction had been given that the court was expressing any opinion as to the facts.

(74) Criminal Law § 522--Judgment, Sentence, and Punishment--Penalty Trial--Argument.

In a capital homicide prosecution, the prosecutor did not commit misconduct in argument by allegedly vouching for a witness by saying that he had told the witness to tell the truth and the witness did so; by urging the jury to consider that defendant might have avoided capture; by reminding the jury that the victims' families were present; by stating that if defendant were not convicted, it would be an insult to one victim's struggle to live; by asking defendant's girlfriend if she was going to wait for defendant; by suggesting that defendant may have escaped from custody more than three times; or by stating, with regard to the testimony of a victim of a prior attack by defendant, that one could not expect to have angels for witnesses. Any possibly questionable comments were sufficiently innocuous that an admonition could have easily cured any harm, and none of the comments were such as to deny defendant a fair trial, divert the jury from its proper role, or invite an irrational, purely subjective response.

COUNSEL

Timothy J. Foley and Richard Schwartzberg, under appointments by the Supreme Court, and Roger Agajanian for Defendant and Appellant.

John K. Van de Kamp and Daniel E. Lungren, Attorneys General, Steve White and Richard B. Iglehart, Chief Assistant Attorneys General, Harley D. Mayfield, Assistant Attorney General, Michael D. Wellington, Frederick R. Millar, Jr., Robert M. Foster, Rudolf Corona, Jr., and Janelle B. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

BAXTER, J.

Defendant was convicted by a jury in the Orange County Superior Court of the November 8, 1982, first degree murder (***28**Pen. Code, §§ 189, 187) [FN1] of Timothy Dykstra (count I); attempted murder (§§ 664/187) of Michael Wolbert (count II); and robbery (§ 211) of those victims (count III). The jury also found that the murder was committed under the special circumstance of murder in the commission of robbery (§ 190.2, subd. (a)(17)(i)), and that defendant had personally used a firearm in the commission of the offenses (§ 12022.5). The same jury found that the killing of Dykstra was intentional and returned a penalty verdict of death.

FN1 All statutory references herein are to the Penal Code unless otherwise indicated.

After denying defendant's automatic application for modification of the penalty (§ 190.4), the judge imposed a sentence of death for the murder, a consecutive term of nine years with a two-year enhancement for the attempted murder, and a stayed (§ 654) term of one year with an eight- month enhancement for the robbery.

This appeal is automatic. (§ 1239, subd. (b).)

Having concluded that no prejudicial error affected the determination of guilt or penalty, we shall affirm the judgment in its entirety.

I

A. *The Prosecution Case.*

The evidence, based in major part on the testimony of Michael Wolbert, and on defendant's confessions, established the following.

Defendant and Brian Hefner, both of whom had been employed as burglar alarm salesmen by Global Wholesalers in Garden Grove, and who shared a motel room, were fired by their employer on November 8, 1982. Because their final paychecks were insufficient to cover future rent, they devised a plan to rob fellow employees who were also to be paid on that date. The pair waited in the company parking lot until another group of employees, among whom were Dykstra and Wolbert, returned from their shifts. They invited Dykstra and Wolbert to join them at a party which, they claimed, was to be held at the home of friends in the Anaheim Hills area.

Dykstra and Wolbert agreed to go to the party. They did not know defendant and Hefner well, however, and were cautious. They insisted on driving in Wolbert's car. They also removed most of their cash from their wallets and hid it behind the dashboard of their car. After leaving defendant's car at an apartment complex, the four drove to a remote area on Santiago Canyon Road where defendant asked Wolbert to stop so that defendant could relieve himself. It was then between 7 and 9 p.m. ***29**

All four men left the car, Dykstra getting out first to permit defendant to leave. After the other three men left the car, Wolbert saw a gun in defendant's waistband. Wolbert then left the car and when he next looked at defendant saw that defendant and Dykstra were standing face-to-face about two feet apart, with defendant holding the gun pointed at Dykstra. Defendant demanded the victims' wallets. Wolbert told him where the money was hidden. Dykstra and Wolbert then stayed on an embankment, several feet apart, while Hefner searched for the money.

Defendant moved over to stand by Wolbert, who asked defendant to let them go, told him to take the car and the money, and assured him that he would not identify him. When Hefner left the car, defendant moved back toward Dykstra who was sitting down. Defendant then raised the gun in one hand and shot Dykstra from a distance of about three or four feet. The bullet passed through the pericardial sac, grazing Dykstra's heart, and entered his right upper lung, causing death by exsanguination, i.e., blood loss.

After defendant shot Dykstra, Wolbert stood up and stepped back. Defendant approached Wolbert, who was backing up, raised the gun in both hands, and shot Wolbert three times. Wolbert was struck first in the torso and fell down. Defendant came closer and from a distance of about three feet shot Wolbert in the left shoulder. As defendant began to walk away Wolbert got up and began to approach defendant. Defendant turned, held the gun close to Wolbert's head and shot him in the left eye, at which point Wolbert fell down again. Wolbert saw defendant pull the hammer of the gun back before each shot.

In spite of his life-threatening wounds, Wolbert did not lose consciousness. He heard defendant and Hefner get into the car and drive back down the road. He was later able to attract the attention of

passersby who summoned aid. He identified his assailants as fellow employees at Global Wholesalers. Dykstra was dead when paramedics arrived. Wolbert was transported to the hospital where he underwent surgery. On the following morning, he identified both defendant and Hefner in a photographic lineup, identifying defendant as the person who had shot him and Dykstra. FN2

FN2 Hefner was tried separately, convicted of the same offenses, and sentenced to life in prison without possibility of parole. The People did not seek the death penalty for Hefner.

Defendant and Hefner were arrested as they left their motel room about 9 a m. on the morning after the robbery and murder. The murder weapon, a .22-caliber single action revolver which still held six expended shell cases in the cylinder, was found hidden in a space behind the bathroom sink. Defendant confessed his involvement and, at the request of the investigating ***30** officers, participated in a videotaped reenactment of those events that had taken place in Santiago Canyon.

Analysis of a sample of defendant's blood, taken at approximately noon on November 9, 1982, revealed no alcohol, amphetamines, opiates, barbiturates, or phencyclidine (PCP). Cocaine and benzoylecgonine, a metabolite of cocaine, were present, however. FN3

FN3 All alcohol and drug tests of Dykstra's blood were negative.

B. *The Defense Case.*

Defendant attempted to establish that his actions on November 8, 1982, were the product of, or influenced by, his ingestion of drugs and that he did not intend to kill Timothy Dykstra. At the time of the offenses defendant was 25 years old. FN4 He testified that he had used drugs since the age of 12, among them marijuana, barbituates, amphetamines, cocaine, PCP, LSD, and heroin. He had first been arrested on a drug-related charge in 1975 when he sold "speed" to an undercover agent. In 1981 he was found guilty of vandalism after becoming involved in a fight while drinking. He had been committed to the Youth Authority after three escapes from county juvenile facilities.

FN4 Defendant testified that Hefner was younger. He was not sure of Hefner's age, but believed him to have been 19.

In 1978, he pleaded guilty to a charge of assault with a deadly weapon, and was sentenced to state prison. On the night of the stabbing incident that led to that conviction he had used marijuana and PCP. That incident occurred in the same motel at which he was living when arrested on November 9, 1982. It was, he testified, a hangout for drug addicts and prostitutes. FN5

FN5 In his guilt phase testimony, defendant claimed that the 1978 incident occurred when two men who had a problem with his roommate, Doug Favello, kicked in the door of the apartment he shared with Favello, ran in, and cut Favello's throat. A third person with a gun remained at the door. Defendant testified that he picked up the knife dropped by the person who had stabbed Favello, ran after the fleeing intruders, and stabbed the one who had slashed Favello's throat just as that person (Scofield) was trying to enter his own room.

On cross-examination defendant conceded that he and several friends went to Scofield's room later that night, denied that they had kicked in the door to that room or that anyone had been in bed in the room, and denied seeing, let alone stabbing, a woman who had been in the room. Evidence was offered by the People during the penalty phase to establish that Favello had not been injured during the initial confrontation, that defendant and others had broken into the room occupied by Scofield

and his friend Kathy Cusack, and that defendant had stabbed Cusack several times.

Brian Hefner had owned both a .22-caliber rifle and the revolver, but defendant persuaded him to pawn the rifle to obtain money with which to buy cocaine. Hefner refused to pawn the revolver, but defendant was not aware that Hefner had the revolver with him on November 8, 1982, when the ***31** pair decided to find someone to rob. They had abandoned a plan to obtain money by selling sugar as cocaine, and Hefner had suggested that they find someone to go with them to buy cocaine, take the victims' money under that pretense, and "just split." They invited Dykstra and Wolbert to a party at which there would be girls and cocaine, but were unsuccessful in an attempt to get Dykstra and Wolbert to provide money with which to buy cocaine. Defendant and Hefner then decided to simply take them somewhere and take their money. Defendant alone decided where to take the victims and gave Wolbert directions to Santiago Canyon, which was an area to which he had been when committed to a county boys ranch.

Hefner's car was left at an apartment complex in the hope that Dykstra and Wolbert would believe that defendant and Hefner lived in that complex. They went to Santiago Canyon so that defendant and Hefner would have time to get away before their victims made it back to town to look for them at the apartment complex. Defendant's intent was only to take the victims' money, not to kill them.

When Hefner told defendant at the Global Wholesalers warehouse that he had brought the gun to protect himself in case anything went wrong, defendant told him to leave it. Hefner put the gun behind the heater in his car. Defendant did not know that Hefner brought the gun with him when the pair transferred to Wolbert's Camaro for the drive to Santiago Canyon.

Defendant testified that he did have to relieve himself when he asked that the car stop. He had planned to take Dykstra and Wolbert farther back in the canyon so that it would take them a long time to come back out. When the car stopped, Hefner got out behind defendant, handed the gun to him, and said, "let's take their money now." Defendant took the gun, held it on the victims, but, he claimed, it was Hefner who demanded their money. After Hefner had gathered up the money, defendant began to back up to get into the car to leave. The victims had not resisted. Wolbert told him to go ahead and take the car, just leave.

At that point, however, Hefner said: "Don't let them go because they'll tell," and yelled at defendant to shoot them. Defendant testified that he did not know what happened then except that he started shooting. He shot until the gun was empty. He had not loaded the gun and did not know how many shells were in it. He did not know whether he used one hand or two. He had no idea where he was firing the gun. He did not intend to shoot anyone through the heart or in the side, and was not aiming there. Dykstra had not made any threatening move prior to being shot, but Wolbert stood up and came running toward him. Defendant did not know at that point that Wolbert ***32** had been hit by the prior shots. Earlier Wolbert had shown defendant a "weapon"-a glove with metal lining-that Wolbert said he carried in case there was "trouble." Defendant did not know he shot Wolbert in the face, but admitted that he had pulled the trigger and was pointing the gun at Wolbert.

At the time of these events defendant was "a little bit loaded." Prior to the incident he had injected himself with cocaine, [FN6] as he had been doing on a daily basis. He had not worked on November 8 because he was "loaded." Because he had been injecting cocaine he had been up for two days before that. The cocaine made him more "wired" and "spaced out." On his return to the motel after the robbery/murder, in which he and Hefner had obtained about $70, he paid the rent and bought a quarter-gram of cocaine from a friend who lived nearby. He and Hefner used that cocaine at the friend's house, and during the evening purchased

two more quarter-grams.

> FN6 Defendant had told police that he was "loaded up on crank," or methamphetamine.

Defendant insisted that although the robbery was planned he had not planned to kill anyone, had not thought it over, and had not considered the consequences of what might happen if he did kill someone.

Defendant presented expert testimony of a forensic psychologist, Dr. Louis Broussard, that defendant had minimal brain injury of a type associated with impulse disorders and specific learning disorders. The learning disorder had caused achievement problems in school, problems that had not been remediated, and as a result his academic achievement was less than it might otherwise have been. Based on the expert's examination and testing of defendant, his review of defendant's confessions and the videotaped reenactment, interviews with family members, and the laboratory tests of defendant's blood, Dr. Broussard believed that defendant was not completely aware of what he was doing during the robbery/murder and could not judge the nature and consequences of his acts at that time.

Dr. Broussard also described the effects of prolonged use of cocaine, which resulted in some users becoming "ambulatory psychotics," having persecutory delusions similar to those of a person getting over acute schizophrenia, and experiencing hallucinations. Dr. Broussard had concluded that defendant was in a drug-induced psychotic state at the time of the events, could not and did not premeditate and deliberate, and was not in control of his senses when he agreed after his arrest to the police interview without counsel. Dr. Broussard also believed that when defendant responded to Hefner's command to shoot, he was behaving like a sleepwalker or person under hypnosis. His behavior was chaotic and drug controlled. ***33**

C. *Penalty Phase.*

1. *Aggravating Evidence.*

The only evidence presented by the People in the initial phase of the penalty trial was the testimony of William Scofield, the victim of the June 15, 1978, assault with a deadly weapon offense to which defendant had pleaded guilty and for which he had served a prison term. Scofield testified that five or six men, including defendant, broke into the hotel room he was sharing with his friend Kathy Cusack. The other men beat him with sticks and baseball bats, dragged him out of the room, and attempted to throw him from the balcony. Defendant came out of the room and stabbed Scofield in the lower back. The wound required stitches. The events occurred on the day after Scofield had an argument and fight with another tenant who, allegedly, had lost a cat belonging to Cusack. Other persons present during that exchange were armed with knives, but no one was stabbed then.

The People sought to present the testimony of Cusack that during the June 15 incident defendant had also stabbed her. Defendant's objection that the pretrial notice of aggravating factors given by the prosecution, which referred only to the assault on Scofield, was not broad enough to give notice that evidence of the assault on Cusack would be offered was sustained and she did not testify at this stage of the penalty trial. (See § 190.3.) The court rejected the People's arguments that the assault on Cusack was so closely related to the assault on Scofield that it was among the circumstances of the latter, and that because defendant had been charged with both assaults notice that evidence of one would be offered was adequate.

Cusack was permitted to testify in rebuttal to the mitigating evidence presented by defendant. She first met defendant on June 12, 1978, at a party in defendant's apartment. She had not seen him again until the early morning hours of June 15 when he and several other men broke into the apartment she shared with Scofield. Defendant had a knife. When the other men, who were beating Scofield with bats and sticks, dragged Scofield out

of the room, defendant remained in the room where Cusack was standing on the bed. He stabbed her through the right forearm, which she had raised to protect herself, stabbed her farther up that arm, and when she fell down onto the bed, slashed her leg. He then stabbed her in the ankle. When defendant attempted to stab Cusack in the abdomen she told him she was pregnant. FN7 He nonetheless tried again to stab her in the abdomen, but she rolled over and he stabbed her in the side. He then stabbed her in the chest, slashed her shoulder, stabbed her in the area of her breast. After stabbing Cusack eight or ***34** more times, defendant began to carve up the walls of the apartment, and to cut up the posters and pictures. When Cusack hit him over the head with a stick, defendant ran out of the apartment. She, too, had to be hospitalized for treatment of her wounds.

FN7 Cusack testified that she was, in fact, four months pregnant.

2. *Mitigating Evidence.*

Defendant was one of nine children. His sisters Lisa, then 15 years old, Rose, 20, Antoinette, 31, and Ida, 33, his brother Louis, 24, and his parents all testified regarding defendant's love and concern for family, his willingness to assist and counsel his siblings, his musical and artistic talent, and the change in his personality when under the influence of drugs. All agreed that drugs were defendant's biggest problem, and testified that he was violent only when under the influence of drugs.

Defendant's father became aware of the drug problem several years before the trial. On the first occasion that defendant came home "loaded," his father "punched him clear across the room." Thereafter his father tried to bribe him and to find employment for him, in an effort to get him off drugs. Defendant had never been violent toward anyone in the family, and when not under the influence of drugs was "one of the nicest kids you can ever meet." He attended all family gatherings, ran errands and did favors for his parents, and never refused their requests. The violent acts about which testimony had been offered were uncharacteristic of defendant.

Christine, defendant's girlfriend for two and one-half years, described his manner with her children as "fantastic," testified that he was very helpful both with household tasks and with car repairs, and characterized defendant as a very loving, caring, gentle, and considerate person who treated her and her children with respect.

II Competency

(1) Relying on *People v. Hale* (1988) 44 Cal.3d 531 [244 Cal.Rptr. 114 [749 P.2d 769], and *People v. Marks* (1988) 45 Cal.3d 1335 [248 Cal.Rptr. 874, 756 P.2d 260], defendant argues that the trial court lacked jurisdiction to proceed to trial because the judge had expressed a doubt as to defendant's competency and had initiated proceedings under section 1368 to determine competency, which proceedings were never held.

We disagree with the initial premise that the court expressed doubt as to defendant's competence and had ordered that proceedings be conducted pursuant to section 1368. ***35**

Defendant relies solely on the court's response to his motion for the appointment of experts "under [Evidence Code section] 730 with respect to an examination of Mr. Visciotti on the criteria of 1026 and 1368." The court granted the motion, orally stating only that the experts would "be requested to conduct the examination based on 1026 and 1368." FN8 The May 2, 1983, form order of appointment signed by Judge Franks in department 38 recited, however: "It Appearing to This Court that defendant's status may fall within the definition set forth in the appropriate statute indicated below" and had check marks on the four lines adjacent to the statutory bases for appointment, sections 1026 and 1368, and Evidence Code sections 730 and 1017. The order set a hearing date of June 20, 1983, in department 38, and ordered the reports of the experts delivered to that department.

FN8 The entire colloquy is set out below:

"Mr. Agajanian [defense counsel]: Your Honor, there's one other matter I'd like to address the court on. I'd like to make a motion under 730 with respect to an examination of Mr. Visciotti on the criteria of 1026 and 1368 and ask it be kept confidential. I'd ask two doctors be appointed.

"The Court: All right. Do you have any preference for any doctors?

"Mr. Agajanian: I would request Dr. Seawright Anderson.

"Mr. Goethals [deputy district attorney]: And I told Mr. Agajanian I'd ask for Dr. Sharma.

"The Court: All right. Doctors Seawright Anderson and Dr. Sharma will be appointed pursuant to section 730 of the Evidence Code, and will be requested to conduct the examination based on 1026 and 1368, and the results of those to be confidential."

Counsel for defendant did not appear on June 20 and no hearing was held. The prosecutor represented that defendant's attorney had advised him a week earlier of a conflicting commitment, and that the two had never agreed on what was to be heard on the day set for the hearing. The case was put over to June 23, at which time it was called in before another judge in a different department. Competence was never mentioned during defendant's June 23 appearance or in any subsequent proceeding, and no psychiatric reports by the appointed experts are in the record.

This record does not suggest that the judge intended to express a doubt as to defendant's competence, or that he intended to initiate proceedings to determine competence. Section 1368 provides that if a doubt as to a defendant's competence arises in the mind of the judge, the judge "shall state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent." If the attorney then informs the court that he or she believes the defendant is or may be incompetent to stand trial, the court is required to order a hearing to determine the question.

It is apparent from this record that counsel's request for appointment of experts for the dual purpose of assisting counsel in making a decision on ***36** whether to enter a plea of not guilty by reason of insanity and to render an opinion on defendant's competence was preliminary to consideration by counsel, let alone the judge, of whether either had a doubt as to defendant's competence. Neither counsel nor the judge expressed a doubt as to defendant's competence and the judge did not order section 1368 proceedings. The typed recital in the form order to the effect that the defendant "may fall within the definition set forth in the appropriate statute indicated above" reflects nothing more than an explanation or justification for the appointment of the experts. FN9 It is not the statement contemplated by section 1368 that the court presently has a doubt as to the defendant's competency. FN10 (Cf. *People v. Westbrook* (1964) 62 Cal.2d 197, 203 [41 Cal.Rptr. 809, 397 P.2d 545] [criminal proceedings suspended and cause transferred to "psychiatric department," an order that could only be explained by the court having a doubt as to the defendant's sanity].)

FN9 Evidence Code section 730 authorizes the appointment of experts when it appears to the court that "expert evidence is or may be required by the court or by any party to the action."

FN10 Defendant does not argue that he was incompetent or that it appears as a matter of law from the record that he was incompetent, thus obligating the court to order a section 1368 hearing. (Cf. *People v. Gomez* (1953) 41 Cal.2d 150 [258 P.2d 825].) He seeks reversal only on the ground that the court expressed doubt as to

his sanity and did order such a hearing.

In *Hale*, by contrast, the court expressed a doubt as to the defendant's competence based on the defendant's conduct and demeanor in the courtroom, inquired of counsel, who agreed that in his opinion the defendant was not competent, and ordered a hearing " 'on the question of the defendant's present mental competency.' " (*People v. Hale, supra,* 44 Cal.3d 531, 535-536.) Similarly, in *People v. Marks, supra,* 45 Cal.3d 1335, the trial court had stated a doubt as to the defendant's mental competence and had ordered " 'the question of his mental competence to be determined in a special hearing which will be held pursuant to Sections 1368.1 and 1369 of the Penal Code.' " (*Id.*, at p. 1338, italics omitted.)

III Jury Selection Issues

Defendant claims that the jury selection process denied him his rights under the Sixth and Fourteenth Amendments to the United States Constitution, and article I, section 16 of the California Constitution, to a randomly selected, representative jury; that the use of case specific hypothetical voir dire questions to "indoctrinate" potential jurors was prejudicial misconduct that resulted in a biased jury; that *Witherspoon- Witt* error (*Witherspoon v. Illinois* (1968) 391 U.S. 510 [20 L.Ed.2d 776, 88 S.Ct. 1770]; *Wainwright v. Witt* (1985) 469 U.S. 412 [83 L.Ed.2d 841, 105 S.Ct. 844]) occurred when ***37** prospective juror Rokes was excused; that three jurors who admitted bias in favor of the death penalty were improperly allowed to remain on the venire panel; and that the trial court erroneously permitted jury selection proceedings to be conducted in his absence. We address each claim in turn.

A. *Representative Jury-Random Selection.*

(2) Appellant contends first that the procedure by which the judge, with the acquiescence of counsel, filled the jury box to initiate the general voir dire following the sequestered *Hovey* death- qualification voir dire (see *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80-81 [168 Cal.Rptr. 128, 616 P.2d 1301]) denied him a randomly selected jury. Random selection, he contends, is mandated by statute and constitutional command, and may not be waived by counsel.

Defendant analogizes jury selection to the status of jury trial itself prior to the 1928 amendment of the California Constitution which for the first time permitted waiver of the right to jury trial. Even under the present article I, section 16, trial by jury in criminal cases is not simply a right of the defendant. It may not be waived unless both the People and the defendant agree. FN11 Because random selection, too, is not simply a right of the defendant but is a state-mandated procedure, it may not be waived.

FN11 Article I, section 16 of the California Constitution: "Trial by jury is an inviolate right and shall be secured to all, ... A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel. ..."

This court rejected a similar argument in *People v. Johnson* (1894) 104 Cal. 418, 419 [38 P. 91], where we held that a claim of error based on an irregularity in the seating of jurors who had been selected from those regularly drawn had been waived by the defendant's failure to object. Here, too, counsel acquiesced in the procedure of which defendant now complains. Since our decision in *Johnson*, however, the Legislature has made it clear that random selection is a firm policy of the State of California.

Section 1046 directs that juries be formed for criminal trials "in the same manner as trial juries in civil actions." Code of Civil Procedure section 197 provided at the time of this trial: "It is the policy of the State of California that all persons selected for jury service shall be selected at random from a fair cross section of the population of the area served by the court, and that all qualified persons have the opportunity, in accordance with this chapter to be

considered for jury service in the state and an obligation to serve as jurors when summoned for that purpose. This chapter applies to all trial juries in all civil and criminal proceedings in all courts." ***38**

Code of Civil Procedure section 191 now states the policy: "The Legislature recognizes that trial by jury is a cherished constitutional right, and that jury service is an obligation of citizenship.

"It is the policy of the State of California that all persons selected for jury service shall be selected at random from the population of the area served by the court; that all qualified persons have an equal opportunity, in accordance with this chapter, to be considered for jury service in the state and an obligation to serve as jurors when summoned for that purpose. ..."

People v. Johnson, supra, 104 Cal. 418, was decided prior to the enactment of Code of Civil Procedure sections 191 and 197. We have not had occasion since the enactment of those sections to consider whether the establishment of random selection as a policy of the state affects the rule applied in *Johnson.* We conclude that it does not. While the parties are not free to waive, and the court is not free to forego, compliance with the statutory procedures which are designed to further the policy of random selection, equally important policies mandate that criminal convictions not be overturned on the basis of irregularities in jury selection to which the defendant did not object or in which he has acquiesced. (Cal. Const., art. VI, § 13; *People v. Edwards* (1991) 54 Cal.3d 787, 813 [1 Cal.Rptr.2d 696, 819 P.2d 436].) The failure to object will therefore continue to constitute a waiver of a claim of error on appeal.

Because we had not reaffirmed the *Johnson* rule (*supra,* 104 Cal. 418) at the time of defendant's trial, however, and the standard by which reversible error is to be determined presents an important question, we will address defendant's claim.

(3) Notwithstanding the policy of random selection and equal opportunity for jury service by all qualified persons, not every departure from the statutory procedures constitutes reversible error. The Legislature also provided in former section 1059 that a challenge to the panel could be founded only on a material departure from those procedures. (See *People v. Wright* (1990) 52 Cal.3d 367, 394, 395 [276 Cal.Rptr. 731, 802 P.2d 221].) Clearly, therefore, the Legislature did not intend that minor deviations from the statutory procedure be grounds for reversal of a judgment of conviction. It follows that a defendant may not claim error on appeal if the procedure utilized in jury selection did not depart materially from the statutory procedures established to further the purpose of random selection.

(4a) The method by which prospective jurors were seated for the purpose of general voir dire in this case was not a material departure from the ***39** procedures established by statute. The nonstatutory procedure to which defendant now objects was used only to select (from the prospective jurors who remained on the venire after death qualification) the first 12 persons to be seated for general voir dire. Instead of directing the courtroom clerk to draw the names of 12 venirepersons at random, FN12 the court sought a stipulation that defendant waive his right to random selection of the initial group of jurors. Instead, each attorney was to submit a list of 20 prospective jurors from which the court would select the first 12 to be seated, matching any who appeared on both lists. FN13

FN12 Code of Civil Procedure section 197, as it presently reads, implements the state policy of random selection: "(a) All persons selected for jury service shall be selected at random, from a source or sources inclusive of a representative cross-section of the population of the area served by the court," while Code of Civil Procedure section 198, directs: "(a) Random selection shall be utilized in creating master and qualified jurors lists ...."

Code of Civil Procedure section 194, sub-

division (*l*), defines "random": " 'Random' means that which occurs by mere chance indicating an unplanned sequence of selection where each juror's name has substantially equal probability of being selected."

At the time of this trial, former section 246 of the Code of Civil Procedure provided: "... The court shall select jurors from [the] panel for the voir dire process in a manner to insure random selection." Code of Civil Procedure section 222 now provides: "(a) Except as provided in subdivision (b), when an action is called for trial by jury, the clerk, or the judge where there is no clerk, shall randomly select the names of the jurors for voir dire, until the jury is selected or the panel is exhausted.

"(b) When the jury commissioner has provided the court with a listing of the trial jury panel in random order, the court shall seat prospective jurors for voir dire in the order provided by the panel list."

FN13 The court made the following proposal: "I was hoping that we could come up with a list of 20 prospective jurors that each of you would find acceptable and hopeful that we could arrive at a stipulation with the People and the defense, the defendant personally waiving his right to a secret-at-random selection of jurors, depending on the court's matching up specific jurors that fall onto both lists that the attorneys would provide me with.

"If you will do that, I'll assure counsel that I will not share the list of one attorney with the other, so it will eliminate any fear of gamesmanship.

"Additionally, if we follow that process, it might cause us to be able to pick a jury much more quickly. It might be beneficial to both sides.

"It certainly would be beneficial to the court in saving time.

"Secondly, the court would, in no way, preclude either counsel in any way from inquiring of those that were selected by a non-random secret ballot.

"And further, as soon as the first 12 are seated, I would agree that there should be no additional wavering from the at-random secret process of selecting."

Counsel were assured that they would be permitted to excuse even persons they had nominated in this fashion, that neither would know if all or any of the initial 12 persons were on both lists, and that diligent voir dire would be permitted as in any other case.

Before the procedure was undertaken, defendant was advised by the court that he, like every other defendant, had a right to random, secret, impartial seating of all prospective jurors. The judge then said: "The inquiry the court ***40** will make is as follows: Does the defendant waive his right and agree that the court may chose the first 12 jurors to be seated, thereafter returning to the usual selection process?" At that point, defendant responded, "Yes."

Counsel for defendant stated that he had advised defendant that he and the prosecutor had each selected 20 jurors from whom the court would make the selection. He stated that defendant had agreed to waive the rights described by the court and to permit selection in that manner. The People also indicated agreement. The court then advised counsel that their lists had "minimally matched up" and that it was probable that there would be some among the first 12 jurors who had been on both lists. The court did not indicate what, if any, criteria were to be applied in the choice of prospective jurors to fill the remaining seats.

The court's explanation of the process to be

used, the waiver elicited from defendant, and defense counsel's representation of his explanation to defendant reflect seemingly divergent views of the process to be utilized. The court did not promise that the first 12 jurors would all be selected from the lists submitted by counsel. The waiver simply permitted the court to choose the first 12 jurors to be seated. When defendant's attorney said that he had told defendant that the jurors would be selected from the lists, the court said nothing to indicate a contrary intent. In fact, four were taken from the prosecution list, three from the defense list, and five were on neither list. Two of the prospective jurors had been included on both lists. Five of the jurors ultimately sworn to try the case had been chosen by the judge pursuant to this stipulation. Of those, two had not been on either list.

The superior court minutes reflect still another interpretation of the stipulation. The minutes recite: "Counsel stipulate the Court may select twelve prospective jurors at random from lists of twenty prospective jurors submitted by each side."

Notwithstanding defendant's present claim that he did not understand the procedure, he is not entitled to relief on appeal on grounds that the statutory jury selection procedures were not followed. We are not faced here with a complete abandonment of random selection. When the general voir dire commenced, the venires of prospective jurors had already been examined in the sequestered *Hovey* voir dire. There is no suggestion that these venires had not been selected at random, pursuant to Code of Civil Procedure section 222. The prospective jurors in them had been seated for the initial voir dire in accordance with that random draw. The procedure here differs, therefore, from that at issue in *People v. Wright, supra*, 52 Cal.3d 367, 393-395, in which the initial seating for voir dire was not conducted in conformity with former section 222 of the Code of Civil Procedure. ***41**

In this case we are not concerned with the initial voir dire, or with a challenge to the panel. Only the general voir dire following the sequestered *Hovey* voir dire is in question. We agree with the assumption implicit in defendant's argument that, in the absence of a statutory provision adapting the procedures for selection of capital jurors to the mandate of *Hovey* (*supra*, 28 Cal.3d 1), trial courts should follow the procedures established by Code of Civil Procedure section 222 to select prospective jurors for a general voir dire which follows a sequestered *Hovey* voir dire. Because the stipulation applied only to the first 12 prospective jurors to be seated and the statutory procedure was followed in the initial selection of the prospective jurors and was followed thereafter, we do not deem the procedure to be a material departure from that mandated by the Legislature.

Defendant attempts to distinguish the procedure utilized in this case from that in *People v. Wright, supra*, 52 Cal.3d 367, on grounds that having presided over the sequestered voir dire the trial judge was aware of the biases of the jurors he selected. That distinction is insufficient to compel reversal since defendant acquiesced in this aspect of the selection process. Regardless of any possible misunderstanding as to the manner in which the trial court would select the first 12 jurors, it was apparent that the selection would be made from jurors whose views about capital punishment had been explored during the sequestered voir dire.

(5) Defendant also argues that random selection is necessary to ensure the constitutional right to a jury drawn from a representative cross- section of the populace. To the extent that he claims the procedures utilized in selecting the jury before which he was tried denied him due process or rights under the Sixth Amendment of the federal Constitution and article I, section 16 of the California Constitution, the claim fails for similar reasons. Random selection does serve to ensure the jury trial rights granted by the Sixth Amendment and article I, section 16 of the California Constitution. Not every departure from the state statutory procedure, even if deemed material, necessarily denies a defendant the constitutional right to a jury selected

from a representative cross-section of the populace, however. We reject defendant's claim that actual harm need not be shown. To warrant reversal of a judgment of conviction, the defendant must demonstrate that the departure affected his ability to select a jury drawn from a representative cross-section of the population. FN14

FN14 The state policy enunciated in the statutes mandating random draw reflects concern "that all qualified persons have an equal opportunity ... to be considered for jury service in the state and an obligation to serve as jurors when summoned for that purpose ...." (Code Civ. Proc., § 191.) The rights of prospective jurors are not before us in this appeal, however. We consider only whether the procedure ensured a fair trial at which the defendant's fundamental constitutional rights were protected. (See *People v. Harris* (1989) 47 Cal.3d 1047, 1071 [255 Cal.Rptr. 352, 767 P.2d 619].)

(4b) Defendant posits scenarios in which designation of acceptable jurors by the parties, or selection by the court, could result in exclusion by ***42** omission of categories of jurors in violation of *People v. Wheeler* (1978) 22 Cal.3d 258 [148 Cal.Rptr. 890, 583 P.2d 748], or in a jury not drawn from a true cross-section of the population (see *Duren v. Missouri* (1979) 439 U.S. 357 [58 L.Ed.2d 579, 99 S.Ct. 664]). He fails, however, to establish that the stipulation to seat the first 12 jurors for general voir dire, from prospective jurors already randomly selected for the sequestered voir dire, could or did have such an impact. To the contrary, the record confirms that during the general voir dire, 19 prospective jurors were randomly selected to replace those excused for cause or peremptorily challenged. Seven of the jurors seated to try the case were selected during this random draw. Five had been among the first twelve seated. This case differs markedly, therefore, from the jury selection process condemned in *United States v. Kennedy* (5th Cir. 1977) 548 F.2d 608, (hereafter *Kennedy*) on which defendant relies for his claim that relief is available without regard to a showing of actual harm.

Far from supporting this proposition, *Kennedy* concludes that the federal statutory right may be waived by failure to challenge the jury, and that more than simply a departure from random selection for the seating of some jurors is necessary to establish a violation of the constitutional right to a jury drawn from a representative cross-section of the community. (*Kennedy, supra,* 548 F.2d 608.) The issue in *Kennedy* was whether use of three volunteer jurors, who had just completed a term of jury service, to sit on a criminal jury constituted a substantial failure to comply with the random selection procedures of the Jury Selection and Service Act of 1968. (28 U.S.C. §§ 1861-1869.) The Fifth Circuit Court of Appeals held that while there had been a substantial failure to comply with the act, the appellant was foreclosed from asserting the statutory violation by failure to challenge the jury on that ground, and that reversal on constitutional grounds was not warranted because the departure from statutory random selection procedures had not denied him the right to a jury drawn from a representative cross-section of the community.

The jurors in question had been randomly selected for the master jury list prepared for use at trials during the prior month. The court rejected that consideration as a basis for finding compliance with the statute, stating: "Nonrandom selection of a subgroup from a randomly selected group does not make for a randomly selected subgroup." (*Kennedy, supra,* 548 F.2d at p. 612.) Nonetheless, the defendant's "forfeiture of the statutory claim in no way affects the sanctity of a defendant's due process right to be tried by a jury drawn from a fair cross-section of the community. While a properly preserved claim of ***43** substantial noncompliance with the Act would of course require reversal if meritorious, the fundamental justice of a conviction remains intact if the jury selection procedure did not transgress that due process guarantee." (*Id.,* at

pp. 613-614.)

"The due process clause does not itself guarantee a defendant a randomly selected jury, but simply a jury drawn from a fair cross section of the community. A claim of denial of this due process right requires a showing that the jury selection process tended to exclude or underrepresent some discernible class of persons and consequently to defeat a fair possibility for obtaining a truly representative cross section." (*Kennedy, supra,* 548 F.2d at p. 614.)

United States v. Northside Rlty. Assoc. (N.D.Ga. 1981) 510 F.Supp. 668 (hereafter *Northside Rlty. Assoc.*) offers no more support.

As defendant observes, insofar as it applies to petit juries the federal Jury Selection and Service Act of 1968 reflects a policy similar, if not identical, to the policy of this state, providing: "It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose." (28 U.S.C. § 1861.)

In *Northside Rlty. Assoc., supra,* 510 F.Supp. 668, the dispositive issue involved substantial noncompliance with the act in a manner not unlike that in the case before this court. In selecting prospective jurors for assignment to divisions within the district from master jury wheels of qualified prospective jurors by use of a newly developed computerized selection procedure, the clerk failed to designate by random process the "starting number" by which the computerized sequence of selection from the wheel was to commence. Instead the jury clerk picked the starting numbers with the result that six of more than five hundred numbers accounted for 32 percent of the choices.

The court dismissed indictments handed down by a grand jury in which the members had been selected in a process initiated in that manner, after finding that the deviation from the act was substantial, and was not an infrequent or inadvertent departure. In so doing the district court accepted the reasoning of the Fifth Circuit in *Kennedy, supra,* 548 F.2d 608, that a showing of prejudice was not necessary to establish a substantial failure to comply with the act. (510 F.Supp. at pp. 692-693.) ***44**

Unlike *Kennedy* (*supra,* 548 F.2d 608) and the instant case, however, the defendants in *Northside Rlty. Assoc., supra,* 510 F.Supp. 668, made a timely and procedurally proper challenge to the indictment, a challenge based on the departure from the statutory mandate of random selection. Thus, neither *Kennedy* nor *Northside Rlty. Assoc.* supports defendant's claim that even an insubstantial deviation from a policy mandating random selection justifies reversal of a judgment of conviction where no proper pretrial challenge was made and no resultant denial of a jury drawn from a representative cross-section is demonstrated.

Defendant's protestations to the contrary notwithstanding, nothing in this record suggests that the statutory violation in this case so skewed the jury selection process that the procedure was so "inherently defective" as to be constitutionally invalid even without a showing that the jury actually chosen was not impartial. (6)**(See fn. 15.) ,** (4c) Nor is reversal required on grounds that the procedure threatened such a potential for abuse or appearance of partiality that reversal without a showing of actual prejudice is required to protect the integrity of the jury selection process. FN15

FN15 We also reject defendant's argument that excusing jurors for hardship denied him a representative jury. (*People v. Thompson* (1990) 50 Cal.3d 134, 157-158 [266 Cal.Rptr. 309, 785 P.2d 857].) He fails to demonstrate how a panel from which

persons have been excused for hardship reasons is less representative. Code of Civil Procedure section 204, subdivision (b), now expressly permits such excusals, and they are to be granted only on a sufficient showing that the individual circumstances of the prospective juror make it unreasonably difficult for the person to serve or that hardship to the public will occur if the person must serve in the particular case.

Defendant makes no effort to identify any cognizable sector of the population that was underrepresented as a result of hardship excusals granted in this case, or to demonstrate that the trial court abused its discretion in granting any particular hardship excuse (to most of which defendant stipulated). Moreover, as we have observed elsewhere, there is no authority for the proposition implicit in this argument that disparity which results notwithstanding the application of neutral and presumptively constitutionally permissible jury selection criteria, including discretionary hardship excuses, is a product of the "systematic exclusion" which the Constitution forbids. (See *People v. Bell* (1989) 49 Cal.3d 502, 530 [262 Cal.Rptr. 1, 778 P.2d 129].)

We agree with defendant that some jurors were excused unnecessarily because they expressed reluctance to sit on the case. The judge offered to excuse jurors who, having thought about the case, "would rather not sit on this case for any reason." Some jurors expressed a preference not to remain. As defendant concedes, however, all of those prospective jurors were removed either by stipulation, by prosecutorial peremptory challenge, or, in one instance without objection by the defense.

B. *Impartial Jury-Witherspoon-Witt Error.*

(7a) Relying on language in *Witherspoon v. Illinois, supra,* 391 U.S. 510, 522, footnote 21 [20 L.Ed.2d 776, 785], which this court once understood to state the constitutional rule (see ***45***People v. Velasquez* (1980) 26 Cal.3d 425, 436 [162 Cal.Rptr. 306, 606 P.2d 341]), defendant claims that the trial court erroneously excluded prospective juror Dale Rokes, who expressed an abstract opposition to the death penalty, but did not make it "unmistakably clear ... that [he] would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case ...." (*Witherspoon v. Illinois, supra,* 391 U.S. 510, 522, fn. 21 [20 L.Ed.2d 776, 785], italics omitted.)

Defendant recognizes that the United States Supreme Court has since clarified the governing principles, holding that a defendant's Sixth and Fourteenth Amendment right to an impartial jury is not compromised by the excusal of a prospective juror whose views about capital punishment give the "definite impression" that those views would " 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " (*Wainwright v. Witt, supra,* 469 U.S. 412, 424 [83 L.Ed.2d 841, 851-852].) We have adopted the reformulated standard in applying the California Constitution. (*People v. Cox* (1991) 53 Cal.3d 618, 645 [280 Cal.Rptr. 692, 809 P.2d 351]; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1165 [259 Cal.Rptr. 701, 774 P.2d 730]; *People v. Ghent* (1987) 43 Cal.3d 739, 767 [239 Cal.Rptr. 82, 739 P.2d 1250].)

We find no error. When asked at the outset of the voir dire if he had a conscientious objection to imposition of the death penalty in an appropriate case, Rokes respondent: "I don't know if I could, no." When pressed by the court to consider if "there's any possibility, by any stretch of the imagination, that you might impose a death penalty for a very horrible crime, for a mass murder," he again replied, "I don't think I could, no." (8a)**(See fn. 16.)** , (7b) Even as a juror deciding the fate of Adolf

Hitler, Rokes believed, "No, I couldn't do it." FN16

FN16 The question to be resolved under *Witherspoon* and its progeny is whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death in the case before the juror. The impact the juror's views might have in actual or hypothetical cases that are not before the juror are irrelevant to that determination. (*People v. Fields* (1983) 35 Cal.3d 329, 357 [197 Cal.Rptr. 803, 673 P.2d 680].)

When asked by defense counsel if his position was that the state did not have the right to take life, Rokes responded: "No, I don't disagree with the law. I couldn't see myself as passing that type of judgment." And, when asked by the prosecutor if he could imagine any circumstance so offensive that he would vote for the death penalty, he replied: "No, I can't." Finally, the court explained its responsibility to determine if it was "unmistakably clear that under no circumstance [he] would ever vote for the death penalty" and asked: "That's the position you've taken?" Rokes replied: "Yes." ***46**

Defendant claims that the questions posed to the prospective juror focused on the wrong question, and did not establish Rokes's inability to follow the law. We see no possibility that Rokes was unaware that he was being asked if he could follow the law. Indeed, he stated that he did not disagree with the law. His answers made it unmistakably clear that he could not personally follow the law by voting to impose a sentence of death.

C. *Jury "Indoctrination."*

(9a) Defendant next complains that the prosecutor improperly used the *Hovey* voir dire (*Hovey, supra,* 28 Cal.3d 1) to indoctrinate prospective jurors and preargue his theory of the case. In the process, defendant claims, the prosecutor was permitted to inquire, by detailed hypothetical, but case-specific, descriptions, into whether the prospective jurors might find death an appropriate penalty in the specific case. The conduct of the voir dire in this manner was, he argues, both error and misconduct because the prosecutor asked each juror to commit himself or herself in advance to a position.

Defendant offers as examples the voir dire of two prospective jurors who were later sworn to try the case. The first was asked: "If we get to the penalty phase, if we get that far, then you've already found the man guilty of first degree murder. It's a horrible crime. And you found he committed this murder while he was engaged in a robbery, based on facts that would be something like a man decides to commit a robbery, arms himself with a handgun to make sure he's successful, robs his victim. During the course of the robbery it occurs to him that if the victim is not alive, there won't be anybody going to the police and complain .... So, realizing that, the robber points his gun at the victim, pulls the trigger, shoots him once through the heart and kills him.

"That's the type of facts we're going to be dealing with, something along those lines, perhaps.

"Do you feel just, first of all, theoretically like it's possible you could vote for the death penalty if you're faced with facts such as those?"

Another juror was asked: "So now you're in a penalty phase with the defendant like this one, who has committed this kind of a crime and I want you to ask yourself, after looking inside yourself whether you could actually vote to put another human being to death for doing a crime like this:

"Let's assume you have a person who decides to commit a robbery because he wants to make some additional money. He goes out and gets ***47** himself a loaded handgun to make the odds more in his favor that he'll be successful. And he finds a victim that he thinks has some money and sure enough, the victim has some money when the defendant sticks him up. Sometime about this point the defendant has the brilliant thought that if I let this guy go, he's going to the police and I might get

caught and whereas if I don't let him go, don't leave any witnesses, I won't get caught, in other words I'd better kill him to make myself more certain of getting away.

"That's exactly what he does; he shoots the victim once through the heart and subsequently he's caught and he's been brought before us and you have found beyond any doubt that he's guilty of first degree murder committed during the course of a robbery.

"Do you think its possible that you could go in the jury room, look the other jurors in the eye and knowing you'll have to come out and look the defendant in the eye also, say I think this crime is so horrendous and the other background facts we've heard are so horrendous, he should be put to death?"

(8b) As we have observed before, "[t]he only question the court need resolve during this stage of the voir dire is whether any prospective juror has such conscientious or religious scruples about capital punishment, in the abstract, that his views would ' "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." ' " (*People v. Mattson* (1990) 50 Cal.3d 826, 845 [268 Cal.Rptr. 802, 789 P.2d 983].) (9b) The *Hovey* "voir dire seeks only to determine if, because of his views on capital punishment, any prospective juror would vote *against* the death penalty without regard to the evidence produced at trial." (*Ibid.*; *People v. Clark* (1990) 50 Cal.3d 583, 597 [268 Cal.Rptr. 399, 789 P.2d 127]. See also, *Wainwright v. Witt, supra*, 469 U.S. 412, 416 [83 L.Ed.2d 841, 846-847].)

It was not necessary, therefore, to permit extensive questioning of the prospective jurors during the *Hovey* voir dire regarding their willingness to impose the death penalty based on the anticipated facts of, or a hypothetical set of facts based on, the case to be tried. (10) **(See fn. 17.) ,** (9c) Defendant objected neither to these questions, nor to similar questions asked of other jurors during the *Hovey* voir dire, [FN17] however.

FN17 We will not presume, even assuming arguendo that the voir dire exceeded proper limits of inquiry, that counsel should have done so. He may well have believed that this method of acquainting jurors with the evidence they were to hear would blunt its eventual impact. Having been forewarned, conditioned, or "indoctrinated," the jurors would not find the circumstances of the crime as shocking as they might otherwise.

Because a reviewing court is unable to ascertain the reasoning of trial counsel from the appellate record, a conclusion that a failure to object reflects incompetence is unwarranted. Unlike the dissent, we believe the rule of *People v. Pope* (1979) 23 Cal.3d 412 [152 Cal.Rptr. 732, 590 P.2d 859] is sound and must be followed here. "Where the record does not illuminate the basis for the challenged acts or omissions, a claim of ineffective assistance is more appropriately made in a petition for writ of habeas corpus." (23 Cal.3d at p. 426.)

Here, of course, defendant has not challenged the competence of trial counsel in his appeal. While he has properly reserved that claim, the dissenting justice raises it "ex proprio motu," i.e., of his own accord, and would reverse the judgment on an issue neither raised nor briefed.

(11a) Although voir dire is not a platform from which counsel may educate prospective jurors about the case, or compel them to commit themselves to a particular disposition of the matter, to prejudice them for or ***48** against a party, or to "indoctrinate" them (see *People v. Williams* (1981) 29 Cal.3d 392, 408 [174 Cal.Rptr. 317, 628 P.2d 869]), the scope of the inquiry permitted during voir dire is committed to the discretion of the court. (12) **(See fn. 18.) ,** (11b) Absent a timely objection

to questions that arguably exceed the proper scope, any claim of abuse of discretion is deemed to have been waived. FN18

FN18 Defendant suggests that an objection would have been futile because the judge participated in part of the voir dire to which he now objects. He also claims that the magnitude of the "error" is such that it is reversible per se, faulting the judge for failing to carry out the court's independent duty to ensure the fair selection of an impartial jury.

Among the inquiries which defendant identifies as improper were questions asked by defense counsel in an effort to convince jurors reluctant to impose the death penalty that there might be circumstances in which they would vote for death. These inquiries were not improper. At the time of this trial both court and counsel could reasonably believe that excusal of a prospective juror for cause related to scrupled opposition to the death penalty was permissible only if he or she would "automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them." (*Witherspoon v. Illinois, supra,* 391 U.S. 510, 522, fn. 21 [20 L.Ed.2d 776, 785] italics omitted; *People v. Lanphear* (1980) 26 Cal.3d 814, 840 [163 Cal.Rptr. 601, 608 P.2d 689].) The questions reflect an attempt to retain reluctant jurors, a purpose to which defendant can have no legitimate objection.

D. *Death Penalty Bias.*

Prospective juror Austin responded to an inquiry by the court whether he had "a leaning one way or the other? Are you more inclined to be pro death as opposed to pro life" with: "Yeah, pro death." He stated that, "[I]t would have to be a lot" of mitigating evidence to convince him to return a verdict of life without possibility of parole. He denied that his views arose out of revenge, explaining simply that he was afraid that a person sentenced to life without parole might escape or be released, and did not think a person who premeditated before killing someone should be loose to kill again. He also preferred the death penalty to life imprisonment because he did not feel he could support such a person for the rest of his life.

(13) Defendant educes from this that Austin was committed to voting for death in any case involving an intentional murder, or at a minimum had a ***49** bias for death. The trial court denied a challenge for cause, however, concluding that Austin's replies did not make it unmistakenly clear that he would impose the death penalty in all cases. We agree, but more importantly, as respondent notes, Austin was not selected as a juror or even seated during the general voir dire. Similarly, prospective juror Wheeler, who defendant claims was also biased toward death, was removed by the People's exercise of a peremptory challenge, and prospective juror Worrell was excused for hardship by stipulation.

E. *Absence of Defendant.*

(14a) Notwithstanding his execution of a written waiver of his right to be present at some stages of jury selection, and a subsequent oral waiver of that right, defendant claims that the judgment must be reversed because he was not present throughout jury selection. He argues that the right to be present during a crucial part of the trial may not be waived, and that even if waiver is permissible, his waivers were invalid.

Defendant concedes that the written waiver executed by him and his attorney on July 5, 1983, is in the language prescribed by subdivision (b) of section 977. That section expressly permits a defendant to waive his right to be present at all felony proceedings other than the arraignment, plea, preliminary hearing, taking of evidence, and imposition of sentence, i.e., proceedings at which the presence of the defendant "bears a reasonably substantial relation to the fullness of his opportunity to de-

fend against the charge." (*People v. Cooper* (1991) 53 Cal.3d 771, 825 [281 Cal.Rptr. 90, 809 P.2d 865]; *People v. Holloway* (1990) 50 Cal.3d 1098, 1116 [269 Cal.Rptr. 530, 790 P.2d 1327].) It provides, however, that the defendant must, "with leave of court, execute in open court, a written waiver of his right to be personally present."

Defendant asserts that "apparently" his written waiver was not executed in open court. The minute order for that date recites, however: "A Waiver of Defendant's Personal Presence is received and ordered filed." Defendant offers no support for his assertion that the waiver was not executed in open court other than the omission of a recital to that effect in the minute order. The minutes recite that defendant and his counsel were present at the time the waiver was received. In the absence of any indication to the contrary we presume, as we must, that a judicial duty is regularly performed. (Evid. Code, § 664. See *Ross v. Superior Court* (1977) 19 Cal.3d 899, 913 [141 Cal.Rptr. 133, 569 P.2d 727].)

(15) Even absent such presumption, however, an irregularity in the procedure by which the waiver is executed is not grounds for reversal of the ***50** judgment in the absence of a showing both that the irregularity affected the voluntary and intelligent nature of the waiver, and that the defendant suffered prejudice as a result of his absence from those aspects of jury selection from which he had absented himself. (*People v. Medina* (1990) 51 Cal.3d 870, 903 [274 Cal.Rptr. 849, 799 P.2d 1282]; *People v. Garrison* (1989) 47 Cal.3d 746, 782-783 [254 Cal.Rptr. 257, 765 P.2d 419].)

(14b) One week after his written waiver was accepted by the court, defendant's attorney advised the court that defendant did not want to be present during further voir dire proceedings. The court noted the prior written waiver and then agreed to acquiesce in defendant's request upon receiving an oral waiver and a statement that defendant volitionally and personally made the request. Defendant's waiver was then elicited and accepted by the court.

We have repeatedly rejected the argument that presence at all stages of a capital case is indispensible and thus unwaivable. (*People v. Sully* (1991) 53 Cal.3d 1195, 1238 [283 Cal.Rptr. 144, 812 P.2d 163]; *People v. Cooper, supra,* 53 Cal.3d 771, 825; *People v. Medina, supra,* 51 Cal.3d 870, 903; *People v. Robertson* (1989) 48 Cal.3d 18, 60-61 [255 Cal.Rptr. 631, 767 P.2d 1109]; *People v. Grant* (1988) 45 Cal.3d 829, 845 [248 Cal.Rptr. 444, 755 P.2d 894]; *People v. Odle* (1988) 45 Cal.3d 386, 406-407 [247 Cal.Rptr. 137, 754 P.2d 184]; *People v. Hovey* (1988) 44 Cal.3d 543, 585-586 [244 Cal.Rptr. 121, 749 P.2d 776].) We are not persuaded that this conclusion should be reconsidered.

F. *Exclusion of the Public and the Press.*

(16) Defendant next claims that reversal of the judgment is required because the public and the press were excluded from the sequestered "death-qualification" voir dire conducted pursuant to *Hovey v. Superior Court, supra,* 28 Cal.3d 1. He concedes that the issue was not raised in the trial court (*People v. Thompson, supra,* 50 Cal.3d 134, 156-157), but argues that the trial court did not give counsel "any real opportunity to do so" and suggests that defendant might not have been competent to waive the right.

As discussed above, the record does not afford any basis for questioning defendant's competence.

The record is also devoid of any support for defendant's claim that trial counsel had no opportunity to object to the sequestered voir dire. Nor will we infer such an inhibition, particularly since the right to a sequestered voir dire was recognized in response to concerns of capital defendants over the ***51** potentially prejudicial effect of an open voir dire on jurors' views and willingness to reveal their views about capital punishment. (*Hovey v. Superior Court, supra,* 28 Cal.3d 1, 80.) As we observed in *People v. Thompson, supra,* 50 Cal.3d 134, 156-157, there was active litigation of the question of the right of the press to attend jury voir dire in 1983 when this trial occurred, and because the sequestered voir dire is for the benefit of the defend-

ant "it is doubtful that any competent defense counsel would have objected to it."

We conclude, therefore, that no impropriety in the jury selection process warrants reversal of the judgment.

IV Guilt Phase Issues

A. *Evidence and Argument Related to the Scofield Incident.*

1. *Cross-examination of Defendant.*

As our brief description of the evidence offered by defendant reflects, his defense strategy involved an effort to attribute his actions to substance abuse, and to convince the jury that his use of cocaine shortly before the offenses so affected his mind that the murder was not intentional, wilfull, deliberate, or premeditated. In support of this effort he admitted his conviction for assault with a deadly weapon, but sought to minimize any implication that he was assaultive, and claimed that he was forced to plead guilty to that offense even though he had acted in self-defense.

In response, the People sought to bring out not only the details of defendant's 1978 assault on William Scofield, but other evidence about the incident, including evidence that defendant had stabbed Kathy Cusack. Defendant was asked if he had kicked the door to the room open, and denied it. He denied that there was a woman in bed, that he had ever seen Cusack, that he had seen a pregnant woman on the night of the stabbing, that Scofield had been in bed, that he had stabbed Cusack, that he had been close enough to her to stab her, or that anyone had cried or screamed that she was pregnant.

(17) Defendant now claims that the cross-examination during which the People elicited these answers was an improper inquiry into inadmissible evidence which implied that he had stabbed Cusack. The prosecutor's questions, defendant claims, were testimony. He did not object on those grounds, however, or on grounds that the cross-examination exceeded the scope of direct. He made only a relevance objection to a question asking if he had decided to plead guilty and go to state prison, and objected, on grounds that ***52** the questions assumed facts not in evidence, to a question asking if he recalled that the initial argument had been over the loss of Cusack's cat. Therefore, even were we to assume that questions were improper, the failure to object bars reversal on that ground. (Evid. Code, § 353, subd. (a).)

We make no such assumption, however, since the inquiry into all of the circumstances of the attack on Scofield was well within the scope of defendant's testimony on direct examination, and sought to elicit evidence relevant to whether defendant had purposefully engaged in violent assaults in the past. Defendant having introduced evidence that his conviction of assault with a deadly weapon was based on conduct he took in self-defense, the People were not precluded by Evidence Code sections 761 and 787 from attempting to rebut that evidence by bringing out all of the circumstances of the incident in which Scofield was attacked. Defendant had placed his character in issue, attempting to show that he did not commit a premeditated murder, and in aid of that effort to cast a favorable light on the circumstances of his prior conviction. The People were, therefore, entitled to cross-examine him regarding all of the circumstances for purposes of impeachment. (Evid. Code, §§ 773, 780; *People v. Lang* (1989) 49 Cal.3d 991, 1017 [264 Cal.Rptr. 386, 782 P.2d 627]; *People v. Wagner* (1975) 13 Cal.3d 612, 617 [119 Cal.Rptr. 457, 532 P.2d 105]; *People v. Schader* (1969) 71 Cal.2d 761, 770-771 [80 Cal.Rptr. 1, 457 P.2d 841].)

(18) Defendant's effort to convert the issue into one of prosecutorial misconduct fares no better. Defendant seeks to rely on the well-established rule that a prosecutor may not examine a witness solely to imply or insinuate the truth of the facts about which questions are posed. (See *People v. Wagner, supra*, 13 Cal.3d 612, 619; *People v. Hamilton* (1963) 60 Cal.2d 105, 116 [32 Cal.Rptr. 4, 383

P.2d 412], disapproved on another point in *People v. Morse* (1964) 60 Cal.2d 631, 649 [36 Cal.Rptr. 201, 388 P.2d 33, 12 A.L.R.3d 810].) That reliance is misplaced. Here the inquiry about the assault on Cusack was unquestionably predicated on evidence available to the prosecution. This is not a case in which the evidence would have been inadmissible but for the fact that defendant's answers may have been untruthful. (See *People v. Lavergne* (1971) 4 Cal.3d 735, 744 [94 Cal.Rptr. 405, 484 P.2d 77].) The evidence would have been admissible. A prosecutor is not under compulsion to anticipate that a witness's memory of additional details regarding events about which he has testified will suddenly fail on cross-examination. The questions were leading, but such questions are not improper when asked in good faith of a presumptively hostile witness on cross-examination. (Evid. Code, § 767, subd. (a)(2); *People v. Williams* (1957) 153 Cal.App.2d 5, 8 [314 P.2d 161]; *People v. Kostal* (1954) 123 Cal.App.2d 120, 123 [266 P.2d 205].) ***53**

2. *Admission of Photographs.*

(19a) Defendant objected, on relevancy grounds and on grounds that they were so gruesome that the prejudicial impact outweighed their probative value (Evid. Code, §§ 350, 352), to introduction of photos of the stab wounds suffered by Cusack.

The photos introduced by the People included one of the door to the room from which Scofield had been dragged and behind which Cusack had been stabbed. Defendant had denied that he and his companions had kicked in the door to the room, had denied that a woman had been in bed in the room, and had denied that he had ever seen Cusack. The photos were relevant, therefore, to impeach his testimony. They were tied to the assault by the testimony of Officer McKay, who had arrived at the crime scene shortly after the stabbings occurred and had photographed the scene. From there he had gone to the hospitals to which Scofield and Cusack had been taken for treatment, where he photographed their wounds. (20) **(See fn. 19.) ,** (19b) He described the wounds, without objection, in his testimony. FN19

FN19 Defendant contends that the court should have excluded McKay's testimony as irrelevant on its own motion. For the reasons stated we do not agree with the assumption that this testimony was irrelevant. Nor is the issue preserved for appeal.

While a court may exercise such authority under Evidence Code section 352 (*People v. Hall* (1986) 41 Cal.3d 826, 834- 835 [226 Cal.Rptr. 112, 718 P.2d 99]; *People v. Jackson* (1971) 18 Cal.App.3d 504, 509 [95 Cal.Rptr. 919]), the failure to so act cannot be urged on appeal as error. Neither this court, nor defendant, can avoid the command of Evidence Code section 353, that "A verdict ... shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:

"(a) There appears of record an objection to or a motion to exclude or to strike the evidence ...."

The record confirms that the trial court properly weighed the probative value of the photos against their prejudicial impact before admitting them. There was no abuse of discretion. (*People v. Harris, supra,* 47 Cal.3d 1047, 1095.)

3. *Guilt Phase Argument.*

(21a) In a related argument, defendant contends that the prosecutor improperly implied, during closing argument at the guilt phase, that defendant had stabbed Cusack. FN20 The argument was closely tied to the impeaching evidence, however, and defendant did not object. (22) **(See fn. 21.) ,** (21b) To ***54** the extent that it might have lacked a basis in the evidence, FN21 any harm could have been cured by such objection and an admonition by the court. Absent objection, the issue has not been preserved for appeal. (*People v. Lewis, supra,* Cal.3d

262, 283; *People v. Green* (1980) 27 Cal.3d 1, 28 [164 Cal.Rptr. 1, 609 P.2d 468].)

FN20 This argument was directed to the prosecutor's emphasis on the evidence that impeached defendant's testimony that although he had been convicted on a plea of guilty of the stabbing of Scofield, he had been acting in self-defense. The prosecutor referred to defendant's denials that the door had been kicked in, that more than one person had been in the room, and that a second person had been stabbed. He then reminded the jury of the photographs of the crime scene depicting the door and the blood on both the bed and the floor. Finally he stated: "I asked the defendant, are you sure there wasn't a girl there that night? Are you sure about that? Are you sure you didn't stab somebody else?" and "Kathy Cusack, the woman who didn't exist in the defendant's story, was stabbed seven times."

FN21 We recently affirmed that "the prosecutor has a wide-ranging right to discuss the case in closing argument. He has the right to fully state his views as to what the evidence shows and to urge whatever conclusions he deems proper. Opposing counsel may not complain on appeal if the reasoning is faulty or the deductions are illogical because these are matters for the jury to determine. [Citation.] The prosecutor may not, however, argue facts or inferences not based on the evidence presented." (*People v. Lewis* (1990) 50 Cal.3d 262, 283 [266 Cal.Rptr. 834, 786 P.2d 892].)

B. *Miranda Warnings Prior to Videotaped Reenactment.*

The trial court found, and defendant does not challenge the finding, that prior to making the taped statement to police in which he admitted shooting Dykstra, defendant had "waived his rights under the *Miranda* decision, that the waiver is freely, voluntarily, knowingly, and intelligently given." (23) Defendant now claims, however, that the officers were obligated, but failed, to properly repeat the *Miranda* advisement (see *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602, 10 A.L.R.3d 974]) prior to the videotaping session conducted six hours later.

We reject this claim. First, defendant did not object to admission of the videotaped reenactment on this ground at trial and thus did not preserve the issue for appeal. (*People v. Mattson, supra,* 50 Cal.3d 826, 853-854; *People v. Milner* (1988) 45 Cal.3d 227, 236 [246 Cal.Rptr. 713, 753 P.2d 669].) Moreover, he agreed to participate in the reenactment during the initial interrogation at which he had voluntarily waived his rights. FN22 Defendant cites no authority for the proposition that, notwithstanding the initial waivers and agreement to the procedure, further warnings and waivers were necessary at the time of the actual videotaping. ***55**

FN22 At the conclusion of the interview during which defendant confessed, the interrogating officer asked defendant: "Would there be any problem with you in doing re-enactment of what happened last night. ... We'll do it in video and take the cameras out, our cameras, for-for investigative purposes, out taking pictures of you and explaining what happened as things went along." Defendant asked, "Yeah, at the scene of the crime?" and then stated: "Sure, I guess I wouldn't mind doing it." Asked twice after that if this would "be a problem" for him, defendant twice replied, "No," adding, "I'll do it" the second time.

At the Santiago Canyon site, defendant was given a general warning by Officer Sidebotham: "John, do you realize that anything you say is being video tape recorded?" to which defendant replied, "Yes, sir."

> Sidebotham then reminded defendant: "And that Investigator Coder and Investigator Heacock previously advised you of your constitutional rights and that you waived those rights. ... Do you still want to waive these rights?" Defendant replied again, "Yes, sir."

Assuming that agreement to continue the interrogation process later was not a sufficient waiver, however, in circumstances such as those here, where the subsequent interrogation took place only a few hours thereafter, the truncated advice given was sufficient. When a subsequent interrogation is reasonably contemporaneous it is not necessary to repeat the full *Miranda* warning. (*People v. Braeseke* (1979) 25 Cal.3d 691, 701-702 [159 Cal.Rptr. 684, 602 P.2d 384], vacated and cause remanded (1980) 446 U.S. 392 [64 L.Ed.2d 784, 100 S.Ct. 2147], reiterated 28 Cal.3d 86 [168 Cal.Rptr. 603, 618 P.2d 149], and cases cited.) Defendant was told that his statements could be used against him, and was reminded of the rights he had waived earlier in the day. In asking defendant if he still wanted to waive his rights, Officer Sidebotham clearly implied that those rights were still available to defendant. (See *People v. Mattson, supra,* 50 Cal.3d 826, 858; *People v. Duren* (1973) 9 Cal.3d 218, 242 [107 Cal.Rptr. 157, 507 P.2d 1365].)

C. *Instructional Error.*

1. *Consideration of Juvenile and Misdemeanor Offenses.*

(24) Defendant next argues that the court erred in failing to instruct the jury sua sponte that it could not consider offenses he committed as a juvenile (sale of narcotics, truancy, trespassing, escape) and his misdemeanor conviction of vandalism in determining his guilt. He concedes that evidence of these offenses was either admitted without objection or was introduced by defendant himself, but claims that the court was obligated nonetheless to instruct on the limited purpose for which the evidence could be considered.

The rule is otherwise. "Although the trial court may in an appropriate case instruct *sua sponte* on the limited admissibility of evidence of past criminal conduct, we have consistently held that it is under no duty to do so." (*People v. Collie* (1981) 30 Cal.3d 43, 63 [177 Cal.Rptr. 458, 634 P.2d 534, 23 A.L.R.4th 776].) We are not persuaded that an exception is warranted in this case. Indeed, defendant's reason for offering evidence of his past misconduct was to persuade the jury that his present offense, like the earlier ones, was the product of his abuse of drugs. He invited the jury to consider those offenses in determining his guilt, and may not complain on appeal that it did so. (See *People v. Williams* (1988) 44 Cal.3d 883, 958-959 [245 Cal.Rptr. 336, 751 P.2d 395].)

2. *Evidence of Mental State.*

(25a) Defendant claims that the instructions given by the court were not adequate to advise the jury of the relevance of the evidence of drug-induced ***56** psychosis, sleep deprivation, and "near automated response to his accomplice's command" to finding the existence or absence of the mental elements of the offenses with which he was charged-murder, attempted murder, and robbery. He complains in particular that the court refused to give instructions on "diminished actuality."

No such instructions were requested, however. Rather, defendant requested instructions on "diminished capacity." (CALJIC former Nos. 4.25, 8.41, 8.48.) The court refused those instructions, which address a defendant's general capacity or ability to form a specific intent or harbor a mental element of an offense, because the defense had been abolished by the amendment of section 22 in 1982, and by the addition of section 25, FN23 an initiative measure adopted by the electorate in the June 8, 1982, election.

> FN23 Section 25, subdivision (a) provides: "The defense of diminished capacity is hereby abolished. In a criminal action, as well as any juvenile court proceeding, evidence concerning an accused person's intoxication, trauma, mental illness, dis-

> ease, or defect shall not be admissible to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge, or other mental state required for the commission of the crime charged."
>
> As amended by Statutes 1981, chapter 404, section 2, pages 1591-1592, and Statutes 1982, chapter 893, section 2, pages 3317-3318, section 22 provides: "(a) No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation or malice aforethought, with which the accused committed the act.
>
> "(b) Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.
>
> "(c) Voluntary intoxication includes the voluntary ingestion, injection, or taking by any other means of any intoxicating liquor, drug, or other substances."

It is clear from the jury verdicts that the jury determined that the murder was a felony murder committed during the perpetration of robbery. Therefore, the only mental state now relevant to those two offenses is the intent to steal. FN24 Both malice and intent to kill are elements of attempted murder, however. The issue is whether the instructions given were adequate to inform the jury that defendant's evidence of drug-induced intoxication and the expert testimony regarding his mental state could be considered in determining if defendant did harbor these mental elements at the time of the offenses. It is clear that they were adequate.

> FN24 The jury made a special finding that the murder was intentional.

The trial court instructed the jury: "In the crimes charged in counts I, II, and III of the Information, namely murder, attempted murder and robbery, a necessary element is the existence in the mind of the defendant of a certain ***57** specific intent or mental state. These are included in the definition of the crimes charged.

"If the evidence shows that the defendant was intoxicated at the time of the alleged offense, the jury should consider his state of intoxication in determining if the defendant has such specific intent or mental state.

"If from all of the evidence you have a reasonable doubt whether defendant was capable of forming such specific intent, or mental state, you must give the defendant the benefit of that doubt and find that he did not have such specific intent."

(26)**(See fn. 25.),** (25b) The court also instructed the jury on the elements of manslaughter, FN25 after which a further instruction on intoxication was given:

> FN25 Defendant claims the court refused to instruct on voluntary manslaughter. The record confirms that two instructions on manslaughter were given. In the first, the court did not define voluntary manslaughter.
>
> "The crime of manslaughter is the unlawful killing of a human being without malice aforethought.
>
> "Involuntary manslaughter is the unlawful killing of a human being without malice aforethought and without an intent to kill."
>
> The court also instructed:

> "The distinction between murder and manslaughter is that murder requires malice while manslaughter does not. ... If you are satisfied beyond a reasonable doubt that the killing was unlawful, but you have reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of such doubt, and find it to be manslaughter rather than murder."
>
> The jury found under properly given instructions that the murder was intentional, and was committed in the perpetration of robbery, thus establishing that the killing was murder of the first degree under the felony-murder rule and section 189 without the necessity of proving malice. Any error in failing to instruct on voluntary manslaughter was harmless. (*People v. Sedeno* (1974) 10 Cal.3d 703, 721 [112 Cal.Rptr. 1, 518 P.2d 913]. See also *People v. Saille* (1991) 54 Cal.3d 1103, 1114 [2 Cal.Rptr.2d 364, 820 P.2d 588] [Malice shown whenever killing is intentional unless negated by evidence of sudden quarrel or heat of passion].)

"If you find that the defendant killed while unconscious as a result of voluntary intoxication and was therefore unable to form a specific intent to kill or to harbor malice aforethought, his killing is involuntary manslaughter." FN26

> FN26 Defendant claims that these instructions, "diminished capacity" instructions, were given erroneously. The instructions could only have been beneficial to him, however, since they permitted the jury to speculate whether the evidence indicated that he lacked the capacity to harbor the relevant mental states, while the other instructions limited the jury to determining whether, in fact, the mental elements of the offenses were present.

With respect to felony-murder-robbery, the court instructed the jury: "Before the defendant may be found guilty of the unlawful killing of a human being as a result of the commission or attempt to commit the crime of ***58** robbery, you must take all the evidence into consideration and determine therefrom, if at the time of the commission or attempt to commit such crime, the defendant was suffering from some abnormal mental or physical condition, however caused, which prevented him from forming the specific intent to commit such crime."

The jury was, therefore, instructed repeatedly that it should take into consideration the evidence of abnormal mental state in determining whether the mental states that are elements of these offenses were present, and was advised that drug-induced intoxication was evidence that should be considered in making that determination. (27) **(See fn. 27.)** There was no error in this regard. FN27

> FN27 In an attempt to establish prejudicial error in the instruction, defendant claims that these instructions, coupled with the omission of a voluntary manslaughter instruction, prevented the jury from considering whether he intended to kill, but did not do so unlawfully because of some provocation spurred by drug use or impulse. Defendant acknowledges that the robbery verdict undercuts this argument, but claims that inadequate instructions make the jury finding of intent to rob "suspect." We are not persuaded. Defendant's own statements establish beyond any question the existence of an intent to rob.

3. *Murtishaw Error.*

(28a) Defendant correctly observes, and the People concede, that the trial court erred in failing to limit the instructions on implied malice to the murder count. (29) As we explained in *People v. Murtishaw* (1981) 29 Cal.3d 733, 764-765 [175 Cal.Rptr. 738, 631 P.2d 446]: "[O]nce a defendant intends to kill, any malice he may harbor is necessarily express malice. Implied malice ... cannot co-

exist with a specific intent to kill. To instruct on implied malice in that setting, therefore, may confuse the jury by suggesting that they can convict without finding a specific intent to kill." FN28 While assault with intent to commit murder (former § 217) was in issue in *Murtishaw*, that rule applies equally to attempted murder since intent to kill is also an element of attempted murder. (*People v. Ratliff* (1986) 41 Cal.3d 675, 695 [224 Cal.Rptr. 705, 715 P.2d 665]; *People v. Ramos* (1982) 30 Cal.3d 553, 583 [180 Cal.Rptr. 266, 639 P.2d 908] revd. on other grounds *sub nom. California v. Ramos* (1983) 463 U.S. 992 [77 L.Ed.2d 1171, 103 S.Ct. 3446].)

FN28 The court gave only a general instruction on the elements of attempt. This was followed by instructions on the elements of murder and defining express and implied malice.

(28b) The court also failed to instruct that an intent to kill is an element of attempted murder, telling the jury only that there must be "a specific intent to commit the crime, and the direct but ineffectual act done toward its commission." As a result, defendant argues, the jury might have believed ***59** that an attempted murder verdict, like a verdict on second degree murder on which it had been instructed, could be returned if implied malice were found.

The People, relying on *People v. Dyer* (1988) 45 Cal.3d 26, 65 [246 Cal.Rptr. 209, 753 P.2d 1], and *People v. Lee* (1987) 43 Cal.3d 666, 677 [238 Cal.Rptr. 406, 738 P.2d 752], contend that the error was harmless. *Dyer* is not helpful to their position, however, since in that case the jury convicted the defendant of attempted first degree murder and had been instructed that a specific intent to kill was an element of that offense. The *Lee* jury had also been instructed that the prosecution had to prove that the defendant shot with the specific intent to kill, and the arguments of counsel were directed to the existence of that intent.

We conclude nonetheless that the omission could not have prejudiced defendant. The jury was instructed that the defendant must have a specific intent to commit the crime, i.e., murder, and murder had been defined. In his argument the prosecutor had stated that the implied malice/felony-murder instructions were inapplicable to attempted murder, and that in attempted murder there must be express malice and intent to kill. FN29 The prosecutor's argument emphasized the evidence that defendant shot Wolbert three times, and that because the third shot was fired into Wolbert's face at point-blank range "there's no question what was in the mind at that point. There's no question what his intent was .... There's no question what this man's intent was when he did that. He intended to kill a second victim. ..."

FN29 Anticipating the instructions to be given, the prosecutor stated:

"The second crime charged is attempted murder. It's a very simple concept. It applies just to the top part of that diagram [outlining the elements and theories of first degree murder].

"Basically it says you attempt, attempt to unlawfully kill another human being with express malice aforethought, in other words, you attempt to kill and you do something with the intent to kill, you try to kill, but for one reason or another you're unsuccessful, that's attempted murder."

The argument of defense counsel was directed primarily to the murder count, but in his attempt to persuade the jury that defendant did not intend to kill, he made reference to the shooting of Wolbert as well as that of Dykstra. There is no question, therefore, but that the jury was aware that a specific intent to kill was an element of attempted murder. (Cf. *People v. Howard* (1992) 1 Cal.4th 1132, 1173 [5 Cal.Rptr.2d 268, 824 P.2d 1315].) The instructional error was harmless beyond a reasonable doubt.

4. *Consideration of Lesser Included Offenses (Stone/Kurtzman).*

(30) The court instructed that the jury must unanimously agree and sign a verdict finding that the defendant was not guilty of first degree murder ***60** before the jury could find defendant guilty or not of second degree murder. Defendant claims that the court erred in giving an instruction that required an acquittal of first degree murder before consideration of lesser included offenses.

The instructions were proper. They did not preclude consideration of lesser offenses. " *Stone* [*Stone v. Superior Court* (1982) 31 Cal.3d 503 (183 Cal.Rptr. 647, 646 P.2d 809)] should be read to authorize an instruction that the jury may not *return a verdict* on the lesser offense unless it has agreed beyond a reasonable doubt that defendant is not guilty of the greater crime charged, but it should not be interpreted to prohibit a jury from *considering* or *discussing* the lesser offenses before returning a verdict on the greater offense." (*People v. Kurtzman* (1988) 46 Cal.3d 322, 329 [250 Cal.Rptr. 244, 758 P.2d 572], original italics.) We concluded in *Kurtzman* that this rule was adequate to protect the defendant's interest that jury deliberations not be improperly restricted.

5. *Other Instructional Error.*

(31)**(See fn. 30.)** Defendant also complains that the court erroneously gave instructions on flight and concealment of evidence, that it was error to instruct that the degree of murder is not an element of the crime, and that the order of the instructions was confusing. FN30

FN30 Defendant also claims that his waiver of the right to be present throughout the voir dire of prospective jurors was ineffectual, that reversal should also be granted because he was absent during discussions in chambers between the judge and counsel regarding instructions and moving admission of exhibits. Our conclusion above that neither section 977 nor constitutional authority supports defendant's claim that the voluntary absence of a defendant during some proceedings, even in a capital case is impermissible, disposes of this claim as well.

(32a) The flight instruction, given in the language of CALJIC No. 2.52, advised the jury that evidence of flight alone is insufficient to establish guilt, but may be considered with other proven facts in deciding the question of guilt or innocence. It followed the language of section 1127c. (33) "An instruction on flight is properly given if the jury could reasonably infer that the defendant's flight reflected consciousness of guilt, and flight requires neither the physical act of running nor the reaching of a far-away haven. [Citation.] Flight manifestly does require, however, a purpose to avoid being observed or arrested." (*People v. Crandell* (1988) 46 Cal.3d 833, 869 [251 Cal.Rptr. 227, 760 P.2d 423].)

(32b) The jury could infer from the actions of defendant immediately following the crime that his flight with Hefner reflected consciousness of ***61** guilt. This conclusion is not affected by defendant's decision to contest only the mental state with which he acted. Even were we to conclude that the instruction should not have been given, however, it was clearly harmless. As in *Crandell, supra,* 46 Cal.3d 833, the instruction did not assume that flight was established, leaving that factual determination and its significance to the jury.

(34) Nor are we persuaded that the instruction on concealment of evidence (CALJIC No. 2.06) was improper simply because it was Hefner who had concealed the gun. The evidence permitted an inference that Hefner had acted on behalf of defendant as well as in concealing the weapon and that he did so with defendant's encouragement. Again, however, if there was error it was harmless beyond a reasonable doubt.

(35) The offense with which defendant was charged was "murder." The court correctly instructed that the degree is not an element of that crime.

The degree is not an element of either first or second degree murder. The court correctly instructed the jury that "all murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder of the first degree," and that "the unlawful killing of a human being whether intentional, unintentional, or accidental, which occurs as a result of the commission of or attempt to commit the crime of robbery, and where there was in the mind of the perpetrator the specific intent to commit such crime, is murder of the first degree."

The jury was thereby required to find all of the elements of the offense of first degree murder. The jury was also instructed that "the burden is on the state to prove beyond a reasonable doubt each of the elements of murder." Contrary to defendant's claim, the instructions did not shift the burden to the defendant, nor would they confuse the jury as to the elements that had to be proven beyond a reasonable doubt. FN31 Although the general rule is that the order in which instructions are given is immaterial and is left to the sound discretion of the trial court (*People v. Sanders* (1990) 51 Cal.3d 471, 519 [273 Cal.Rptr. 537, 797 P.2d 561]; *People v. Carrasco* (1981) 118 Cal.App.3d 936, 942 [173 Cal.Rptr. 688]), we have reviewed the order in which the instructions were given in this case and are satisfied that the order was logical and that no confusion was reasonably possible. (*People v. Ford* (1964) 60 Cal.2d 772, 793 [36 Cal.Rptr. 620, 388 P.2d 892].) ***62**

FN31 Defendant apparently concedes that jury unanimity on the theory of first degree murder is not required. (See *Schad v. Arizona* (1991) 501 U.S. ___, ___ [115 L.Ed.2d 555, 572-574, 111 S.Ct. 2491, 2503-2504 (plur. opn.), 2506-2507, conc. opn. of Salia, J.)]; *People v. Milan* (1973) 9 Cal.3d 185, 194-195 [107 Cal.Rptr. 68, 507 P.2d 956]; *People v. Nicholas* (1980) 112 Cal.App.3d 249, 273 [169 Cal.Rptr. 497].)

V Special Circumstances Issue

(36) Defendant argues that the failure of the trial court to instruct the jury pursuant to *People v. Garcia* (1984) 36 Cal.3d 539 [205 Cal.Rptr. 265, 684 P.2d 826] and *Carlos v. Superior Court* (1983) 35 Cal.3d 131 [197 Cal.Rptr. 79, 672 P.2d 862], that a specific intent to kill is a necessary element of a felony-murder special circumstance was error that requires that the felony-murder-robbery special circumstance be set aside. It is not sufficient, he claims, that the jury found, under other proper instructions, that the murder was intentional because the jury must also find that the murder was committed with express malice, premeditation, and deliberation.

This claim lacks merit. *Carlos v. Superior Court, supra,* 35 Cal.3d 131, was reconsidered and overruled in *People v. Anderson* (1987) 43 Cal.3d 1104 [240 Cal.Rptr. 585, 742 P.2d 1306], in which we held that intent to kill is not necessary if a defendant convicted of first degree murder personally killed the victim. Consequently, *Carlos* applies only to murder committed between December 12, 1983, the date on which *Carlos* was decided, and October 13, 1987, the date on which it was overruled. (*People v. Whitt* (1990) 51 Cal.3d 620, 637 [274 Cal.Rptr. 252, 798 P.2d 849]; *People v. Thompson, supra,* 50 Cal.3d 134, 175; *In re Baert* (1988) 205 Cal.App.3d 514, 517-522 [252 Cal.Rptr. 418].) The jury found on other properly given instructions that defendant personally killed Dykstra. It is also well established that the felony-murder special circumstances (§ 190.2, subd. (a)(17)) are not limited to premeditated and deliberate murders, and that such a requirement is not mandated by the Eighth Amendment or other constitutional considerations. (*People v. Belmontes* (1988) 45 Cal.3d 744, 794-795 [248 Cal.Rptr. 126, 755 P.2d 310].)

VI Penalty Phase Issues

A. *Instructions.*

1. *CALJIC Former No. 8.84.2.*

The court instructed the jury in the language of

CALJIC former No. 8.84.2: "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death.

"However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without possibility of parole." ***63**

(37a) Relying on *People v. Brown* (1985) 40 Cal.3d 512, 538-545 [220 Cal.Rptr. 637, 709 P.2d 440] (revd. on other grounds *sub nom. California v. Brown* (1987) 479 U.S. 538 [93 L.Ed.2d 934, 107 S.Ct. 837]), defendant contends that this instruction and the prosecutor's penalty phase argument, without further explanation of the weighing process and the role of the jury in determining the appropriate penalty, misled the jury. FN32 Together these factors restricted the jury to implementing a mechanical weighing formula under which imposition of the death penalty was mandatory if "bad" outweighed "good," and left the jury without an understanding of its role and responsibility in determining the appropriate penalty.

> FN32 In support of his claim that the jury was misled, defendant also points to statements and questions by both the judge and the prosecutor during the voir dire which may have led prospective jurors to believe that assessment of the penalty was a mechanical process which they would be obligated to carry out. The prosecutor's explanation to the jurors in the penalty phase argument, coming weeks after the voir dire, and immediately before the matter was submitted to the jury, was unquestionably adequate to dispel any misunderstanding of their role these statements and questions may have invited.
>
> The voir dire statements by the judge anticipated the "unadorned" instruction given later. Explaining the penalty phase procedure, the judge told the prospective jurors, inter alia, that if the "evidence of mitigating factors, that is, factors that are beneficial to the defense side, outweigh the aggravating factors, your duty is to come back with a verdict of the mitigated sentence, that is, life without possibility of parole.
>
> "If the aggravating factors, in your judgment, outweigh the mitigating factors, the aggravating factors being that evidence that is bad, or goes to the detriment of the defendant, or damning in nature as far as the defendant is concerned, if that outweighs the mitigating factors, your responsibility is to come back with a verdict of death."

(38a) In a related argument, defendant argues that reversal of the judgment of death is required because the record does not affirmatively demonstrate that the jury properly considered all mitigating evidence and inferences. In support of this claim, defendant relies not only on the use of CALJIC former No. 8.84.2, but also on a perceived failure of other instructions to ensure that the jury was aware of the full extent of its discretion to consider any mitigating evidence.

(39) When addressing such claims we examine the entire record, including the instructions and arguments, to determine whether the jury was misled to the prejudice of the defendant about the scope of its sentencing discretion. (*People v. Brown, supra,* 40 Cal.3d 512, 544, fn. 17.) We must ascertain whether, overall, the jury was adequately informed of the full nature of its sentencing responsibility, both as to the manner in which the various factors are to be weighed and as to the scope of its sentencing discretion. (*People v. Belmontes, supra,* 45 Cal.3d at pp. 802-803.)

(37b) Having reviewed the record here, we are satisfied that the argument of counsel clearly informed the jury that the weighing process was not

***64** mechanical, and impressed on the jurors that they had both the discretion and the responsibility to determine whether death was the appropriate penalty in light of all of the evidence. Indeed, the prosecutor opened his argument by advising the jury that at this stage of the trial the only question to be answered was "in light of what you know this defendant has done, what penalty or punishment does he deserve?"

The prosecutor made it clear that the weighing process was not arithmetical or mechanical. He told the jurors that after they had decided that a factor was applicable and decided if it was aggravating or mitigating, "finally you attach a weight to it. In other words, you ask yourselves how important is the factor ... how important is it in the overall picture? ... [O]nce you've done that and you've attached a weight to each one of the factors, you look at the total weight at the end of your deliberations on each one of the factors and you answer the final question: Do the aggravating factors outweigh the mitigating? In which case you vote for the death penalty. On the other hand, if you think that the mitigating factors outweigh the aggravating factors, you give the defendant the lesser sentence of life in prison without possibility of parole."

He impressed on the jurors the tremendous responsibility they undertook "sitting in life or death judgment of a human being," and told them that "the way you really answer these questions ... the way you will make your ultimate determination is by determining what kind of a crime this is and by determining what kind of a person it was who committed the crime." As he was reviewing the evidence and its relationship to the statutory aggravating and mitigating factors, the prosecutor told the jury that factor (k)-"[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime"-(§ 190.3, factor (k)), allowed the jury to "consider pity and sympathy for him and theoretically that's enough to save his life. ... If you feel sorry for him, you can give him the benefit of that pity and sympathy and you can save his life." FN33

FN33 Pursuant to agreement by counsel, the court's instruction on this factor supplemented the statutory language with: "or any factor offered by the defense as a factor in mitigation of the penalty," thus making it clear that the jury could consider any mitigating evidence.

The jury was told that one factor alone could save defendant's life even though all of the others were "overwhelmingly aggravated," if by itself it weighed more than the other factors.

We see no likelihood, based on the prosecutor's argument, that the jury would have believed that the weighing process involved nothing more than adding the number of mitigating and aggravating factors. In summation, he ***65** told the jurors that it was their duty and obligation to return a verdict of death "if that's what he deserves." (40) **(See fn. 34.),** (37c) The jury was thus impressed with the scope of its discretion and its responsibility to determine the appropriate penalty. FN34

FN34 In support of his claim that the jury was misled, defendant argues that the prosecutor also argued that the absence of some statutory mitigating factors should be considered aggravating. After the trial of this case we held in *People v. Davenport* (1985) 41 Cal.3d 247, 289-290 [221 Cal.Rptr. 794, 710 P.2d 861], that such argument was improper and should not be permitted in the future because it was likely to confuse the jury as to the meaning of the terms "aggravation" and "mitigation." It is not improper, however, to review each factor and the possible relevance of the evidence to finding it present.

The prosecutor's argument in this case followed a permissible pattern of review. He used the absence of a factor as a spring-

board from which to launch his discussion of the evidence which precluded finding the factor to be present. In the instances relied on by defendant to establish "*Davenport* error," the context made it clear that he was relying on the aggravating nature of the evidence, not the absence of a mitigating factor, in his attempt to persuade the jury that death was the appropriate penalty.

Thus, in commenting on factor (e)-"[w]hether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act"-(§ 190.3, factor (e)), the prosecutor emphasized that the victims were lured to the scene. "The defendant lied ... they didn't have anything to do with what happened that day. That's an aggravating factor. If it applies again-maybe you don't think that applies, but if anything it's an aggravating factor."

The prosecutor left categorization of age (§ 190.3, factor (i)) to the jury, stating only it was not mitigating and that the jury "may think it isn't a big deal, or it's an aggravating factor." As to section 190, factor (j)-"[w]hether or not the defendant was an accomplice to the offense and his participation in the offense was relatively minor,"-the prosecutor said that because defendant was the "triggerman" the factor could not help him. "That's an aggravating factor." Again, the reference was to the evidence that defendant personally shot the victims, not to the absence of section 190, factor (j), as the aggravating consideration.

Defendant's attorney also emphasized that while the prosecution might be asking that a verdict of death be returned even though the defendant was "49 percent good," an inaccurate but possibly effective tactic, "it's not that easy a case in my opinion. That's not the type of procedure that can be taken lightly without careful evaluation and careful consideration." He also urged the jury to consider sympathy and pity "because there's nothing more serious than what you're being asked to do. You're being asked to take somebody's life. That's the bottom line."

Again it was made clear that no mechanical weighing was expected, and that the jury's responsibility was to determine, based on all of the evidence, and considering sympathy and pity for the defendant, if he should be put to death. The court included an instruction that the jury could "consider pity and sympathy for the defendant in deciding the penalty to be imposed on the defendant."

(38b) We reject petitioner's argument that the jury may not have known that it could consider all mitigating evidence that was before it. Here, as in ***66** past cases, defendant argues that the jury may have believed it was limited because the statutory factors referred only to "extreme" mental or emotional disturbance and "extreme" duress. Again we are satisfied that this language did not impermissibly restrict the jury's exercise of discretion. (See *People v. Morris* (1991) 53 Cal.3d 152, 225-226 [279 Cal.Rptr. 720, 807 P.2d 949], and cases cited.) There was no suggestion in the argument of counsel, for instance, that the jury could not consider whether defendant acted under duress because the instruction referred only to "extreme" duress. The prosecutor argued that the jury should reject defendant's attempt to persuade them that Hefner had "convinced him he should," but never suggested that the rejection should be because the evidence did not demonstrate "extreme" duress. Indeed, the arguments of both counsel assumed, and made clear to the jury, that counsel assumed that the jury would consider all of the mitigating evidence and inferences that might be drawn therefrom. Recognizing that the jury might not find the mitigating evidence persuasive, however, counsel made no effort to rely on it. We are satisfied, nonetheless, that the jury was not misled, and was aware that it was free to consider any evidence presented at the guilt and penalty phases of the trial in mitigation. FN35

FN35 Defendant's counsel told the jury that in addition to the statutory factors "we have in addition ... any other factor that you think is relevant in considering whether or not this case should be mitigated. We also have one that is not listed there. You may consider pity or sympathy for the particular defendant, so we have a lot of different factors to consider."

Counsel did not argue that any statutory mitigating factor was present. He adopted a different tactic, conceding that the jury could find that all of the possibly aggravating factors were present, and none of the mitigating. His approach was to note the tragedy and the impact of the murder victim's death on other people, and to ask the jury not to add to the tragedy or cause others to suffer the same impact by condemning defendant to death.

2. *Instructions on Lesser Offenses.*

(41) Defendant argues that because the court did not give clear instructions on all possible lesser included offenses, the reliability of the verdict of death has been undermined. We have rejected his claim that there was prejudicial guilt phase error in the court's failure to instruct on voluntary manslaughter. In this context, however, he argues that the omission of the instruction may have prevented the jury from understanding the distinction between the degrees of murder and manslaughter and between voluntary and involuntary manslaughter. If so, the jury would not be able to properly consider the impact of the reduced levels of culpability in considering the relevance of the evidence of his intoxication to culpability and penalty. That evidence would be relevant at the penalty phase, he argues, notwithstanding its irrelevance at the guilt phase in light of the felony-murder finding.

We agree that the evidence was relevant. We do not agree that any instructional error misled the jury as to that relevance, however. As we noted ***67** above, it is clear that the jury was aware that intent to kill was an element of attempted murder and rejected the evidence that defendant's intoxication negated the existence of that intent. And, as noted earlier, the jury was instructed that it should take into account the evidence of both defendant's abnormal mental state and his drug-induced intoxication. The jury rejected defendant's attempt to establish reduced, culpability on that basis when it returned the guilt verdict.

(42) Defendant also claims that the jury might not have been aware that his intoxication was relevant in determining whether he committed larceny or auto theft rather than robbery. He argues, in support of his claim that inadequate instruction prejudiced him in this regard, that he "maintained that he did not intend to rob Dykstra or Wolbert."

We reject his claim that the instructions were inadequate in this regard. The jury was instructed that robbery was a specific intent crime, that the specific intent to commit robbery had to be proven beyond a reasonable doubt, and that defendant's intoxication should be considered in determining if he had the requisite specific intent. Instructions on larceny were given, and the jury was told that if it was not satisfied that the defendant was guilty of the charged offense it could convict on any lesser included offense. The instructions were adequate. (*People v. Jones* (1991) 53 Cal.3d 1115, 1145 [282 Cal.Rptr. 465, 811 P.2d 757].)

We note also that defendant does not accurately describe his testimony. While he testified that at the time the car pulled over he intended only to urinate, he also testified that his intent was to take the victims farther up the canyon before taking their money. Defendant refused to characterize his intent as an intent to "rob," but his own description of the plan admitted that intent. At one point during cross-examination when the prosecutor asked about his choice of words, defendant testified: "We didn't intend to rob them, just to get them to-rip them off of their money, get them to give it to us and take it." Asked what his intent was when the gun was used, he stated: "Same intentions, take their money."

We see no possibility that the jury was unaware that drug- or alcohol- induced intoxication could afford a basis for a guilt phase verdict of lesser offenses, failed to understand that this reflected society's recognition of differing degrees of legal culpability, or failed to recognize that drug- and alcohol-induced intoxication could be considered in assessing defendant's culpability at the penalty phase.

3. *Standard of Proof.*

(43) Defendant claims that the court erred in refusing to instruct the jury that before it could impose the death penalty it had to find beyond a ***68** reasonable doubt that aggravating factors outweighed mitigating and that death was the appropriate penalty. We have repeatedly rejected the argument that the reasonable doubt standard, one required when determining guilt and making factual determinations, is appropriate to assessing the penalty to be imposed in a capital case. (See, e.g., *People v. Bacigalupo* (1991) 1 Cal.4th 103, 146 [2 Cal.Rptr.2d 335, 820 P.2d 559]; *People v. Gordon* (1990) 50 Cal.3d 1223, 1273-1274 [270 Cal.Rptr. 451, 792 P.2d 251]; *People v. Jennings* (1988) 46 Cal.3d 963, 992 [251 Cal.Rptr. 278, 760 P.2d 475].)

B. *Evidence of Prior Criminal Conduct.*

1. *Kathy Cusack.*

(44a) Defendant first claims that evidence of his attack on Kathy Cusack should have been excluded as more prejudicial than probative (Evid. Code, § 352), and as improper rebuttal. He also complains that introduction of evidence of criminal acts of which a defendant has not been convicted denies a fair trial since determination of guilt is made by the same jury that has already returned a verdict of guilty on the charges for which the defendant is on trial. Neither claim has merit.

(45a) Evidence of prior assaultive conduct is expressly made admissible as a statutory aggravating factor by section 190.3, factor (b)-"The presence ... 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." As such it is a matter which the state believes to be particularly relevant to the penalty decision. (*People v. Jennings, supra,* 46 Cal.3d 963, 988; *People v. Melton* (1988) 44 Cal.3d 713, 770 [244 Cal.Rptr. 867, 750 P.2d 741].) (46)**(See fn. 36.),** (45b) Therefore, while we recognize that the court has authority under Evidence Code section 352 to control the manner in which evidence of past criminal conduct is offered, it has no discretion to exclude all evidence related to a statutory sentencing factor. (*People v. Douglas* (1990) 50 Cal.3d 468, 531 [268 Cal.Rptr. 126, 788 P.2d 640]; *People v. Karis* (1988) 46 Cal.3d 612, 641, fn. 21 [250 Cal.Rptr. 659, 758 P.2d 1189].) FN36 (44b) The evidence was properly offered in rebuttal to defendant's attempt to persuade the jury that his violent acts were uncharacteristic and that he normally treated people with concern and respect. (***69** *People v. Rodriguez* (1986) 42 Cal.3d 730, 791-792 [230 Cal.Rptr. 667, 726 P.2d 113].)

FN36 Defendant's reliance on *People v. Harvey* (1979) 25 Cal.3d 754 [159 Cal.Rptr. 696, 602 P.2d 396], for his further claim that the plea bargain in which he pleaded guilty to the assault with a deadly weapon on Scofield precludes consideration of the attack on Cusack in this proceeding, is misplaced. We held there that it would be unfair to permit a court to consider the facts underlying counts dismissed in a plea bargain in sentencing for the charge to which the defendant had pleaded guilty. We reasoned that absent a contrary agreement it was implicit in such a bargain "that defendant will suffer no adverse sentencing consequences by reason of the facts underlying, and solely pertaining to, the dismissed count." (*Id.,* at p. 758.)

The sentence to which we referred, however, was the sentence then being imposed. Nothing in *Harvey, supra,* 25 Cal.3d 754, precludes consideration of all incidents of assaultive conduct in senten-

> cing for subsequent offenses, including capital sentencing, whether or not the defendant has been charged with those offenses, or had them dismissed in a bargained-for disposition of other charges. (*People v. Robertson, supra,* 48 Cal.3d 18, 47; *People v. Melton, supra,* 44 Cal.3d 713, 755.)

Defendant asserts that the mitigating evidence he offered to show that he was good to members of his family was limited to evidence of his conduct when he was not under the influence of drugs and that it was not offered as evidence that he was nonviolent or to demonstrate a character trait of being a nonviolent person. On that basis he argues that evidence of his prior assaultive conduct while under the influence of drugs was not proper rebuttal. We are not persuaded.

The prosecution may rebut mitigating character evidence with evidence related to the character trait raised by defendant. (*People v. Mickle* (1991) 54 Cal.3d 140, 191 [284 Cal.Rptr. 511, 814 P.2d 290]; *People v. Rodriguez, supra,* 42 Cal.3d 730, 792, fn. 24.) A number of witnesses testified to defendant's kind, loving, and compassionate behavior. (47)**(See fn. 37.),** (44c) A capital defendant who offers, as mitigating evidence relevant to whether he should live or die, [FN37] evidence that he is a kind and considerate person may not restrict the scope of evidence offered to rebut that inference by arguing that he intended only to demonstrate that he was kind and considerate under limited circumstances or to particular people. Evidence that defendant violently assaulted a pregnant woman who was in bed and stabbed her several times even after being told of her condition was relevant and proper rebuttal to the evidence that he was a kind and considerate person.

> FN37 Defendant's reliance on Evidence Code section 1102 is misplaced. That section permits the prosecution to introduce evidence of a trait of character "in the form of an opinion or evidence of his reputation" in order to rebut evidence the defendant has offered to prove the defendant's "conduct in conformity with such character or trait of character."
>
> The relevance of evidence of character or a character trait to the penalty determination in a capital case is not whether the defendant acted in conformity with a character trait, but whether the defendant's character or character trait should be considered a mitigating factor. Therefore, whether prosecution evidence is proper rebuttal must be determined in the peculiar circumstance of a penalty trial, not under Evidence Code section 1102.

(48) Defendant also makes a wide-ranging constitutional attack on introduction of evidence of unadjudicated criminal conduct, asserting, without elaboration, that he was denied due process and equal protection, that his ***70** right against self-incrimination was violated, that the presumption of innocence was infringed, that the right to confrontation was denied, and that the right to a reliable penalty determination was affected. He concedes that a due process-based claim was considered and rejected in *People v. Balderas* (1985) 41 Cal.3d 144, 204-205 [222 Cal.Rptr. 184, 711 P.2d 480], in which we found no support in decisions of the United States Supreme Court for the suggestion that due process requires impanelment of a separate jury to determine the penalty in a capital case. We decline his invitation to reconsider our conclusion that admission of unadjudicated criminal acts as aggravating factors is constitutionally permissible.

(49a) We also reject defendant's claim that admission of evidence of the attack on Cusack was error either because the prosecution failed to give notice, or because defendant was denied a continuance to enable him to prepare to defend against that evidence. The notice of aggravating evidence given by the People pursuant to section 190.3 prior to trial did not include this evidence, but section 190.3 expressly excludes rebuttal evidence from the notice

requirement.

Defendant did request a continuance in order to find witnesses (other than William Scofield) "who would testify as to what really occurred that evening" and in order to prepare for cross-examination of Cusack. He did not name the potential witnesses, however, and the prosecution's abortive effort to introduce Cusack's testimony earlier should have alerted counsel to the probability that she would be called as a rebuttal witness. Counsel was on notice that Scofield would be a witness, and any investigation of the 1978 events in which Scofield was attacked would have revealed "what really occurred that evening."

(50) Notice 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 notice requirement of section 190.3. (*People v. Cooper, supra,* 53 Cal.3d 771, 842.) (49b) Finally, the court did order that all police reports related to the 1978 incident, those about Scofield and Cusack, be delivered to counsel immediately, and she was not called until the following day. Under the circumstances, there was no abuse of discretion in denying the request for a continuance. The ruling is one that is committed to the sound discretion of the trial court. (*People v. Ainsworth* (1988) 45 Cal.3d 984 [248 Cal.Rptr. 568, 755 P.2d 1017].)

Unlike the situation in *Lankford v. Idaho* (1991) 500 U.S. ___ [114 L.Ed.2d 173, 111 S.Ct. 1723] on which defendant relies, ample notice that the state ***71** would seek the death penalty was given from the outset of this prosecution. Special circumstances were charged and the People gave notice of the aggravating evidence it intended to offer at the penalty phase. Defendant was not denied notice of the issue to be resolved at the penalty phase of the trial.

Nor does introduction of evidence of unadjudicated offenses threaten imposition of the death penalty on the basis of materially inaccurate evidence such as that considered by the jury in *Johnson v. Mississippi* (1988) 486 U.S. 578 [100 L.Ed.2d 575, 108 S.Ct. 1981]. There the only evidence offered to support an aggravating factor of prior conviction of a felony involving use or threat of violence was a copy of a prior commitment to prison. The judgment reflected in that commitment was subsequently set aside. The Supreme Court held that consideration of the invalid conviction was clearly prejudicial since no other evidence of aggravating circumstances was available, and created a risk that the sentence was imposed arbitrarily. Here there was no comparable risk. Evidence of the facts underlying the prosecution's claim that defendant had committed a prior violent crime was offered, and the jury was instructed that it could not consider that evidence unless defendant's commission of the acts was proved beyond a reasonable doubt.

2. *William Scofield.*

(51) Relying on *People v. Jackson* (1985) 37 Cal.3d 826 [210 Cal.Rptr. 623, 694 P.2d 736], and *People v. Crowson* (1983) 33 Cal.3d 623 [190 Cal.Rptr. 165, 660 P.2d 389], defendant claims that it was error to permit Scofield to testify regarding the details of defendant's 1978 assault on him. Evidence of a prior felony conviction must be limited, he claims, to evidence of the minimal, or least adjudicated, elements of the prior offense to avoid the double jeopardy and speedy trial implications of litigating the truth of the past offense.

Defendant concedes that no objection was made to the evidence. Moreover, we have rejected similar claims (see *People v. Karis, supra,* 46 Cal.3d 612, 640; *People v. Melton, supra,* 44 Cal.3d 713, 755-756; *People v. Gates* (1987) 43 Cal.3d 1168, 1203 [240 Cal.Rptr. 666, 743 P.2d 301]), and are not persuaded that these decisions should be reconsidered. The presentation of evidence of past criminal conduct at a sentencing hearing does not place the defendant in jeopardy with respect to the past offenses. He is not on trial for

the past offense, is not subject to conviction or punishment for the past offense, and may not claim either speedy trial or double jeopardy protection against introduction of such evidence. (*People v. Melton, supra,* 44 Cal.3d 713, 756, fn. 17.) ***72**

3. *Evidence of Juvenile and Noncriminal Conduct.*

(52) The court instructed the jury to consider all of the evidence received at any phase of the trial. Defendant claims that as a result the jury was improperly permitted to consider evidence of nonviolent and juvenile offenses that otherwise would have been inadmissible at the penalty phase.

Not only did defendant fail to request a limiting instruction, but his assumption that violent juvenile conduct was inadmissible is unwarranted. Section 190.3 permits consideration of "other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence." Evidence of violent juvenile conduct is admissible under that section. (*People v. Burton* (1989) 48 Cal.3d 843, 862 [258 Cal.Rptr. 184, 771 P.2d 1270]; *People v. Lucky* (1988) 45 Cal.3d 259, 295 [247 Cal.Rptr. 1, 753 P.2d 1052].)

Evidence of nonviolent criminal activity that did not result in a felony conviction is, as defendant claims, inadmissible as an aggravating factor. (*People v. Burton, supra,* 48 Cal.3d 843, 862.) Here, however, the evidence that defendant now claims should not have been considered was evidence that he himself had introduced in support of his effort to establish that his criminal conduct was attributable to his use of drugs and that he was otherwise a loving, caring, nonviolent and law-abiding person. The court did limit consideration of the evidence by instructing the jury to consider the statutory factors (§ 190.3) in determining the penalty. Having introduced the evidence himself, defendant may not now complain that the jury might have concluded that the factor to which it was relevant was aggravating rather than mitigating. (*People v. Williams, supra,* 44 Cal.3d 883, 957.) FN38 ***73**

FN38 The prosecutor did refer to the evidence of defendant's prior criminal conduct, stating that it reflected a person "with a fairly aggravated background," but he did so in arguing that the testimony by members of defendant's family did not accurately portray his character, and that the jury was not being asked to impose the death sentence on a person who had only "one bad day in his 25 years." In his subsequent discussion of the factors the jury was to consider he did not argue that this evidence was aggravating under any of the factors.

One reference to defendant's juvenile record was in the prosecutor's discussion of section 190.3, factor (i)-"The age of the defendant at the time of the crime"-and there he argued only that defendant's age "doesn't help him a bit. He's 25, 26. He's been an adult. He's actually been convicted of both juvenile and adult offenses. He's been sent to state prison as an adult before. His age doesn't help him here."

In another reference, while discussing the expanded section 190.3, factor (k) instruction that permitted the jury to consider any evidence offered by defendant including pity or sympathy for defendant, the prosecutor asked the jury to "remember what kind of a person he has shown himself to be during his life, both in his late years as a juvenile and as an adult. Don't waste your pity on someone who doesn't deserve it."

At no time did the prosecutor argue that defendant's juvenile record should be considered an aggravating factor. The argument was carefully tailored to discount the evidence as mitigating.

C. *Response to Jury Inquiries.*

During the second day of deliberation, the jury

sent questions to the judge asking:

"1. Can you give us a more explicit legal definition of the phrase 'extreme duress'?"

and

"2. Can you give us a more explicit legal definition of the phrase 'moral justification'?"

The court responded in writing, signed with "O.K." by both counsel, stating:

"The definition of the terms of which you inquire are [*sic*] self evident. These are not especially technical terms under the law and you are to construe these phrases in their common meaning. In other words, they mean what they say."

(53a) Notwithstanding his attorney's approval of the response, defendant claims that it was inadequate since the response did not further define the terms and did not correct a misunderstanding which he claims was implicit in the inquiry as to the power of the jury to consider any factor calling for a sentence less than death even if not specifically enumerated in the statute. Even now, however, defendant does not suggest what more appropriate "clarification" might have been given. (See *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1227 [275 Cal.Rptr. 729, 800 P.2d 1159].)

The jury inquiry related to the court's instruction, in the language of section 190.3, advising the jury of the aggravating and mitigating factors which the jury should consider in determining the appropriate penalty. Section 190.3, factor (f) permits consideration of "[w]hether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct." Section 190.3, factor (g) permits consideration of "[w]hether or not defendant acted under extreme duress or under the substantial domination of another person."

Assuming the issue was preserved for appeal, there was no error. "Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries ***74** what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*, 408 U.S. 238 (1972)." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362 [100 L.Ed.2d 372, 380, 108 S.Ct. 1853].) The statutory factor in *Maynard v. Cartwright, supra,* was that the murder be "especially heinous, atrocious, or cruel." Those adjectives failed to give the jury adequate guidance since they suggested only that the individual juror was to determine if the murder was more than "just heinous," and an ordinary person could believe that all unjustified, intentional taking of life was "especially heinous." (486 U.S. at p. 364 [100 L.Ed.2d at p. 382].)

Factors (f) and (g) of section 190.3, by contrast, are not "aggravating circumstances" comparable to those under consideration in *Maynard v. Cartwright, supra,* 486 U.S. 356, or *Lewis v. Jeffers* (1990) 497 U.S. 764 [111 L.Ed.2d 606, 110 S.Ct. 3092], on which defendant also relies. (54) Neither is a "special circumstance" whose function in this state is to channel jury discretion by narrowing the class of defendants who are eligible for the death penalty. (55) Under the California death penalty law an "aggravating factor" identifies a matter which the jury may consider in deciding whether a defendant who has already been found eligible for the death penalty should receive that punishment. "[W]ith respect to the process of sentencing from among that class those defendants who will actually be sentenced to death, '[w]hat is important ... is an individualized determination on the basis of the character of the individual and the circumstances of the crime. [Citation.] It is not simply a finding of facts which resolves the penalty decision, ' " but ... the jury's moral assessment of those facts as they reflect on whether the defendant should be put to death ...." ' " (*People v. Brown, supra,* 40 Cal.3d

512, 540, italics omitted.) Consideration of statutory aggravating and mitigating factors as part of the jury's normative function of determining the appropriate punishment is, therefore, distinguishable from the factual determination made when the jury finds that a special circumstance allegation is true.

Nonetheless, the jury must "be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face." (*Walton v. Arizona* (1990) 497 U.S. 639, ___ [111 L.Ed.2d 511, 528, 110 S.Ct. 3047, 3057].) This obligation undoubtedly extends to aggravating factors identified in section 190.3. Factors (f) and (g), however, are mitigating factors which call to the attention of the jury only two of an unlimited number of matters which the jury may consider as weighing against imposition of the death penalty. Moreover, these factors do not describe the relevant consideration solely in terms of vague and pejorative adjectives as ***75** does subdivision (a)(14) of section 190.2, the California equivalent of the "heinous, atrocious, and cruel" aggravating factor considered by the Supreme Court in *Maynard v. Cartwright, supra,* 486 U.S. 356. This court held subdivision (a)(14) invalid as an unconstitutionally vague special circumstance in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797 [183 Cal.Rptr. 800, 647 P.2d 76], noting that none of the terms met "the standards of precision and certainty required of statutes which render persons eligible for punishment, either as elements of a charged crime or as a charged special circumstance." (*Id.*, at p. 802.)

(56) Section 190.3, factor (f) asks the jury to consider whether the defendant believed his act was morally justified, while factor (g) is predicated on duress, a noun whose meaning is generally understood as force or compulsion. "Duress" is modified by the word "extreme," which has a meaning that is generally understood as describing the farthest end or degree of a range of possibilities. There is no comparable vagueness, and the defendant is further protected against possible arbitrary sentencing in that any mitigating evidence he offers must be considered by the jury.

(53b) We do not join defendant's assumption that the jury inquiry reflected confusion as to whether it could consider the evidence that defendant fired the gun in response to Hefner's command. It is highly improbable that a jury would consider that to be evidence of duress of any sort, and the jury had been expressly instructed that any factor offered in mitigation could be considered.

Inasmuch as no substantial evidence of duress, extreme or otherwise, and no evidence suggesting that defendant believed he was morally justified was offered, defendant suffered no prejudice from the failure of the court to respond differently.

D. *Double Counting of Aggravating Factors.*

(57) Defendant complains that the court's instructions, tracking the statutory language of factors (a), (b), and (c) of section 190.3, FN39 without further clarification, permitted the jury to consider some evidence under more than one of the factors, thus artificially inflating that evidence. ***76**

> FN39 The part of the instruction of which defendant complains advised the jury that in determining the penalty it should consider:
>
> "(a) the circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true.
>
> "(b) the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence, or the expressed or implied threat to use force or violence.
>
> "(c) the presence or absence of any prior felony conviction."

The "prior convictions" encompassed in factor

(c) do not include the offenses of which the defendant had been convicted in the current proceeding (*People v. Balderas, supra,* 41 Cal.3d 144, 201), and the circumstances of the current offenses which reflect violence and/or threats of violence are to be considered only under factor (a). Factor (b) relates to other unadjudicated criminal conduct. (*People v. Miranda* (1987) 44 Cal.3d 57, 105-106 [241 Cal.Rptr. 594, 744 P.2d 1127].)

The jury was not told that it should or could "double count" or "triple count" evidence under these factors, however, and the court is not under a duty to instruct sua sponte that such consideration would be improper. (*People v. Guzman* (1988) 45 Cal.3d 915, 966 [248 Cal.Rptr. 467, 755 P.2d 917].) Since the prosecutor did not mislead the jury, or suggest that the evidence be considered more damning because it related to more than one factor, FN40 we do not agree that it is likely the jury overemphasized its importance.

> FN40 In his penalty phase argument the prosecutor carefully and properly segregated the evidence. He told the jury that the first factor "deals specifically with the crime that you've heard about and convicted this man of, and the special circumstance involved." He then reminded the jury of the evidence concerning the shooting of Dykstra and Wolbert in the course of a robbery.
>
> Addressing factor (b), he told the jury that the factor involved prior violence, and reminded the jury it had heard evidence about the attack on Cusack. He then turned to factor (c), recalling that defendant had admitted that he had pled guilty to a felony, and discussing the evidence relevant to the 1978 attack on Scofield.

E. *Age Factor.*

(58) Defendant urges the court to reconsider our conclusion in *People v. Lucky, supra,* 45 Cal.3d 259, 302, that age-related matters suggested by the evidence and relevant to the penalty decision are not limited to consideration as mitigating evidence under factor (i) of section 190.3. He argues that, as defined by the court in *Lucky,* the age factor fails to offer guidance to the jury and invites arbitrary and capricious sentencing. This, he suggests, renders factor (i) unconstitutionally vague, and its use a violation of the Eighth and Fourteenth Amendments.

Lucky, supra, 45 Cal.3d 259, and *People v. Rodriguez, supra,* 42 Cal.3d 730, 789, make it clear, however, that chronological age alone may not be deemed aggravating. As long as neither the prosecutor in argument, nor the court in its instructions, suggests that age is to be considered aggravating, the jurors may determine the relevance, if any, of the defendant's age to the appropriate penalty. (*People v. Hernandez* (1988) 47 Cal.3d 315, 362 [253 Cal.Rptr. 199, 763 P.2d 1289].) Permitting the jury to make this decision, as ***77** part of what we have described as the "essentially normative task" (*People v. Allen* (1986) 42 Cal.3d 1222, 1287 [232 Cal.Rptr. 849, 729 P.2d 115]) of determining the appropriate penalty after weighing the evidence and applying its own moral standard, contravenes no constitutional principle.

F. *Proportionality.*

(59) Defendant asks the court to undertake both intracase and intercase proportionality review, arguing that the death sentence imposed on him is arbitrary, discriminatory, and disproportionate under the due process, equal protection, and cruel and unusual punishment clauses of the United States and California Constitutions. He bases his claim on the evidence of his chemical dependency, the fact that Hefner did not receive the death penalty even though he was a full participant in the events, and his conviction of only one murder with no prior arrests for murder.

None of these considerations warrants reversal of the penalty under any of the theories proposed by defendant. "Unless the state's capital punishment system is shown by the defendant to operate in an arbitrary and capricious manner, the fact that such

defendant has been sentenced to death and others who may be similarly situated have not does not establish disproportionality violative of constitutional principles. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 306-312 [95 L.Ed.2d 262, 287-291, 107 S.Ct. 1756, 1774- 1777]).” (*People v. McLain* (1988) 46 Cal.3d 97, 121 [249 Cal.Rptr. 630, 757 P.2d 569].)

The conclusion of the jury that the intentional killing of Dykstra during a $70 robbery in which an attempt was made to kill a second victim in order to prevent identification, by a person who had in the past committed other drug-related violent assaults, warranted imposition of the death penalty is not aberrant and does not demonstrate arbitrary or capricious sentencing. The penalty cannot be deemed disproportionate to the offense.

G. *Motion for Modification (§ 190.4).*

(60a) Defendant argues that the trial court did not properly rule on his motion for modification of the verdict of death. He claims that the court's denial of the motion was arbitrary and erroneous, took into account improper considerations, and failed to recognize mitigating inferences, all in violation of his rights under the Sixth and Eighth Amendments.

The basis for these claims is an assertion that the court considered and referred to information contained in the probation report prior to ruling on ***78** the motion, and failed to refer to evidence that might have been considered mitigating.

(61) A judge should not consider the probation officer's report prior to ruling on a modification motion. In making that ruling the judge is limited to consideration of the evidence that was before the penalty jury. (*People v. Gonzalez, supra,* 51 Cal.3d 1179, 1238.) (60b) While the recitals of the judge state only that the report had been reviewed prior to “sentencing,” that statement was made at the hearing in which the motion for modification was denied. The record supports defendant's assumption that the judge had already reviewed the probation report when he denied the motion therefor.

Nonetheless the judge set out in great detail the evidence on which he relied for his conclusion that the aggravating factors “overwhelmingly” outweighed the mitigating. No mention of evidence other than that before the jury, and thus properly before the court, is made in the court's statement. The judge stated expressly that he had considered all of the evidence that had been presented to the jury in making his determination of the proper penalty, and that this included the “totality of the penalty phase evidence.” We must assume, therefore, that the judge considered only evidence that had been before the jury in making his ruling. (*People v. Sully, supra,* 53 Cal.3d 1195, 1250; *People v. Douglas, supra,* 50 Cal.3d 468, 539-540.) It is also clear that he was aware of, understood why the jury might have discounted, and did himself consider all of the potentially mitigating evidence.

H. *Validity of Death Penalty Law.*

(62) Defendant asks the court to reevaluate the validity of the 1978 death penalty law, arguing that the constitutional requirements of a law which narrows the class of murderers eligible for the death penalty while avoiding arbitrary and capricious imposition are not satisfied. He concedes that the court has held that the narrowing function is satisfied notwithstanding the unavailability of intercase proportionality review, but argues that the breadth of prosecutorial discretion in exercising the charging function itself leads to arbitrary and capricious implementation of the law.

This argument is not supported by either empirical evidence or authority which suggests that the manner in which prosecutors exercise their discretion in seeking the death penalty in murder prosecutions in which special circumstances appear to be present is arbitrary. (*People v. Keenan* (1988) 46 Cal.3d 478, 506 [250 Cal.Rptr. 550, 758 P.2d 1081].) It requires nothing more than a review of the facts of other cases recently before this court to refute defendant's speculation that prosecutors in other heavily populated ***79** counties such as Los Angeles County would not seek the death penalty

for murder committed in comparable circumstances. (See, e.g., *People v. Fuentes* (1991) 54 Cal.3d 707 [286 Cal.Rptr. 792, 818 P.2d 75]; *People v. Duncan* (1991) 53 Cal.3d 955 [281 Cal.Rptr. 273, 810 P.2d 131]; *People v. Lewis, supra,* 50 Cal.3d 262.)

Defendant also asks that we reconsider prior decisions (see *People v. Sully, supra,* 53 Cal.3d 1195, 1250- 1251, and cases cited) upholding the 1978 death penalty law against challenges attacking the omission of requirements for written findings on the presence of aggravating factors; proof beyond a reasonable doubt of those factors; jury unanimity on aggravating factors; agreement beyond a reasonable doubt that aggravating outweigh mitigating factors, and that death is the appropriate penalty; additional procedures for appellate review of the sentencing decision; or a presumption in favor of life without parole. FN41 We decline the invitation.

FN41 Counsel acknowledges our rejection of these claims in prior cases and explains that they are presented here in part in order to ensure preservation for federal review.

VII Prosecutorial Misconduct

Acknowledging that no objections or requests for admonition were made on that basis, defendant claims that instances of prosecutorial misconduct occurring throughout the trial were so serious and pervasive that the trial court had a sua sponte duty which the judge failed to assume to correct the abuse. He claims that the misconduct was so pervasive that he was denied a fair trial and that reversal is therefore required notwithstanding the failure to properly preserve the issue for appeal.

(63) A defendant who does not object and seek an admonition to disregard improper statements or argument by the prosecutor is deemed to have waived any error unless the harm caused could not have been corrected by appropriate instructions. (*People v. Bell, supra,* 49 Cal.3d 502, 547; *People v. Green, supra,* 27 Cal.3d 1, 34.) Because we do not expect the trial court to recognize and correct all possible or arguable misconduct on its own motion (*People v. Bell, supra,* 49 Cal.3d 502, 542; *People v. Adcox* (1988) 47 Cal.3d 207, 261 [253 Cal.Rptr. 55, 763 P.2d 906]; *People v. Poggi* (1988) 45 Cal.3d 306, 335-336 [246 Cal.Rptr. 886, 753 P.2d 1082]), defendant bears the responsibility to seek an admonition if he believes the prosecutor has overstepped the bounds of proper comment, argument, or inquiry.

Defendant claims the prosecutor acted improperly in a variety of ways-by comments designed to appeal to the fears and prejudices of the jurors, by ***80** casting aspersions on the defense case with accusations of perjury and deceit, and by inviting consideration of irrelevant issues and facts not supported by the evidence. Much of the conduct on which he relies for these claims cannot reasonably be characterized in that manner, however.

(64) Defendant complains in particular that the prosecutor attempted to impeach his credibility by asking if defendant had changed his appearance because he was to appear before the jury. This, he suggests, was an appeal to passion and prejudice, but *People v. Kirkes* (1952) 39 Cal.2d 719, 724 [249 P.2d 1], on which he relies, hardly supports that argument. In *Kirkes* the prosecutor, stating facts not in evidence, had asserted personal knowledge of the defendant's guilt, implied he would not have prosecuted had he not believed in the defendant's guilt, and pictured the defendant as a person who would kill again to cover his crime and prevent witnesses from testifying. While we may question the relevance of defendant's possibly improved appearance to assessing his veracity, the misconduct, if any, in the line of questioning could easily have been cured by an admonition had an objection been made. FN42

FN42 Counsel did object on relevancy grounds to a question asking if defendant had “any particular reason” for having cut his hair 10 months before trial, and when defendant answered “no” to the question

asking if he cut his hair because he was to appear before a jury, counsel objected to a follow-up inquiry: "It is totally coincidental?"

(65) Defendant next complains that rather than challenging the qualifications of defendant's expert, Dr. Broussard, the prosecutor attempted to denigrate the value of the results of tests performed on defendant by referring to some as "little squiggles" that gave some insight into defendant's personality, FN43 and asking with regard to the Rorschach test that the expert "tell the jury what it was about any of those ink blots and his responses that cause you to go back 25 years in his life and say he had a problem with his mother." The prosecutor also asserted in cross-examining the expert that "anybody can call themselves a forensic psychologist, right," and asked if "the problem you have with this crime [is] the fact that he was apprehended so easily."

FN43 The "squiggles" reference was to markings made by the subject of a Bender Visual Motor Gestalt test. Dr. Broussard had testified on direct that his opinion was based in part on his administration of that test to defendant. A copy of his report was being used on cross- examination. He had explained that the test involved showing the subject drawings or designs on paper, and asking the subject to copy what he had been shown on a sheet of paper. The prosecutor then characterized what was written as "those little squiggles on that paper."

Defendant offers no basis on which to conclude that this term was anything other than descriptive of the marks in question. Asked later on redirect examination whether the marks would look like squiggles to persons not versed in psychology, Dr. Broussard agreed that they would "unless you're trained in interpreting."

(66a) In further cross-examination the prosecutor questioned Dr. Broussard about "the Rosenhan" study, with which the expert was not acquainted, ***81** defendant's extrajudicial statements and his testimony at trial, the prosecutor asking questions that were assertions of fact or conclusions reached in that study, the import of which was that psychiatrists are unable to accurately diagnose schizophrenia and paranoia. The study itself was not introduced.

Referring to a similar attempt to impeach an expert on the basis of the same study, the Court of Appeal held that overruling an objection to the questioning was patent error. "It consists mainly in the prosecutor's having insinuated by his questions that half of all mental illness is feigned, and that the 'test'-whatever it is or may be-was-again in the *prosecutor's* opinion-settled and irrefutable. In fact, all of these assumptions were and are extremely dubious. Further, it is error to permit the use of professional studies not relied upon by an expert in the formulation of his opinion. (Evid. Code, § 721, subd. (b).) To allow their use would be to circumvent the hearsay rule." (*People v. Criscione* (1981) 125 Cal.App.3d 275, 286 [177 Cal.Rptr. 899], fn. omitted.)

We agree that the manner in which the prosecutor cross-examined Dr. Broussard was improper in these instances. The misconduct here was more egregious than that considered by the Court of Appeal in *Criscione, supra,* 125 Cal.App.3d 275, because the expert in that case was familiar with the Rosenhan study. (67) It is proper to question an expert about matter on which the expert bases his or her opinion and on the reasons for that opinion. A party attacking the credibility of the expert may bring to the jury's attention material that is relevant to the issue of which the expert was unaware (*People v. Bell, supra,* 49 Cal.3d 502, 532), but that party may not by its questions testify regarding the content of that material.

(66b) The questions and statements identified by defendant as misconduct make up only a small part of the cross-examination of the witness, one

which is reflected in more than 100 pages of reporter's transcript. The complete examination of the witness covered 175 pages of transcript. Proper questions elicited a concession by the expert that there was a very good possibility that if 50 psychologists reviewed the same test results they would not be unanimous in their opinions. (68)**(See fn. 44.),** (66c) Clearly, an admonition to the prosecutor and to the jury would have cured any prejudice from the improper conduct. FN44

FN44 Defendant also cites as misconduct the prosecutor's reference to Dr. Broussard as a "prostitute" in penalty phase argument. Assuming that this characterization was not mere hyperbole or exaggeration, and exceeded the bounds of permissible argument, however, it was not so potentially prejudicial that a prompt objection and admonition could not have averted any such prejudice. The failure to object precludes consideration of the claim here. (See *People v. Carrera* (1989) 49 Cal.3d 291, 320 [261 Cal.Rptr. 348, 777 P.2d 121].)

(69)**(See fn. 45.),** (70) We see no misconduct in that part of the prosecutor's penalty phase argument in which, addressing inconsistencies between defendant's extrajudicial statements and his testimony at trial, the prosecutor ***82** accused defendant of lying. Comment based on a reasonable inference drawn from the evidence is not improper even when the inference is that a witness has lied. FN45

FN45 One such comment related to defendant's attempt to characterize his conduct in the Scofield incident as self-defense. Another was directed to defendant's denial that Cusack had been present or had been attacked.

Both anticipated the prosecutor's exhortation to the jury to disregard anything defendant said because his testimony was unworthy of any credibility. The argument was founded on the evidence and inferences reasonably drawn therefrom. It was not improper.

This is true also of the comments made in the prosecutor's rebuttal argument suggesting that because the defense lacked substance the penalty phase argument followed the technique of attempting to distract, pounding the table and making smoke. The penalty phase argument by defendant's counsel was a rambling discourse, not tied to particular evidence. The prosecutor's description was not inaccurate.

(71) Similarly, we cannot accept defendant's characterization of the prosecutor's reference to evidence which the trial court had admitted as "misconduct," an argument based on defendant's appellate claim that the trial court erred in permitting the jury to consider evidence of his misdemeanor, juvenile, and nonviolent offenses at the penalty phase. We have rejected defendant's argument that this evidence was erroneously admitted or considered.

The suggestion that argument based on evidence that has been admitted is misconduct would fail even were we to conclude that the admission of the evidence was error. Regardless of whether an appellate court may later conclude that a piece of evidence was erroneously admitted, argument directed to the evidence does not become misconduct by hindsight. Such references may be considered in determining the prejudicial effect of the error in admitting evidence, but are not misconduct.

(72) Defendant also cites as misconduct the prosecutor's statement in his penalty phase argument that Hefner had never been arrested or convicted. The statement was made in the context of assessing whether mitigation should be found under section 190.3, factor (g) on the basis of duress by Hefner. The prosecutor was responding to defendant's attempt to shift principal responsibility for the robbery-murder to Hefner. In argument the prosec-

utor stated to the jury that "you have a picture of [Hefner]. No prior record; never been arrested; never been convicted; 18 years old."

This was not, as defendant argues, an improper means of putting before the jury damaging facts that were not in evidence. Defendant himself had testified that as far as he knew Hefner had not been to prison or arrested for any crimes of violence. The prosecutor misspoke when he said that Hefner had never been arrested. Defendant had testified that Hefner told him he had ***83** been arrested. Again, however, had defendant objected this discrepancy could easily have been clarified by the court.

(73) Nor was it misconduct for the prosecutor to anticipate the instructions on lesser included offenses which the court would give by arguing that those instructions were required by law and did not indicate that the court necessarily believed that the instructions applied. A prosecutor is entitled to argue that the evidence shows beyond a reasonable doubt commission of the charged offenses, and that it does not support only a lesser included offense. We see no impropriety in this context to a statement that the fact that instructions are given on lesser offenses should not be understood by the jury as reflecting the view of the court as to the sufficiency of the evidence to support conviction of the charged offense. That argument is fully consistent with the standard instructions which the judge gave the jury, advising the jury that he did not intend by anything he said to suggest how the jury should find on any question; and that the jury was to determine whether some of the instructions were applicable; and that "you must not conclude from the fact that an instruction has been given that the court is expressing any opinion as to the facts."

(74) The remaining citations of misconduct fall into similar categories-attacking hyperbole in argument, or possibly questionable comments that were sufficiently innocuous that an admonition could easily have cured any harm. FN46 Neither these comments, nor any of those discussed above that might arguably have been misconduct, were such as to deny the defendant a fair trial, divert the jury from its proper role, or invite an irrational, purely subjective response. (See *People v. Lewis, supra,* 50 Cal.3d 262, 284.)

FN46 The claimed misconduct was:

1. The prosecutor "vouched" for the testimony of Michael Wolbert, saying he had told Wolbert to tell the truth and do his best, and "that's what he did."

2. The prosecutor urged the jury to consider that defendant might have avoided capture, reminded the jury that the victims' families were present, and stated that if defendant were not convicted on all counts, it would be an insult to Wolbert's struggle to live.

3. The prosecutor asked defendant's girlfriend if she was "gonna wait for him."

4. The prosecutor suggested that defendant may have escaped from custody more than the three times of which a witness, defendant's father, was aware.

5. The prosecutor stated, with regard to Scofield's testimony, based on the prosecutor's own experience, "you can't expect to have angels for witnesses."

VIII Judgment

The judgment is affirmed in its entirety.

Lucas, C. J., Panelli, J., Kennard, J., Arabian, J., and George, J., concurred. ***84**

MOSK, J.

I dissent.

Ex proprio motu, I would raise-and resolve in the affirmative-the question whether Roger James Agajanian, who served as counsel in the trial court, provided defendant with ineffective assistance in violation of his rights under the Sixth Amendment

to the United States Constitution and article I, section 15, of the California Constitution. FN1

FN1 Agajanian also served as counsel in this court from the commencement of the appeal in 1983 until his suspension from the practice of law in 1990. Shortly thereafter, present counsel was appointed in his place.

Agajanian's deficiencies as trial counsel were pervasive and serious. The point is established by the record. It is confirmed by the majority opinion's practically countless references to waiver. Examples of Agajanian's failings are hard to select, each competing with the rest for egregiousness. By way of illustration only, I note the following. At the guilt phase, Agajanian relied on the defense of diminished capacity. Much to the surprise he expressed at trial, this defense had previously been abolished and rendered a nullity for all relevant purposes. At the penalty phase, Agajanian presented a summation asking the jury to spare defendant's life. The argument he made in support was worthless. The majority is generous in describing the remarks as "a rambling discourse, not tied to particular evidence." (Maj. opn., *ante,* at p. 82, fn. 45.) FN2

FN2 Agajanian's deficiencies as appellate counsel were also pervasive and serious. Witness the fact that the sole act of any significance that he performed on behalf of defendant over the course of almost seven years of representation before this court was the filing of a single thirty-page brief raising only two insubstantial penalty claims.

Agajanian's deficiencies at trial compel this conclusion: his failings resulted in a breakdown of the adversarial process at trial; that breakdown establishes a violation of defendant's federal and state constitutional right to the effective assistance of counsel; and that violation mandates reversal of the judgment even in the absence of a showing of specific prejudice. (See *United States v. Cronic* (1984) 466 U.S. 648, 653-662 [80 L.Ed.2d 657, 664-670, 104 S.Ct. 2039] [speaking of the federal constitutional guaranty only]; *People v. Ledesma* (1987) 43 Cal.3d 171, 242-245 [233 Cal.Rptr. 404, 729 P.2d 839] (conc. opn. of Grodin, J.) [speaking of both the federal and state constitutional guaranties].) FN3

FN3 Agajanian's deficiencies on appeal would have compelled the same conclusion had he not been suspended from the practice of law and been replaced by present counsel.

"The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." (***85***Herring v. New York* (1975) 422 U.S. 853, 862 [45 L.Ed.2d 593, 600, 95 S.Ct. 2550]; accord, *United States v. Cronic, supra,* 466 U.S. at p. 655 [80 L.Ed.2d at p. 665].) In other words, "The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness." (*Polk County v. Dodson* (1981) 454 U.S. 312, 318 [70 L.Ed.2d 509, 516, 102 S.Ct. 445].) It follows that the system requires "meaningful adversarial testing." (*United States v. Cronic, supra,* 466 U.S. at p. 656 [80 L.Ed.2d at p. 666].) "When"-as here-"such testing is absent, the process breaks down and hence its result must be deemed unreliable as a matter of law." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1237 [259 Cal.Rptr. 669, 774 P.2d 698] (conc. & dis. opn. of Mosk, J.); see *United States v. Cronic, supra,* 466 U.S. at p. 659 [80 L.Ed.2d at p. 668]; see also *Rose v. Clark* (1986) 478 U.S. 570, 577-578 [92 L.Ed.2d 460, 470-471, 106 S.Ct. 3101] [to similar effect].)

For the foregoing reasons, I would reverse the judgment in its entirety.

Appellant's petition for a rehearing was denied April 29, 1992. Mosk, J., was of the opinion that the petition should be granted. ***86**

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