S117235

No._____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

ROBERT LEWIS, JR.

CAPITAL CASE
No.S117235

(Related Automatic Appeal
No. S020670

On Habeas Corpus

Los Angeles Superior
Court No. A027897

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**PETITIONER'S INFORMAL REPLY TO INFORMAL RESPONSE FOR WRIT OF HABEAS CORPUS**



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## CLAIMS

### CLAIM I: PETITIONER MAKES A PRIMA FACIE CASE THAT RON SLICK DEPRIVED PETITIONER OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Ron Slick, now infamous for his pathetic record as an appointed lawyer, in capital defense cases, conducted Petitioner's capital trial in four days. (Petn. 31.) The penalty phase took 1 hour and 36 minutes, including the arguments of counsel and the instructions by the judge. (*Ibid.*) Despite Petitioner's excruciating life history, Mr. Slick put on no meaningful mitigation evidence. (*Ibid.*)

Claim I asks this Court to consider the big picture regarding Mr. Slick's representation of Mr. Lewis. Respondent does not take on the disturbing facts of this case directly. Instead, they try to pick apart the big picture and distract this Court with analysis of irrelevant detail.

For instance, Respondent argues that Petitioner fails to provide sufficient factual specifics to establish deficient performance and prejudice under *Strickland v. Washington* (1984) 466 U.S. 668. (IR 18.) Respondent further asserts that Petitioner has not made the requisite showing of total breakdown of the adversarial process under *United States v. Cronic* (1984) 466 U.S. 648, and therefore must show prejudice. (IR 19.) Respondent also argues that Petitioner fails to provide evidence demonstrating ineffective assistance of counsel in Mr. Slick's representation of Paul

Tuilaepa, Senon Grajeda, Oscar Lee Morris and Donrell Thomas. (IR 19-20.) Further, Respondent asserts that the allegations of ineffective assistance regarding Andre Burton, Robert Wilson, and Robert Glover do not show Mr. Slick's performance in this case was deficient or that Petitioner was prejudiced. (IR 20.)

Respondent opts not to directly defend Mr. Slick's record as a capital lawyer because it is an undefendable record of incompetence. Instead, Respondent wants this Court to look at each one of the cases in which a client of Ron Slick was sentenced to death as unrelated to Petitioner's case and unrelated to each of the other cases in which Mr. Slick's assistance resulted in a death sentence. This argument misses the point. It is not a coincidence that the same attorney who conducted Petitioner's entire trial in four days is also responsible for putting these other men on death row through his incompetence.

Mr. Slick's egregious behavior in his abject failure to defend Mr. Lewis was consistent with his pattern and practice of incompetence. (Petn. 29.) His record of not presenting exculpatory evidence and not challenging prosecution evidence fits neatly with his conduct in Petitioner's case. (Petn. 29-31.) As argued below, trial counsel's assistance fell far below the *Strickland* standard.

The United States Supreme Court has held that the standards for

capital defense work articulated by the American Bar Association ("ABA") are "guides to determining what is reasonable." (*Wiggins v. Smith* (2003) 123 S. Ct. 2527, 2537.) Mr. Slick's performance as Mr. Lewis' trial counsel was the antithesis of these standards. As argued below, his performance failed to meet the ABA standards for trial preparation overall, voir dire and jury selection, and the investigation and presentation of the penalty phase. (ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) 10.10.1, 10.10.2, 10.11.)

As argued in Claims V-XVI, trial counsel failed Mr. Lewis at every stage of his representation. Mr. Slick put on no meaningful defense despite exculpatory evidence available to him. (Petn. 31.) He failed to present mitigating evidence, despite Mr. Lewis' mental retardation and excruciating childhood. (Petn. 31.) His failure to adequately investigate all aspects of the case prevented him from making reasonable tactical decisions. (Petn. 33-36.)

Mr. Slick's representation fell far below any reasonable standard for trial counsel in a capital case. The right to counsel is meaningless if Mr. Lewis can be put to death based on a record like this.

## CLAIM II: THE PETITION IS NEITHER SUCCESSIVE, NOR UNTIMELY WITHIN THE MEANING OF THIS COURT'S PROCEDURAL DEFAULT RULES.

Respondent boldly contends that the Court should bar itself from

considering the merits of any of Petitioner's claims except for Claims III, IV, XXII, XXIII, and XXV. (IR 15.) The government argues that all of the other claims fall victim to the Court's decision of *In re Clark* (1993) 5 Cal.4th 750, that procedurally bars habeas corpus claims that are untimely made.[1] This contention is based on a misunderstanding of Petitioner's pleadings and the rules in *Clark*. Petitioner's claims are not procedurally defaulted.

### A. Respondent Misunderstands - and Explicitly Concedes the Merits of - Petitioner's Claim II.

Respondent asserts that Petitioner devotes "23 pages of his 307-page petition to the issue of timeliness." (IR 4.) This is not accurate. The pages of the petition to which Respondent refers (Petn. 37-59) are actually devoted to the issue of "successiveness."[2] Petitioner set forth a number of reasons why it would be unfair and unwarranted to apply a successiveness bar to his claims, including that, at the time Petitioner's 1988 petition was filed:

(1) Petitioner's appointed counsel was under no obligation to conduct a habeas investigation or an investigation of any particular scope,
(2) there was no clearly established or regularly applied "successiveness" bar that would have put counsel on notice

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[1]Respondent explicitly concedes that Petitioner is not subject to the other procedural bar announced in *Clark*, that of successiveness. (IR 5, fn. 3.)

[2]I.e., to explain why the petition's claims should not be barred because Petitioner failed to present them in his first petition, filed on April 29, 1988. (See *In re Clark* (1993) 5 Cal.4th 750.)

that if he failed to include particular claims in a first petition that Petitioner would be barred from presenting them in a second petition,

(3) much of the factual support for Petitioner's new claims was unavailable to Petitioner's 1988 counsel because of various reasons, including the lesser amount of funding then available to appointed counsel for habeas investigation, and

(4) the legal basis for some of Petitioner's new claims was unavailable in 1988. (Petn. 37-47.)

Furthermore, as raised in the petition, failure to consider Petitioner's various claims would also effect a miscarriage of justice. (Petn. 47-59.) In addition, Respondent concedes the issue.

Respondent agrees that it would be inappropriate to apply a successiveness bar to Petitioner's claims, and cites language in a footnote in this Court's opinion in *In re Robbins* (1998) 18 Cal.4th 770, establishing that the Court "will not apply the successive petition bar to cases where prior habeas corpus petitions were filed prior to the decision in *In re Clark* [(1993) 5 Cal.4th 750]." (IR 5, fn. 3.) In that footnote, the Court, after noting that the rules concerning successiveness had not been regularly adhered to prior to the *Clark* decision, the court stated:

> Because the prior habeas corpus petition in this matter was filed before the date of finality of *Clark, supra*, we . . . do not rely upon our successiveness rule. *Clark* serves to notify habeas corpus litigants that we shall apply the successiveness rule when we are faced with a petitioner whose prior petition was filed *after* the date of finality of *Clark, supra*.

(*In re Robbins, supra*, 18 Cal.4th at p. 778, fn. 9, emphasis added.)

Petitioner agrees with Respondent's reading of the Court's language

in the cited *Robbins* footnote. Petitioner's prior habeas petition was filed in 1988, long before the decision in *Clark*. Thus, in accordance with the Court's stated policy in *Robbins*, and the parties' agreement, it is clear that there is no successiveness bar to Petitioner's claims.

### B. Petitioner's Claims Are Presumptively Timely Under the Court's Announced Policies and Precedent.

It is equally clear that there is no untimeliness bar to Petitioner's claims. A petition for writ of habeas corpus is presumptively timely if filed within 180 days of the final due date for the filing of the Appellant's Reply Brief in the concurrent automatic appeal. (Sup. Ct. Policies Regarding Cases Arising From Judgment of Death [hereinafter, "Standards"], Policy 3 [hereinafter "Policy 3"], std. 1-1.1.[3]) Petitioner's Reply Brief in the concurrent automatic appeal was filed on January 3, 2003. The present Petition was due to be filed on July 2, 2003, 180 days later. Therefore, Mr. Lewis's claims are presumptively timely and so not barred by the rule in *Clark*. (See *In re Robbins* (1998) 18 Cal.4th 770, 784; *In re Clark*, *supra*, 5 Cal.4th at p. 783.)

The detailed timeliness pleading burden which Respondent asserts Petitioner has failed to satisfy (see IR, pp. 6-7, et seq.) is a burden

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[3]As it read as of the time of the filing of the petition, Standard 1-1.1 provided as follows: "A petition for a writ of habeas corpus will be presumed to be filed without substantial delay if is filed within 180 days after the final due date for the filing of appellant's reply brief on the direct appeal, or within 24 months after appoint of habeas corpus counsel, whichever is later."

applicable only where a petition is filed after expiration of the Standards' period of presumptive timeliness. (See, e.g., *In re Robbins*, *supra*, 18 Cal.4th at p. 779 ["whenever a habeas corpus petition is filed more than 90 days[4] after the filing of the reply brief in the direct appeal, the petitioner has the burden of establishing the timeliness of the claims raised in the petition"]; *In re Clark*, *supra*, 5 Cal.4th at p. 784 ["[w]here the presumption of timeliness is not applicable . . . any substantial delay in the filing of a petition after the factual and legal bases for the claim are known or should have been known must be explained and justified"]; Policy 3, std. 1-1.2 ["a petition filed more than 180 days after the final due date for the filing of appellant's reply brief on the direct appeal . . . may establish absence of substantial delay if it alleges with specificity facts showing the petition was filed within a reasonable time after petitioner or counsel (a) knew, or should have known, of facts supporting a claim and (b) became aware, or should have become aware, of the legal basis for the claim"].)

Respondent overlooks that when Petitioner's current counsel was appointed on May 2, 1994, Policy 3 was in place and quite clearly stated that a petition would be deemed timely if filed within the prescribed number of days from the final due date of the direct appeal reply brief. Both *Clark* (5 Cal.4th at pp. 783-786) and *Robbins* (18 Cal.4th at pp. 779-780)

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[4]The post-reply-brief period of presumptive timeliness, now 180 days, was 90 days at the time of the decisions in *Robbins* and *Clark*.

reiterated that message. Neither Petitioner, nor his counsel, had any reason to suspect that a successor petition, filed and prepared with funding newly made available under the Standards, could be deemed untimely if filed within the prescribed period of presumptive timeliness. It would be unfair, and, indeed, violative of due process, to procedurally bar Petitioner's claims on the basis of some new, previously unannounced stricter standard. (Cf. *Ford v. Georgia* (1991) 498 U.S. 411, 423 ["[n]ovelty in procedural requirements cannot be permitted to thwart review . . . applied for by those who, in justified reliance upon prior decisions, seek vindication . . . of their federal constitutional rights"].)

Respondent apparently believes that the limited nature of the trial court remand following Petitioner's initial direct appeal somehow alters the clear language of the Standards and this Court's explication of those standards in *Clark* and *Robbins*, and somehow put Petitioner on notice that he could not rely upon the period of presumptive timeliness set forth in the Standards and discussed in those opinions. (IR 6.) Respondent is wrong.[5]

It is true that the trial court remand was solely for a new section 190.4(e) hearing (and not for a complete new trial) and that the new direct appeal is limited to issues arising from the new section 190.4(e)

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[5]Indeed, although the entirety of Respondent's twelve page procedural argument requires that the Court be willing to carve up Petitioner's claims into "first-trial" and "remand" categories, the government provides no citation or additional analysis in favor of the proposed distinction.

proceedings and the imposition of a sentence of death. (*People v. Lewis* (1990) 50 Cal.3d 262, 292.) However, no similar limitation was imposed on any habeas petition counsel might file; nor was there any reason for Petitioner or his counsel to believe that any such limitation would or could be imposed. Nothing in *Clark*, which sought to clarify state law concerning successive petitions, in any way suggested that a proper successor petition was limited to issues relating to a newly re-litigated stage of the trial court proceedings. And, indeed, the Court has issued OSC's and granted evidentiary hearing on issues raised in successor petitions filed long after the end of trial court proceedings and without regard to whether any particular stage of the trial proceedings had been re-litigated. (See, e.g., the OSC's and evidentiary hearing orders recently issued in *In re Bacigalupo*, Case No. S079656; and *In re Miranda*, Case No. S058528.) Certainly nothing in the language of Policy 3 suggests that the period of presumptive timeliness prescribed therein is limited by the scope of the re-litigated trial court proceedings giving rise to a new appeal,[6] and Respondent never

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[6]Nor has the Court so read Policy 3 in prior cases. See, for example, the Court's June 30, 1999 order denying relief in *In re Davenport*, Case No. S049760. The petition in that matter had been filed by the attorney appointed to represent Davenport on his direct appeal following a penalty phase retrial. (See, *People v. Davenport* (1995)11 Cal.4th 1171, 1188 [noting that the case was reaching the Court again "after a penalty phase retrial following this court's affirmance of defendant John Galen Davenport's 1980 first degree murder conviction . . . and torture-murder special-circumstance finding . . . , and reversal of his death sentence based on instructional error"].) The petition, which raised both guilt and penalty phase claims, was filed within 90 days of the final due date for the reply brief on the penalty-retrial direct appeal, and relied upon the Standards' presumption of timeliness as establishing that the petition was timely filed. (*Davenport* Petition, Case No. S049760, 11.) Respondent argued there, as in the present case,