IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re **ROBERT LEWIS, JR.,** On Habeas Corpus.	**CAPITAL CASE** S117235

Related Automatic Appeal No. S020670
Los Angeles County Superior Court No. A027897
The Honorable Elsworth Beam & The Honorable Richard F. Charvat, Judges

INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

On October 27, 1983, petitioner went to the home of Milton Estell, bound and gagged Mr. Estell, and stabbed him in the chest and shot him in the back. Petitioner was apprehended in Mr. Estell's Cadillac five days later. (*People v. Lewis* (1990) 50 Cal.3d 262, 271-273.)

Following a jury trial in the Los Angeles County Superior Court, petitioner was found guilty of the first-degree murder and robbery of Milton Estell. (Pen. Code, §§ 187, subd. (a), 211.) The jury found true the special circumstance, under the 1978 death penalty law, that the murder was committed during the commission or attempted commission of a robbery. (Pen. Code, § 190.2, subd. (a)(17).) (CT[1/] 7-15, 42.) At the conclusion of the penalty phase, the jury fixed the penalty at death. (CT 16-30, 42.) In 1984, the trial court

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1. All references to transcripts refer to the original and supplemental clerk's and reporter's transcripts filed in the concurrent automatic appeal (case no. S020670), unless otherwise specified. Respondent asks this Court to take judicial notice of its records, including all documents filed on behalf of petitioner and respondent in the course of petitioner's automatic appeal and his previous habeas corpus action. (Evid. Code, § 452; see *In re Clark* (1993) 5 Cal.4th 750, 798, fn. 35.)

sentenced petitioner to death in accordance with the jury's verdict. (CT 42-43.)

Petitioner filed a petition for writ of habeas corpus (case no. S005412) with this Court on April 29, 1988. On May 19, 1989, this Court issued an order requesting respondent to file an informal response to the petition. After the parties filed responsive pleadings, this Court denied the petition on the merits on September 7, 1989. The order denying the petition provided, in its entirety, as follows: "The petition for writ of habeas corpus DENIED."[2/]

On March 1, 1990, this Court decided petitioner's automatic appeal. (CT 2-51; see *People v. Lewis* (1990) 50 Cal.3d 262.) The Court affirmed petitioner's 1984 convictions of first-degree murder and first-degree residential robbery and the jury's true finding on the Penal Code section 190.2, subdivision (a)(17), robbery-murder special-circumstance allegation. (CT 7-15, 42; *Lewis*, *supra*, 50 Cal.3d at pp. 274-278, 292.) Further, the Court reviewed and affirmed the penalty phase proceedings, including the jury's affixing the penalty at death. (CT 16-30, 42; *Lewis*, *supra*, 50 Cal.3d at pp. 279-285, 292.) However, this Court found error had occurred in the consideration of the automatic application for modification of verdict (Pen. Code, § 190.4, subd. (e)) and remanded the cause to the trial court with specific limiting language:

> the judgment of death is vacated and the cause is remanded to the trial court for the *limited purpose* of redetermining defendant's application for modification of the verdict in accordance with this opinion. If the trial court, upon application of the appropriate standards, denies the application for modification, it shall reinstate the judgment of death. If it grants the application, it shall enter a judgment of life without the possibility of parole. Any subsequent appeal shall be limited to issues

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2. Respondent also notes that petitioner's first state habeas corpus petition was filed prior to this Court's decision in *In re Clark*, *supra*, 5 Cal.4th 750.

related solely to the modification application.

(*Lewis, supra*, 50 Cal.3d at p. 292; CT 42-43, emphasis added.)

On March 20, 1991, the trial court heard and denied petitioner's motion for modification of the verdict (Pen. Code, § 190.4, subd. (e)). (CT 225.) Petitioner was sentenced to death on count I in accordance with the jury's verdict. (CT 226-232.)

Petitioner filed his opening brief in his automatic appeal on April 16, 2002. The Respondent's Brief was filed on July 15, 2002, and the reply brief was filed on January 6, 2003. The automatic appeal is currently pending awaiting the scheduling of oral argument.

On July 2, 2003, petitioner filed the instant petition for writ of habeas corpus. This Court requested respondent to file an informal response to the petition for writ of habeas corpus pursuant to Rule 60 of the California Rules of Court.

ARGUMENT

I.

PETITIONER'S SUBSTANTIAL DELAY IN THE PRESENTATION OF A MAJORITY OF THE CLAIMS BARS THEIR CONSIDERATION

Petitioner's pending automatic appeal arises *solely* from the limited remand for consideration of the automatic application for modification of verdict. Although petitioner filed this petition within 180 days of his reply brief in the pending automatic appeal, by raising numerous claims relating to his trial, rather than the limited remand proceedings, petitioner returns for a second bite at the "apple" of habeas relief almost 14 years after his first habeas petition was denied by this Court in September 1989. Petitioner recognizes the need to justify his delay, and he devotes his entire *Claim II* argument, consisting of 23 pages of his 307-page petition, to the issue of timeliness. (Petn. 37-59.) However, his justifications are inadequate, and he has not demonstrated that the trial-related claims in the petition fall within the exceptions to the rule barring consideration of untimely habeas corpus petitions.

Both this Court and the United States Supreme Court have long recognized the State's strong and legitimate interest in finality of its judgments and the detriment to society in having mere "tentative judgments." (*In re Harris* (1993) 5 Cal.4th 813, 831; *In re Clark, supra*, 5 Cal.4th at p. 775; see also *Calderon v. Thompson* (1998) 523 U.S. 538, 555-559 [118 S.Ct. 1489, 140 L.Ed.2d 728].) This Court has also demonstrated its awareness of the burden upon the State and the justice system in cases where retrial may be required, especially after a substantial delay caused by the filing of untimely or successive petitions. (*In re Harris, supra*, 5 Cal.4th at p. 831; *In re Clark, supra*, 5 Cal.4th at pp. 770, 774-775, 777, 782, 787-789.) If a petitioner is granted a new trial as a means of habeas relief after significant delay, the "erosion of memory" and

the disappearance of witnesses and evidence prejudice the State and "diminish the chances of a reliable criminal adjudication." (*In re Clark, supra*, 5 Cal.4th at pp. 770, 775, 776.) Indeed, such a delayed adjudication subverts the judicial process. (See *Calderon v. Thompson*, *supra*, 523 U.S. at p. 555.)

Thus, this Court has held that unjustified delay can be a bar to habeas corpus relief. Delay may occur under two circumstances: (1) where there is substantial delay in presenting a claim regardless of the existence of any prior habeas attacks on the judgment (*In re Clark, supra*, 5 Cal.4th at pp. 782-787), and (2) where the petition amounts to a successive petition which raises additional claims that could have been presented in an earlier attack on the judgment (*id.* at pp. 769-770, citing *In re Horowitz* (1949) 33 Cal.2d 534, 546-547). "A successive petition presenting additional claims that could have been raised in an earlier attack on the judgment is, of necessity, a delayed petition." (*Id.* at p. 770.)[3/]

Historically, this Court has required a petitioner to justify *any* substantial delay in presenting claims via habeas corpus petitions. (*In re Wells* (1967) 67 Cal.2d 873, 875; *In re Shipp* (1965) 62 Cal.2d 547, 553; *In re Swain* (1949) 34 Cal.2d 300, 304.) In June 1989 this Court published timeliness standards for habeas corpus petitions filed in capital cases. (See Supreme Court Policies Regarding Cases Arising From Judgments of Death, Policy 3 [hereinafter "Policies"], stds. 1-1.1 to 1-3.) A petitioner's failure to comply with the timeliness policies permits this Court to deny the petition as untimely. (Policies, std. 1-3.) However, this Court has observed, "Even before June 1989, a habeas corpus petitioner who had knowledge that grounds for a habeas corpus

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3. This Court has stated that it will not apply the successive petition bar to cases where prior habeas corpus petitions were filed prior to the decision in *In re Clark*. (*In re Robbins* (1998) 18 Cal.4th 770, 778, fn. 9.) Petitioner's prior habeas petition predates *Clark*. Therefore, respondent does not assert a successive petition bar here.

petition existed was on notice that any substantial delay in filing a petition after the grounds became known had to be justified." (*In re Clark, supra*, 5 Cal.4th at p. 782, citing *In re Stankewitz* (1985) 40 Cal.3d 391, 396, fn. 1 and *People v. Jackson* (1973) 10 Cal.3d 265, 268.)

On May 2, 1994, current counsel received a dual appointment to represent petitioner in his current automatic appeal and any related habeas corpus proceeding. The instant petition was filed on July 2, 2003 – nine years after counsel was appointed. Under this Court's existing precedent, petitioner's presentation of habeas claims arising from the litigation related to the automatic motion for modification of the verdict would appear to be timely since the Policies generally promote contemporaneous filing of appellate and habeas issues. Although petitioner fails to specifically identify these claims, respondent identifies them as *Claims XXII, XXIII, and XXV*.

However, delay in presenting claims relating to events arising from petitioner's *trial*, rather than the new hearing on the motion for modification of verdict, tends to subvert the judicial process since the substantial delay significantly diminishes the probability of a reliable criminal adjudication. This Court should require petitioner to justify his lengthy delay in bringing claims arising from his trial. Petitioner's efforts to excuse his delay in raising these trial issues are addressed below.

A petitioner may establish the absence of substantial delay if the petition 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." (Policies, Policy 3 std. 1-1.2; see also *In re Robbins, supra*, 18 Cal.4th at p. 780.) As to *each claim and sub-claim*, a petitioner must allege when the information was obtained, known, and reasonably should have been known. (*In re Robbins, supra*, 18 Cal.4th at p.

799, fn. 21; *In re Gallego* (1998) 18 Cal.4th 825, 837, fn. 11; *In re Sanders* (1999) 21 Cal.4th 697, 720, fn. 13.) Without specificity, this Court cannot determine whether the claims presented in the petition were raised in a reasonable period of time. (*In re Clark, supra*, 5 Cal.4th at p. 786.) Here, petitioner fails to make an adequate showing of the absence of substantial delay.

Petitioner argues he did not substantially delay because some claims stated in the petition "are based in whole or in part upon new discovered facts that Petitioner did not know, and could not have known at the time of his first petition." (Petn. 41.)[4/] However, the petition fails to allege with specificity when petitioner or his counsel knew, or should have known, the facts supporting the claims raised in the petition. (Policies, Policy 3, std. 1-1.2; *In re Robbins, supra*, 18 Cal.4th at p. 787; *In re Sanders, supra*, 21 Cal.4th at p. 704.) Further, the petition fails to allege with specificity which claims were discovered as the *result of investigation* after counsel's appointment. As a result, the petition fails to provide sufficient information for respondent or this Court to assess whether any of the claims, *except Claims III, IV, XXII, XXIII, and XXV*, were filed without substantial delay. (*In re Clark, supra*, 5 Cal.4th at p. 786.)

Despite petitioner's failure to categorize the claims in the petition,

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4. Petitioner lists these facts as including (1) materials lost or destroyed by the Los Angeles District Attorney, Long Beach Police, and trial counsel but reconstructed by current habeas counsel; (2) the testimony of Lewis Wong; (3) testimony relating to the business record foundation for the registration card; (4) information concerning petitioner's "life history of trauma"; (5) evidence of petitioner's mental retardation; (6) evidence of petitioner's learning disabilities; (7) evidence of the effects of incarceration; and (8) evidence of petitioner's good acts. (Petn. 41-42.) Most, if not all, of these allegations are clearly not "newly discovered" and, therefore, cannot excuse or justify the extreme delay in presenting the claims raised in the petition. For instance, by "reconstructing" materials lost or destroyed by trial counsel (Petn. 41), current habeas counsel essentially concedes the materials obtained were available to prior counsel and, therefore, were not "newly discovered."

some of the timeliness questions may be resolved by examining the nature of the claim presented. For instance, claims which rely *exclusively* upon the appellate record are claims which should have been known at the time of the first appeal. (*In re Gallego*, 18 Cal.4th at p. 838.) In presenting *Claims V, IX, X, XVII, XIX, XX, and XXIV*, petitioner relies exclusively upon the trial record for factual support of his contentions. Thus, it appears that all the aforementioned claims should have been known to prior counsel before the conclusion of the appellate process in 1990 and should have been known to current counsel well before the instant petition was filed in 2003.

As for *Claims I, V-XII, XIV-XVII, XXIV, and XXVI- XXXII,* petitioner fails to specify the "triggering facts" which could justify further investigation into those claims, or what steps were taken, or when steps were taken to gain information in support of those claims. (*In re Robbins, supra*, 18 Cal.4th at pp. 789-791.) As a result, petitioner again fails to provide sufficient details to permit this Court to assess whether these claims were presented without substantial delay.

Petitioner offers, as an initial general excuse for prior habeas counsel's failure to discover the "newly-discovered" facts listed above, the fact that this Court denied prior habeas counsel's initial request for funds for investigation and consultation of experts. (Petn. 43-44.) However, petitioner fails to tie this excuse to any individual claim and wholly fails to explain how additional funding was necessary to present claims relying exclusively on the appellate record or claims of which prior appellate and habeas counsel were plainly aware. Indeed, prior habeas counsel retained at least three experts (Michael Adelson, Edward Bronson, and Lois Heaney) who submitted declarations on his behalf. Prior habeas counsel personally interviewed trial counsel and examined his file. There is no indication that prior habeas counsel encountered any difficulty in collecting necessary records and documentation, much less the

type of difficulty purportedly experienced by current counsel (see *Claim III*).

Also, petitioner argues that prior appointed habeas counsel did not have an affirmative duty to "exhaustively investigate all of Petitioner's possible habeas corpus claims" and lacked notice that all claims were required to be presented in a single petition. (Petn. 39-40.) Both reasons are insufficient to provide a blanket excuse for the substantial delay in raising claims never previously presented on habeas and additional evidentiary support for other claim previously raised. Even under the Policies there exists no duty to "exhaustively investigate" habeas claims. Rather, "counsel has a duty to investigate potential habeas corpus claims only if counsel has become aware of information that might reasonably lead to actual facts supporting a potentially meritorious claim." Concerning the notice afforded petitioner that delay could bar claims raised in a future petition, "[e]ven before June 1989, a habeas corpus petitioner who had knowledge that grounds for a habeas corpus petition existed was on notice that any substantial delay in filing a petition after the grounds became known had to be justified." (*In re Clark, supra*, 5 Cal.4th at p. 782, citing *In re Stankewitz* (1985) 40 Cal.3d 391, 396, fn. 1 and *People v. Jackson* (1973) 10 Cal.3d 265, 268.) Thus, this excuse fails to justify the delay in presenting the trial-related claims in this petition.

Respondent's review of the petition's claims, except *Claims III, IV, XXII, XXIII, and XXV*, demonstrates the factual and legal grounds for these claims were known, or should reasonably have been known, to petitioner and his counsel no later than his first automatic appeal. For instance, the legal and factual basis for *Claim I* existed in 1988 when prior habeas counsel filed the first petition since the claim is premised upon the length of petitioner's trial and the Supreme Court's 1984 decision in *United States v. Cronic* (1984) 466 U.S. 648 [104 S.Ct. 2039, 80 L.Ed.2d 657]. Claims which rely *exclusively* upon the appellate record are claims which should have been known at the time of the

appeal. (*In re Gallego, supra*, 18 Cal.4th at p. 838.) Thus, this claim should have been known to prior counsel before the conclusion of the appellate process in 1990 and should have been known to current counsel well before the instant petition was filed in 2003. Similarly, all of the allegations within *Claim V* are premised upon either the appellate record or facts reasonably known to prior appellate and habeas counsel.

To the extent petitioner's allegations of "newly discovered" facts might relate more particularly to some of these claims, the petition debunks his assertion he was not aware of the information when he filed his first habeas petition in 1988. For instance, as further discussed in *Claim VI* (Petn. 77-80), prior habeas counsel was aware of the existence of Mr. Wong and included the essential substance of the declaration now provided by Mr. Wong in the prior habeas petition filed in 1988. As a result, Mr. Wong's "testimony" is not newly discovered. As further discussed in *Claim VIII* (Petn. 82-84), petitioner references the trial record and the 1988 declaration of investigator Kristina Kleinbauer (Petn. Exh. 12), which was attached to the 1988 petition, as the only factual support for his claims concerning trial counsel's failure to prepare an "alibi" defense. Clearly, prior habeas counsel was well aware of this information.

As for trial counsel's investigation of mental defenses (*Claim VII*; Petn. 80-82), although petitioner only recently located a psychologist willing to diagnose him as suffering from mental retardation and organic brain damage, the scope and nature of trial counsel's investigation has been well known to petitioner since his prior appeal and habeas petition. He has failed to justify his substantial delay in presenting this claim.

The substance of *Claim IX* (Petn. 85-87) was presented in petitioner 1988 petition and, thus, was clearly known to petitioner well before the instant petition was filed.

Claim X (Petn. 87-93) relies exclusively on the appellate record for its assertion of ineffective assistance. Claims which rely *exclusively* upon the appellate record are claims which should have been known at the time of the appeal. (*In re Gallego, supra*, 18 Cal.4th at p. 838.) Thus, these claims have been reasonably known to petitioner since his trial in 1984. The delay in presenting these claims is substantial.

Claims *XI and XII* (Petn. 93-98, 99-100) were presented in petitioner's first automatic appeal and his first habeas petition (which relied upon the same expert declarations appended to the instant petition), and petitioner fails to allege any new material facts in support of the claim. Nor has he explained his delay of nine years following counsel's appointment to renew these claims.

As for *Claim XIII* (Petn. 101-104), petitioner asserts that he could not have presented this argument in his first habeas petition because the argument relies "in significant part" upon the statistics developed from data provided in 1995 and published in 1997. (Petn. 44.) However, as further discussed below, in *McCleskey v. Kemp* (1987) 481 U.S. 279, 289 [107 S.Ct. 1756, 95 L.Ed.2d 262], the court found statistics "insufficient to show irrationality, arbitrariness and capriciousness under any kind of Eighth Amendment analysis." Petitioner challenged the constitutionality of California's special circumstances in general in 1988 and could have challenged the narrowing function of the robbery special circumstance despite the unavailability of the study in 1988, particularly since Supreme Court precedent existing since 1987 minimizes the value of such statistical data.

Similarly, the so-called evidence of petitioner's "good acts" (*Claim XIV*; Petn. 124) is predicated solely upon exhibits attached to the habeas petition filed in 1988. There is nothing "new" about this information. As for information concerning petitioner's "life history of trauma" (*Claim XIV*); Petn. 104-135) such information was within petitioner's personal knowledge and

petitioner has not alleged facts establishing the information was not known to petitioner at the time of trial, much less the first habeas petition. As for *Claim XV* (Petn. 136-166) *and Claim XVIII* (Petn. 180-182), according to petitioner's expert, evidence suggesting petitioner's mental retardation and learning disabilities was "available" to trial counsel's mental health experts prior to trial but was not properly evaluated by the experts.

Concerning *Claim XVI* (Petn. 167-178), both petitioner and his trial counsel were personally aware of the fact of petitioner's juvenile incarcerations at the time of his trial and when the first petition was filed in 1988. To the extent petitioner now presents an expert opinion founded on these previously known facts to form the basis of his claim that evidence of the effects of incarceration, he has not established that this information was not known to petitioner or his prior habeas counsel and could not reasonably have been known to them in 1988.

Claim XVII (Petn. 178-179), *Claim XXIV* (Petn. 204-210), and *Claim XXVII* (Petn. 222-269) rely exclusively on the appellate record to allege error in the penalty phase instructions. (*In re Gallego, supra*, 18 Cal.4th at p. 838.) Petitioner does not allege that these claims could not have been raised earlier.

As for *Claim XIX* (Petn. 183-186) and *Claim XX* (Petn. 187), petitioner's reliance upon a recent case to argue, by analogy, the application of a legal theory does not create a "new rule of law" stating an exception to the timeliness bar. Challenges to the absence of proportionality review in California's death penalty scheme have been frequently and repeatedly raised prior to the civil case authority referenced by petitioner, and he offers no reason for his failure to do so earlier.

As for the contentions stated in *Claim XXI* (Petn. 187), those claims merely repeat contentions raised elsewhere in the petition in *Claims XXII, XXIII, XXIV, XXV, XXVI, XXIX, and XXX.* These claims are addressed