In the Supreme Court of the State of California

In re **ALFREDO REYES VALDEZ,** on Habeas Corpus.	**CAPITAL CASE** S107508 Related Automatic Appeal No. S026872

Los Angeles County Superior Court Case No. KA007782
The Honorable Thomas Nuss, Judge
The Honorable Charles E. Horan, Judge

RESPONSE TO PETITIONER'S BRIEF OF EXCEPTIONS TO THE REPORT OF THE REFEREE

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INTRODUCTION

On December 8, 2008, the Los Angeles County Superior Court filed the Referee's Report addressing four questions that this Court ordered resolved at an evidentiary hearing. As to questions 1 through 3, the referee found that trial performance by lawyer Anthony Robusto was reasonable under *Strickland v. Washington* (1984) 466 U.S. 668 [104 S.Ct. 2052, 80 L.Ed.2d 674] (*Strickland*), and its progeny. As to the final question, the referee concluded that Robusto's performance was partially deficient, but there was no prejudice under *Strickland.* On March 9, 2009, respondent filed a Brief and Exceptions that: (1) took very limited exception to the referee's findings and conclusions; (2) respectfully disagreed with the referee's deficient performance finding on the fourth question (Referee's Report at pp. 104-105); and (3) proved that there was no prejudice under *Strickland* concerning all foregoing questions. On July 7, 2009, petitioner filed a Brief of Exceptions to the Referee's Report to which respondent respectfully files this Response.

RESPONSE TO ARGUMENT I

Petitioner claims that deference to the findings of the referee is unjustified. (Petitioner's Brief at pp. 87-89.) Respondent disagrees. (See Respondent's Brief and Exceptions at pp. 8-9.)

RESPONSE TO ARGUMENT II

Petitioner argues that this Court's (February 7, 2007) order did not authorize the referee to decide that there was no prejudice under *Strickland* on question 3. (Petitioner's Brief at pp. 88-90.) Regardless of that finding, precedent makes clear that the ultimate question of whether Robusto's trial performance was constitutionally ineffective is one that is subject to independent review by this Court as petitioner concedes. (Petitioner's Brief at 90.)

RESPONSE TO ARGUMENT III

Petitioner takes exception to the referee's ruling that excluded evidence of the existence of a Pomona Contract Lawyers Association (PCLA) contract. (Petitioner's Brief at pp. 91-118.) The referee exercised proper discretion under Evidence Code section 352 because the contract was clearly irrelevant to the four questions, all of which involved whether Robusto's actual trial performance was objectively reasonable under prevailing constitutional standards at the time of the performance (1991 through 1992). (See *Yarborough v. Gentry* (2003) 540 U.S. 1, 8 (*Gentry*) [124 S.Ct. 1, 157 L.Ed.2d 1] ["The Sixth Amendment guarantees reasonable competence, not perfect advocacy with the benefit of hindsight"]; *Bell v. Cone* (2002) 535 U.S. 685, 702 [122 S.Ct. 1843, 152 L.ED.2d 914] ["a court must indulge a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight"]; *Strickland, supra*, 466 U.S. at p. 690 ["a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct"]; *In re Lucas* (2004) 33 Cal.4th 682, 722; *In re Andrews* (2002) 28 Cal.4th 1234, 1253-1254.)

Moreover, petitioner appears to be improperly expanding the scope of the evidentiary hearing by arguing that: (1) the PCLA contract created a conflict of interest that denied effective assistance of counsel because Robusto's performance was limited by the terms in the contract; (2) the PCLA contract violated federal and state constitutional principles of due process and equal protection; (3) petitioner was entitled to the trial assistance of a second attorney that the contract precluded; and (4) the foregoing was "structural error" that alone justifies habeas relief.

(Petitioner's Brief at pp. 91-118.) Apart from the fact that Robusto testified that he had no idea how much he was paid for petitioner's case and did not seek second counsel because he did not think the case was so complex as to require it (see Petitioner's Brief at pp. 4-5, 92), petitioner is plainly arguing a new theory of ineffective assistance that was not ordered for resolution at the evidentiary hearing. Petitioner's exception to the referee's evidentiary ruling should not be sustained on this ground.

Also, assuming (without conceding) that Robusto's 1991 through 1992 performance was deficient due to the foregoing, such deficiency would not be "structural error" (Petitioner's Brief at pp. 113-118). Petitioner instead would still have prove that such deficiency was prejudicial under *Strickland* and its progeny. (Respondent's Brief and Exceptions at pp. 10-14.) There was no prejudice as to any referenced question. (*Id.* at pp. 19-20, 26-27, 46-47, 49.)

RESPONSE TO ARGUMENT IV

Contrary to petitioner's argument (Petitioner's Brief at pp. 119-129), the record supports the referee's findings and conclusion that Robusto's trial performance was not deficient under *Strickland* as to the evidence of the blood on the pants in the Monte Carlo vehicle. Simply put, Robusto testified that he investigated all disclosed evidence involving the foregoing blood, and he tactically refused to pursue further investigation because: (1) the then-known prosecution blood results were reasonably more harmful than helpful to petitioner; and (2) defense testing could encourage further prosecution testing that could lead to additional harmful blood testing results.

Respondent has already provided the standard for reviewing counsel's performance under *Strickland*. (Respondent's Brief and Exceptions at pp. 10-13.) Respondent has also noted the standard of review for habeas reference hearings. (*Id.* at pp. 8-9.) Also, as a starting point, on April 19,

1991, Robusto was appointed counsel as to the robbery-murder in this case. He later (pretrial in this case) successfully defended petitioner at the preliminary hearing of an unrelated murder charge. (Petitioner's Brief at p. 9.) Ten months after Robusto's appointment as counsel in this case, i.e., on February 3, 1992, the Los Angeles County District Attorney filed the information against petitioner. The guilt phase trial began on March 16, 1992, the penalty phase trial began on March 24, 1992, and petitioner was sentenced to the death penalty on May 22, 1992. (Respondent's Brief and Exceptions at pp. 6, 37-46; Referee's Report at pp. 30-31.)

Both here and concerning Argument V, petitioner properly admits that Robusto testified to the referee that he heard petitioner's pretrial attorney-client confession that: (1) he shot and robbed the murder victim; (2) he owned the firearm (likely murder weapon) seized from the Monte Carlo vehicle pursuant to his arrest about 24 hours after the murder; and (3) Liberato Gutierrez had nothing to do with the charged robbery-murder. After receiving that confession, Robusto tactically decided that he did not want petitioner to reveal to him any further specific details about the robbery or the murder. Mindful of the confidential confession, Robusto instead prepared for the guilt phase trial pursuant to the governing law in light of all other investigated evidence. (See *Strickland, supra*, 466 U.S. at p. 691 ["The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information"].) Given the foregoing, Robusto tactically decided that the guilt phase trial defense would be that the police investigation was poor or a rush to judgment as to petitioner. (Petitioner's

Brief at pp. 5, 8-9, 78-82, 119-138; *People v. Valdez* (2004) 32 Cal.4th 73, 106-110 (*Valdez*).)

As to blood on the pants, the referee noted the following. Robusto knew pre-trial that prosecution testing proved that the foregoing blood was not that of the victim, and the report so indicating was (and is still) in Robusto's trial file. Petitioner had given Robusto a pre-trial attorney-client admission that: (1) the foregoing pants had nothing to do with the robbery-murder; and (2) the pants belonged to someone else. Robusto understood pre-trial that evidence that the pants-blood was not the victim's blood might suggest to the jury that the blood on the firearm (also seized from the Monte Carlo vehicle) was not the victim's blood. However, Robusto also tactically believed that if he raised such defense, or sent the firearm for further blood testing, the prosecution might test the firearm using DNA technology, and such results might prove that the blood on the firearm was indeed that of the murder victim. Robusto was concerned that if he introduced trial proof of the results of the testing of the pants, the prosecutor would argue to the jury that if the defense truly believed that this showed that the firearm-blood did not originate with the victim, the defense should have done additional testing on the firearm. (Referee's Report at pp. 31-32.)

Given the totality of the foregoing, Robusto tactically decided that he did not want to "go anywhere near the blood issues" as a direct defense. He nonetheless elicited testimony that the pants-blood was found by police, and he argued to the jury that the prosecution had failed to present evidence of its testing. He did the foregoing to show that the quality of the prosecution's investigation and presentation was flawed. Robusto noted to the referee that the trial prosecution responded to the foregoing defense by making the same jury argument that he feared would be made if he had

directly introduced the analysis of the pants-blood. (Referee's Report at p. 32.)

Robusto was also concerned that that if he raised issues relating to the blood on the pants in the Monte Carlo vehicle, the prosecutor might call witnesses such as the Monte Carlo's owner (Juan Velador) or petitioner's companion arrestee (Pedro Morales) to offer the jury an innocent explanation for the pants. Robusto tactically feared that the foregoing could result in petitioner being more closely tied to the firearm seized from in the Monte Carlo car at the time of the joint arrest of petitioner and Morales. (Referee's Report at p. 32.) Other evidence independently proved to the guilt phase jury that: (1) the firearm in the Monte Carlo vehicle could have been the murder weapon; (2) petitioner's palm print was lifted from the grip part of that firearm; (3) blood that surrounded petitioner's palm print was consistent with the victim's blood type; and (4) petitioner's palm print was made when the surrounding blood was wet. (Respondent's Brief and Exceptions at p. 5.) Robusto knew pre-trial that even if Morales lied to a jury about the firearm, a prosecutor could impeach Morales with his post-arrest police statement, where he claimed that the bloodstained firearm was in petitioner's possession while they were in Velador's borrowed Monte Carlo car within 24 hours after the shooting in this case. (Referee's Report at pp. 32-33.)

Although petitioner criticizes the finding that trial counsel made reasonable tactical decisions on this issue (see Petitioner's Brief at pp. 120-128), his complaints really amount to second-guessing counsel's "'difficult, tactical decisions in the harsh light of hindsight'" (*People v. Scott* (1997) 15 Cal.4th 1188, 1212; see *People v. Jones* (2003) 29 Cal.4th 1229, 1254; *People v. Weaver* (2001) 26 Cal.4th 876, 926; see also *Gentry, supra*, 540 U.S. at p. 8; *Strickland, supra*, 466 U.S. at pp. 689-690). Given the foregoing, the referee properly found that Robusto's guilt phase trial

assistance was reasonable under *Strickland* and its progeny. (Referee's Report at pp. 47-60; Respondent's Brief and Exceptions at pp. 9-20.)

RESPONSE TO ARGUMENT V

Contrary to petitioner's argument (Petitioner's Brief at pp. 129-138), the evidence supports the referee's findings and conclusion that Robusto's performance was not deficient under *Strickland* as to the third-party culpability evidence involving Gutierrez. Robusto testified that he investigated all evidence involving Gutierrez (including petitioner's pretrial confidential attorney-client confession), and such proof overwhelmingly established that Gutierrez was not involved in the robbery-murder in this case.

Pomona police detectives Gregg Guenther and Frank Terrio, both of whom testified at the guilt phase trial (*Valdez, supra*, 32 Cal.4th at pp. 82-85, 87, 106-110), testified at the reference hearing. The evidence showed that about two days before the shooting, the victim had cashed a federal income tax check for $1,203. Minutes before the murder, the victim had told petitioner and others in the small house that he had $3,000 in cash that he was planning to take to Mexico by airplane later that morning. By contrast, Detective Guenther told the referee that at the time of his arrest, Gutierrez merely had $13.04 on his person. The detective arrested Gutierrez about 10 to 20 minutes after the victim's body was discovered on a street by a curb several houses from his small house where: (1) petitioner was the last person to see the victim alive; and (2) petitioner was last seen with the pre-murdered victim merely 10 or so minutes prior to the discovery of the victim's body. The small amount of cash that police found on Gutierrez at the time of his arrest clearly tended to prove that he did not rob the murder victim. (Referee's Report at pp. 12-13.)

The victim died from multiple close range gunshot wounds to the head and upper body. Detective Guenther told the referee that Gutierrez

had a blood alcohol level of .30% at the time of his arrest. (Referee's Report at p. 12.) Gutierrez's high blood alcohol content tended to show that he was incapable of entering the victim's house without detection. The evidence showed that the victim was awake at the time he was shot, and was next to a .22-caliber firearm as he sat on a bed in the living room. He thus clearly would have detected the presence of a highly intoxicated stranger if someone like Gutierrez had entered the small house immediately prior to the shooting. According to Detective Guenther, after the arrest, Gutierrez stated that: (1) he had drops of blood on his shirt and boots because he had a bloody nose the day before the shooting; and (2) he did not know the victim or anything about the murder. Police separately interviewed three people arrested in the alley with Gutierrez (i.e., Pedro Venegas, Jose Vargas, and Angelica Reyes), and all three corroborated the story of Gutierrez that he was not involved in the murder. (Referee's Report at pp. 12-13.) At the murder scene, there was no shoe prints near the body. None of the witnesses in the house immediately before the shooting identified Gutierrez, and his fingerprints were not found at the murder scene. (*Id.* at pp. 13-14.) The referee excluded from consideration post-conviction prosecution proof that the blood on the shirt and boots of Gutierrez was from one donor, and that donor was not the murder victim. (Referee's Report at p. 44.)

The foregoing reference hearing proof confirmed counsel Robusto's tactical decision that a third-party culpability defense involving Gutierrez would have been more harmful than helpful to proving petitioner's guilt or innocence. Given that Gutierrez was clearly not involved in the robbery-murder, evidence involving him at the penalty phase would have undermined Robusto's credibility in saving petitioner from the death penalty.

It was also reasonable under *Strickland* for Robusto (as an officer of the court) to be ethically concerned about actually "pointing the finger" at Gutierrez during the guilt and penalty phase trials (*Valdez, supra*, 32 Cal.4th at pp. 107-108) when petitioner had made a confidential attorney-client pretrial confession that he was the true robber-killer in this case. (Respondent's Brief and Exceptions at pp. 25-26; see Petitioner's Brief at pp. 5, 10-11.) Here, it must be noted that Robusto never met with petitioner's current habeas counsel because "for various reasons he did not feel comfortable speaking with her, including because she told him that petitioner had confessed his guilt to her." (Referee's Report at p. 38.) Also, "[c]ounsel's performance and even willingness to serve could be adversely affected" by the "availability of post-trial inquiry into attorney performance or of detailed guidelines for its evaluation[.]" (*Strickland, supra*, 466 U.S. at p. 690.) At any rate, "[t]here are countless ways to provide effective assistance in any given case" and "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." (*Id.* at p. 689.) Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential." (*Id.*) Here, simply put, Robusto's trial assistance to petitioner was objectively reasonable under *Strickland* and its progeny. (Referee's Report at pp. 33-35, 61-70; Respondent's Brief and Exceptions at pp. 20-27, 47-49.)

RESPONSE TO ARGUMENT VI

Petitioner's final argument is that the death penalty must be reversed due to counsel's failure to investigate evidence that he suffered from childhood physical or mental (father) abuse, substance abuse, effects from post-traumatic stress disorder, brain dysfunction or damage, or attention deficit disorder prior to or during the 1992 penalty phase trial. (Petitioner's Brief at pp. 138-170.) Petitioner's brief essentially begins with a 62-page discussion of mitigation evidence offered to the referee through: (1) his

obviously biased family members and friends, many of whom testified to the penalty phase jury (*Valdez, supra*, 32 Cal.4th at pp. 89-91); (2) hired so-called *Strickland* expert, who clearly testified with the benefit of "hindsight" (see *Gentry, supra*, 540 U.S. at p. 8); (3) two hired medical experts who (largely based on examination of post-conviction declarations drafted by habeas counsel's employee that were signed by petitioner's family members and friends around 2002) opined that petitioner suffered from "severe and unrelenting emotional and physical abuse" that he had throughout his childhood that caused "mental state and serious resulting substance abuse" problems that Robusto failed to investigate when he was appointed in 1991; and (4) rebuttals to respondent's medical expert. (Petitioner's Brief at 12-74.)

Simply put, respondent agrees with the referee's detailed well-supported findings and conclusion that petitioner failed to prove the existence of any such mitigation evidence during the 1991 through 1992 trial representation time span (or presently). (Referee's Report at pp. 35-38, 71-103; Respondent's Brief and Exceptions at pp. 8, 10-13, 27-47.)

CONCLUSION

For these reasons, as well as those in respondent's informal response filed in this Court, merits-return to the Order to Show Cause filed in this Court, and post-hearing briefing submitted to the referee and to this Court, subclaims A, B, H, and I in Claim IV of the pending habeas petition should be denied.

Dated: July 28, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONSE TO PETITIONER'S BRIEF OF EXCEPTIONS TO THE REPORT OF THE REFEREE uses a 13 point Times New Roman font and contains 2,920 words.

Dated: July 28, 2009

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *In re Alfredo Reyes Valdez, On Habeas Corpus* No.: S107508

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 5, 2009, I served the attached **RESPONSE TO PETITIONER'S BRIEF OF EXCEPTIONS TO THE REPORT OF THE REFEREE** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 5, 2009, at Los Angeles, California.

Ronda Jones
Declarant

Signature

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