Case no. S285006

IN THE SUPREME COURT OF CALIFORNIA

In re

EUGENE THOMPSON

on Habeas Corpus

Los Angeles County Super. Ct. Case no. YA045468
Hon. F. Hourigan, III

PETITIONER'S INFORMAL REPLY

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INTRODUCTION

In 2001, Petitioner Eugene Thompson was sentenced to forty-years-to-life under the Three Strikes law for attempted carjacking and stealing a purse from a car parked at a gas station. Unbeknownst to any court until now, Mr. Thompson was seriously mentally ill at the time. Documents reflecting Mr. Thompson's severe psychiatric problems were available at the time of his trial and sentencing, and would have constituted powerful mitigating evidence, but Mr. Thompson's trial attorney presented virtually no mitigation at sentencing despite his constitutional obligation to do so. *See People v. Thimmes*, 138 Cal. App. 4th 1207, 1212 (2006) (requiring a new sentencing hearing when defense counsel failed to present material evidence at a Three Strikes sentencing hearing, in violation of the defendant's Sixth Amendment right to effective representation). The documentation of Mr. Thompson's serious mental health issues, childhood trauma, and other mitigating evidence presented his Petition only became available when undersigned counsel began investigating his case.

In addition to the new evidence discovered since Mr. Thompson's conviction, new case law also undermines his

conviction. As discussed in Mr. Thompson's opening Petition, his sentence is materially indistinguishable from the Three Strikes sentence invalidated by the Second District Court of Appeals as unconstitutionally disproportionate in *People v. Avila*, 57 Cal. App. 5th 1134, 1150-51 (2020). *Avila* holds that certain Three Strikes sentences that were once "commonplace" now violate Article I section 17 of the California Constitution due the "evolving state of California's criminal jurisprudence." *Avila*, 57 Cal. App. 5th at 1150.

Respondent argues that Mr. Thompson's claims are untimely and otherwise procedurally deficient and incorrect on the merits. As discussed below, Respondent is mistaken on the law and the facts of Mr. Thompson's case.

ARGUMENT

I. MR. THOMPSON'S PETITION IS NOT PROCEDURALLY BARRED.

Respondent argues that Mr. Thompson's claims are procedurally barred as untimely, previously decided on direct appeal, and/or insufficiently pled. For the following reasons, Respondent is incorrect.

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A. Mr. Thompson's claims are not untimely.

Respondent argues Mr. Thompson's petition is untimely because there was "substantial delay" between the time Mr. Thompson was aware of the facts and law involved in his claims and the time he filed his petition for relief. (Inf. Resp. at 12.)

A general "reasonableness" standard applies in determining whether a habeas petition is timely filed. *In re Reno* 55 Cal. 4th 428, 461 (2012). "Substantial delay is measured from the time the petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim." *Id.*; *In re Robbins*, 18 Cal. 4th 770, 780 (1998); *see also Robinson v. Lewis*, 9 Cal. 5th 883, 897 (2020) (one untimely claim does not make a habeas corpus petition untimely).

A habeas corpus petition shall not be untimely if, as here, "the question is one of excessive punishment." *In re Ward*, 64 Cal. 2d 672, 675 (1966) (excusing a delay of over twenty years in bringing a habeas claim for excessive punishment). The state is not harmed by delay in excessive punishment cases. *In re Bartlett*, 15 Cal. App. 3d 176, 186 (1971); *see also In re Wilson*, 182 Cal. Rptr. 3d 774, 780 (as modified Jan. 30, 2015) (excusing

a fifteen-year delay);[1] *People v. Miller*, 6 Cal. App. 4th 873 (1992) (excusing ten-year delay); *In re Huddleston*, 71 Cal. 2d 1031, 1032-1034 (1969) (excusing a eight-year delay).

Here, Mr. Thompson's petition is based on new case law, *People v. Avila*, 57 Cal. App. 5th 1134 (2020), and a sophisticated understanding of the right to effective representation of counsel in a non-capital sentencing hearing. *See* Romano, *Striking Back: Using Death Penalty Cases to Fight Disproportionate Sentences Imposed Under California's Three Strikes Law*, 21 STAN. LAW & POL. REV. 311 (2010). Mr. Thompson himself has no legal training and limited access to legal materials and could not have possibly filed his claim prior to the Second District's relatively recent decision in *Avila*, 57 Cal. App. 5th 1134. Through undersigned counsel, Mr. Thompson initially filed his claim for relief on May 5, 2023, and has been diligently litigating his case ever since. Mr. Thompson's initial petition was filed fewer than

[1] This Court subsequently granted review and superseded the opinion sub nom, *Wilson (Derrick Lynn) on H.C.*, 346 P.3d 26 (Cal. 2015), before dismissing review and remanding. *In re Wilson*, 376 P.3d 639, Cal., (Aug. 10, 2016).

eight months after counsel received prison files from the Department of Corrections, which are central to this case.[2]

In *Reno*, this Court expressed a concern for potential "abuse of the writ" of habeas corpus by counsel withdrawing and substituting new counsel to learn of information offered in support of the claim. *Reno*, 55 Cal. 4th at 463, citing *In re Clark*, 5 Cal. 4th 750, 765 (1993). That is not the case here. Unlike capital defendants, Mr. Thompson had no incentive to delay adjudication of his claims—he was simply unaware of the extent of his rights. *See Ward*, 64 Cal. 2d at 675; *Bartlett*, 15 Cal. App. 3d at 186 (the state is not harmed by delay in excessive punishment cases).

B. Mr. Thompson's cruel or unusual punishment claim relies on new case law in *Avila*.

Respondent argues Mr. Thompson's claim of cruel and unusual punishment is barred because it was raised and rejected on his direct appeal. (Inf. Resp. at 16.) *In re Waltreus*, 62 Cal. 2d 218, 225 (1965), generally bars raising issues on habeas petitions

[2] On October 3, 2022, counsel received Mr. Thompson's prison central file. The prison documents total 9,432 pages of information regarding Mr. Thompson's mental illness and childhood trauma underlying his ineffective assistance of counsel claim.

which were raised and rejected on direct appeal. However, claims based on new law, as here, are exempted from this rule. *In re Harris*, 5 Cal. 4th 813, 825, 841 (1993).[3]

Mr. Thompson's claim of cruel or unusual punishment depends on the Second District's relatively recent decision in *Avila*, which held that certain sentences imposed under California's Three Strikes law which were once "commonplace" are now unconstitutional due to "evolving standards of decency." *Avila***,** 57 Cal. App. at 1151 ("There comes a time when the people who populate the justice system must take a fresh look at old habits.") Mr. Thompson's appeal was final long before *Avila* was decided, and because *Avila* constitutes new law, at least as applied to certain Three Strikes sentences, his claim is not barred by the so-called "*Waltreus* rule." *See Harris*, 5 Cal. 4th at 825, 841.

C. Mr. Thompson alleged adequate facts to substantiate his claim.

Respondent argues that Mr. Thompson failed to present documentary evidence in support of his claim that his trial

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[3] *Shalabi v. City of Fontana*, 11 Cal. 5th 842 (2021) disapproved of, but did not overrule, *In re Harris*, on other grounds, tolling for minors.

counsel provided ineffective assistance of counsel at his sentencing hearing. (Inf. Resp. at 17.)

In order to sufficiently plead his habeas case, Mr. Thompson's petition must "(i) state fully and with particularity the facts on which relief is sought, as well as (ii) include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations." *People v. Duvall*, 9 Cal. 4th 464, 474 (1995).

Mr. Thompson has done just that.

II. MR. THOMPSON'S SIXTH AMENDMENT RIGHT TO EFFECTIVE REPRESENTATION OF COUNSEL WAS VIOLATED WHEN HIS TRIAL ATTORNEY FAILED TO PRESENT POWERFUL, READILY AVAILABLE MITIGATING EVIDENCE.

Respondent acknowledges that Mr. Thompson had a right to effective representation of counsel at his Three Strikes sentencing hearing, including a right to present mitigating evidence. *See Thimmes* 138 Cal. App. 4th at 1212. Respondent also acknowledges that mental illness is a mitigating factor at sentencing and that documentary evidence of Mr. Thompson's severe mental illness was available at the time of his sentencing but wasn't presented to the sentencing court. (Inf. Resp. at 20-22.) Respondent argues that there was no error in neglecting to

present this mitigating evidence because trial counsel had a "strategic" reason to omit it and because it wouldn't have made a difference had it been presented.

Again, Respondent is mistaken.

A. Failure to present readily available evidence of severe mental illness at Mr. Thompson's sentencing hearing fell below a reasonable level of care and cannot be excused as a "strategic" decision.

It is beyond dispute that evidence documenting Mr. Thompson's severe mental illness, in the form of prison medical files, was available at the time of Mr. Thompson's 2001 sentencing hearing (Ex. C.), and that none of this evidence was presented in court. The evidence included documentation that Mr. Thompson was recently in a prison mental health program, suffered from auditory hallucinations, attempted suicide, and suffered from a history of childhood abuse and neglect (Ex. C.)

A defense counsel's failure to investigate a client's case that results in the omission of potentially meritorious evidence is a paradigmatic case of ineffectiveness. *See In re Lucas*, 33 Cal. 4th 682, 732 (2004) (counsel failed to introduce evidence of defendant's beatings by his mother); *People v. Frierson*, 25 Cal. 3d 142, 164-65 (1979) (counsel failed to investigate defendant's

"mental condition" and failed to offer evidence of defendant's "youth and family difficulties"); *People v. Pope*, 23 Cal. 3d 412, 425 (1979); *Williams v. Filson*, 908 F.3d 546, 564 (9th Cir. 2018).[4]

In *People v. O'Hearn*, 57 Cal. App. 5th 280 (Cal. Ct. App. 2020), the court granted habeas relief for the defendant and reversed a trial court judgment finding effective assistance of counsel because—as here—the trial attorney failed to investigate the defendant's mental health. In *O'Hearn*, the court lamented:

> O'Hearn's recent diagnosis of psychosis and schizoaffective disorder, his use of antipsychotic medications, and his history of repeated psychiatric hospitalizations might have provided the basis of a successful defense to the charge. But voluminous medical records presenting this evidence went unused because [counsel] failed to conduct an investigation that would readily have disclosed it.

Id. at 288; *see also People v. Tatlis*, 230 Cal. App. 3d 1266, 1273-74 (1991) (finding failure to exercise informed discretion where

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[4] According to the American Bar Association, "[d]efense counsel's investigative efforts [...] should explore appropriate avenues that reasonably might lead to information relevant to [...] consequences of the criminal proceedings, and potential dispositions and penalties." Amer. Bar Ass'n Criminal Justice Defense Function Standard 4-4.1(c) (4th ed. 2017). Defense counsel must also "present all arguments or evidence which will assist the court [...] in reaching a sentencing disposition favorable to the accused." Amer. Bar Ass'n Criminal Justice Defense Function Standard 4-8.3 (c) (4th ed. 2017).

court does not "consider all mitigating circumstances in imposing sentence").

Furthermore, the failure of Mr. Thompson's trial attorney to present evidence of his client's mental illness cannot be considered "strategic," as Respondent maintains, because trial counsel never investigated the issue. A tactical decision by counsel must be "a reasonable and informed one in the light of the facts and options reasonably apparent . . . and founded upon reasonable investigation and preparation." *Frierson*, 25 Cal. 3d at 166. "[C]ounsel can hardly be said to have made a strategic choice when [s/he] has not yet obtained the facts on which such a decision could be made." *Sanders v. Ratelle*, 21 F.3d 1446, 1457 (9th Cir. 1994) (citing *United States v. Gray*, 878 F.2d 702, 711 (3d Cir.1989)). [5]

[5] Respondent also argues that Mr. Thompson was "require[d] . . . to provide a sworn statement from counsel disclosing whether counsel had tactical reasons for his or her actions or omissions," citing *In re Harris* 5 Cal. 4th at 827. (Inf. Resp. at 18.) In *Harris* says no such thing. At this stage, all that is required of Mr. Thompson is that he present "reasonable available documentary evidence"—which he did in abundance. (*See, e.g.,* Ex. C, Ex. E, Ex. L, Ex. O, Ex. X, Ex. Y, Ex. Z.)

B. The omission of mitigating evidence regarding Mr. Thompson's mental illness and childhood trauma prejudiced the outcome of his sentencing hearing.

Respondent argues that the outcome of Mr. Thompson's sentencing hearing was not prejudiced by the omission of mitigating evidence regarding Mr. Thompson's psychiatric condition and extreme childhood trauma. (Inf. Resp. at 22-23.) Respondent claims that Mr. Thompson's claim fails because he "must demonstrate a witness" available to testify at trial.

Again, Respondent misstates the relevant law.

Mr. Thompson presented numerous documents that were available at the time of his sentencing, and all prepared by prison experts, recording his mental illness and childhood trauma. (Ex. C, Ex. E, Ex. L.) Evidence of mental illness, substance abuse, and childhood trauma is "substantial and potentially compelling mitigating evidence," and failure to investigate and present such evidence at sentencing is "profoundly prejudicial." *Silva v. Woodford*, 279 F.3d 825, 847 (9th Cir. 2002); *Andrews v. Davis*, 944 F.3d 1092, 1117 (9th Cir. 2019) (evidence of childhood abuse is "especially mitigating" and its omission is "particularly prejudicial.")

Recent California Court of Appeal decisions have held that the mitigating evidence omitted from Mr. Thompson's case is precisely the sort of evidence that puts a defendant outside the ambit of the Three Strikes sentencing scheme. In *People v. Dryden*, 60 Cal. App. 5th 1007, 1031-32 (2021), the Court of Appeals reversed a Three Strikes sentence as an abuse of discretion when the trial court neglected to give adequate consideration of the defendant's "long history" mental illness, "violent and abusive upbringing," and history of addiction. Similarly, in *Avila*, 57 Cal. App. 5th 1140-1141, the Court of Appeals again held that a Three Strikes sentence was inappropriate given mitigating circumstances similar to those present here. First, the court noted the young age of the defendant when he committed his prior strikes. *Id*. at 1141. Here, Mr. Thompson committed his strike priors at the young ages of twenty-four and twenty-six. Second, the court noted that the defendant did not use a weapon in his current strike. *Id.* at 1142. Similarly, Mr. Thompson did not use a weapon in any of his offenses. Third, the court noted that the defendant had been exposed to drugs at a young age and that his criminal conduct "appear[ed] to be related to his drug addiction rather than to

sinister motives." *Id*. at 144-45. Similarly, here, Mr. Thompson was exposed to drugs by his family at a young age. Each of Mr. Thompson's convictions arose from his drug addiction as well as the mental illness and childhood abuse which precipitated his drug addiction.

III. MR. THOMPSON'S CASE IS MATERIALLY INDISTINGUISHABLE FROM *PEOPLE v. AVILA*.

In *People v. Avila*, 57 Cal. App. 5th 1134, 1150 (2020), the Court of Appeals held that certain Three Strikes sentences that were once "commonplace" now violate Article I section 17 of the California Constitution due the "evolving state of California's criminal jurisprudence." The facts of *Avila* are strikingly similar to Mr. Thompson's case.

In *Avila*, the defendant suffered from mental illness and childhood trauma and stood convicted of attempted robbery and extortion, which the trial court described as "brutal" and "violent." *Avila*, 57 Cal. App. 5th at 1142.

Respondent attempts to distinguish *Avila* by arguing that Mr. Thompson's instant more serious than the defendant's convictions in *Avila*. (Inf. Resp. at 24.)

Again, Respondent is mistaken.

There is one objective way to compare the seriousness of two criminal cases which invariably have different specific facts—which is the punishment allocated to each crime by the legislature. Here, the maximum punishments available to Mr. Thompson for his offense and the defendant in *Avila* for his offense are identical.

In *Avila*, the defendant stood convicted of attempted robbery and attempted extortion of two different victims on different days. *Avila*, 57 Cal. App. 5th at 1142. Standing on their own (i.e. before factoring the Three Strikes law), the maximum punishment for these crimes is nine years. *See* Penal Code §§ 213 (punishment for robbery), 520 (punishment for extortion).

Here, the maximum punishment for Mr. Thompson's crimes is also nine years. *See* Penal Code § 215 (punishment for carjacking).[6]

Respondent does not attempt to distinguish Mr. Thompson's prior criminal record from *Avila* because it is

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[6] "A person may be charged with [carjacking] and Section 211 [robbery]. However, no defendant may be punished [for carjacking] and Section 211 for the same act which constitutes a violation of both [carjacking] and Section 211." Penal Code § 215(c)

undeniable that the defendant in *Avila* had a longer and more severe criminal history. In *Avila*, the defendant's prior "strikes" were for assault with a deadly weapon, multiple robberies, and unlawful intercourse with a child. *Id.* at 1148. Mr. Thompson's prior strikes were strong arm robberies, characterized by the court as "no weapons, no battery, no fighting, no injuries." (RT 15-16.)

In short, Mr. Thompson's instant offense is materially indistinguishable from the crimes committed by the defendant in *Avila* (in that both carried maximum punishments of nine years), and Mr. Thompson's prior criminal history is undeniably less violent than the defendant's in *Avila*. Simply put, if the Three Strikes sentence in *Avila* was unconstitutionally disproportionate, then so is Mr. Thompson's.

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CONCLUSION

For the foregoing reasons, Mr. Thompson respectfully requests that this Court grant his petition.

Dated: January 9, 2025

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Cal. Rule of Court 8.024(c)

The text of this brief consists of 3,187 words as counted by the Microsoft Office Word word processing program used to generate the brief.

Date: January 9, 2025

/s/ Michael S. Romano
Michael S. Romano

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In re Eugene Thompson
(Los Angeles Cty. Super. Ct. Case no. YA045468)

I, SUSAN CHAMPION, declare that I am over the age of eighteen years and not a party to this action. My business address is 559 Nathan Abbott Way, Stanford, California 94305-8610.

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I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on January 9, 2025, at Stanford, California.

/s/ Susan Champion
Susan Champion

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Three Strikes Project
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