

Case No. 14-56373

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ERNEST DEWAYNE JONES,

Petitioner-Appellee,

v.

RON DAVIS,

Acting Warden of California State Prison at San Quentin,

Respondent-Appellant.

**PETITIONER-APPELLEE'S
SUPPLEMENTAL EXCERPTS OF
RECORD**

Appeal from the United States District Court
for the Central District of California
U.S.D.C. No. 09-CV-02158-CJC

The Honorable Cormac J. Carney, Judge

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11 **UNITED STATES DISTRICT COURT**
 12 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

13 ERNEST DEWAYNE JONES,
 14 Petitioner,

15 V.

16 KEVIN CHAPPELL, Warden of
 17 California State Prison at San
 18 Quentin,
 19 Respondent.

Case No. CV-09-2158-CJC
DEATH PENALTY CASE

**RESPONSE TO RESPONDENT'S
 OPENING BRIEF ON CLAIM 27**

Date: August 4, 2014
 Time: 11:00 a.m.
 Courtroom: 9B

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Cases..... Page(s)

Ali v. Hickman, 571 F.3d 902 (9th Cir. 2009)20

Allen v. Ornoski, 435 F.3d 946 (9th Cir. 2006) 11

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Coe v. Thurman, 922 F.2d 528 (9th Cir. 1990)8

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Duke Power Co. v. Carolina Envt’l Study Group, Inc., 438 U.S. 59, 98
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Duncan v. Henry, 513 U.S. 364, 115 S. Ct. 887, 130 L. Ed. 2d 865
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 15 *Matias v. Oshiro*, 683 F.2d 318 (9th Cir. 1982)6
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11 *Rompilla v. Beard*, 545 U.S. 374, 25 S. Ct. 2456, 162 L. Ed. 2d 360

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13 *Simmons v. United States*, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d

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15 *Soering v. United Kingdom*, App. No. 14038/88, 11 Eur. H. R. Rep.

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17 *Spaziano v. Florida*, 468 U.S. 447, 104 S. Ct. 3154 82 L. Ed. 2d 340

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I. INTRODUCTION

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2 Pursuant to this Court's June 11, 2014 Order, Mr. Jones submits this
3 response to respondent's brief on Claim 27. Order Amending Briefing Schedule
4 and Setting Hearing on Claim 27, June 11, 2014, ECF No. 110. In its "Opening
5 Brief on Claim 27 that Lengthy Confinement of Petitioner Under Sentence of
6 Death Violates [the] Eighth Amendment," respondent asserts that (1) Mr. Jones
7 failed to comply with the exhaustion doctrine; (2) a portion of the claim is not ripe
8 for review; and (3) relief is bared by 28 U.S.C. section 2254(d). Opening Brief on
9 Claim 27 that Lengthy Confinement of Petitioner Under Sentence of Death
10 Violates Eighth Amendment (Resp. Opening Br.) at 2-7, June 9, 2014, ECF No.
11 107. Respondent's arguments, however, reflect a fundamental misunderstanding of
12 the nature of the claims presented in the state court and this Court, the California
13 Supreme Court's limited resolution of the claim on direct appeal, and the effect of
14 respondent's express waiver of the exhaustion requirement after Mr. Jones filed his
15 federal Petition for Writ of Habeas Corpus in 2010.

16 Mr. Jones presented a portion of Claim 27 to the state court on direct appeal.
17 Appellant's Opening Br. at 229-43, Notice of Lodging, Apr. 6, 2010, ECF No. 29
18 ("NOL") at B1; Appellant's Reply Br. at 100, NOL at B3. Specifically, Mr. Jones
19 presented to the state court a "twofold" claim: "first, that delay in itself constitutes
20 cruel and unusual punishment; and second, that the actual carrying out of the
21 execution would serve no legitimate penological ends." Appellant's Opening Br. at
22 240-41. Mr. Jones supported his claim with citations to legal authorities noting
23 that the physical conditions and emotional and mental anguish that death row
24 inmates face while awaiting execution – described in the Appellant's Opening
25 Brief as "death row phenomenon" – constitute cruel and unusual punishment.
26 Appellant's Opening Br. at 229-43; *see also* Appellant's Opening Br. at 237
27 (arguing that Mr. Jones's ten-year appellate process and additional habeas corpus
28 proceedings exceed the "length of stay" considerations in *Soering v. United*

1 *Kingdom*, App. No. 14038/88, 11 Eur. H. R. Rep. 439 (1989)).

2 The state court's adjudication of the claim consisted of the following:
3 Defendant's argument that "one under judgment of death suffers
4 cruel and unusual punishment by the inherent delays in resolving his
5 appeal is untenable. If the appeal results in reversal of the death
6 judgment, he has suffered no conceivable prejudice, while if the
7 judgment is affirmed, the delay has prolonged his life."

8 *People v. Jones*, 29 Cal. 4th 1229, 1267, 131 Cal. Rptr. 2d 468 (2003) (citing and
9 quoting *People v. Anderson*, 25 Cal. 4th 543, 606, 106 Cal. Rptr. 2d 575 (2001)).

10 In the Petition for Writ of Habeas Corpus filed in this Court, Mr. Jones
11 significantly expanded on the legal and/or factual bases for Claim 27. Citing to
12 several constitutional provisions, Mr. Jones alleged entitlement to relief because (1)
13 California failed to provide "a constitutionally full, fair, and timely review of his
14 conviction and sentence"; (2) California's excessive "delay in" the "final
15 resolution" of cases "far exceeds that of any other state with capital punishment"
16 and was not attributable to Mr. Jones's actions; (3) the deplorable conditions at San
17 Quentin are "psychologically torturous, degrading, brutalizing, and
18 dehumanizing"; (4) there are a significant number of deaths by suicide or other
19 causes at San Quentin compared to the few executions that have occurred; and (5)
20 several of the executions that have occurred have been botched. Petition for Writ
21 of Habeas Corpus By a Prisoner in State Custody (28 U.S.C. § 2254) (Petition),
22 Mar. 10, 2010, at 414-18, ECF No. 26. Mr. Jones also supplemented the appellate
23 claim with additional factual allegations his claims that: (1) the uncertainty of
24 execution inflicts unconstitutional "psychological suffering"; (2) execution after
25 such an excessive delay negates any legitimate purpose – including retribution and
26 deterrence – to be served by capital punishment; and (3) based on the forgoing,
27 executing Mr. Jones after the excessive delay (fifteen years since the death
28 judgment) that already has occurred and the "several more years likely" to pass and

1 under the conditions at San Quentin “would involve the needless infliction of
2 avoidable mental anguish and psychological pain and suffering were it to occur.”
3 Petition at 414-18.

4 Mr. Jones presented the California Supreme Court with this enhanced claim
5 in the state petition filed contemporaneously with the federal petition, but Mr.
6 Jones withdrew that petition and the California Supreme Court did not review the
7 claim because respondent expressly waived the exhaustion defense as to all claims
8 in the federal petition. *See* Answer to Petition for Writ of Habeas Corpus, filed
9 April 6, 2010, at 2 n.3, ECF No. 28 (noting that “Respondent is not asserting that
10 any claims in the instant federal Petition are unexhausted”); Response to
11 Application to Defer Informal Briefing on Petition for Writ of Habeas Corpus, Mar.
12 25, 2010, *In re Jones*, California Supreme Court Case No. S180926 at 1,
13 Supplemental Notice of Lodging of Documents, filed May 13, 2010, ECF No. 42
14 at F8 (stating “respondent has examined the federal petition and has determined
15 that all claims therein appear to be exhausted....Respondent will therefore be filing
16 an answer to the federal petition and will not be asserting that any claims are
17 unexhausted.”); *see also* 28 U.S.C. § 2254(b)(3) (excusing exhaustion requirement
18 when “the State, through counsel, expressly waives the requirement”).

19 Thus, respondent’s exhaustion and section 2254(d) arguments must account
20 for the limited review that the state court conducted with respect to the claim raised
21 in Appellant’s Opening Brief and respondent’s decision to waive any exhaustion
22 objections to the claim pled in the Petition filed in this Court in 2010. Rejection of
23 respondent’s arguments is thus mandated.

24 **II. THE EXHAUSTION DOCTRINE DOES NOT PRECLUDE**
25 **THIS COURT FROM GRANTING RELIEF ON CLAIM 27.**

26 Respondent asserts that a portion of Mr. Jones’s Claim 27 – the portion
27 alleging an Eighth Amendment violation based on delay caused by the current lack
28 of an execution protocol in California – is unexhausted. Resp. Opening Brief at 2.

1 Respondent is incorrect. This portion of Claim 27 is in fact exhausted because it is
2 sufficiently related and intertwined with the claim that was raised on appeal and the
3 claim to which respondent expressly waived any exhaustion objections. Even if
4 this Court finds otherwise, this portion of Claim 27 is properly before this Court
5 because: (1) it would be otherwise futile for Mr. Jones to return to the California
6 Supreme Court; and (2) the exhaustion requirement must be excused because the
7 circumstances of this case render the California corrective process ineffective to
8 protect Mr. Jones's rights.

9 Federal habeas relief is generally available to state prisoners only after they
10 have exhausted their claims in state court. 28 U.S.C. § 2254(b); *see also O'Sullivan*
11 *v. Boerckel*, 526 U.S. 838, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999); *Vasquez v.*
12 *Hillery*, 474 U.S. 254, 257, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986) (purpose of
13 exhaustion doctrine is "to afford the state courts a meaningful opportunity to
14 consider allegations of legal error without interference from the federal judiciary").
15 The exhaustion doctrine, however, is a matter of federalism and comity, not of
16 jurisdiction. *See, e.g., Granberry v. Greer*, 481 U.S. 129, 134, 107 S. Ct. 1671, 95
17 L. Ed. 2d 119 (1987); *see also Coleman v. Thompson*, 501 U.S. 722, 731, 111 S. Ct.
18 2546, 115 L. Ed. 2d 640 (1991). A claim is exhausted for purposes of legal and
19 factual exhaustion if it has been "fairly present[ed]" to the state courts, so that the
20 state court has an "opportunity to pass upon and correct' alleged violations" of
21 petitioner's federal rights. *Duncan v. Henry*, 513 U.S. 364, 365, 115 S. Ct. 887,
22 130 L. Ed. 2d 865 (1995) (quoting *Picard v. Connor*, 404 U.S. 270, 275, 92 S. Ct.
23 509, 30 L. Ed. 2d 438 (1971)).

24 **A. Claim 27 is Exhausted in its Entirety.**

25 Mr. Jones provided the state court the opportunity to "pass upon" his claim
26 that the uncertainty of whether he will be executed following an extraordinarily
27 lengthy delay in execution of his sentence renders his death sentence
28 unconstitutional. Appellant's Opening Br. at 230 (quoting *In re Medley*, 134 U.S.

1 160, 172, 10 S. Ct. 384, 33 L. Ed. 835 (1890)); *see also* Petition at 417 (alleging
2 “psychological suffering” caused by uncertainty of execution and quoting *In re*
3 *Medley*); Petition at 418 (alleging “needless inflection of avoidable mental anguish
4 and psychological pain and suffering”). In the Amended Petition for Writ of
5 Habeas Corpus, Mr. Jones listed the lack of a valid lethal injection protocol as a
6 more specific reason why the unconscionable delay in the final resolution of his
7 case violates the Constitution. First Amended Petition for Writ of Habeas By A
8 Prisoner in State Custody (28 U.S.C. § 2254) (First Amended Petition) at 421-22,
9 Apr. 28, 2014, ECF No. 105. Nonetheless, the nature of the claim – that the
10 uncertainty of whether Mr. Jones will be executed after an extraordinarily lengthy
11 delay is unconstitutional – was unaffected by the amendment.

12 Thus, Mr. Jones’s argument that California’s lack of a valid execution
13 protocol further violates the Eighth Amendment is sufficiently related and
14 intertwined with the claim that was presented to the state court (and the claim to
15 which respondent waived exhaustion) to satisfy the exhaustion requirement. *See*
16 *Lounsbury v. Thompson*, 374 F.3d 785, 788 (9th Cir. 2004) (holding that by
17 exhausting his procedural due process challenge in his state court petition,
18 petitioner had fairly presented his substantive due process claim that he was tried
19 while mentally incompetent because “the clear implication of his claim was that by
20 following a constitutionally defective procedure, the state court erred in finding
21 him competent.”). Claims are “sufficiently related” or “intertwined” for
22 exhaustion purposes when, by raising one claim, the petition clearly implies
23 another error. *Id.* at 788. Here, Mr. Jones’s state claim that the extraordinary delay
24 in the execution of sentence clearly encompassed any additional delays attributable
25 to the state, such as the current lack of an execution protocol. This augmented
26 allegation to Claim 27 only provided further factual support for the claim; it relies
27 on the same federal legal theory as well as the same operative facts. *Gray v.*
28 *Netherland*, 518 U.S. 152, 162-63, 116 S. Ct. 2074, 135 L. Ed. 2d 457 (1996);

1 *Gaitlin v. Madding*, 189 F.3d 882, 888 (9th Cir. 1999). Accordingly, Claim 27 is
2 exhausted in its entirety.

3 **B. The Portion of Claim 27 Regarding California’s Lack of an Execution**
4 **Protocol Must be Deemed Exhausted Because California Does Not**
5 **Provide A Viable Forum for Mr. Jones to Present it.**

6 Even if this Court finds that Claim 27 is partially unexhausted, this Court
7 should nevertheless consider that portion of Claim 27 because it would be futile for
8 Mr. Jones to return to state court. The exhaustion requirement applies only when
9 state remedies are available. *See, e.g., Engle v. Isaac*, 456 U.S. 107, 125-26 n.28,
10 102 S. Ct. 1558, 71 L.Ed.2d 783 (1982). “[I]n determining whether a remedy for
11 a particular constitutional claim is ‘available,’ the federal courts are authorized,
12 indeed required, to assess the likelihood that a state court will accord the habeas
13 petitioner a hearing on the merits of his claim.” *Phillips v. Woodford*, 267 F.3d
14 966, 974 (9th Cir. 2001) (quoting *Harris v. Reed*, 489 U.S. 255, 268, 109 S. Ct.
15 1038, 103 L. Ed. 2d 308 (1989) (O’Connor, J., concurring)). “[F]ederal courts
16 should defer action only if there is some reasonable probability that (state) relief . .
17 . will actually be available.” *Matias v. Oshiro*, 683 F.2d 318, 320 (9th Cir. 1982)
18 (quoting *Powell v. Wyrick*, 657 F.2d 222, 224 (8th Cir. 1981)); *see also Sweet v.*
19 *Cupp*, 640 F.2d 233, 236 (9th Cir. 1981) (holding petitioner need not exhaust state
20 remedies which would clearly be futile).

21 Here, Mr. Jones has insufficient state remedies available to him because of
22 the inevitable inordinate state court delay in resolving habeas corpus petitions and
23 the extreme unlikelihood that the state court would consider the claim on its merits.
24 As Mr. Jones detailed in his First Amended Petition and Opening Brief on Claim
25 27, the California Supreme Court summarily denies the overwhelming majority of
26 capital habeas corpus petitions without any explication of its reasoning and it is the
27 very rare circumstance in which it issues orders to show cause (eight percent of
28 habeas corpus proceedings) and the rarer circumstances that it holds an evidentiary

1 hearing (less than five percent of habeas corpus proceedings). *See* First Amended
2 Petition at 418, Petitioner’s Opening Br. on Claim 27 at 13-1, June 9, 2014, ECF
3 No. 109.¹ Moreover, the California Supreme Court has denied claims similar or
4 identical to Claim 27 on the merits in forty-one decisions on direct appeal and
5 ninety-five orders in state habeas corpus proceedings, and has never found that a
6 petitioner has stated a prima facie case requiring the issuance of an order to show
7 cause, let alone granted relief on the claim. Far from demonstrating “a reasonable
8 probability that [state] relief will actually be available,” *Matias*, 683 F.2d at 320,
9 this dysfunctional system guarantees that the California Supreme Court will
10 conclude that he has not stated a prima facie case for relief. *Phillips*, 267 F.3d at
11 974.

12 **C. California’s Dysfunctional Death Penalty System Exempts Claim 27**
13 **From the Exhaustion Requirement.**

14 Finally, regardless whether Claim 27 has been exhausted in its entirety, this
15 Court must consider it because the ineffectiveness of California’s corrective
16 process require that any unexhausted portion of the claim be excused from the
17 exhaustion requirement pursuant to 28 U.S.C. section 2254(b)(1)(B)(ii).² As a
18

19 ¹ In this case specifically, the California Supreme Court took six and a half
20 years to summarily deny Mr. Jones’s habeas petition and it did not provide him a
21 hearing or resolve any factual disputes.

22 ² 28 U.S.C. section 2254(b) provides:

23 (1) An application for a writ of habeas corpus on behalf of a person
24 in custody pursuant to the judgment of a State court shall not be
25 granted unless it appears that—

26 (A) the applicant has exhausted the remedies available in the courts
27 of the State; or

28 (B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect
the rights of the applicant.

1 result of the extraordinary delay in this case, primarily due to the dysfunction of
2 California's death penalty system, Mr. Jones's rights to merits review outweigh the
3 jurisprudential concerns that underlie the exhaustion requirement. Mr. Jones has
4 been waiting for final review of his conviction and sentence for nineteen years, and
5 he will inevitably wait many more. More than four years passed before the
6 California Supreme Court appointed counsel to represent Mr. Jones in his
7 automatic appeal, over eight years passed between Mr. Jones's sentencing and the
8 California Supreme Court's affirmance of his sentence, and over six and a half
9 additional years passed before the Court ruled on Mr. Jones's state habeas petition.
10 First Amended Petition at 415-17. There is simply no reasonable justification for
11 this delay, and there is "no end in sight" to the delay. *See Phillips*, 56 F.3d at 1035.
12 The delay is attributable only to the California state authorities' failure to
13 adequately fund the system and decide cases in a prompt manner.

14 Federalism and comity must give way in this case given the extreme delay.
15 "Although the requirement of exhaustion and its underlying principles form a
16 threshold test for habeas relief, they are designed as an 'accommodation' rather
17 than an 'insuperable barrier.'" *Hankins v. Fulcomer*, 941 F.2d 246, 249 (3d Cir.
18 1991) (quoting *Wilwording v. Swenson*, 404 U.S. 249, 250, 92 S. Ct. 407, 30 L. Ed.
19 2d 418 (1971)); *see also Lee v. Stickman*, 357 F.3d 338 (3d Cir. 2004) (exhaustion
20 excused because of eight-year delay in state post-conviction collateral
21 proceedings). The circumstances in this case render the California corrective
22 process ineffective to protect Mr. Jones's rights. Accordingly, the requirement of
23 exhaustion should be excused as to the execution protocol portion of Claim 27.
24 *See, e.g., Coe v. Thurman*, 922 F.2d 528, 531 (9th Cir. 1990) (delay of three-years
25 and eight months from time of filing of notice of appeal in California direct appeal
26 excused exhaustion); *Harris v. Champion*, 15 F.3d 1538, 1556 (10th Cir. 1994)
27 (delay of more than two years from notice of appeal in direct appeal process gives
28 rise to a presumption that the process is ineffective); *Wojtczak v. Fulcomer*, 800

1 F.2d 353 (3d Cir. 1986) (three and one-half year delay inordinate); *Lowe v.*
2 *Duckworth*, 663 F.2d 42 (7th Cir. 1981) (three and one-half year delay inordinate);
3 *Dozie v. Cady*, 430 F.2d 637 (7th Cir. 1970) (seventeen-month delay inordinate);
4 *compare Hamilton v. Calderon*, 134 F.3d 938 (9th Cir. 1998) (less than two-year
5 delay in review by California Supreme Court not extreme).³

6 Application of this exception to the exhaustion requirement is particularly
7 applicable to Claim 27, which is premised upon the lengthy delays inherent in
8 California system. As detailed in Mr. Jones's Opening Brief, the Attorney
9 General's insistence on requiring habeas corpus petitioners to return to the
10 California Supreme Court to exhaust state remedies has been a substantial reason
11 for the delay in the resolution of capital cases. Petitioner's Opening Br. on Claim
12 27 at 12. Requiring Mr. Jones to return to the state courts to exhaust a small
13 portion of Claim 27 will result in years of additional litigation. Petitioner's
14 Opening Br. on Claim 27 at 12-13 (noting historical data that the California
15 Supreme Court takes over three years to resolve exhaustion petitions). Moreover,
16 the unconscionable delay that forms the basis of Claim 27 would only increase,
17 exacerbating the constitutional violation that Mr. Jones seeks to remedy. As one
18 court noted, "[i]t is the legal issues that are to be exhausted, not the petitioner."
19 *Burkett v. Cunningham*, 826 F.2d 1208, 1218 (3d Cir. 1987) (citations omitted).

20
21
22 ³ "Inordinate delay" is different from and something less than "extraordinary
23 delay." See *Coe*, 922 F.2d at 531 ("four years is an alarming amount of time");
24 *Phillips*, 56 F.3d at 1034 n.3 (finding fifteen-year delay in guilt phase review
25 allows federal court to review guilt phase claims prior to state penalty phase
26 retrial). The decision to excuse exhaustion is affected by the nature of the
27 proceeding. To excuse a portion of an already exhausted claim excused from the
28 requirement due to inordinate delay requires a much less significant showing of
delay than to deem the entire penalty phase trial, appeal, and post-conviction
excessively delayed as in *Phillips*, 56 F.3d at 1035.

1 “because there is no clearly established law from the United States Supreme Court
2 endorsing a claim of cruel and unusual punishment for a lengthy delay between
3 conviction and execution of a capital sentence.” Resp. Opening Br. at 5.
4 Respondent’s argument fails for several reasons.

5 First, respondent rests its argument entirely on applying section 2254(d) and
6 asserting that there is no clearly established federal law supporting Mr. Jones’s
7 claim. Resp. Opening Br. on Claim 27 at 5-7. Citing a 2006 Ninth Circuit case
8 that so held, respondent argues that federal habeas relief is barred. Resp. Opening
9 Br. at 7 (citing *Allen v. Ornoski*, 435 F.3d 946, 958 (9th Cir. 2006)). But the
10 petitioner in *Allen*, unlike Mr. Jones, based his claim solely on Eighth Amendment
11 grounds. *Compare Allen*, 435 F.3d at 955 (noting that petitioner’s claim is that
12 twenty-three years under horrific conditions of confinement violate the Eighth
13 Amendment), *with* Petitioner’s Opening Br. on Claim 27 at 2-16, 25, 42-47 & n.17
14 (raising Equal Protection and due process grounds for relief). *Allen* is further
15 distinguishable because the uncertainty that exists about the final resolution in Mr.
16 Jones’s case, as set forth in Petitioner’s Opening Brief on Claim 27 at pages 37
17 through 41, has drastically increased since 2006, particularly in light of the
18 California Department of Corrections and Rehabilitation’s failure to lawfully
19 promulgate an execution protocol that comports with constitutional requirements.
20 These additional facts bring Mr. Jones’ claim in line with the clearly established
21 law set forth in his Opening Brief on Claim 27. *See* Petitioner’s Opening Br. at 25-
22 41 (citing the supporting clearly established federal law, including *Rhodes v.*
23 *Chapman*, 452 U.S. 337, 347, 101 S. Ct. 2392, 69 L. Ed. 2d 59 (1981); *Hutto v.*
24 *Finney*, 437 U.S. 678, 98 S. Ct. 2565, 57 L. Ed. 2d 522 (1978); *Estelle v. Gamble*,
25 429 U.S. 97, 103, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976); *Trop v. Dulles*, 356 U.S.
26 86, 101-02, 78 S. Ct. 590, 598, 2 L. Ed. 2d 630 (1958) (plurality opinion); *In re*
27 *Medley*, 134 U.S. 160, 172, 10 S. Ct. 384, 33 L. Ed. 835 (1890); and *In re*
28 *Kemmler*, 136 U.S. 436, 447, 10 S. Ct. 930, 34 L. Ed. 519 (1890)). Similarly, since

1 2006, California's death penalty system's dysfunction has steadily increased such
2 that the California death penalty fails to further the penological goals of retribution
3 and deterrence. Petitioner's Opening Br. at 2-25; *see also* section IV.D., *infra*.
4 Accordingly, Mr. Jones's claim is distinguishable from *Allen* and squarely
5 governed by the clearly established federal law set forth in the Opening Brief on
6 Claim 27 and herein.

7 Second, and more fundamentally, respondent's Opening Brief on Claim 27
8 entirely fails to address the threshold question a court must answer before it can
9 apply AEDPA deference: whether section 2254(d) is applicable. Instead,
10 respondent assumes, without any support, that the state court's adjudication of the
11 claim was an adjudication on the merits and that it resolved the identical claim
12 presented to this Court. Resp. Opening Br. on Claim 27 at 5-6. Section 2254(d),
13 however, applies only to claims that have been "adjudicated on the merits" in state-
14 court proceedings. 28 U.S.C. § 2254(d).

15 Third, respondent's argument fails because respondent ignores the fact that
16 there are two ways in which a claim that has been adjudicated on the merits by the
17 state court may satisfy section 2254(d). The first, as noted by respondent, is if the
18 state court's adjudication of the claim "resulted in a decision that was contrary to,
19 or involved an unreasonable application of, clearly established Federal law." 28
20 U.S.C. § 2254(d)(1). For the reasons set forth below, Mr. Jones satisfies section
21 2254(d)(1). Mr. Jones may additionally satisfy section 2254(d) if the state court's
22 adjudicated of his claim "resulted in a decision that was based on an unreasonable
23 determination of the facts in light of the evidence presented in the State court
24 proceeding." 28 U.S.C. § 2254(d)(2).

25 Finally, respondent fails entirely to address the applicability of § 2254(d)(2).
26 Mr. Jones also satisfies § 2254(d)(2) for the reasons described below. Accordingly,
27 he is entitled to de novo review of his claim.
28

1 **A. Mr. Jones is Entitled to De Novo Review Because the State Court Did**
2 **Not Adjudicate His Claim on the Merits.**

3 Where the state court “did not reach the merits of [the petitioner’s
4 constitutional] claim[,] federal habeas review is not subject to the deferential
5 standard that applies under AEDPA to ‘any claim that was adjudicated on the
6 merits in State court proceedings.’”; “[i]nstead, the claim is reviewed *de novo*.”
7 *Cone v. Bell*, 556 U.S. 449, 472, 129 S. Ct. 1769, 1784, 173 L. Ed. 2d 701 (2009)
8 (quoting 28 U.S.C. § 2254(d)); *see also Rompilla v. Beard*, 545 U.S. 374, 390, 25
9 S. Ct. 2456, 2467, 162 L. Ed. 2d 360 (2005) (reviewing the prejudice prong of the
10 *Strickland* inquiry *de novo* because the state court did not reach prejudice).

11 **1. The California Supreme Court never adjudicated Claim 27 as**
12 **presented to this Court.**

13 In its opinion in *Cullen v. Pinholster*, the Supreme Court explicitly held that
14 “not all federal habeas claims by state prisoners fall within the scope of § 2254(d),
15 which applies only to claims ‘adjudicated on the merits in State court
16 proceedings.’” *Cullen v. Pinholster*, ___ U.S. ___, 131 S. Ct. 1388, 1401, 179 L. Ed.
17 2d 557 (2011) (holding the restrictions of section 2254(e)(2) applicable when
18 “federal habeas courts ... decid[e] claims that were not adjudicated on the merits in
19 state court”). The Court further recognized that claims outside the scope of section
20 2254(d) may include instances where evidence developed after the conclusion of
21 state court proceedings produces a “new claim” for 2254(d) purposes, although
22 related in some way to a claim adjudicated on the merits in state court. *Pinholster*,
23 131 S. Ct. at 1401 n.10 (declining to “draw the line between new claims and claims
24 adjudicated on the merits” but noting that a hypothetical situation in which new
25 evidence arises after the state court has adjudicated a claim on the merits may well
26 give rise to a new claim). Though the Supreme Court did not “draw the line”
27 between new claims and previously adjudicated claims in *Pinholster*, it previously
28 has held that a claim involving evidence that “fundamentally alter[s] the legal

1 claim already considered by the state courts” is a claim that requires exhaustion.
2 *Hillery*, 474 U.S. at 260.

3 The Ninth Circuit, therefore, long has held that that a federal habeas claim is
4 sufficiently distinct from a claim previously presented to the state court “if new
5 factual allegations either fundamentally alter the legal claim already considered by
6 the state courts, or place the case in a significantly different and stronger
7 evidentiary posture than it was when the state courts considered it.” *Dickens v.*
8 *Ryan*, 740 F.3d 1302, 1318 (9th Cir. 2014) (internal quotations omitted).
9 Following the Supreme Court decision in *Pinholster*, the Ninth Circuit held that a
10 claim that has not been fairly presented to a state court according to these
11 guidelines has not been “adjudicated on the merits” for purposes of section
12 2254(d). *Id.* at 1320 (rejecting “any argument that *Pinholster* bars the federal
13 district court’s ability to consider Dickens’s ‘new’ IAC claim” a claim that added
14 “extensive factual allegations” to the original ineffective assistance of counsel
15 claim presented in the state court); *see also, e.g., Green v. Thaler*, 699 F.3d 404,
16 420 (5th Cir. 2012); *Roybal v. Chappell*, No. 99CV2152-JM KSC, 2013 WL
17 6589381 (S.D. Cal. Dec. 16, 2013).

18 These well-established principles preclude any application of section
19 2254(d) to Claim 27. As detailed in the section I, *supra*, Claim 27 presents
20 substantially different factual and legal bases than the claim presented in the direct
21 appeal. In particular, Mr. Jones alleged facts regarding the state’s dysfunctional
22 system that fails to provide full, fair, and timely review of capital judgments and
23 which produces excessive delay that is unique among states with capital
24 punishment; the deplorable conditions at San Quentin that are psychologically
25 torturous, degrading, brutalizing, and dehumanizing; the high rate of deaths by
26 suicide or other causes at San Quentin compared to the few executions that have
27 occurred; the uncertainty of execution or even resolution of his case that results in
28 unconstitutional psychological trauma; and the excessive delay (fifteen years since

1 the imposition of the death judgment) that already has occurred and the “several
2 more years likely” to pass and under the conditions at San Quentin “would involve
3 the needless infliction of avoidable mental anguish and psychological pain and
4 suffering were it to occur.” Petition at 414-18.

5 Although respondent waived exhaustion of Claim 27,⁴ these facts
6 substantially altered the claim that was presented in the direct appeal and thus
7 Claim 27 is distinct from the claim that California Supreme Court resolved. *See*
8 *e.g.*, *Green*, 699 F.3d at 420 (holding that where the state court rejected a
9 competency-to-be-executed claim in 2010, subsequent competency-to-be-executed
10 claim in the federal petition based on updated mental health evidence was a “new
11 claim”); *Roybal*, 2013 WL 6589381 (S.D. Cal. Dec. 16, 2013) (granting leave to
12 amend federal petition with new claims and rejecting state argument that 2254(d)
13 would foreclose consideration of them). Thus, the limitation contained in section
14 2254(d) are inapplicable and this Court must review the merits of the claim de
15 novo. *See, e.g.*, *Dickens*, 740 F.3d at 1320.

16 **2. The California Supreme Court did not adjudicate the appellate**
17 **claim on the merits.**

18 Similarly, section 2254(d) is inapplicable to the portion of the claim that was
19 presented in the direct appeal. The state court’s adjudication of Mr. Jones’s claim
20 contains no citation to federal law; rather, it simply deems Mr. Jones’ claim
21 “untenable” and concludes that Mr. Jones cannot demonstrate prejudice because
22 any delay will have prolonged his life if the judgment is affirmed and he will not
23 have been prejudiced – in other words, he will not be executed – if the judgment is
24 reversed. *Jones*, 29 Cal. 4th at 1267. The state court thus did not reach the
25 question of whether the physical conditions under which Mr. Jones has suffered

26 _____
27 ⁴ As noted above, respondent’s express waiver of exhaustion estops
28 respondent from reliance on the exhaustion requirement. 28 U.S.C. § 2254(b)(3).

1 and continues to suffer, as well as the mental anguish his circumstances have
2 engendered while awaiting execution, constitute cruel and unusual punishment.

3 Although the Supreme Court has held that there is a presumption that such a
4 state court denial of a claim constitutes an adjudication on the merits, even when
5 the state court does not address a petitioner's claim, this presumption is rebuttable:
6 "When a federal claim has been presented to a state court and the state court has
7 denied relief, it may be presumed that the state court adjudicated the claim on the
8 merits *in the absence of any indication or state-law procedural principles to the*
9 *contrary.*" *Harrington v. Richter*, 562 U.S. ___, 131 S. Ct. 770, 784-85 (2011)
10 (emphasis added). Here, state-law procedural principles defeat the presumption
11 that the state court adjudicated Mr. Jones' claim on the merits.

12 State law procedural principles dictate that the state court decide Mr. Jones's
13 based solely on the appellate record and ignore the additional facts Mr. Jones cited
14 in support of his claim.⁵ *See, e.g., People v. Barnett*, 17 Cal. 4th 1044, 1183, 74
15 Cal. Rptr. 2d 121 (1998) (declining to consider a capital defendant's claim that
16

17 ⁵ The state court's precedent in other cases is relevant to assessing its
18 adjudication of Mr. Jones's claim because "[c]ourts are as a general matter in the
19 business of applying settled principles and precedents of law to the disputes that
20 come to bar." *Beam Distilling Co. v. Georgia*, 510 U.S. 529, 534 (1991). The
21 state court is presumed to have applied already decided legal principles and
22 precedents when those principles and precedents predate the events on which the
23 dispute turns. *Id.* That the state court applied these principles in Mr. Jones's case
24 is further supported by the fact that the California Supreme Court continued to
25 apply this precedent to similar claims in the years following its adjudication of
26 Mr. Jones's claim. *See, e.g., People v. Ledesma*, 39 Cal. 4th 641, 745, 47 Cal.
27 Rptr. 3d 326, 417 (2006) (holding that defendant's claim that execution after more
28 than twenty-five years of imprisonment constitutes cruel and unusual punishment
could not be resolved based on the appellate record and citing *Barnett* in support);
People v. Carter, 36 Cal. 4th 1114, 1213, 32 Cal. Rptr. 3d 759 (2005) (declining
to resolve a claim that execution following lengthy and torturous confinement
constitutes cruel and unusual punishment and citing *Barnett* in support).

1 execution after inordinate delay violated the Eighth Amendment’s Cruel and
2 Unusual Punishment Clause because it relied on “evidence and matters not
3 reflected in the record on appeal,” and the state court’s review on direct appeal is
4 limited to the appellate record) (citing *People v. Sanchez*, 12 Cal. 4th 1, 59, 47 Cal.
5 Rptr. 2d 843 (1995), *disapproved of other ground by People v. Doolin*, 45 Cal. 4th
6 390, 87 Cal. Rptr. 3d 209 (2009); *People v. Szeto*, 29 Cal. 3d 20, 35, 171 Cal. Rptr.
7 652 (1981)). This precedent makes clear that state-law procedural principles
8 foreclosed the state court’s use of the facts that petitioner placed before the court in
9 support of his argument that the conditions he endured (and endures) while
10 awaiting execution constitute cruel and unusual punishment; they similarly
11 foreclosed the state court’s use of the facts petitioner set forth in support of the
12 argument that his execution after a lengthy delay is unconstitutional. *See Barnett*,
13 17 Cal. 4th at 1183; *Sanchez*, 12 Cal. 4th at 59; *Szeto*, 29 Cal. 3d at 35. Taken
14 together with the state court’s failure to address the portion of Mr. Jones’ claim
15 related to the physical conditions under which Mr. Jones has suffered and
16 continues to suffer, as well as the mental anguish his circumstances have
17 engendered while awaiting execution, this rebuts the presumption that the state
18 court adjudicated Mr. Jones’ claim on the merits. Accordingly, section 2254(d)
19 does not apply and Mr. Jones is entitled to de novo review. *See, e.g., Winston v.*
20 *Kelly*, 592 F.3d 555-56 (4th Cir. 2010) (“If the record ultimately proves to be
21 incomplete, deference to the state court’s judgment would be inappropriate because
22 judgment on a materially incomplete record is not an adjudication on the merits for
23 purposes of § 2254(d).”), *aff’d* 683 F.3d 489, 498-99 (4th Cir. 2012).

24 **B. Mr. Jones Satisfies Section 2254(d) Because the State Court Had Before**
25 **It, But Ignored, the Facts Supporting His Claim, and Because the State**
26 **Court Based Its Ruling on Incorrect Factual Assumptions.**

27 Even if the state court adjudicated Mr. Jones’s claim on the merits, Mr. Jones
28 nevertheless surmounts section 2254(d) because the state court had before it, but

1 ignored, the facts supporting his claim, and because the state court based its ruling
2 on incorrect factual assumptions. As set forth above, in reaching its conclusion
3 that Mr. Jones did not suffer (and will not suffer) any prejudice, the state court
4 undoubtedly failed to consider the facts and authorities establishing the existence
5 of psychological harm from uncertain, but lengthy, pre-execution delays in support
6 of Mr. Jones's claim. In addition, the state court made several factual assumptions
7 rooted in either incomplete evidence or no evidence, and, as a consequence, made
8 erroneous factual findings.

9 First, the state court appears to have assumed that any delay was attributable
10 to Mr. Jones and a function of Mr. Jones availing himself of his rights to review. In
11 adjudicating Mr. Jones' claim, the state court quoted and cited *People v. Anderson*,
12 which rejected the appellant's claim in part because "the automatic appeal process
13 following judgments of death is a constitutional safeguard, not a constitutional
14 defect . . . because it assures careful review of the defendant's conviction and
15 sentence." *Anderson*, 25 Cal. 4th at 605 (internal citations omitted).

16 *Anderson*, in turn, relied on two previous California Supreme Court
17 opinions. *People v. Hill*, 3 Cal. 4th 959, 1015-16, 13 Cal. Rptr. 2d 475 (1992),
18 *overruled on other grounds by Price v. Superior Court*, 25 Cal. 4th 1046, 108 Cal.
19 Rptr. 2d 409 (2001); *People v. Frye*, 18 Cal. 4th 894, 1030, 77 Cal. Rptr. 2d 25
20 (1998), *disapproved of on other grounds by People v. Doolin*, 45 Cal. 4th 390, 87
21 Cal. Rptr. 3d 209 (2009). In both *Hill* and *Frye*, the California Supreme Court held
22 that pre-execution delays did not violate the Eighth Amendment because the delay
23 was a function of the time it took the capital defendant to avail himself of his rights
24 to review. *Hill*, 3 Cal. 4th at 1015-16; *Frye*, 18 Cal. 4th at 1030-31. These cases
25 are consistent with subsequent state court jurisprudence attributing any pre-
26 execution delay to the petitioner because he wishes to appeal his sentence. *See*,
27 *e.g.*, *People v. Ochoa*, 26 Cal. 4th 398, 463, 110 Cal. Rptr. 2d 324 (2001) (issuing
28 direct appeal opinion in capital defendant's case nine years after final judgment and

1 describing defendant as “delaying his execution for these past nine years”),
2 *abrogated on other grounds as stated in People v. Coombs*, 34 Cal. 4th 821, 860
3 (1995).⁶ The state court so concluded despite Mr. Jones’s assertion on direct
4 appeal that the delay in his case is “the result of the nature of the [appellate and
5 post-conviction] process and no fault of his own,” Appellant’s Opening Br. at 240,
6 and the existence of significant evidence in the state court’s possession of its own
7 dysfunctional system supporting Mr. Jones’ assertion, *see* Petitioner’s Opening Br.
8 on Claim 27 at 2-16.

9 Second, the state court concluded in *Anderson* that the defendant had “no
10 conceivable complaint” of prejudice from the pre-execution delay because “life
11 without possibility of parole was the minimum sentence he faced.” 25 Cal. 4th at
12 606. In so concluding, the state court made a factual determination in Mr. Jones’s
13 case that inmates on death row endure conditions comparable to those experienced
14 by inmates sentenced to life without the possibility of parole. The state court made
15 this factual determination based on an assumption; if it considered any evidence in
16 support of this conclusion, such evidence was incomplete, as the state court’s
17 factual determination was incorrect. *See* Petitioner’s Opening Br. on Claim 27 at
18 25-41.

19 Each of these factual errors render the state court’s adjudication of Mr.
20 Jones’ claim an unreasonable application of clearly established federal law under
21 section 2254(d)(1). *Porter v. McCollum*, 558 U.S. 30, 42, 123 S. Ct. 2527, 156 L.

22
23 ⁶ This reasoning also contravenes Supreme Court precedent holding that the
24 idea that a petitioner should be forced to forfeit one set of fundamental
25 constitutional rights in order to vindicate a second set of constitutional rights is
26 “intolerable.” *Simmons v. United States*, 390 U.S. 377, 394, 88 S. Ct. 967, 976,
27 19 L. Ed. 2d 1247 (1968). “Obviously, where the state court’s legal error infects
28 the fact-finding process, the resulting factual determination will be unreasonable
and no presumption of correctness can attach to it.” *Taylor v. Maddox*, 366 F.3d
992, 1001 (9th Cir. 2004).

1 Ed. 2d 471 (2009) (concluding that the state court unreasonably applied clearly
2 established federal law because it “did not consider or unreasonably discounted”
3 facts in the record before it); *Wiggins v. Smith*, 539 U.S. 510, 528, 123 S. Ct. 2527,
4 156 L. Ed. 2d 471 (2003) (finding that the state court made incorrect assumptions
5 about the facts and “based its conclusion, in part, on a clear factual error” and
6 “[t]his partial reliance on an erroneous factual finding . . . highlights the
7 unreasonableness of the state court’s decision”). The state court’s refusal to
8 consider relevant facts further constitutes an unreasonable determination of the
9 facts, and Mr. Jones thus satisfies section 2254(d)(2). *Miller-El v. Cockrell*, 537
10 U.S. 322, 346 (2003) (holding that § 2254(d)(2) is satisfied where state court “had
11 before it, and apparently ignored,” relevant factual information); *Ali v. Hickman*,
12 571 F.3d 902, 921 (9th Cir. 2009) (holding that § 2254(d)(2) was satisfied where
13 state court ignored comparative juror analysis information in the record, when
14 adjudicating *Batson* claim); *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004)
15 (ruling that the state court fact-finding process is undermined, and § 2254(d)(2) is
16 satisfied, “where the state has before it, yet apparently ignores, evidence that
17 supports petitioner’s claim”).

18 **C. The State Court’s Holding That Mr. Jones Suffered No Conceivable**
19 **Prejudice is Contrary To Clearly Established Federal Law.**

20 On direct appeal, the state court held that Mr. Jones’ argument was
21 “untenable” because, “If the appeal results in reversal of the death judgment, he
22 has suffered no conceivable prejudice, while if the judgment is affirmed, the delay
23 has prolonged his life.” *Jones*, 29 Cal. 4th at 1267. The state court’s conclusion
24 that Mr. Jones suffered no conceivable prejudice thus necessarily rested on the
25 assumption articulated by the state court in *Hill* and *Frye* that the Eighth
26 Amendment cannot not be violated if an inmate’s conviction and sentence are
27 obtained without error. *See Hill*, 3 Cal. 4th at 1015 (holding “the inherent-delay
28 argument is untenable in a capital case, like this one, in which the judgment as to

1 the defendant's guilt and death-eligibility, *i.e.*, a statutory special circumstance, are
2 affirmed on appeal."); *Frye*, 18 Cal. 4th at 1031 (endorsing the position that it
3 would be a "mockery of justice" if appellant had his sentence reversed because of
4 the time it took for him to pursue unmeritorious claims). The state court thus
5 essentially declined to consider Mr. Jones' claim that the Constitution prohibits his
6 execution based on its conclusion that his conviction and sentence were obtained
7 without error.⁷

8 This conclusion is contrary to well-established Supreme Court jurisprudence
9 for two reasons. First, it is contrary to established federal law acknowledging that
10 the Eighth Amendment may be violated by the execution of an inmate, even if his
11 conviction and sentence were obtained without error, based on conditions and facts
12 that have emerged since the time that his sentence was imposed. *Ford v.*
13 *Wainwright*, 477 U.S. 399, 417-18, 105 S. Ct. 2595, 91 L. Ed. 2d 335 (1986); *see*
14 *also Hall v. Florida*, ___ U.S. ___, 134 S. Ct. 1986, 2001 (May 27, 2014) ("The
15 death penalty is the gravest sentence our society may impose. Persons facing that
16 most severe sanction must have a fair opportunity to show that the Constitution
17 prohibits their execution."). Second, the court's conclusion rests on the assumption
18 that Mr. Jones' claim of cruel and unusual punishment is limited to the act of
19 execution. This is not so; as Mr. Jones made clear, the conditions under which he
20 has been forced to live and the mental anguish he has endured during this period of
21 delay, while awaiting execution, constitute cruel and unusual punishment. The
22 state court's dismissal of this claim runs contrary to federal law that has clearly
23 established that conditions of confinement and uncertainties surrounding execution

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25
26 ⁷ As Mr. Jones has demonstrated in prior briefing, the state court's
27 conclusion that Mr. Jones' conviction and sentence were obtained without error
28 was also incorrect.

1 may violate the Eighth Amendment.⁸ See Petitioner’s Opening Br. at 25-41 (citing
2 clearly established federal law in support of petitioner’s position).

3 **D. Mr. Jones Satisfies Section 2254(d) Because the State Court Standard is**
4 **Contrary to Clearly Established Federal Law Regarding the Penological**
5 **Purposes of the Death Penalty.**

6 The state court’s jurisprudence – which it is presumed to have followed in
7 Mr. Jones’s case, see n.5, *supra* – is also contrary to clearly established federal law
8 regarding principles of retribution and deterrence. In *People v. Ochoa*, the state
9 court first addressed a capital defendant’s claim that execution after lengthy delay
10 cannot serve any legitimate penological ends.⁹ *Ochoa*, 26 Cal. 4th at 462-64. The
11 court rejected the defendant’s claim, concluding “that execution notwithstanding
12 the delay associated with defendant’s appeals furthers both the deterrent and
13 retributive functions; shielding defendant from execution solely on this basis
14 would frustrate these two penological purposes.” *Id.* at 464. More specifically, the
15 state court concluded—without any citation or factual support—that the conditions
16 of confinement on death row would only serve to enhance the deterrent effect of
17 the death penalty and that “an announcement by this court that any defendant
18 whose automatic appeal has been pending for many years is exempt from
19 subsequent execution would eviscerate any possible deterrent effect of a death
20 sentence.” *Id.* at 463. The state court’s conclusions regarding deterrence are
21 contrary to clearly established federal law. Established federal law makes clear
22 that “it is fanciful to believe” that a prospective capital defendant in a particular
23

24 ⁸ As noted above, Mr. Jones satisfies section 2254(d) because the state court
25 failed entirely to adjudicate this portion of Mr. Jones’ claim.

26 ⁹ Mr. Jones, like the defendant in *Ochoa*, claimed that his execution after
27 lengthy delay serves no legitimate penological purpose. Appellant’s Opening
28 Brief at 229-43.

1 category of offenders would be deterred by the knowledge that a small number of
2 persons within this category of offenders have been executed. *Thompson v.*
3 *Oklahoma*, 487 U.S. 815, 838, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988); *see also*
4 *Enmund v. Florida*, 458 U.S. 782, 800, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982)
5 (concluding that rare imposition of the death penalty upon a class of offenders
6 “further attenuates its possible utility as an effective deterrence”).

7 Similarly, the state court’s conclusion that “the passage of time and alteration
8 of circumstances have no bearing on” the analysis of whether a particular
9 punishment serves a retributive purpose, *Ochoa*, 26 Cal. 4th at 463, is contrary to
10 well-established legal principles. Federal law is clear that the passage of time and
11 alteration of circumstances are relevant factors in assessing the retributive value of
12 the death penalty, particularly when these factors result in the execution of a
13 random few. *Furman v. Georgia*, 408 U.S. 238, 304-05, 92 S. Ct. 2726 33 L. Ed.
14 2d 346 (1972) (Brennan, J., concurring) (“The asserted public belief that murderers
15 . . . deserve to die is flatly inconsistent with the execution of a random few.”); *id.* at
16 311 (White, J., concurring) (“When imposition of the penalty reaches a certain
17 degree of infrequency, it would be very doubtful that any existing general need for
18 retribution would be measurably satisfied.”). Moreover, retribution has been
19 defined by the Supreme Court as “an expression of community outrage.” *Spaziano*
20 *v. Florida*, 468 U.S. 447, 461, 104 S. Ct. 3154 82 L. Ed. 2d 340 (1984). That the
21 passage of time and alteration of circumstances have no bearing on the expression
22 of community outrage squarely contradicts the Supreme Court’s longstanding
23 recognition that the Eighth Amendment “draw[s] its meaning from the evolving
24 standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*,
25 356 U.S. 86, 101, 78 S. Ct. 590, 598, 2 L. Ed. 2d 630 (1958) (plurality opinion);
26 *see also Enmund v. Florida*, 458 U.S. at 788; *Coker v. Georgia*, 433 U.S. 584, 593-
27 95, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977) (plurality opinion); *Weems v. United*
28 *States*, 217 U.S. 349, 373-78, 30 S. Ct. 433, 54 L. Ed. 793 (1910).

1 **V. THIS COURT’S ANALYSIS OF THE STATUS OF THE**
2 **DEATH SENTENCES IMPOSED BETWEEN 1978 AND 1997**
3 **FULLY SUPPORTS GRANTING OF RELIEF ON CLAIM 27.**

4 In its June 10, 2014 Order, this Court attached a chart of the individuals
5 sentenced to death in California between 1979 and 1997 and the status of their
6 cases. The Court invited the parties “to address the chart and the troubling issues it
7 raises.” Order Amending Briefing Schedule and Setting Hearing on Claim 27 at 3,
8 ECF No. 110.¹⁰

9 This Court’s chart – which analyzes the cases of the 507 people sentenced
10 between 1978 and 1997 – fully supports the conclusion that “executing those
11 essentially random few who outlive the dysfunctional post-conviction review
12 process serves no penological purpose and is arbitrary in violation of well-
13 established constitutional principles.” Order at 2. Almost forty percent (39.6) of
14 those cases are still pending before the California courts, for direct appeal or
15 collateral review, or for the purposes of federal exhaustion. In short, 201 of those
16 individuals have been waiting more seventeen years – in some cases up to thirty-
17 five years – for federal review and adjudication of their claims. Seventy-nine
18 individuals – 15.6 percent of those sentenced in that 20-year period – have died
19 from causes other than execution. Nearly three times the number of those executed
20 have had their death sentenced vacated by the federal courts. Other studies have
21 demonstrated that sixty percent of California death sentences are reversed by the
22

23 ¹⁰ Counsel for Mr. Jones conducted a review of the cases and identified some
24 additional or different information for a few of the cases. The suggested
25 modifications to the chart are indicated in track changes in the attachment to this
26 brief. Among these suggestions are the addition of fifteen cases not currently
27 reflected in the chart that are pending in state court proceedings and the removal
28 of duplicate entries. The numbers used in this brief correspond with those on the
attached chart.

1 federal courts, Ex. 14 to Petitioner’s Opening Brief on Claim 27 at 632, ECF No.
2 109-3, while 1.7 percent of death sentences in California have actually resulted in
3 execution.¹¹ Meanwhile, the more recent statistics included in Mr. Jones’s Opening
4 Brief demonstrate that the delay inherent in the California’s dysfunctional state
5 court system has increased dramatically for those sentenced since 1997.
6 Petitioner’s Opening Br. at 8.

7 **VI. CONCLUSION**

8 For the foregoing reasons, Mr. Jones is entitled to relief on Claim 27.

9
10 Dated: July 3, 2014

Respectfully submitted,

11 HABEAS CORPUS RESOURCE CENTER

12
13 By: /s/ Michael Laurence

14 Michael Laurence

15 Attorneys for Petitioner Ernest DeWayne Jones
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24 ¹¹ This figure is calculated by dividing the total number of executions since
25 1978 (thirteen in California), *see* Ex. 13 to Petitioner’s Opening Br. on Claim 27
26 at 630, ECF. No. 109-3, by the total number of inmates sentenced to death since
27 1978 (746), *see* Div. of Adult Ops., Cal. Dep’t of Corr. and Rehab., *Condemned*
28 *Inmate Summary List* (July 3, 2014), http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateSummary.pdf.

Death Sentences in California, 1978-1997¹

Between 1978 and 1997, ~~594-628~~ death judgments were imposed by the State of California. This chart describes the current case status of the ~~496-507~~² individuals sentenced in that time period whose death sentences have not been overturned by the California Supreme Court (unless subsequently reinstated) and whose post-conviction proceedings have not been stayed to determine their mental competency to face the death penalty. Of these ~~496-507~~ individuals, 13 were executed by the State (Red), ~~18-16~~ had relief denied by the federal courts but have had their executions stayed (Pink), ~~37-38~~ had their death sentences vacated by the federal courts and are no longer on Death Row (Blue), ~~80-79~~ died on Death Row from causes other than execution by the State of California (Orange), ~~167-160~~ are currently having their habeas petitions evaluated by federal district courts (Green) or the Ninth Circuit Court of Appeals (Purple), and ~~181-201~~³ are still having their appeals reviewed by the California Supreme Court, either on direct or collateral review (Yellow). This chart is current through June 2014.⁴

Name	Date Sentenced	Federal Case Number	Federal Judicial District	Date Federal Habeas Proceedings Initiated ⁵	Current Case Status	Years Since Sentenced
Lavell Frierson	8/14/1978	92-06251 DDP	Central	10/19/1992	Relief Granted (2007)	--
Doug Stankewitz	10/12/1978	91-00616 AWI	Eastern	11/15/1991	Relief Granted (2012)	--
Ronald Bell	3/2/1979	99-20615 RMW	Northern	4/12/1991	CD Cal Petition Pending	35
Robert Harris	2/9/1979 3/6/1979	90-00380 E	Southern	3/26/1990	Executed (1992)	--
Earl Jackson	3/19/1979	95-03286 ER	Central	5/17/1995	Relief Granted (2008) / Resentenced to Death (2010) / State Proceedings Pending	35
Keith Williams	4/13/1979	89-00160 REC	Eastern	2/22/1989	Executed (1996)	--
David Murtishaw	4/27/1979	91-00508 OWW	Eastern	9/10/1991	Relief Granted (2001) / Resentenced to Death / Deceased (2011)	--
Robert Massie	5/25/1979	99-02861 CAL	Northern	6/14/1999	Executed (2001)	--
Richard Chase	6/8/1979				Deceased (1980)	
Stevie Fields	8/29/1978 8/21/1979	92-00465 AHM	Central	1/23/1992	Relief Denied (2007) / Execution Stayed	35
David Ghent	10/30/1979	90-02763 RMW	Northern	9/26/1990	Relief Granted (2002)	--

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Richard Montiel	11/20/1979	96-05412 LJO	Eastern	4/22/1996	ED Cal Petition Pending	35
James Anderson	11/30/1979	03-07948 JLS	Central	11/4/2003	CD Cal Petition Pending	35
Steven Ainsworth	1/30/1980	90-00329 LKK	Eastern	3/16/1990	Relief Granted (2001)	--
Richard Phillips	2/20/1980	92-05167 AWI	Eastern	3/4/1992	Relief Granted (2012)	--
Alejandro Ruiz	2/21/1980	89-04126 FMC	Central	7/11/1989	Deceased (2007)	--
David Moore	4/30/1980				Deceased (1980)	
Marvin Walker	9/8/1980	94-01997 PJH	Northern	6/7/1994	ND Cal Petition Pending	34
Darrell Rich	1/23/1981	89-00823 EJG	Eastern	6/12/1989	Executed (2000)	--
Jerry Bunyard	3/2/1981 1/30/1981				State Proceedings Pending	35
Bernard Hamilton	3/2/1981	92-00474 B	Southern	3/31/1992	Relief Granted (1994) / Resentenced to Death (1996) / State Proceedings Pending	33
Lawrence Bittaker	3/22/1981 3/24/1981	91-01643 TJH	Central	3/27/1991	CD Cal Petition Pending	33
Harvey Heishman	3/30/1981	90-01815 VRW	Northern	6/26/1990	Relief Denied (2010) / Execution Stayed	33
Eric Kimble	4/6/1981 4/1/1981	90-04826 SVW	Central	9/7/1990	CD Cal Petition Pending	33
Stanley Williams	4/15/1981	89-00327 SVW	Central	1/18/1989	Executed (2006)	--
Robert McLain	5/12/1981	89-03061 JGD	Central	5/18/1989	Relief Granted (1998)	--
Joe Johnson	5/28/1981				State Proceedings Pending	33
Anthony Bean	7/20/1981	90-00648 WBS	Eastern	5/18/1990	Relief Granted (1998)	--
Stephen Anderson	7/24/1981	92-00488 JGD	Central	1/24/1992	Executed (2002)	--
Oscar Gates	8/7/1981	88-02779 WHA	Northern	7/14/1988	ND Cal Petition Pending	33
Michael Burgener	9/4/1981	10-03399 GHK	Central	5/6/2010	State Proceedings Pending	33
Ronald Hawkins	9/20/1981				Deceased (1983)	
Billy Ray Hamilton	10/16/1981	89-03758 THE	Northern	10/4/1989	Deceased (2007)	--
John Davenport	11/4/1981	96-06883 DSF	Central	9/30/1996	State Proceedings Pending	33
Russell Coleman	11/20/1981	89-01906 RMW	Northern	6/2/1989	Relief Granted (2000)	--
Edgar Hendricks	12/4/1981	89-02901 EFL	Northern	8/7/1989	Relief Granted (1995)	--
Gary Guzman	12/22/1981				Deceased (1991)	

Fernando Caro	1/5/1982 1/8/1982	93-04159 JW	Northern	11/23/1993	Relief Granted (2002)	--
Bluford Hayes Jr.	1/22/1982	92-00603 DFL	Eastern	4/14/1992	Relief Granted (2005)	--
Phillip Lucero	1/26/1982	01-02823 VAP	Central	3/27/2001	CD Cal Petition Pending	32
Richard Hovey	2/10/1982	89-01430 MHP	Northern	4/26/1989	Relief Granted (2006)	--
Carlos Avena	2/12/1982	96-08034 GHK	Central	11/15/1996	Circuit Appeal Pending	32
Albert Brown	2/22/1982	94-08150 ABC	Central	12/5/1994	Relief Denied (2008) / Execution Stayed	32
Willie Branner	2/26/1982	90-03219 DLJ	Northern	11/9/1990	ND Cal Petition Pending	32
Rondald Sanders	3/3/1982	92-05471 LJO	Eastern	7/13/1992	ED Cal Petition Pending	32
William Payton	2/5/1982 3/9/1982	94-04779 R	Central	7/18/1994	Relief Denied (2011) / Execution Stayed	32
William Bonin	3/12/1982	91-00693 ER	Central	2/7/1991	Executed (1996)	--
Benjamin Silva	3/15/1982	90-03311 DT	Central	6/26/1990	Relief Granted (2005)	--
Darnell Lucky	4/7/1982	91-00583 TJH	Central	2/1/1991	CD Cal Petition Pending	32
Richard Boyde	4/20/1982	91-02522 GPS	Central	5/9/1991	Relief Granted (2008)	--
George Carpenter	5/21/1982				Deceased (1984)	
Melvin Wade	5/21/1982	89-00173 R	Central		Relief Granted (1994)	
Gary Howard	5/27/1982	88-07240 WJR	Central	12/8/1988	Relief Granted (1996)	--
Richard Grant	5/28/1982	90-00779 JAM	Eastern	6/18/1990	Relief Granted (2010)	--
John Brown	6/15/1982	90-02815 AHS	Central	6/1/1990	CD Cal Petition Pending	32
Manuel Babbitt	7/8/1982	89-01407 WBS	Eastern	8/1/1989	Executed (1999)	--
Mose Willis	7/26/1982				Deceased (1988)	
Prentice Snow	8/31/1982				State Proceedings Pending	32
Adam Miranda	9/17/1982	89-07130 JLS	Central	12/11/1989	CD Cal Petition Pending State Proceedings Pending	32
James Karis	9/17/1982	89-00527 LKK	Eastern	4/13/1989	Relief Granted (1998) / Resentenced to Death (2007) / Deceased (2013)	--
James Karis	9/17/1982				Deceased (2013)	
Brett Pensinger	9/20/1982	92-01928 DSF	Central	3/30/1992	Circuit Appeal Pending	32
Fernando	10/6/1982	89-00736 JAM	Eastern	5/25/1989	Relief Denied (2010) /	32

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Belmontes					Execution Stayed	
Bronte Wright	10/29/1982	92-06918 AHM	Central	11/20/1992	Deceased (2000)	--
Ronald Deere	11/10/1982 10/1980	92-01684 CAS	Central	3/18/1992	Circuit Appeal Pending (Relief Granted / Certiorari Pending)	32 34
Joseph Poggi	11/12/1982				Deceased (1990)	
Clarence Allen	11/22/1982	88-01123 FCD	Eastern	8/31/1988	Executed (2006)	--
Ricardo Sanders	12/3/1982	96-07429 JFW	Central	10/22/1996	Circuit Appeal Pending	32
Craig Ross	12/10/1982	96-02720 SVW	Central	4/16/1996	CD Cal Petition Pending	32
Steven Champion	12/10/1982	96-02845 SVW	Central	4/22/1996	State Proceedings Pending	32
Michael Hamilton	12/17/1982	90-00363 OWW	Eastern	6/12/1990	Relief Granted (2009)	--
Maurice Keenan	1/21/1983	89-02167 DLJ	Northern	6/22/1989	Relief Granted (2001)	--
Ronald Fuller	2/3/1983				Deceased (1989)	
Denny Mickle	2/24/1983 17/1986	92-02951 THE	Northern	7/30/1992	ND Cal Petition Pending	31 34
Douglas Clark	3/16/1983	92-06567 PA	Central	11/3/1992	CD Cal Petition Pending	31
James Melton	3/18/1983	89-04182 RMT	Central	7/13/1989	Relief Granted (2007)	--
Michael Williams	4/1/1983	90-01212 R	Southern	8/31/1990	Relief Granted (1993)	--
Jaturun Siripongs	4/22/1983	89-06530 WDK	Central	11/9/1989	Executed (1999)	--
Malcolm Robbins	5/12/1983	91-04748 TJH	Central	9/4/1991	CD Cal Petition Pending	31
Larry Roberts	5/27/1983	93-00254 TLN	Eastern	2/18/1993	ED Cal Petition Pending	31
Larry Webster	6/9/1983	93-00306 LKK	Eastern	2/25/1993	ED Cal Petition Pending	31
Kevin Malone	6/14/1983	96-04040 WJR	Central	6/7/1996	Executed by Missouri (1999)	--
Michael Morales	6/14/1983	91-00682 DT	Central	2/6/1991	Relief Denied (2005) / Execution Stayed	31
Gerald Gallego	6/21/1983	92-00653 SBA	Northern	2/4/1992	Deceased (2002)	--
George Marshall	6/28/1983	97-05493 AWI	Eastern	5/12/1997	Deceased (2001)	--
William Proctor	6/28/1983	96-01401 JAM	Eastern	7/31/1996	ED Cal Petition Pending	31
Martin Gonzalez	7/8/1983				Deceased (1990)	
Keith Adcox	7/11/1983	92-05830 LJO	Eastern	12/1/1992	State Proceedings Pending	31

Francis Hernandez	7/12/1983	90-04638 RSWL	Central	8/28/1990	Circuit Appeal Pending	31
Albert Howard	8/3/1983	93-05726 LJO	Eastern	10/25/1993	Deceased (2009)	--
Douglas Mickey	9/23/1983	93-00243 RMW	Northern	1/22/1993	Relief Denied (2010) / Execution Stayed	31
Alfred Dyer	9/26/1983	93-02823 VRW	Northern	7/29/1993	Relief Granted (1998)	--
Demetrie Mayfield	9/30/1983	94-06011 ER	Central	9/2/1994	Relief Granted (2001)	--
Constantino Carrera	10/7/1983 10/14/1983 3	90-00478 AWI	Eastern	7/31/1990	Relief Denied (2012) / Execution Stayed Relief Granted (2012)	31
John Visciotti	10/21/1983	97-04591 R	Central	6/23/1997	Circuit Appeal Pending	31
Donald Miller	11/10/1983	91-02652 NM	Central	5/16/1991	Deceased (2005)	--
Robert Thompson	12/6/1983	90-06605 CBM	Central	12/5/1990	Deceased (2006)	--
David Mason	1/27/1984		Eastern		Executed (1993)	
Jackson Daniels	1/31/1984 3/14/1984	92-04683 JSL	Central	8/5/1992	Relief Granted (2006) / Resentenced to Death (2010) / State Proceedings Pending	30
Mark Reilly	2/1/1984	93-07055 JAK	Central	11/22/1993	CD Cal Petition Pending	30
Andrew Robertson	2/3/1984 5/31/1978	90-04850 CBM	Central	9/10/1990	Deceased (1998)	--
Donald Beardslee	3/13/1984	92-03990 SBA	Northern	10/1/1992	Executed (2005)	--
Michael Jennings	3/27/1984	89-01360 JW	Northern	3/19/1989	Relief Granted (2003)	--
Michael Hunter	3/28/1984	90-03275 JW	Northern	11/13/1990	Relief Granted (2001)	--
Charles Moore	5/16/1984	91-05976 KN	Central	11/1/1991	Relief Granted (1997) / Resentenced to Death (1998) / State Proceedings Pending	30
Michael Jackson	5/21/1984	91-04249 R	Central	8/8/1991	Relief Granted (2001) / Resentenced to Death (2002) / State Proceedings Pending	30
Richard Ramirez	6/4/1984 11/7/1989	07-08310 BRO	Central	12/26/2007	Deceased (2013)	--
Scott Pinholster	6/4/1984	95-06240 GLT	Central	9/19/1995	Relief Denied (2011) / Execution Stayed	30
Jesse Andrews	6/8/1984	02-08969 R	Central	11/21/2002	Circuit Appeal Pending	30

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Robert Diaz	6/15/1984	93-06309 TJH	Central	10/19/1993	Deceased (2010)	--
Stephan Mitcham	7/6/1984	97-03825 LHK	Northern	8/10/1994	ND Cal Petition Pending	30
Robert Bloom	7/23/1984	90-02581	Central	5/22/1990	Relief Granted (1997) / Resentenced to Death (2001) / State Proceedings Pending	30
Robert Bloom	7/23/1984				State Proceedings Pending	
Jay Kaurish	7/27/1984	92-01623 DT	Central	3/16/1992	Deceased (1992)	--
William Kirkpatrick	8/14/1984	96-00351 WDK	Central	1/18/1996	Circuit Appeal Pending	30
Thomas Thompson	8/17/1984	89-03630 DT	Central	6/15/1989	Executed (1998)	--
Watson Allison	10/2/1984	92-06404 CAS	Central	10/26/1992	Relief Granted (2010)	--
Charles McDowell	10/23/1984	90-04009 MRP	Central	7/30/1990	Relief Granted (1998) / Resentenced to Death (1999) / State Proceedings Pending	30
Robert Lewis	11/1/1984				State Proceedings Pending	30
Kenneth Lang	12/5/1984	91-04061 MMM	Central	7/29/1991	CD Cal Petition Pending	30
Richard Boyer	12/14/1984	06-07584 GAF	Central	11/29/2006	Circuit Appeal Pending	30
Thaddaeus Turner	12/21/1984	91-00153 LJO	Eastern	4/1/1991	Relief Granted (2009)	--
William Clark	2/1/1985	95-00334 DOC	Central	1/18/1995	Relief Granted (2006)	--
Earl Jones	2/22/1985	94-00816 TJH	Central	2/7/1994	Deceased (2006)	--
Ward Weaver	4/4/1985 / 11/1985	02-05583 AWI	Eastern	5/17/2002	ED Cal Petition Pending	29
Fred Douglas	4/5/1985	91-03055 RSWL	Central	6/6/1991	Relief Granted (2003)	--
Patrick Gordon	5/3/1985	91-00882 LKK	Eastern	7/5/1991	ED Cal Petition Pending	29
Kevin Cooper	5/15/1985	92-00427 H	Southern	3/24/1992	Relief Denied (2009) / Execution Stayed	29
Charles Whitt	5/23/1985 / 26/1981	94-07960 WJR	Central	11/23/1994	Deceased (2004)	--
Andre Burton	6/4/1985	91-01652 AHM	Central	3/27/1991	State Proceedings Pending	29
Brian Mincey	6/14/1985	93-02554 PSG	Central	5/3/1993	CD Cal Petition Pending	29

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Randy Haskett	6/28/1985 8/28/1979	92-06192 GAF	Central	10/15/1992	Relief Granted (2009)	--
Duane Holloway	7/8/1985	05-02089 KJM	Eastern	10/19/2005	ED Cal Petition Pending	29
Robert Stansbury	7/15/1985	95-08532 WMB	Central	12/11/1995	Deceased (2003)	--
Richard Ramierz	8/8/1985	91-03802 CBM	Central	7/15/1998	Relief Granted (2009)	--
Kenneth Gay	9/20/1985	01-05368 GAF	Central	6/18/2001	State Proceedings Pending	29
Raynard Cummings	9/20/1985	95-07118 CBM	Central	10/20/1995	Circuit Appeal Pending	29
Michael Cox	11/26/1985	04-00065 MCE	Eastern	1/5/2004	ED Cal Petition Pending	29
Jeffrey Sheldon	12/19/1985	96-05545 TJH	Central	8/13/1996	CD Cal Petition Pending	29
Stephen DeSantis	2/3/1986	93-01083 FCD	Eastern	7/1/1993	Deceased (2002)	--
Michael Mattson	2/7/1986 4/10/1980	91-05453 FMC	Central	10/8/1991	Deceased (2009)	--
Tiequon Cox	4/30/1986	92-03370 CBM	Central	6/4/1992	Relief Denied (2011) / Execution Stayed	28
Henry Duncan	5/5/1986	92-01403 AHS	Central	3/4/1992	Relief Granted (2008)	--
Ronald McPeters	5/7/1986	95-05108 LJO	Eastern	2/13/1995	ED Cal Petition Pending	28
Chay'im Ben-Sholom	5/9/1986	93-05531 AWI	Eastern	8/10/1993	Relief Granted (2012)	--
Freddie Taylor	5/30/1986	92-01627 EMC	Northern	4/30/1992	ND Cal Petition Pending	28
Ralph Thomas	6/4/1986 9/25/1986	93-00616 MHP	Northern	2/18/1993	Relief Granted (2013)	--
Curtis Price	7/10/1986	93-00277 PJH	Northern	1/25/1993	ND Cal Petition Pending	28
Barry Williams	7/11/1986	00-10637 DOC	Central	10/4/2000	CD Cal Petition Pending	28
Anthony Sully	7/15/1986	92-00829 WHA	Northern	2/21/1992	Relief Denied (2013) / Execution Stayed	28
Troy Ashmus	7/25/1986 7/29/1986	93-00594 THE	Northern	2/17/1993	ND Cal Petition Pending	28
Mauricio Silva	8/1/1986 8/11/1986				State Proceedings Pending	28
Royal Hayes	8/8/1986 8/18/1986	01-03926 MHP	Northern	10/18/2001	Relief Denied (2011) / Execution Stayed	28
Rodney Alcala	8/20/1986 6/20/1980	94-1424 SVW	Central	3/4/1994	Relief Granted (2003) / Resentenced to Death (2010) / State Proceedings Pending	28 34
Antonio Espinoza	9/17/1986 9/18/1986	94-01665 LKK	Eastern	10/13/1994	ED Cal Petition Pending	28

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Wilbur Jennings	11/12/1986	91-00684 AWI	Eastern	12/16/1991	Deceased (2014)	--
Robert Danielson	11/13/1986	95-02378 SI	Northern	7/8/1994	Deceased (1995)	--
Thomas Edwards	12/11/1986	93-07151 CJC	Central	11/26/1993	Relief Denied (2009) / Deceased (2009)	--
Anderson Hawthorne	12/19/1986 12/18/1986	92-00488 JGD	Central	11/13/1995	CD Cal Petition Pending State Proceedings Pending	28
Theodore Frank	2/23/1987 2/4/1980	91-06287 AHS	Central	11/18/1991	Deceased (2001)	--
Teofilio Medina	2/25/1987 2/26/1987	94-01892 RSWL and 97- 07062 RSWL	Central	3/25/1994	Circuit Appeal Pending	27
Christopher Day	3/3/1987				Deceased (1994)	
David Breaux	3/12/1987	93-00570 JAM	Eastern	4/6/1993	ED Cal Petition Pending	27
Conrad Zapien	3/23/1987	94-01455 WDK	Central	3/7/1994	Circuit Appeal Pending	27
Richard Benson	4/30/1987	94-05363 AHM	Central	8/8/1994	Circuit Appeal Pending	27
Robert Nicolaus	6/23/1987	95-02335 MMC	Northern	9/17/1992	Deceased (2003)	--
Alfred Sandoval	6/30/1987	94-08206 R	Central	12/7/1994	Relief Granted (2001)	--
Steven Livaditis	7/8/1987	96-02833 SVW	Central	4/22/1996	CD Cal Petition Pending	27
Harold Memro (Reno)	7/17/1987 7/22/1980	96-02768 CBM	Central	4/18/1996	State Proceedings Pending CD Cal Petition Pending	2734
George Wharton	7/22/1987	92-03469 CJC	Central	6/9/1992	Circuit Appeal Pending	27
Robert Garceau	7/30/1987	95-05363 OWW	Eastern	5/12/1995	Deceased (2004)	--
Willie Johnson	8/5/1987	98-04043 SI	Northern	10/21/1998	ND Cal Petition Pending	27
Timothy Pride	8/6/1987	93-00926 GEB	Eastern	6/9/1993	Deceased (1994)	--
Bruce Morris	8/27/1987	92-00483 EJH	Eastern	3/27/1992	Relief Granted (2007)	--
Jeffrey Wash	9/1/1987	95-01133 CAL	Northern	4/3/1995	Deceased (1996)	--
Donrell Thomas	9/10/1987				Deceased (1992)	
Mitchell Sims	9/11/1987	95-05267 GHK	Central	8/8/1995	Relief Denied (2006) / Execution Stayed	27
Martin Kipp	9/18/1987	99-04973 ABC	Central	5/10/1999	CD Cal Petition Pending	27
Paul Tuilaepa	9/25/1987	95-04619 DDP	Central	7/13/1995	State Proceedings Pending CD Cal Petition Pending	27

Fred Freeman	10/7/1987	99-20614 JW	Northern	9/22/1995	Deceased (2009)	--
Kenneth Clair	12/4/1987	93-01133 CAS	Central	2/26/1993	Circuit Appeal Pending	27
Keith Fudge	12/11/1987	95-05369 RGK	Central	8/11/1995	CD Cal Petition Pending	27
Richard Clark	12/18/1987	97-20618 WHA	Northern	8/5/1994	Circuit Appeal Pending	27
Michael Wader	1/5/1988	96-05482 HLH	Central	8/9/1996	Deceased (1997)	--
Michael Hill	1/21/1988	94-00641 CW	Northern	2/24/1994	ND Cal Petition Pending	26
William Noguera	1/29/1988	94-06417 CAS	Central	9/23/1994	CD Cal Petition Pending	26
Horace Kelly	3/24/1988 6/25/1986	98-02722 TJH	Central	4/6/1998	CD Cal Petition Pending	2628
Laverne Johnson	4/1/1988	95-00305 THE	Northern	1/26/1995	ND Cal Petition Pending	26
Lance Osband	4/8/1988	97-00152 KJM	Eastern	1/30/1997	ED Cal Petition Pending	26
Marcelino Ramos	4/27/1988 1/25/1980	98-02037 AHS	Central	3/20/1988	Deceased (2007)	--
David Rogers	5/2/1988				State Proceedings Pending	26
Dennis Brewer (Mayfield)	5/4/1988	97-03742 FMO	Central	5/19/1997	CD Cal Petition Pending	26
Bill Bradford	5/11/1988	98-05799 RSWL	Central	7/20/1998	Deceased (2008)	--
Curtis Fauber	5/16/1988	95-06601 GW	Central	10/3/1995	CD Cal Petition Pending	26
David Raley	5/17/1988	93-02071 JW	Northern	6/1/1993	Relief Denied (2007) / Execution Stayed / State Proceedings Pending	26
Theodore Wrest	5/18/1988	95-00214 DDP	Central	1/11/1995	CD Cal Petition Pending	26
William Hart	5/27/1988	05-03633 MMM	Central	5/16/2005	CD Cal Petition Pending	26
Armenia Cudjo	5/21/1988 5/27/1988	99-08089 JFW	Central	8/9/1999	Relief Granted (2013)	--
Joselito Cinco	6/10/1988				Deceased (1988)	
David Carpenter	6/27/1988 11/20/1984	00-03706 MMC and 98-02444- MMC	Northern	10/6/2000	ND Cal Petition Pending	2630
Richard Samayoa	6/28/1988	00-02118 W	Southern	10/16/2000	Relief Denied (2012) / Execution Stayed	26
Guy Rowland	6/29/1988	94-03037 WHA	Northern	8/26/1994	Circuit Appeal Pending	26
Gary Hines	7/8/1988	98-00784 TLN	Eastern	5/1/1998	ED Cal Petition Pending	26

Tracy Cain	7/12/1988	96-2584 ABC	Central	4/11/1996	Circuit Appeal Pending	26
Dennis Webb	8/15/1988	97-00956 VAP	Central	2/13/1997	CD Cal Petition Pending State Proceedings Pending	26
William Dennis	9/6/1988	98-021027	Northern	10/9/1998	ND Cal Petition Pending	26
Jerry Frye	9/12/1988	99-00628 LKK	Eastern	3/29/1999	ED Cal Petition Pending	26
Daniel Jenkins	10/6/1988	07-01918 JGB	Central	3/22/2007	State Proceedings Pending	26
Charles Riel	10/14/1988	01-00507 LKK	Eastern	3/14/2001	ED Cal Petition Pending	26
Richard Turner	10/19/1988 4/7/1980	09-07449 BRO	Central	10/14/2009	State Proceedings Pending	26 34
Jose Rodrigues	10/21/1988 10/28/1988	96-01831 CW	Northern	5/17/1996	ND Cal Petition Pending	26
Sammy Marshall	10/27/1988				Deceased (1997)	
Teddy Sanchez	10/31/1988	97-06134 AWI	Eastern	11/20/1997	ED Cal Petition Pending	26
Aurthur Halvorsen	11/18/1988				State Proceedings Pending	26
Rodney Berryman	11/28/1988	95-05309 AWI	Eastern	4/27/1995	Circuit Appeal Pending	26
Max Barnett	11/30/1988	99-02416 JAM	Eastern	12/8/1999	State Proceedings Pending	26
Manuel Mendoza	1/6/1989	03-06194 SJO	Central	8/29/2003	CD Cal Petition Pending	25
Herbert Coddington	1/20/1989	01-01290 KJM	Eastern	7/3/2001	ED Cal Petition Pending	25
Reynaldo Ayala	2/9/1989	01-00741 BTM	Southern	4/27/2001	Circuit Appeal Pending	25
Lester Ochoa	3/20/1989	99-11129 DSF	Central	10/22/1999	CD Cal Petition Pending	25
Drax Quartermain	4/10/1989				Deceased (2005)	
Rodney Beeler	5/5/1989	96-00606 GW	Central	1/29/1996	CD Cal Petition Pending	25
James Scott	5/18/1989	03-00978 ODW	Central	2/10/2003	CD Cal Petition Pending	25
Jeffrey Kolmetz	5/18/1989				Deceased (1996)	
Steven Crittenden	6/12/1989	95-01957 KJM	Eastern	10/26/1995	Circuit Appeal Pending	25
Jack Farnam	6/15/1989	06-00917 SJO	Central	2/15/2006	State Proceedings Pending	25
Albert Cunningham	6/16/1989	02-07170 GHK	Central	9/13/2002	Relief Denied (2013) / Execution Stayed Execution Stayed	25
Louis Craine	6/27/1989				Deceased (1989)	

George Smithey	7/18/1989				Deceased (2010)	
David Welch	7/25/1989	00-20242 RMW	Northern	2/28/2000	State Proceedings Pending	25
Ronald Seaton	7/27/1989 6/16/1989	04-09339 FMO	Central	11/12/2004	CD Cal Petition Pending	25
James Blair	8/9/1989	06-04550 VAP	Central	7/20/2006	CD Cal Petition Pending State Proceedings Pending	25
Cynthia Coffman	8/31/1989 10/30/1989	06-07304 ABC	Central	11/15/2006	CD Cal Petition Pending	25
Robert Fairbank	9/5/1989 9/1/1989	98-01027 CRB	Northern	3/16/1998	Relief Denied (2011) / Execution Stayed	25
Manuel Alvarez	9/14/1989	97-01895 GEB	Eastern	10/8/1997	ED Cal Petition Pending	25
David Lucas	9/19/1989				State Proceedings Pending	25
David Rundle	9/21/1989	08-01879 TLN	Eastern	8/13/2008	ED Cal Petition Pending	25
Robert Maury	10/27/1989 11/3/1989	12-01043 WBS	Eastern	4/19/2012	ED Cal Petition Pending	25
Terry Bemore	11/2/1989	08-00311 LAB	Southern	2/15/2008	Circuit Appeal Pending	25
Stanley Davis	11/15/1989 11/14/1989				State Proceedings Pending	25
Randy Kraft	11/29/1989	01-04623 AG	Central	5/23/2001	CD Cal Petition Pending	25
Hector Ayala	11/30/1989	01-01322 IEG	Southern	7/20/2001	Circuit Appeal Pending	25
Jeffrey Hawkins	1/31/1990	96-01155 TLN	Eastern	6/19/1996	ED Cal Petition Pending	24
Dean Carter	2/6/1990 1/30/1990	06-04532 RGK and 06-01343 BEN KSC	Central	7/20/2006	Circuit Appeal Pending	24
Alfredo Padilla	2/7/1990	01-06305 LJO	Eastern	10/4/2001	Deceased (2008)	--
Fermin Ledesma	2/7/1990 3/14/1980	07-02130 PJH	Northern	4/17/2007	State Proceedings Pending	24 34
Jon Dunkle	2/7/1990	06-04115 PJH	Northern	6/30/2006	ND Cal Petition Pending	24
Pedro Arias	2/22/1990	99-00627 WBS	Eastern	3/29/1999	ED Cal Petition Pending	24
Dennis Lawley	2/26/1990	08-01425 LJO	Eastern	9/23/2008	Deceased (2012)	--
Larry Davis Jr.	3/8/1990	96-002443 DT	Central	4/5/1996	Relief Denied (2004) / Deceased (2005)	--
Mario Gray	3/14/1990	07-05935 DSF	Central	9/12/2007	Deceased (2013)	--

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Mark Schmeck	4/5/1990	13-05415 RS	Northern	11/21/2013	ND Cal Petition Pending	24
Tracey Carter	4/20/1990	04-06524 DDP	Central	8/6/2004	State Proceedings Pending	24
Christopher Tobin	4/24/1990				State Proceedings Pending	24
Richard Letner	4/24/1990				State Proceedings Pending	24
Jerry Bailey	5/16/1990				Deceased (1998)	
John Holt	5/30/1990	97-06210 AWI	Eastern	12/15/1997	State Proceedings Pending	24
Maureen McDermott	6/8/1990	04-00457 DOC	Central	1/26/2004	CD Cal Petition Pending	24
Mark Bradford	7/3/1990	97-06221 TJH	Central	8/19/1997	CD Cal Petition Pending	24
Steven Catlin	7/6/1990	07-01466 LJO	Eastern	10/5/2007	ED Cal Petition Pending	24
Ralph Yeoman	7/10/1990				Deceased (2014)	
Raymond Steele	7/24/1990	03-00143 GEB	Eastern	1/24/2003	ED Cal Petition Pending	24
Jarvis Masters	7/30/1990				State Proceedings Pending	24
Kurt Michaels	7/31/1990	04-00122 JAH	Southern	1/16/2004	SD Cal Petition Pending	24
Roland Comtois	7/31/1990				Deceased (1994)	
Joseph Muselwhite	9/25/1990	01-01443 LKK	Eastern	7/26/2001	Deceased (2010)	--
Kristin Hughes	10/2/1990	03-02666 JSW	Northern	6/6/2003	ND Cal Petition Pending	24
Evan Nakahara	11/6/1990	05-04604 DDP	Central	6/24/2005	CD Cal Petition Pending	24
Isaac Gutierrez Jr.	11/14/1990	05-03706 DOC	Central	5/18/2005	Deceased (2008)	--
Paul Brown	11/16/1990				Deceased (2004)	
Milton Lewis	12/6/1990	02-00013 TLN	Eastern	1/3/2002	ED Cal Petition Pending	24
Ramon Salcido	12/17/1990	09-00586 MMC	Northern	2/9/2009	State Proceedings Pending	24
Raymond Gurule	12/19/1990				Deceased (2007)	
Carmen Ward	1/28/1991 1/25/1991	06-02009 PA	Central		State Proceedings Pending	23
James Majors	2/4/1991	99-00493 MCE	Eastern	3/12/1999	ED Cal Petition Pending	23
Christopher Box	2/22/1991	04-00619 AJB	Southern	3/26/2004	State Proceedings Pending	23
Paul Bolin	2/25/1991	99-05279 LJO	Eastern	3/11/1999	ED Cal Petition Pending	23
Raymond Lewis	2/6/1991 3/7/1991	03-06775 LJO	Eastern	12/9/2003	ED Cal Petition Pending	23

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Tauro Waidla	3/8/1991	01-00650 AG	Central	1/22/2001	CD Cal Petition Pending	23
Richard Moon	5/19/1991 5/9/1991	08-08327 JAK	Central	12/17/2008	State Proceedings Pending	23
Robert McDonald	5/31/1991				Deceased (1993)	
Ronald Jones	6/4/1991	98-10318 JLS	Central	12/28/1998	CD Cal Petition Pending	23
John Sapp	6/21/1991 10/16/1991	04-04163 JSW	Northern	9/30/2004	State Proceedings Pending	23
Paul Watson	6/27/1991 12/13/1991				State Proceedings Pending	23
Curtis Ervin	6/28/1991	00-01228 CW	Northern	4/10/2000	ND Cal Petition Pending	23
Clifford Bolden	7/19/1991	09-02365 PJH	Northern	5/28/2009	State Proceedings Pending	23
Jesse Gonzalez	7/28/1991 7/28/1981	95-02345 JVS	Central	4/12/1995	State Proceedings Pending	23 33
Martin Navarette	8/14/1991	11-07066 VAP	Central	8/26/2011	State Proceedings Pending	23
Anthony Townsel	9/13/1991				State Proceedings Pending	23
James O'Malley	11/21/1991				State Proceedings Pending	23
Michael Slaughter	11/27/1991	05-00922 AWI	Eastern	7/18/2005	State Proceedings Pending ED Cal Petition Pending	23
Michael Jones	12/13/1991	04-02748 ODW	Central	4/20/2004	CD Cal Petition Pending	23
Dellano Cleveland	12/19/1991	05-03822 SVW	Central	5/24/2005	CD Cal Petition Pending	23
Deondre Staten	1/16/1992	01-09178 MWF	Central	10/24/2001	CD Cal Petition Pending	22
Richard Farley	1/17/1992				State Proceedings Pending	22
Chauncey Veasley	1/21/1992 1/24/1992	05-03822 SVW	Central	4/12/2005	CD Cal Petition Pending	22
Robert Taylor	1/30/1992	07-06602 FMO	Central	10/11/2007	CD Cal Petition Pending	22
Edward Bridges	2/20/1992				Deceased (2008)	
Ricky Earp	2/21/1992	00-06508 MMM	Central	6/19/2000	CD Cal Petition Pending	22
Colin Dickey	2/27/1992	06-00357 AWI	Eastern	3/31/2006	ED Cal Petition Pending	22
Billy Waldon	2/28/1992				State Proceedings Pending	22
Jose Casares	3/13/1992				State Proceedings Pending	22
Richard Viera	3/30/1992	05-01492 AWI	Eastern	11/22/2005	ED Cal Petition Pending	22
Gregory Smith (Scott)	4/3/1992	05-08017 DSF	Central	11/9/2005	State Proceedings Pending	22

Franklin Lynch	4/28/1992				State Proceedings Pending	22
James Marlow	5/8/1992 8/31/1989	05-06477 ABC	Central	8/31/2005	CD Cal Petition Pending	22 25
Paul Watkins	5/11/1992				State Proceedings Pending	22
Thomas Walker	5/12/1992				Deceased (1997)	--
Andrew Brown	5/21/1992 5/14/1992	04-03931 AG	Central	6/2/2004	CD Cal Petition Pending	22
Alfredo Valdez	5/22/1992	10-05252 BRO	Central	7/16/2010	State Proceedings Pending	22
Marchand Elliott	6/3/1992				State Proceedings Pending	22
Alfredo Prieto	6/18/1992	05-07566 AG	Central	10/20/2005	State Proceedings Pending CD Cal Petition Pending	22
Jack Friend	6/19/1992				State Proceedings Pending	22
Maria Alfaro	7/14/1992	07-07072 CJC	Central	10/30/2007	CD Cal Petition Pending	22
Stephen Cole	7/16/1992	05-04971 DMG	Central	7/7/2005	CD Cal Petition Pending	22
Gregory Smith (Calvin)	8/14/1992	04-03436 JSW	Northern	8/19/2004	ND Cal Petition Pending	22
Rodney San Nicolas	8/31/1992	06-00942 LJO	Eastern	7/20/2006	ED Cal Petition Pending	22
Jessie Ray Moffett	9/2/1992				Deceased (1998)	
James Tulk	10/9/1992				Deceased (2006)	
Dannie Hillhouse	10/13/1992	03-00142 MCE	Eastern	1/24/2003	ED Cal Petition Pending	22
Alphonso Howard	10/20/1992	08-06851 DDP	Central	10/17/2008	CD Cal Petition Pending	22
David Williams	10/20/1992	12-03975 AG	Central	5/7/2012	State Proceedings Pending	22
Rudolph Roybal	10/20/1992	99-02152 JM	Southern	10/5/1999	SD Cal Petition Pending	22
Gerald Cruz	10/26/1992 10/23/1992				State Proceedings Pending	22
James Beck	10/27/1992 10/23/1992				State Proceedings Pending	22
Richard Tully	12/4/1992				State Proceedings Pending	22
Sergio Ochoa	12/10/1992	02-07774 RSWL	Central	10/4/2002	CD Cal Petition Pending	22
George Williams	12/21/1992 12/17/1992				State Proceedings Pending	22

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Ricardo Roldan	12/29/1992	09-06589 DOC	Central	9/10/2009	CD Cal Petition Pending State Proceedings Pending	22
William Ramos	1/8/1993	05-03752 SI	Northern	9/16/2005	ND Cal Petition Pending	21
John Lewis	3/3/1993	11-06395 JAK	Central	8/3/2011	CD Cal Petition Pending	21
Gregory Tate	3/5/1993				State Proceedings Pending	21
Joseph Danks	4/2/1993	11-00223 LJO	Eastern	2/9/2011	State Proceedings Pending	21
Erik Chatman	4/9/1993	07-00640 WHA	Northern	1/31/2007	State Proceedings Pending	21
Maurice Boyette	5/7/1993	13-04376 WHO	Northern	9/20/2013	ND Cal Petition Pending	21
Omar Martinez	5/10/1993	04-09090 PA	Central	11/3/2004	State Proceedings Pending CD Cal Petition Pending	21
Albert Lewis	5/21/1993	11-00766 ODW	Central	1/26/2011	State Proceedings Pending	21
Anthony Oliver	5/21/1993	10-08404 ODW	Central	11/4/2010	CD Cal Petition Pending	21
Latwon Weaver	5/28/1993	12-02140 MMA	Southern	8/30/2012	SD Cal Petition Pending State Proceedings Pending	21
Warren Bland	5/28/1993				Deceased (2001)	--
Catherine Thompson	6/10/1993 6/16/1993				State Proceedings Pending	21
Vincente Benavides	6/16/1993				State Proceedings Pending	21
Michael Combs	6/21/1993	05-0 4777 ODW	Central	6/30/2005	CD Cal Petition Pending	21
Robert Curl	7/15/1993				State Proceedings Pending	21
Mark Crew	7/22/1993	12-04259 YGR	Northern	8/13/2012	ND Cal Petition Pending	21
Charles Stevens	7/30/1993	09-00137 WHA	Northern	1/12/2009	ND Cal Petition Pending	21
Christian Monterroso	8/12/1993	12-07888 DMG	Central	9/13/2012	CD Cal Petition Pending	21
Corvin Emdy	8/19/1993 9/9/1993				Deceased (1993)	--
Richard Dehoyos	8/27/1993				State Proceedings Pending	21
Cedric Harrison	8/30/1993	09-05045 JW	Northern	10/22/2009	Deceased (2009)	--
Enrique Zambrano	9/8/1993	09-04917 LHK	Northern	10/15/2009	ND Cal Petition Pending	21
Eric Houston	9/20/1993	13-05609 WHA	Northern	12/4/2013	ND Cal Petition Pending	21

Robert Smith	9/24/1993 9/30/1993	11-03062 EJD	Northern	6/21/2011	ND Cal Petition Pending State Proceedings Pending	21
James Heard	9/28/1993				State Proceedings Pending	21
Cleophus Prince	11/5/1993				State Proceedings Pending	21
Abelino Manriquez	11/16/1993				State Proceedings Pending	21
Herbert Koontz	11/19/1993	03-01613 FCD	Eastern	7/31/2003	Deceased (2007)	--
Eric Hinton	12/10/1993	10-06714 DMG	Central	9/9/2010	CD Cal Petition Pending State Proceedings Pending	21
Michael Huggins	12/17/1993	06-07254 YGR	Northern	11/22/2006	State Proceedings Pending	21
Jerry Kennedy	12/20/1993	13-02041 LKK	Eastern	10/1/2013	ED Cal Petition Pending	21
Lanell Harris	1/12/1994				State Proceedings Pending	20
Steven Bell	3/7/1994 3/4/1994				State Proceedings Pending	20
Robert Wilson	4/8/1994 7/14/1988	07-00519 MWF	Central	1/22/2007	CD Cal Petition Pending	20 26
Christopher Sattiewhite	4/25/1994				State Proceedings Pending	20
Tim Depriest	5/27/1994	07-06025 JLS	Central	9/17/2007	CD Cal Petition Pending	20
Delaney Marks	6/3/1994	11-02458 LHK	Northern	5/19/2011	ND Cal Petition Pending	20
Brian Johnsen	6/9/1994 6/22/1994				State Proceedings Pending	20
Milton Pollock	6/10/1994	05-01870 SI	Northern	5/5/2005	State Proceedings Pending	20
James Robinson	6/17/1994				State Proceedings Pending	20
Jaime Hoyos	7/11/1994	09-00388 L	Southern	2/26/2009	SD Cal Petition Pending	20
Phillip Jablonski	8/12/1994	07-03302 SI	Northern	6/22/2007	State Proceedings Pending	20
Walter Cook	9/2/1994				State Proceedings Pending	20
Tomas Cruz	9/9/1994	13-02792 JST	Northern	6/18/2013	ND Cal Petition Pending	20
Joseph Cook	9/16/1994	12-08142 CJC	Central	9/20/2012	CD Cal Petition Pending State Proceedings Pending	20
Mary Samuels	9/16/1994	10-03225 SJO	Central	4/29/2010	CD Cal Petition Pending State Proceedings Pending	20
Shaun Burney	9/16/1994	10-00546 RGK	Central	1/26/2010	State Proceedings Pending	20

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Bryan Jones	9/19/1994 9/16/1994					State Proceedings Pending	20
Ronnie Dement	9/26/1994					State Proceedings Pending	20
Robert Jurado	10/1/1994 10/7/1994	08-01400 JLS	Southern	7/31/2008		SD Cal Petition Pending	20
Billy Riggs	10/28/1994	09-04624 JAK	Central	6/26/2009		State Proceedings Pending	20
Carl Powell	11/10/1994					State Proceedings Pending	20
Celeste Carrington	11/23/1994	10-04179 RS	Northern	9/16/2010		ND Cal Petition Pending	20
Anthony Bankston	1/20/1995					State Proceedings Pending	19
Edgardo Sanchez-Fuentes	1/20/1995 3/3/1995					State Proceedings Pending	19
Steven Bonilla	1/20/1995	08-00471 CW	Northern	1/22/2008		ND Cal Petition Pending	19
Danny Horning	1/26/1995	10-01932 JAM	Eastern	7/21/2010		State Proceedings Pending	19
Randall Wall	1/30/1995					State Proceedings Pending	19
Steven Homick	1/31/1995 1/13/1995					State Proceedings Pending	19
Royal Clark	2/3/1995	12-00803 LJO	Eastern	5/16/2012		State Proceedings Pending	19
Raymond Johns	2/8/1995					Deceased (2004)	--
Keith Loker	2/10/1995 2/17/1995					State Proceedings Pending	19
Johnny Avila	3/21/1995 3/29/1995	11-01196 AWI	Eastern	7/19/2011		State Proceedings Pending	19
Randy Garcia	3/23/1995					State Proceedings Pending	19
Hooman Panah	3/26/1995 3/6/1995	05-07606 RGK	Central	10/21/2005		Circuit Appeal Pending	19
Ernest Jones	4/7/1995	09-002158 CJC	Central	3/27/2009		CD Cal Petition Pending	19
Glen Cornwell	4/21/1995	06-00705 TLN	Eastern	3/31/2006		ED Cal Petition Pending	19
Mark Thornton	5/15/1995					State Proceedings Pending	19
Greg Demetrulias	5/22/1995 5/19/1995	07-01335 DOC	Central	2/28/2007		Circuit Appeal Pending	19
Kerry Dalton	5/23/1995					State Proceedings Pending	19
Regis Thomas	6/15/1995 8/15/1995					State Proceedings Pending	19
Lester Virgil	6/29/1995					State Proceedings Pending	19
Johnaton George	7/17/1995					State Proceedings Pending	19
Christopher Geier	7/21/1995	10-04676 R	Central	6/24/2010		State Proceedings Pending	19
Charles Rountree	8/11/1995					State Proceedings Pending	19

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Christopher Lightsey	8/15/1995					State Proceedings Pending	19
Sergio Nelson	9/9/1995 9/7/1995					State Proceedings Pending	19
Thomas Lenart	10/6/1995	05-01912 MCE	Eastern	9/21/2005		State Proceedings Pending	19
John Beames	10/11/1995	10-01429 AWI	Eastern	8/9/2010		ED Cal Petition Pending State Proceedings Pending	19
Paul Hensley	10/13/1995 10/16/1995					State Proceedings Pending	19
Loi Vo	10/18/1995					State Proceedings Pending	19
Stephen Hajek	10/18/1995					State Proceedings Pending	19
Donald Smith	10/19/1995					State Proceedings Pending	19
Leroy Wheeler	10/19/1995 10/25/1995					State Proceedings Pending	19
Stanley Bryant	10/19/1995					State Proceedings Pending	19
William Suff	10/26/1995					State Proceedings Pending	19
William Suff	10/26/1995					State Proceedings Pending	19
Caroline Young	10/27/1995					Deceased (2005)	--
Douglas Kelly	11/8/1995					State Proceedings Pending	19
Ernest Dykes	11/30/1995 12/22/1995	11-04454 SI	Northern	9/7/2011		ND Cal Petition Pending	19
Demetrius Howard	12/7/1995					State Proceedings Pending	19
John Cunningham	1/12/1996					State Proceedings Pending	18
Alfredo Valencia	1/23/1996					State Proceedings Pending	18
Jerry Rodriguez	2/21/1996					State Proceedings Pending	18
Valamir Morelos	2/21/1996					State Proceedings Pending	18
Steven Brown	2/23/1996					State Proceedings Pending	18
Dexter Williams	2/28/1996	12-01344 LJO	Eastern	8/17/2012		ED Cal Petition Pending	18
Richard Gamache	4/2/1996					State Proceedings Pending	18
Andre Alexander	4/23/1996	11-07404 JAK	Central	9/8/2011		State Proceedings Pending	18
Frank Carter	4/25/1996					Deceased (2001)	--

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Robert Cowan	5/8/1996 5/1996				State Proceedings Pending	18
Dennis Ervine	5/31/1996				State Proceedings Pending	18
Keith Taylor	6/5/1996				State Proceedings Pending	18
Eric Leonard	6/13/1996				State Proceedings Pending	18
Keith Doolin	6/18/1996	09-01453 AWI	Eastern	8/17/2009	State Proceedings Pending	18
Daniel Whalen	6/24/1996				State Proceedings Pending	18
Edward Morgan	7/19/1996				State Proceedings Pending	18
Clifton Perry	7/26/1996 7/24/1996	11-01367 AWI	Eastern	8/16/2011	State Proceedings Pending	18
Raymond Butler	7/29/1996				State Proceedings Pending	18
Lamar Barnwell	8/9/1996				State Proceedings Pending	18
Freddie Fuiava	8/19/1996	12-10646 VAP	Central	12/12/2013	CD Cal Petition Pending	18
Christopher Self	8/28/1996				State Proceedings Pending	18
Albert Jones	9/20/1996				State Proceedings Pending	18
Bob Williams	9/20/1996	09-01068 AWI	Eastern	6/17/2009	State Proceedings Pending	18
John Riccardi	9/20/1996				State Proceedings Pending	18
Richard Davis	9/26/1996	13-00408 EMC	Northern	1/29/2013	ND Cal Petition Pending	18
Richard Leon	10/1/1996				State Proceedings Pending	18
Richard Parson	10/11/1996				Deceased (2011)	--
Darrel Lomax	10/16/1996	11-01746 JLS	Central	2/28/2011	State Proceedings Pending	18
Charles Case	10/25/1996				State Proceedings Pending	18
James Thompson	10/26/1996 10/21/1996				State Proceedings Pending	18
Michael Elliot	10/31/1996				State Proceedings Pending	18
Christopher Spencer	11/7/1996				State Proceedings Pending	18
Brandon Taylor	11/13/1996 6/27/1997				State Proceedings Pending	18 19
George Contreras	12/11/1996				State Proceedings Pending	18
Dewayne Carey	12/16/1996				State Proceedings Pending	18
Michael Pearson	12/18/1996				State Proceedings Pending	18
Scott Collins	12/19/1996	13-07334 JFW	Central	10/3/2013	CD Cal Petition Pending	18

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Maurice Harris	12/20/1996	13-04026 PA	Central	6/5/2013	CD Cal Petition Pending	18
Richard Foster	12/31/1996 12/13/1996				State Proceedings Pending	18
Michael Ihde	1/3/1997				Deceased (2005)	--
Eric Bennet	1/9/1997				State Proceedings Pending	17
Herbert McClain	1/21/1997				State Proceedings Pending	17
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Stephen Redd	2/28/1997				State Proceedings Pending	17
Jeffery Mills	3/10/1997				State Proceedings Pending	17
Joseph Montes	3/18/1997				State Proceedings Pending	17
Johnny Mungia	4/7/1997				State Proceedings Pending	17
Johnathan D'Arcy	4/11/1997				State Proceedings Pending	17
Jimmy Palma	6/11/1997				Deceased (1997)	--
Richard Valdez	6/11/1997				State Proceedings Pending	17
Daniel Silveria	6/13/1997				State Proceedings Pending	17
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Ramon Rogers	6/30/1997 9/10/1997				State Proceedings Pending	17
Lawrence Bergman	7/8/1997				Deceased (2009)	--
Bobby Lopez	7/11/1997 11/14/1997				State Proceedings Pending	17
Michael Martinez	8/29/1997				State Proceedings Pending	17
Carlos Hawthorne	9/5/1997				State Proceedings Pending	17
John Famalaro	9/5/1997				State Proceedings Pending	17
Michael Bramit	9/15/1997 9/8/1997				State Proceedings Pending	17
Royce Scott	9/17/1997				State Proceedings Pending	17
John Abel	9/26/1997				State Proceedings Pending	17
Ronald Mendoza	10/27/1997 10/24/1997				State Proceedings Pending	17

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Frank Becerra	10/31/1997				State Proceedings Pending	17
Terrance Page	10/31/1997				Deceased (2008)	--
Sean Vines	11/7/1997				State Proceedings Pending	17
Herminio Serna	11/21/1997				State Proceedings Pending	17
James Trujeque	11/21/1997				State Proceedings Pending	17
Frank Abilez	12/4/1997				Deceased (2012)	--
Gunner Lindberg	12/12/1997	09-05509 MWF	Central	7/28/2009	State Proceedings Pending	17
Floyd Smith	12/14/1997 10/16/1997				State Proceedings Pending	17
Bill Poyner	12/16/1997				Deceased (1998)	--
Martin Mendoza	12/23/1997				State Proceedings Pending	17
William Clark	12/29/1997				State Proceedings Pending	17
<u>Melvin Turner</u>	<u>8/20/1980</u>	<u>96-02844 DOC</u>	<u>Central</u>	<u>4/22/1996</u>	<u>State Proceedings Pending</u>	<u>34</u>
<u>Noel Jackson</u>	<u>6/2/1989</u>				<u>State Proceedings Pending</u>	<u>25</u>
<u>Clarence Ray, Jr.</u>	<u>7/28/1989</u>	<u>96-06252 LJO</u>	<u>Eastern</u>	<u>11/8/1996</u>	<u>State Proceedings Pending</u>	<u>25</u>
		<u>SAB</u>				
<u>Jackie Ray Hovarter</u>	<u>11/30/1990</u>				<u>State Proceedings Pending</u>	<u>24</u>
<u>Jesse Morrison</u>	<u>10/30/1991</u>				<u>State Proceedings Pending</u>	<u>23</u>
<u>Richard Stitely</u>	<u>9/14/1992</u>				<u>State Proceedings Pending</u>	<u>22</u>
<u>Morris Solomon, Jr.</u>	<u>6/16/1992</u>				<u>State Proceedings Pending</u>	<u>22</u>
<u>Donald Griffin</u>	<u>9/22/1992</u>				<u>State Proceedings Pending</u>	<u>22</u>
<u>Charles Keith Richardson</u>	<u>10/7/1992</u>				<u>State Proceedings Pending</u>	<u>22</u>
<u>Keone Wallace</u>	<u>5/27/1993</u>				<u>State Proceedings Pending</u>	<u>21</u>
<u>Jose Francisco Guerra</u>	<u>11/22/1993</u>				<u>State Proceedings Pending</u>	<u>21</u>
<u>Ignacio Arriola Tafoya</u>	<u>6/6/1995</u>				<u>State Proceedings Pending</u>	<u>19</u>
<u>Orlando Gene Romero</u>	<u>8/28/1996</u>				<u>State Proceedings Pending</u>	<u>18</u>

Michael McCrea Whisenhunt	10/21/1996				State Proceedings Pending	18
Gene Estel McCurdy	4/22/1997				State Proceedings Pending	17

¹ The chart describes the case status of any individual sentenced in 1997 or earlier because all such individuals, unless deceased, executed, or granted a writ of habeas corpus, have spent at least 17 years on Death Row, the amount of time Justice Stevens posited might be constitutionally problematic in *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., respecting the denial of certiorari). In total, ~~366-378~~ of the 746 inmates currently on California's Death Row were sentenced to death 17 or more years ago. For all but a small handful of those individuals sentenced to death *after* 1997, state proceedings are still ongoing, and none have completed the federal habeas process.

² [This chart reflects one judgment for each individual. The original chart included 492 individuals.](#)

³ [34 of the 201 appeals being reviewed by the California Supreme Court are exhaustion petitions and 26 are pending OSC cases.](#)

⁴ The chart was compiled using publicly available information from the court dockets of the four federal judicial districts in California, the public docket of the California Supreme Court, and the California Department of Corrections and Rehabilitation's ("CDCR") list of condemned inmates, which is available at http://www.cdcr.ca.gov/capital_punishment/docs/condemnedinmatelistsecure.pdf, and the CDCR's list of condemned inmates who have died since 1978, which is available at http://www.cdcr.ca.gov/Capital_Punishment/docs/CONDEMNEDINMATESWHOHAVEDIEDSINCE1978.pdf.

⁵ Federal habeas proceedings are initiated when the petitioner seeks appointment of federal habeas counsel, not when the petitioner's federal writ of habeas corpus is filed. Some individuals that have initiated federal habeas proceedings may still have state proceedings pending for exhaustion purposes. In such cases, the federal petition is effectively stayed while the state proceedings are completed.

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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ERNEST DEWAYNE JONES,

Petitioner,

v.

**KEVIN CHAPPELL, Warden of
California State Prison at San
Quentin,**

Respondent.

CV 09-2158-CJC
CAPITAL CASE
**RESPONDENT'S RESPONSIVE
BRIEF ON CLAIM 27**

Hon. Cormac J. Carney
United States District Judge

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1 Respondent hereby files the instant brief in response to Petitioner's Opening
2 Brief on Claim 27 ("Opening Brief"). As discussed below, Claim 27 as presented
3 in the Opening Brief is unexhausted because new factual allegations supporting the
4 claim were never presented to the California Supreme Court. Even without the
5 exhaustion problems, habeas corpus relief on Claim 27 is barred by 28 U.S.C.
6 § 2254(d).

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 **ARGUMENT**

9 **I. AMENDED CLAIM 27 IS UNEXHAUSTED BECAUSE IT WAS NEVER**
10 **PRESENTED TO THE CALIFORNIA SUPREME COURT**

11 Exhaustion of state remedies is a prerequisite to a federal court's consideration
12 of claims sought to be presented by a state prisoner in federal habeas corpus. 28
13 U.S.C. § 2254(b); *Picard v. Connor*, 404 U.S. 270, 275, 92 S. Ct. 509, 30 L. Ed. 2d
14 438 (1971); *Wooten v. Kirkland*, 540 F.3d 1019, 1025 (9th Cir. 2008). To satisfy
15 the state exhaustion requirement, the petitioner must fairly present his federal
16 claims to the state's highest court. *Rose v. Lundy*, 455 U.S. 509, 515, 102 S. Ct.
17 1198, 71 L. Ed. 2d 379 (1982). A claim has not been fairly presented unless the
18 prisoner has described in the state court proceedings both the operative facts and the
19 federal legal theory on which his contention is based. *See Gray v. Netherland*, 518
20 U.S. 152, 162-63, 116 S. Ct. 2074, 135 L. Ed. 2d 457 (1996); *Gatlin v. Madding*,
21 189 F.3d 882, 888 (9th Cir. 1999).

22 In the Opening Brief, Petitioner contends that the conditions of his
23 confinement while he is awaiting execution violate the Eighth Amendment because
24 they are physically and psychologically torturous. (Opening Brief at 25-41.)
25 Petitioner describes the physical conditions on California's death row, arguing that
26 such conditions are substandard and inhumane and that long periods of confinement
27
28

1 under such conditions constitutes physical and psychological torture.¹ (Opening
2 Brief at 26-35.) Petitioner also contends that the uncertainties in California's death
3 penalty scheme, including uncertainty about the method by which he will be
4 executed and whether he will ever be executed, are psychologically tortuous.
5 (Opening Brief at 35-41.) Petitioner, however, has never presented *any* of these
6 allegations to the California Supreme Court. In his direct appeal in the California
7 Supreme Court, Petitioner presented a *Lackey*² claim, arguing that his death
8 sentence violated the Eighth Amendment only because of the long delay between
9 sentencing and execution. (NOL B1 at 229-43.) Petitioner never argued in the
10 California Supreme Court that the conditions of his confinement violate the Eighth
11 Amendment. Thus, to the extent these new allegations focusing on the conditions
12 of confinement place it in a fundamentally different light, Claim 27 is unexhausted.

13 Petitioner also contends in the Opening Brief that his execution would violate
14 equal protection because he must endure lengthy and indefinite incarceration as a
15 capital prisoner seeking post-conviction relief whereas non-capital inmates seeking
16 post-conviction relief do not endure such lengthy and indefinite incarceration.
17 (Opening Brief at 42-47.) Petitioner never presented such an equal protection claim
18 to the California Supreme Court. Accordingly, this new legal theory renders Claim
19 27 unexhausted.

20 Further, in support of Claim 27, Petitioner presents three volumes of exhibits
21 in the Opening Brief, totaling 644 pages. However, none of the exhibits was
22 presented to the California Supreme Court. To the extent the exhibits, intended to
23 further factually support the claim, fundamentally alter the legal claim that

24
25 ¹ Petitioner contends that the physical conditions on East Block where he is
26 confined are deplorable, that he is isolated, and that medical and psychiatric
treatment on death row is deficient. (Opening Brief at 26-31.)

27 ² See *Lackey v. Texas*, 514 U.S. 1045, 115 S. Ct. 1421, 131 L. Ed. 2d 304
28 (1995) (Stevens, J., respecting denial of certiorari).

1 Petitioner actually presented to the California Supreme Court, they render the claim
2 unexhausted.

3 This Court has no authority to grant relief on an unexhausted claim, absent
4 Respondent's express waiver of the exhaustion requirement, which Respondent
5 does not give. *See* 28 U.S.C. § 2254(b). Accordingly, because Petitioner's new
6 allegations and legal theories are so drastically different from those actually
7 presented to the California Supreme Court in support of his lengthy incarceration
8 claim, Claim 27 is unexhausted.

9 **II. HABEAS CORPUS RELIEF ON CLAIM 27 IS BARRED BY 28 U.S.C.**
10 **§ 2254(d)**

11 Even assuming that Claim 27 is exhausted, it is barred by 28 U.S.C. § 2254(d)
12 because the Supreme Court has never clearly held that the pre-execution duration
13 on a state's death row could violate the Eighth Amendment, or any other provision
14 of the Constitution for that matter. Absent utter disregard for § 2254(d), and the
15 vast catalogue of Supreme Court decisions interpreting it, relief cannot be granted
16 on this claim.

17 **A. The Standard of Review**

18 As amended by the Antiterrorism and Effective Death Penalty Act of 1996
19 ("AEDPA"), 28 U.S.C. § 2254(d) constitutes a "threshold restriction," *Renico v.*
20 *Lett*, 559 U.S. 766, 773 n.1, 130 S. Ct. 1855, 176 L. Ed. 2d 678 (2010), on federal
21 habeas corpus relief that "bars relitigation of any claim 'adjudicated on the merits'
22 in state court" subject to two narrow exceptions. *Harrington v. Richter*, 131 S. Ct.
23 770, 784, 178 L. Ed. 2d 624 (2011) ("*Richter*"). These exceptions require a
24 petitioner to show that the state court's previous adjudication of the claim either (1)
25 was "contrary to, or involved an unreasonable application of, clearly established
26 Federal law, as determined by the Supreme Court of the United States," or (2) was
27 "based on an unreasonable determination of the facts in light of the evidence
28 presented at the State Court proceeding." *Id.* at 783-84 (quoting 28 U.S.C.

1 § 2254(d)). Only if a petitioner can survive this threshold review as to claims
2 previously rejected on their merits by a state court is a federal court permitted to
3 reach the merits of a petitioner's claims, reviewing them "de novo." *See Panetti v.*
4 *Quarterman*, 551 U.S. 930, 953, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007) ("When
5 a state court's adjudication of a claim is dependent on an antecedent unreasonable
6 application of federal law, the requirement set forth in § 2254(d)(1) is satisfied. A
7 federal court must then resolve the claim without the deference AEDPA otherwise
8 requires."); *see also Howard v. Clark*, 608 F.3d 563, 569 (9th Cir. 2010); *Frantz v.*
9 *Hazey*, 533 F.3d 724, 735-36 (9th Cir. 2008) (en banc).

10 The inquiry under 28 U.S.C. § 2254(d)(1) is sharply circumscribed. First,
11 "clearly established federal law" is limited to Supreme Court authority that
12 "squarely addresses" the claim at issue and provides a "clear answer." *Wright v.*
13 *Van Patten*, 552 U.S. 120, 125-26, 128 S. Ct. 743, 169 L. Ed. 2d 583 (2008); *see*
14 *also Premo v. Moore*, 131 S. Ct. 733, 743, 178 L. Ed. 2d 649 (2011); *Knowles v.*
15 *Mirzayance*, 556 U.S. 111, 121-22, 129 S. Ct. 1411, 173 L. Ed. 2d 1411 (2009);
16 *Carey v. Musladin*, 549 U.S. 70, 77, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); *see*
17 *also Marshall v. Rodgers*, 133 S. Ct. 1446, 1450-51, 185 L. Ed. 2d 540 (2013)
18 (federal habeas court may "look to circuit precedent to ascertain whether [a federal
19 appellate court] has already held that the particular point in issue is clearly
20 established by Supreme Court precedent," but may not use lower court authority "to
21 refine or sharpen a general principle of Supreme Court jurisprudence into a specific
22 legal rule" or "to determine whether a particular rule of law is so widely accepted
23 among the Federal Circuits that it would, if presented to [the Supreme] Court, be
24 accepted as correct"). Second, newly proffered evidence is irrelevant; rather,
25 review of the state court decision is strictly "limited to the record that was before
26 the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 131
27 S. Ct. 1388, 1398, 179 L. Ed. 2d 557 (2011). And third, in light of the record
28 before the state court and the clearly established Supreme Court precedent, the state

1 court decision must have been “objectively unreasonable,” and not merely incorrect
2 in the view of the federal court. *Richter*, 131 S. Ct. at 785; *Renico v. Lett*, 559 U.S.
3 at 773; *see also Felkner v. Jackson*, 131 S. Ct. 1305, 1307, 179 L. Ed. 2d 374
4 (2011) (per curiam). To satisfy this standard, the state court is not required to “cite
5 or even be aware of [the Supreme Court’s] cases under § 2254(d).” *Richter*, 131 S.
6 Ct. at 784. “Even a strong case for relief does not mean the state court’s contrary
7 conclusion was unreasonable.” *Id.* at 786.

8 The inquiry under § 2254(d)(2) is likewise sharply circumscribed, as it calls
9 for federal courts to be “particularly deferential” to the state courts. *Taylor v.*
10 *Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004). The Ninth Circuit has said that an
11 unreasonable factual determination under § 2254(d)(2) may be shown where the
12 state court failed to make a finding necessary to support its decision, it relied on an
13 incorrect standard in making a necessary factual finding, or the factfinding process
14 supporting the decision was itself defective. *Id.* at 1000-01. Again, it is insufficient
15 that the state court’s factual determination was merely erroneous; to satisfy
16 § 2254(d)(2) it instead must be shown that “any appellate court” would have been
17 *unreasonable* in approving the finding of fact. *Id.* at 1000; *see also Rice v. Collins*,
18 546 U.S. 333, 338-39, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006). “This is a
19 daunting standard—one that will be satisfied in relatively few cases.” *Taylor v.*
20 *Maddox*, 366 F.3d at 1000.

21 The standard set forth in § 2254(d) is “difficult to meet . . . because it was
22 meant to be.” *Richter*, 131 S. Ct. at 786; *see also Burt v. Titlow*, 134 S. Ct. 10, 15-
23 16, 187 L. Ed. 2d 348 (2013) (“Recognizing the duty and ability of our state-court
24 colleagues to adjudicate claims of constitutional wrong, AEDPA erects a
25 formidable barrier to federal habeas relief for prisoners whose claims have been
26 adjudicated in state court.”). It “reflects the view that habeas corpus is a guard
27 against extreme malfunctions in the state criminal justice systems, not a substitute
28 for ordinary error correction through appeal.” *Richter*, 131 S. Ct. at 786. To that

1 end, it precludes review of any claims previously rejected on their merits by a state
2 court except in the narrow category of cases “where there is no possibility
3 fairminded jurists could disagree that the state court’s decision conflicts with [the
4 Supreme Court’s] precedents.” *Id.* Accordingly, to overcome the bar of § 2254(d),
5 a petitioner is required to show at the threshold that “the state court’s ruling on the
6 claim being presented in federal court was so lacking in justification that there was
7 an error well understood and comprehended in existing law beyond any possibility
8 for fairminded disagreement.” *Id.*; *see also Burt v. Titlow*, 134 S. Ct. at 16 (“We
9 will not lightly conclude that a State’s criminal justice system has experienced the
10 ‘extreme malfunction’ for which federal habeas relief is the remedy.”) (quoting
11 *Richter*, 131 S. Ct. at 786, alteration omitted); *Johnson v. Williams*, 133 S. Ct.
12 1088, 1091, 1094, 185 L. Ed. 2d 105 (2013) (standard of § 2254(d) is “difficult to
13 meet” and “sharply limits the circumstances in which a federal court may issue a
14 writ of habeas corpus to a state prisoner whose claim was ‘adjudicated on the merits
15 in State court proceedings’”).

16 Just this term, in *White v. Woodall*, 134 S. Ct. 1697 (2014), the Supreme Court
17 again explained just how narrow and limited the “clearly established” law
18 requirement is. In discussing this aspect of § 2254(d)(1), the Court explained that
19 the section “provides a remedy for instances in which a state court unreasonably
20 applies this Court’s precedent; it does not require state courts to *extend* this Court’s
21 precedent or license federal courts to treat the failure to do so as error.” *Id.* at 1706
22 (italics in original). In other words, “if a habeas court must extend a rationale
23 before it can apply to the facts at hand, then by definition the rationale was not
24 clearly established at the time of the state court decision.” *Id.* (quoting *Yarborough*
25 *v. Alvarado*, 541 U.S. 652, 666, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004))
26 (internal quotation marks omitted). Although “[t]he difference between applying a
27 rule and extending it is not always clear,” “[c]ertain principles are fundamental
28 enough that when new factual permutations arise, the necessity to apply the earlier

1 rule will be beyond doubt.” *Id.*, quoting *Yarborough*, 541 U.S. at 666. “The
2 critical point is that relief is available under § 2254(d)(1)’s unreasonable-
3 application clause if, and only if, it is so obvious that a clearly established rule
4 applies to a given set of facts that there could be no ‘fairminded disagreement’ on
5 the question.” *Id.* at 1706-07 (quoting *Richter*, 131 S. Ct. at 786).

6 **B. Section 2254(d) Bars Relief on Claim 27**

7 **1. Lackey Claim**

8 In the Opening Brief, Petitioner contends that execution following decades of
9 incarceration under a sentence of death violates the Eighth Amendment because it
10 would not satisfy the penological goals of retribution and deterrence that justify
11 application of the death penalty. (Opening Brief at 16-25.) This claim fails under
12 § 2254(d) because the Supreme Court has never held that execution following a
13 lengthy term of incarceration violates the Eighth Amendment. In fact, the Supreme
14 Court has thus far refused to even consider the issue, denying every certiorari
15 petition for which review of the issue has been sought. *See, e.g., Johnson v.*
16 *Bredesen*, 558 U.S. 1067, 130 S. Ct. 541, 175 L. Ed. 2d 552 (2009); *Thompson v.*
17 *McNeil*, 556 U.S. 1114, 129 S. Ct. 1299 (2009); *Foster v. Florida*, 537 U.S. 990,
18 123 S. Ct. 470, 154 L. Ed. 2d 359 (2002); *Knight v. Florida*, 528 U.S. 990, 120 S.
19 Ct. 459, 145 L. Ed. 2d 370 (1999); *Elledge v. Florida*, 525 U.S. 944, 119 S. Ct.
20 366, 142 L. Ed. 2d 303 (1998); *Lackey v. Texas*, 514 U.S. 1045, 115 S. Ct. 1421,
21 131 L. Ed. 2d 304 (1995). Although fair-minded jurists might disagree whether
22 execution after decades of incarceration advances the goals of retribution and
23 deterrence, this does not justify relief under § 2254(d). Rather, to obtain relief,
24 there must be Supreme Court authority that “squarely addresses” the claim at issue
25 and provides a “clear answer.” *Wright v. Van Patten*, 552 U.S. at 125-26. No
26 Supreme Court decision has held that execution following a certain term of
27 incarceration violates the Eighth Amendment. Therefore, Petitioner’s *Lackey* claim
28 fails under § 2254(d). *See Allen v. Ornoski*, 435 F.3d 946, 958 (9th Cir. 2006)

1 (denial of habeas relief proper because Supreme Court has never held that
2 execution after long tenure on death row constitutes cruel and unusual punishment).

3 In its Order Amending Briefing Schedule and Setting Hearing on Claim 27
4 (Docket No. 110), this Court has encouraged the parties to address the chart that is
5 attached to the Order that documents the case status of 496 individuals who are
6 currently on California's death row. The chart unquestionably shows that there are
7 long delays in the execution of death sentences in California and that an extremely
8 small number of capital inmates have been executed to date.³ Delay in this regard
9 can be attributed to various factors, including but not limited to the state court's
10 heavy capital caseload, inconsistent adjudication speeds in the lower federal courts,
11 repetitive litigation in state court conducted by capital inmates, and stay and
12 abeyance requests by the inmates themselves. Of course, there are many other
13 contributing factors as well.

14 But this state of affairs with respect to the post-conviction review process – in
15 state and federal court – for California condemned inmates does not entitle
16 Petitioner to habeas corpus relief under § 2254(d). This Court has stated that “the
17 chart strongly suggests that executing those essentially random few who outlive the
18 dysfunctional post-conviction review process serves no penological purpose and is
19 arbitrary in violation of well-established constitutional principles.” (Docket No.
20 110 at 2.) Respondent respectfully disagrees.

21 As Justice Thomas has explained, since the time Justice Stevens first wrote on
22 the issue after certiorari was denied in *Lackey*, to date, “[t]here is simply no
23 authority ‘in the American constitutional tradition or in this Court’s precedent for
24 the proposition that a defendant can avail himself of the panoply of appellate and
25 collateral procedures and then complain when his execution is delayed.’” *Johnson*
26 *v. Bredesen*, 558 U.S. 1067, 130 S. Ct. 541, 544-45, 175 L. Ed. 2d 552 (2009)

27 ³ In Petitioner's case, it has been nearly twenty years since he was sentenced
28 to death.

1 (Thomas, J., concurring in denial of certiorari), quoting *Thompson v. McNeil*, 556
2 U.S. 1114, 129 S. Ct. 1299, 1301 (2009) (Thomas, J., concurring in denial of
3 certiorari). The sole source of the delay in execution of sentence in this case is the
4 condemned inmate pursuing post-conviction relief. Not once has Jones expressed
5 disappointment with the speed, or lack thereof, with which the process is
6 operating.⁴ And of course, Jones has never agreed to forego post-conviction review
7 and simply submit to execution. “It makes ‘a mockery of our system of justice . . .
8 for a convicted murderer, who, through his own interminable efforts of delay . . .
9 has secured the almost-indefinite postponement of his sentence, to then claim that
10 the almost-indefinite postponement renders his sentence unconstitutional.”
11 *Thompson v. McNeil*, 556 U.S. 1114, 129 S. Ct. 1299, 1301 (2009) (Thomas, J.,
12 concurring in denial of certiorari) quoting *Turner v. Jabe*, 58 F.3d 924, 933 (4th
13 Cir. 1995) (Luttig, J., concurring in judgment). To find a basis upon which relief
14 could be granted for an inmate’s delayed execution resulting from pursuit of post-
15 conviction remedies, the Supreme Court (and this Court) would have to “invent a
16 new Eighth Amendment right.” *Thompson v. McNeil*, 129 S. Ct. at 1301.

17 It is beyond any reasonable debate that the Supreme Court has never held that
18 the execution of a small number of individuals who outlive a lengthy post-
19 conviction review process - even if it is dysfunctional - violates the Eighth
20 Amendment, or some other constitutional provision, or some combination of well-
21 established constitutional principles. The Ninth Circuit has expressly recognized
22 this fact. *Smith v. Mahoney*, 569 F.3d 1133, 1153 (9th Cir. 2010) (“We have
23 rejected *Lackey* claims in the past. In *Allen v. Ornoski*, 435 F.3d 946 (9th
24 Cir.2006), we determined, in the context of AEDPA, that ‘[t]he Supreme Court has
25

26 _____
27 ⁴ Arguing that it would be unconstitutional to execute Petitioner after such a
28 long time on death row is not the same as arguing the review process and his
execution should happen faster.

1 never held that execution after a long tenure on death row is cruel and unusual
2 punishment.’ *Id.* at 958”). Therefore, relief is barred by § 2254(d).

3 **2. Conditions of Confinement**

4 Petitioner also contends that the conditions of his confinement while he is
5 awaiting execution violate the Eighth Amendment because they are physically and
6 psychologically torturous. (Opening Brief at 25-41.) He argues that the physical
7 conditions on California’s death row death row are substandard and inhumane.
8 (Opening Brief at 26-35.) He also argues that the uncertainty concerning the
9 method by which he will be executed, and whether he will ever be executed, is
10 psychologically tortuous. (Opening Brief at 35-41.) These claims are barred under
11 § 2254(d) because they concern challenges to the conditions of confinement.

12 Traditionally, challenges to prison conditions are cognizable only under 42
13 U.S.C. § 1983, while challenges implicating the fact or duration of confinement are
14 brought through a habeas action. *Docken v. Chase*, 393 F.3d 1024, 1026 (9th Cir.
15 2004). “‘Federal law opens two main avenues to relief on complaints related to
16 imprisonment: a petition for habeas corpus, 28 U.S.C. § 2254, and a complaint
17 under the Civil Rights Act of 1871, Rev. Stat. § 1979, as amended, 42 U.S.C.
18 § 1983. Challenges to the lawfulness of confinement or to particulars affecting its
19 duration are the province of habeas corpus.’” *Hill v. McDonough*, 547 U.S. 573,
20 579, 126 S. Ct. 2096, 165 L. Ed. 2d 44 (2006) (quoting *Muhammad v. Close*, 540
21 U.S. 749, 750, 124 S. Ct. 1303, 158 L. Ed. 2d 32 (2004)). “An inmate’s challenge
22 to the circumstances of his confinement, however, may be brought under § 1983.”
23 *Id.*; see *Skinner v. Switzer*, 131 S. Ct. 1289, 1299 n.13, 179 L. Ed. 2d 233 (2011)
24 (“when a prisoner’s claim would not ‘necessarily spell speedier release,’ that claim
25 does not lie at ‘the core of habeas corpus,’ and may be brought, if at all, under
26 § 1983”); *Ramirez v. Galaza*, 334 F.3d 850, 856 (9th Cir. 2003) (“Suits challenging
27 the validity of the prisoner’s continued incarceration lie within ‘the heart of habeas
28 corpus,’ whereas ‘a § 1983 action is a proper remedy for a state prisoner who is

1 making a constitutional challenge to the conditions of his prison life, but not to the
2 fact or length of his custody”). Here, Petitioner’s challenge to the conditions of his
3 confinement (unhealthy living conditions, isolation, inadequate medical treatment,
4 etc.) and his claim that such conditions are physically and psychologically torturous
5 are not challenges to the fact or duration of his custody. Therefore, the claim is not
6 cognizable in these habeas proceedings. And even if the allegations of psychic pain
7 are somehow an attack on the duration of Petitioner’s pre-execution custody, the
8 Supreme Court has never held that such allegations support a basis for habeas
9 corpus relief. The claim must be rejected.

10 **3. Equal Protection**

11 Petitioner further contends that his execution would violate equal protection
12 because he must endure lengthy and indefinite incarceration as a capital petitioner
13 seeking post-conviction relief whereas non-capital petitioners seeking post-
14 conviction relief do not endure such lengthy and indefinite incarceration. (Opening
15 Brief at 42-47.) But the Supreme Court has never held that execution following
16 lengthy and indefinite incarceration while a capital petitioner seeks post-conviction
17 relief violates equal protection. Indeed, the reason is self-evidence. Capital and
18 non-capital prisoners are not similarly situated. *Massie v. Hennessey*, 875 F.2d
19 1386, 1389 (9th Cir. 1989). Thus, relief on this claim is barred by § 2254(d).

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CONCLUSION

For the reason stated above, granting relief on Claim 27 would be impermissible.

Dated: June 30, 2014

Respectfully submitted,

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11 **UNITED STATES DISTRICT COURT**
 12 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

13 ERNEST DEWAYNE JONES,
 14 Petitioner,

15 v.

16 KEVIN CHAPPELL, Warden of
 17 California State Prison at San
 18 Quentin,
 19 Respondent.

Case No. CV-09-2158-CJC
DEATH PENALTY CASE

**PETITIONER'S OPENING BRIEF
 ON CLAIM 27**

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Cases	Page(s)
<i>Atkins v. Virginia</i> , 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 345 (2002).....	18
<i>Attorney Gen. of New York v. Soto-Lopez</i> , 476 U.S. 898, 106 S. Ct. 2317, 90 L. Ed. 2d 899 (1986).....	44
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<i>Brown v. Plata</i> , ___ U.S. ___, 131 S. Ct. 1910, 179 L. Ed. 2d 969 (2011).....	30
<i>Ceja v. Stewart</i> , 134 F.3d 1368 (9th Cir. 1998)	25
<i>City of Cleburne v. Cleburne Living Ctr.</i> , 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).....	46
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<i>Coleman v. Balkcom</i> , 451 U.S. 949, 101 S. Ct. 2994, 68 L. Ed. 2d 334 (1981).....	21, 33
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<i>Commonwealth v. O’Neal</i> , 339 N.E.2d 676 (Mass. 1975) (Tauro, J., concurring).....	33
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1 *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251
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13 *Rhodes v. Chapman*, 452 U.S. 337, 101 S. Ct. 2392, 69 L. Ed. 2d 59

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15 *Rinaldi v. Yeager*, 384 U.S. 305, 86 S. Ct. 1497, 16 L. Ed. 2d 577

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18 *Romer v. Evans*, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855

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3 *Thompson v. Enomoto*, 815 F.2d 1323 (9th Cir. 1987).....26

4 *Thompson v. McNeil*, 129 S. Ct. 1299, 129 S. Ct. 1299 (2009).....25, 27

5 *Toussaint v. McCarthy*, 597 F. Supp. 1388 (N.D. Cal. 1984).....27

6 *Trop v. Dulles*, 356 U.S. 86, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958)21, 31

7 *United States v. Windsor*, ___ U.S. ___, 133 S. Ct. 2675, 186 L. Ed. 2d

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11 *Williams v. New York*, 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337

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16 Cal. Penal Code § 1054.911

17 Cal. Penal Code § 148411

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20 **Other Authorities**

21 *Arthur L. Alarcón & Paula M. Mitchell, Executing the Will of the*

22 *Voters?: A Roadmap to Mend or End the California Legislature's*

23 *Multi-Billion-Dollar Debacle*, 44 Loy. L.A. L. Rev. S41 (2011).....10, 15

24 *Arthur L. Alarcón, Remedies for California's Death Penalty*

25 *Deadlock*, 80 S. Cal. L. Rev. 697 (2007)

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27 *Clinton T. Duffy, Eighty-Eight Men and Two Women* 254 (1962).....32

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1 Craig Haney & Philip Zimbardo, *The Past and Future of U.S. Prison*
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 4 Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On*
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 9 Lewis Powell, *Capital Punishment*, 102 Harv. L. Rev. 1035 (1989)22
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 13 Angela Sun, Note, “*Killing Time*” in the Shadow of Death: Why
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1 **I. THE RESOLUTION OF MR. JONES’S CASE HAS BEEN,**
2 **AND WILL BE, UNCONSCIONABLY DELAYED BECAUSE THE**
3 **CALIFORNIA DEATH PENALTY SYSTEM IS DYSFUNCTIONAL.**

4 In August 1992, Mr. Jones – then twenty-eight years old – was arrested and
5 charged with capital murder. 1 Clerk’s Transcript (CT) 87-89; Exhibits to Petition
6 of Writ of Habeas Corpus, Notice Of Lodging (NOL) at C.2, Ex. 26 at 268. He
7 was formally sentenced to death on April 2, 1995, and the review process of his
8 judgment began. 2 CT 504. Over nineteen years later, judicial review of the
9 constitutionality of his convictions and sentences continues and will continue for
10 the foreseeable future. After being in custody for almost twenty-two years, Mr.
11 Jones will turn fifty years old on June 27, 2014. Exhibits to Petition of Writ of
12 Habeas Corpus, NOL at C.2, Ex. 26 at 268.

13 The extraordinary lengthy period of judicial review that Mr. Jones has
14 experienced is typical of California death penalty cases. Indeed, former California
15 Supreme Court Chief Justice Ronald M. George described the state’s mechanism
16 for appellate and habeas corpus review of death judgments as “dysfunctional,” a
17 view endorsed by the bi-partisan California Commission on the Fair
18 Administration of Justice. California Commission on the Fair Administration of
19 Justice, Report and Recommendation on the Administration of the Death Penalty
20 in California (Gerald Uelmen ed. 2008) (“Commission Report”), attached as
21 Exhibit (Ex.) 1 at 125.² The Commission drew upon the seminal study conducted
22

23 ² The California Commission on the Fair Administration of Justice, created
24 by Senate Resolution No. 44 of the 2003-04 Session of the California State
25 Senate, extensively studied the administration of capital punishment in California
26 and addressed many of the issues implicated by Claim 27. The Commission was
27 chaired by former Attorney General John K. Van de Kamp and was composed of
28 a judge, prosecutors, criminal defense lawyers, elected officials, law enforcement
officials, academicians, representatives of victims’ organizations, and other
concerned individuals. After conducting three public hearings at which seventy-

continued...

1 by Senior Judge Arthur Alarcón,³ to identify multiple defects in the California
2 death penalty process. The Commission identified numerous defects, including
3 the failure to adequately recruit and compensate counsel who are able and willing
4 to accept appointments in appellate and habeas corpus proceedings, the prejudicial
5 delays in the appointment of counsel, the California Supreme Court's inability to
6 review the automatic appeals and habeas corpus proceedings in a timely fashion,
7 and the inability to provide death-row inmates with an effective forum for
8 litigating potentially meritorious claims, which increases the delay during federal
9 judicial review.⁴ Ex. 1 at 127-48.

10 As a result, the "elapsed time between judgment and execution in California
11 _____

12 two individuals testified and considering voluminous documentation, the
13 Commission in 2008 issued detailed and extensive recommendations to repair the
14 flaws in California's death penalty system. The critical recommendations for
15 addressing the delays in the administration of that system – expanding the pool of
16 attorneys willing and qualified to accept appointments in capital cases, ensuring
17 adequate resources for the adjudication of capital cases at the trial and post-
18 conviction stages, and reducing the likelihood of constitutional errors – were
19 unanimously approved by the Commissioners. Ex. 1 at 126-48. (In accordance
20 with this Court's Local Rules, citation to the Report are to the page numbers
21 affixed to the exhibit and not the internal pagination used by the Commission.)

22 ³ Arthur L. Alarcón, *Remedies for California's Death Penalty Deadlock*, 80
23 S. Cal. L. Rev. 697 (2007).

24 ⁴ The current California death penalty scheme is a product of Proposition 7,
25 better known as the "Briggs Initiative," which superseded the 1977 death penalty
26 statute. Ex. 1 at 120. The Commission noted that the Briggs Initiative "gives
27 broad discretion to prosecutors to decide whether a homicide should be
28 prosecuted as a death penalty case." Ex. 1 at 131 (noting that "87% of
California's first-degree murders are 'death eligible'"); *see also* ECF No. 84 at
129-45 (describing the challenge to the California statute contained in Claim 24);
ECF No. 100 at 238-44 (same). This broad discretion stands in sharp contrast to
other states' statutes, *see, e.g.*, ECF No. 84 at 129-45, and "has opened the
floodgates beyond the capacity of our judicial system," Ex. 1 at 149.

1 exceeds that of every other death penalty state,” averaging over two decades for
2 the handful of executions that have occurred in California. Ex. 1 at 125, 127. As
3 the Commission noted, the time between sentencing and execution in California is
4 misleadingly low because so few capital sentenced defendants have been
5 executed. Ex. 1 at 127. Moreover, as a result of the inherent defects in the system
6 that continue to escalate, the time frame for carrying out executions undoubtedly
7 will reach, and exceed, three decades from the imposition of sentence. Ex. 15 ¶5
8 (noting that there currently are 493 capital inmates whose judgment was imposed
9 before June 9, 1994, and 318 whose judgment was imposed before June 9, 1989);
10 *see also* Ex. 15 ¶15 (noting that the delay between sentencing and disposition of
11 state habeas corpus petitions resolved between 2008 and 2014 was 17.2 years).

12 This systemic failure is a direct consequence of inadequacies in California’s
13 death penalty system and the state’s inability or unwillingness to fund the system
14 adequately to provide representation and court resources. As the Commission on
15 the Fair Administration of Justice concluded, using “conservative figures,” \$232.7
16 million annually must be allocated to fund the current dysfunctional process, with
17 a several-year phase-in plan. Ex. 1 at 158. Despite the publication of the
18 Commission’s findings in 2008, the Governor and the State Legislature have failed
19 to allocate any additional funding to remedy the defects in the system, and the
20 unconscionable delays have been exacerbated. Ex. 15 ¶3.⁵

21
22 _____
23 ⁵ Initiative efforts to remedy the dysfunctional system similarly have failed.
24 In November 2012, Proposition 34, which would have abolished capital
25 punishment in California, failed by a narrow margin. *See* California Secretary of
26 State, State Ballot Measures, 2012 General Election Results (available at
27 <http://www.sos.ca.gov/elections/sov/2012-general/15-ballot-measures.pdf>) (last
28 visited June 9, 2014). In December 2013, death proponents sought to qualify an
initiative on the November 2014 ballot that would have imposed severe and
unworkable limitations on the presentation and review of challenges to capital
judgments, but were unsuccessful in gaining sufficient signatures to qualify the

continued...

1 **A. The California Death Penalty System Is Dysfunctional.**

2 **1. Delays in the Appointment of Counsel.**

3 Mr. Jones experienced substantial delays in the appointment of counsel to
4 represent him in his automatic appeal and habeas corpus proceedings. On April
5 13, 1999, more than four years after judgment was imposed, the California
6 Supreme Court appointed counsel to represent Mr. Jones in his automatic appeal.
7 On October 20, 2000, over five years after Mr. Jones was sentenced to death, the
8 California Supreme Court appointed the Habeas Corpus Resource Center to
9 represent him in state habeas corpus proceedings.

10 The delay in appointment of counsel for Mr. Jones is typical of the
11 California process. The Commission concluded that approximately three to five
12 years elapses after judgment is imposed before direct appeal counsel is appointed
13 and eight to ten years elapses before the appointment of habeas corpus counsel.
14 Ex. 1 at 133. Since the Commission's Report, the backlog in the appointment of
15 counsel and the resulting delay have increased exponentially, particularly with
16 respect to the appointment of habeas corpus counsel. As of June 9, 2014, there
17 were 70 condemned prisoners without counsel for the appellate proceedings in the
18 California Supreme Court and 352 individuals without habeas corpus counsel.⁶
19 Ex. 15 ¶7 & Table/Figure 1. On average, the 77 inmates whose direct appeals are
20 concluded and who lack habeas corpus counsel have waited 15.81 years after their
21

22 _____
23 measure for the ballot. *See, e.g.*, California Death-Penalty Reform Initiative
24 Pushed to 2016, KCRA.com, May 10, 2014 (available at
25 <http://www.kcra.com/news/local-news/news-sacramento/calif-deathpenalty-reform-initiative-pushed-to-2016/25914676#!WEqHc>) (last visited June 9, 2014).

26 ⁶ At the time that Mr. Jones was appointed habeas corpus counsel in 2000,
27 there were approximately 215 inmates on California's death row without habeas
28 corpus counsel. Ex. 15 ¶6.

1 sentencing, still to be without the appointment of habeas corpus counsel; 160
2 inmates have been without habeas corpus counsel for more than ten years, and one
3 inmate continues to lack counsel despite being sentenced in 1992, almost 24 years
4 ago. Ex. 15 ¶8.⁷

5 The Commission on the Fair Administration of Justice unanimously found
6 that backlog and delays in the appointment of counsel to handle capital cases were
7 attributable to the failure to provide sufficient funding to expand agency counsel,
8 or to fully compensate private attorneys in a manner that allows them to provide
9 representation that complies with their ethical obligations to their clients. Ex. 1 at
10 127-28, 145-48. Because of the dearth of private counsel, the Commission found
11 that the only means of eliminating the backlog of unrepresented inmates was to
12 expand the HCRC with a five-fold increase in its annual state budget. Ex. 1 at
13 127, 146-47. In contrast to the Commission's recommendations, however, the
14 reality is that after sustaining several years of reductions, the HCRC's annual
15 budget has decreased to \$12.7 million, and the office lacks funding to fully staff its
16 legislatively established attorney positions.

17 **2. Delays in State Court Review of Capital Judgments**

18 The Commission found that there were substantial delays in the California
19

20 ⁷ The number of cases without habeas corpus counsel increases yearly
21 because appointments do not keep pace with the number of new judgments of
22 death and the need to replace private habeas corpus counsel who are unable to
23 continue representation. Over the past five years, the State has averaged 22 death
24 judgments per year, while over the same time period, there has been an average of
25 10 annual appointments to represent death-row inmates in their habeas corpus
26 proceedings. Ex. 15 ¶9. Adding to the backlog of inmates without counsel is the
27 need to replace counsel who withdrew from representation before the habeas
28 corpus proceedings were completed. Since 2003, of the 192 cases in which
habeas corpus petitions have been filed, 40 petitioners lost their initially
appointed private counsel and required replacement counsel – a replacement rate
of 21 percent. . Ex. 15 ¶10.

1 Supreme Court’s resolution of direct appeals and habeas corpus proceedings in
2 capital cases. Ex. 1 at 133-34. The Commission noted that there was “a backlog
3 of 80 fully briefed automatic appeals in the death cases awaiting argument” and
4 that the delay “averages 2.25 years.” Ex. 1 at 133. The Commission similarly
5 noted that the “California Supreme Court currently has 100 fully briefed habeas
6 corpus petitions awaiting decision” and “there is now an average delay of 22
7 months between the filing of the petition and the decision of the California
8 Supreme Court.” Ex. 1 at 133-34.

9 In Mr. Jones’s case, the delay was substantially greater than the Commission
10 identified. Mr. Jones filed his petition in the California Supreme Court on October
11 21, 2002,⁸ and informal briefing was completed on December 8, 2003.⁹ Six-and-a-
12 half years after the filing of the petition and sixty-three months after the briefing
13 was completed, the California Supreme Court denied the petition on March 11,
14 2009, without conducting an evidentiary hearing or issuing a published decision.

16 ⁸ At the time of filing the state petition, the California Supreme Court’s
17 policies provided that Mr. Jones’s petition would be considered timely if it was
18 filed two years from the date of appointment of counsel. The California Supreme
19 Court has since determined that the minimum amount of time required to
20 investigate and present legally sufficient challenges to a petitioner’s conviction,
21 sentence, and confinement is three years. Supreme Court Policies Regarding
22 Cases Arising from Judgments of Death, Policy 3 Timeliness Standard 1-1.1 (as
amended Nov. 30, 2005) (available at [http://www.courts.ca.gov/documents/
PoliciesMar2012.pdf](http://www.courts.ca.gov/documents/PoliciesMar2012.pdf)) (last visited June 9, 2014).

23 ⁹ California law authorizes a court to request that the state file an “informal
24 response” to a habeas corpus petition; if the court requests an informal response,
25 the petitioner is entitled to file a reply. Cal. R. Ct. 4.551(b)(1) & (2) (West 2014).
26 The time taken to complete the informal briefing in Mr. Jones’s case was typical
27 of other capital cases. For those petitions filed in 2004 – the same year that Mr.
28 Jones filed his petition – respondent took an average of .53 years to file the
informal response and petitioners took an average of .69 years to file the reply.
Ex. 15 ¶12.

1 The California Supreme Court's delay in resolving Mr. Jones's petition was well
2 above the 22 month average cited by the Commission and the 45 month average
3 that the court took to resolve the other capital habeas petitions filed in 2004. The
4 California Supreme Court's decision came over 14 years after Mr. Jones was
5 sentenced to death.

6 Moreover, the California Supreme Court's delay in resolving capital habeas
7 corpus petitions has substantially increased since the Commission's Report. The
8 California Supreme Court currently has 176 pending capital habeas cases, with an
9 average pending time of 4.07 years.¹⁰ Ex. 15 ¶13. Of those cases, 107 have been
10 fully briefed awaiting decision for an average of 4.16 years (or 50 months) since
11 the reply to the informal response was filed. Ex. 15 ¶13 & Table/Figure 2. For the
12 68 capital habeas corpus petitions that the California Supreme Court *has* resolved
13 from 2008 through the filing of this Brief, the delay is equally staggering. The
14 average time between the completion of briefing and the California Supreme
15 Court's decision is 3.98 years, or 47.8 months. Ex. 15 ¶14. Thus, the Supreme
16 Court's delay in resolving capital habeas petitions has more than doubled in the
17 six years since the Commission Report.

18 **B. Defects in the State Process Have Produced Inordinate Delays in**
19 **Federal Review of California Capital Cases.**

20 The delay directly attributable to the state's refusal to provide sufficient
21 counsel and judicial resources to review capital judgments is crippling. This and
22 the state's other defects have created substantially greater delays in federal review
23 of these cases. As early as 1999, researchers identified the costs to the federal

24 _____
25 ¹⁰ This number excludes initial petitions that the California Supreme Court
26 permits to be filed to toll the federal statute of limitations period while the court
27 locates counsel willing to accept an appointment, counsel files an amended
28 petition within the court's timeliness policies, and the court resolves the amended
petition. *See, e.g., In re Morgan*, 50 Cal. 4th 932, 237 P.3d 993 (2010).

1 judiciary resulting from the failure of the California system to fund and resolve
2 challenges to death penalty judgments. The Administrative Office of the United
3 States Courts commissioned PriceWaterhouseCooper to examine the
4 extraordinarily high federal cost of review of California capital cases. Ex. 12. The
5 findings demonstrate the effect that California’s “perfunctory post-conviction
6 process” has on the federal judiciary. Ex. 12 at 423; *see also* Ex. 12 at 492 (noting
7 that “California has unique factors contributing to habeas petition and evidentiary
8 hearing costs [in capital habeas corpus proceedings] that are not common to the
9 other Ninth Circuit states”); Ex. 12 at 508 (noting that part of the significant cost-
10 differential before California capital cases and federal court and non-California
11 cases “may be due to the new discovery and investigation at the federal level
12 overlooked at the state post-conviction level”).

13 **1. The State Fails to Provide Sufficient Resources for Habeas Corpus**
14 **Counsel to Investigate and Present Potentially Meritorious Claims.**

15 The Commission on the Fair Administration of Justice found that the state’s
16 death penalty system fails to adequately fund counsel in a manner that satisfies the
17 American Bar Association guidelines and fully compensate attorneys for their
18 work. Ex. 1 at 146. Under California Supreme Court guidelines, private counsel
19 may choose one of two means of compensation: a time-and-cost basis or a fixed
20 fee rate. *Payment Guidelines for Appointed Counsel Representing Indigent*
21 *Criminal Appellants in the California Supreme Court; Guidelines for Fixed Fee*
22 *Appointments, on Optional Basis, to Automatic Appeals and Related Habeas*
23 *Corpus Proceedings in the California Supreme Court.*¹¹ Under the first system,
24 attorneys are compensated at a rate of \$145 per allowable hour, but counsel are
25 subject to unrealistic “allowable hours benchmarks,” limiting the number of hours
26

27 ¹¹ The guidelines are available on the Court’s website: [http://www.courts](http://www.courts.ca.gov/documents/PoliciesMar2012.pdf)
28 [.ca.gov/documents/PoliciesMar2012.pdf](http://www.courts.ca.gov/documents/PoliciesMar2012.pdf) (last visited June 9, 2014).

1 that can be spent on client communication, record review, and petition preparation.
2 *Payment Guidelines for Appointed Counsel Representing Indigent Criminal*
3 *Appellants in the California Supreme Court*, Parts II.A, II.I.3(ii). Private
4 appointed habeas counsel who choose to be compensated on a fixed fee and
5 expense basis are assigned one of three categories, ranging from \$85,000 to
6 \$127,000, depending on factors relating to the size of the record and nature of the
7 case. *See Guidelines for Fixed Fee Appointments, on Optional Basis, to Automatic*
8 *Appeals and Related Habeas Corpus Proceedings in the California Supreme*
9 *Court*. These fees include any assistance by second counsel and all incidental
10 expenses (other than for habeas corpus investigation) incurred during the
11 representation. *Guidelines for Fixed Fee Appointments*, Guideline 2. Under both
12 payment plans, compensation rates for services of investigators and experts are
13 strictly limited, *id.* at Part III.C.7.a., with a maximum of \$50,000. *Id.*; Cal. Gov't
14 Code § 68666(b) (“The Supreme Court may set a guideline limitation on
15 investigative and other expenses allowable for counsel to adequately investigate
16 and present collateral claims of up to fifty thousand dollars (\$50,000) without an
17 order to show cause.”).

18 These hourly benchmarks and payments fall far short of the actual costs
19 necessary to adequately perform the work that is ethically required in habeas
20 corpus cases. The Commission Report noted that in a successful habeas petition in
21 *In re Lucas*, 33 Cal. 4th 682, 122 Cal. Rptr. 2d 374 (2004), the law firm of Cooley
22 Godward LLP provided 8,000 hours of pro bono attorney time, 7,000 hours of
23 paralegal time, and litigation expenses of \$328,000. Ex. 1 at 146 n.71. Other
24 estimates of how much adequate investigation costs range from \$250,000 to
25 \$300,000 – again, far above the \$50,000 permitted by statute. Arthur L. Alarcón
26 & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or*
27
28

1 *End the California Legislature's Multi-Billion-Dollar Debacle*, 44 Loy. L.A. L.
2 Rev. S41, S621 n.624 (2011).¹²

3 In addition to lacking sufficient funding to conduct an adequate
4 investigation in state habeas corpus proceedings, condemned inmates are
5 hampered in their ability to develop the factual predicate of their claims. Absent
6 the issuance of an order to show cause, California petitioners lack the power to
7 issue subpoenas and compel witness testimony. Cal. Penal Code § 1484 (West
8 2014); *Durdines v. Super. Ct.*, 76 Cal. App. 4th 247, 252, 90 Cal. Rptr. 2d 217
9 (1999) (holding that the court lacked power to solicit trial counsel's declaration
10 before the issuance of a writ or an order to show cause). Thus, the primary
11 mechanism for postconviction discovery is California Penal Code section 1054.9.
12 Section 1054.9 provides that, prior to filing their state habeas petitions, capital
13 petitioners shall have reasonable access to materials they would have been entitled
14 to receive at the time of trial, to the extent that such materials are currently in the
15 possession of the prosecution or law enforcement authorities who were involved in
16 the investigation or prosecution of the case. Cal. Penal Code § 1054.9 (West
17 2014); *In re Steele*, 32 Cal. 4th 682, 697, 10 Cal. Rptr. 3d 536 (2004). However,
18 California courts – including the state Supreme Court – have limited the scope of
19 available discovery by means of procedural hurdles that are frequently impossible
20

21 ¹² The fact that these hours and expenses are necessary has been made clear
22 under guidelines issued by the federal courts, the American Bar Association, and
23 case law mandating a full investigation of all potentially meritorious issues. *See*
24 *American Bar Association, Guidelines for the Appointment and Performance of*
25 *Defense Counsel in Death Penalty Cases*, Guideline 10.15.1 (Revised Edition,
26 Feb. 2003) (ABA Guidelines) (requiring postconviction counsel to litigate all
27 arguably meritorious issues, present issues in a manner to preserve them for
28 subsequent review, and aggressively investigate “all aspects of the case”); *see also* ABA Guideline 10.7 (Investigation); ABA Guideline 10.8 (The Duty to Assert Legal Claims).

1 for petitioners to surmount.

2 Chief among these limitations is the California Supreme Court's mandate
3 that petitioners are not entitled to receive material that would have been
4 discoverable at trial, but which has never been disclosed, unless they are able to
5 demonstrate a basis to believe that the material exists (or existed at trial). *Barnett*
6 *v. Super. Ct.*, 50 Cal. 4th 890, 901, 114 Cal. Rptr. 3d 576 (2010). In this way,
7 postconviction discovery in California capital cases is determined by fiat of a
8 guessing game. Petitioners can access discoverable material only to the extent that
9 habeas counsel is able to divine sufficient clues to the existence of material that
10 neither their counsel nor they have ever seen, but to which they would
11 unquestionably be entitled under the discovery rules were the material's existence
12 known to them.

13 As a result of these financial and discovery limitations, capital habeas
14 corpus petitioners in California initiate federal habeas corpus litigation without
15 having fully developed all potentially meritorious claims in state court. Instead,
16 such claims can be developed in the first instance only after death-row inmates
17 have access to federal resources. For its part, the California Attorney General's
18 Office routinely has insisted that habeas corpus petitioners return to the California
19 Supreme Court to exhaust state remedies. *See, e.g.*, Ex. 12 at 422 (noting that the
20 "strategy of the California Attorney General's Office in litigating claims [by
21 raising non-exhaustion] is believed to have a major impact on the costs of cases in
22 California"); Ex. 12 at 424 (noting that attorneys report that "the California
23 Attorney General's Office will rarely waive the exhaustion defense"). Since 1978,
24 condemned inmates have filed 267 exhaustion petitions in the California Supreme
25 Court, and the average time that the inmate remains in state court following the
26 filing of an exhaustion petition is 3.19 years. Ex. 15 ¶16; *see also* Alarcón,
27 *Remedies for California Death Row Deadlock*, 80 S. Cal. L. Rev 697 at 736
28 (2007) (finding an average of three-year delay resulting from need "to exhaust

1 claims in seventy-four percent” of the federal habeas corpus cases).

2 **2. The California Supreme Court’s Failure to Review Judgments**
3 **Adequately.**

4 Unlike the practice of virtually all death-penalty states, the California
5 Supreme Court resolves in the first instance habeas corpus petitions challenging
6 capital judgments. Following the filing of a petition, California law requires the
7 court to assume “the petition’s factual allegations are true,” and determine whether
8 “the petitioner would be entitled to relief.” *People v. Duvall*, 9 Cal. 4th 464, 474-
9 75, 37 Cal. Rptr. 2d 259 (1995). When “a habeas corpus petition is sufficient on
10 its face (that is, the petition states a prima facie case on a claim that is not
11 procedurally barred), the court is obligated by statute to issue a writ of habeas
12 corpus” or an order to show cause. *People v. Romero*, 8 Cal. 4th 728, 737-38, 35
13 Cal. Rptr. 2d 270 (1994). In practice, however, the California Supreme Court
14 summarily denies the overwhelming majority of capital habeas corpus petitions
15 without any explication of its reasoning after reviewing only the petition and,
16 usually, the requested informal briefing. Alarcón, *Remedies for California’s Death*
17 *Row Deadlock*, 80 S. Cal. L. Rev at 741; *see also* Ex. 1 at 145. According to the
18 Commission’s Report, the Supreme Court historically has issued orders to show
19 cause in fewer than eight percent of habeas corpus proceedings, and held
20 evidentiary hearings in less than five percent of the cases. Ex. 1 at 145; *see also*
21 Judge Arthur L. Alarcón, *Remedies for California’s Death Row Deadlock*, 80 S.
22 Cal. L. Rev. at 741.

23 Judge Alarcón explained the problems that these practices have on federal
24 review of California death penalty cases:

25 The absence of a developed factual record and an articulated
26 analysis from the California Supreme Court regarding the reasons
27 for denying relief can contribute to lengthier delays when the
28 prisoner seeks relief in federal court or in subsequent state habeas

1 proceedings. As a result of its overwhelming backlog of death
2 penalty cases and its duty to review civil and other criminal cases on
3 appeal, the Supreme Court has been forced to reject the requests
4 from federal judges in the Ninth Circuit asking that orders denying a
5 petition for a writ of state habeas corpus spell out the reasons for the
6 denial. Chief Justice Ronald George explained in response to an
7 inquiry from U.S. Senator Dianne Feinstein “that drafting and
8 reviewing an order containing more information than the basic
9 ground for denying relief consumes far more time on the part of both
10 staff and the justices, to the detriment of the court’s performance of
11 its responsibilities in noncapital cases.” After receiving Chief
12 Justice George’s response, Senator Feinstein wrote to Governor
13 Arnold Schwarzenegger requesting his assistance in addressing the
14 problem of the “lengthy and unnecessary delays” in processing death
15 penalty cases in California because of inadequate funding. Senator
16 Feinstein concluded that “[t]he absence of a thorough explanation of
17 the [California Supreme] Court’s reasons for its habeas decisions
18 often requires federal courts to essentially start each federal habeas
19 death penalty appeal from scratch, wasting enormous time and
20 resources.”

21 Alarcón, *Remedies for California’s Death Row Deadlock*, 80 S. Cal. L. Rev at
22 742-43 (footnotes omitted); *see also* Ex. 1 at 134 (noting that “much of this delay
23 [in federal court] is attributable to the absence of a published opinion and/or an
24 evidentiary hearing in the state courts. Often, the federal courts cannot ascertain
25 why state relief was denied”). Moreover, the failure to resolve factual disputes in
26 state court has compelled federal courts to expend substantial resources to
27 ascertain the disputed facts, determine whether an evidentiary hearing is
28 warranted, and conduct one if necessary. Ex. 1 at 160 (“The California Supreme

1 Court's summary denial of habeas petitions without evidentiary hearings and
2 without any explanation of the reasons does not save time, since it adds to the
3 delay in resolution of the inevitable subsequent federal habeas corpus claim.”).

4 Critically, the California Supreme Court has failed to correct even the most
5 obvious prejudicial errors in capital cases. Since 1978, the court has resolved the
6 merits of 729 of the 1003 habeas corpus petitions filed by condemned inmates.
7 Ex. 15 ¶17. Of the 729 cases, the court has issued orders to show cause in 99
8 cases (13.6%), and ordered evidentiary hearings in 45 cases (6.2%). Of these
9 cases, the California Supreme Court has granted some form of relief in capital
10 habeas corpus proceedings only eighteen times or in 2.5% of the cases it has
11 resolved. Ex. 15 ¶17. In contrast, the Arizona Supreme Court “reverses two out of
12 every five sentences it reviews.” Ex. 14.

13 As a result, many years after the imposition of sentence, federal courts have
14 been required to conduct constitutionally mandated scrutiny of capital judgments.
15 Not surprisingly, given the California Supreme Court's failure to find and correct
16 constitutional error, federal courts have granted relief in habeas corpus
17 proceedings arising from California death judgments in a substantial majority of
18 the cases reviewed. As reported by the Commission on the Fair Administration of
19 Justice in 2008, “federal courts have rendered final judgment in 54 habeas corpus
20 challenges to California death penalty judgments” and “[r]elief in the form of a
21 new guilt trial or a new penalty hearing was granted in 38 of the cases, or 70%.”
22 Ex. 1 at 126. Between the 2008 publication of the Commission's report and an
23 article on California's death penalty system authored by Judge Alarcón and Paula
24 M. Mitchell in 2011, “federal habeas corpus relief has been granted in five
25 additional cases, and denied in four additional cases, all of which are final
26 judgments, making the rate at which relief has been granted 68.25%.” Arthur L.
27 Alarcón & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to*
28 *Mend or End the California Legislature's Multi-Billion-Dollar Debacle*, 44 *Loy.*

1 L.A. L. Rev. S41, S55 n.26 (2011).

2
3 **II. MR. JONES'S EXECUTION FOLLOWING DECADES OF**
4 **INCARCERATION UNDER A DEATH SENTENCE WOULD**
5 **SATISFY NEITHER OF THE PENOLOGICAL OBJECTIVES**
6 **DEEMED ESSENTIAL TO OVERCOME THE EIGHTH**
7 **AMENDMENT PROHIBITION OF CRUEL AND UNUSUAL**
8 **PUNISHMENT.**

9 The psychological impact of Mr. Jones's decades-long confinement,
10 conscious as he is of the state's declared intention to escort him from his cell and
11 execute him at some indefinite future date, renders his protracted warehousing as a
12 condemned man a punishment materially different from either the punishment of
13 death or the punishment of life in prison without possibility of parole. It is more
14 likely that a condemned prisoner will die of natural or other causes than be
15 executed by the state. This statistical likelihood has transmuted a California death
16 sentence into a sentence of life imprisonment with no possibility of parole but
17 slight possibility of execution. California has never enacted such a Damoclean
18 penalty, neither could it do so. The de facto existence of this third penalty gives
19 rise to two distinct constitutional violations: execution of a death sentence
20 following decades-long incarceration fails to serve the penological purposes that
21 the Supreme Court has declared indispensable to justifying application of the death
22 penalty without offense to the Eighth Amendment; and further, prolonged
23 incarceration under the uncertain but unremitting threat of execution is torturous
24 and constitutes cruel and unusual punishment within the meaning of the Eighth
25 Amendment.

26 **A. Eighth Amendment Limitations on Punishment**

27 The determination that a specific punishment does not per se violate the
28 Constitution does not exempt the manner in which that punishment is applied from

1 continued Eighth Amendment scrutiny. *See, e.g., Weems v. United States*, 217 U.S.
2 349, 378, 30 S. Ct. 544, 54 L. Ed. 793 (1910) (noting importance of judicial
3 deference to legislative power, “unless that power encounters in its exercise a
4 constitutional prohibition. In such case, not our discretion, but our legal duty,
5 strictly defined and imperative in its direction, is invoked.”). Thus, for example,
6 although the Eighth Amendment provides that the imposition of monetary fines is
7 a constitutional exercise of state power, it also establishes that some fines may be
8 unconstitutional. In finding that the Eighth Amendment does not in all
9 circumstances prohibit execution as a sanction, the Supreme Court has repeatedly
10 articulated the qualification that, in order to avoid the ban on cruel and unusual
11 punishment, the penalty must serve some penological end that could not be
12 otherwise accomplished. In Mr. Jones’s case, it does not.

13 The primary concern of the Eighth Amendment is excessive punishment.
14 *See, e.g., O’Neill v. Vermont*, 144 U.S. 323, 340, 12 S. Ct. 693, 36 L. Ed. 450
15 (1892) (“The whole inhibition is against that which is excessive, either in the bail
16 required, or fine imposed, or punishment inflicted.”). Moreover, “[a] penalty must
17 accord with ‘the dignity of man,’ which is ‘the basic concept underlying the Eighth
18 Amendment.’ (Citation omitted.) This means, at least, that the punishment not be
19 ‘excessive.’” *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S. Ct. 2909, 2929-30, 49 L.
20 Ed. 2d 859 (1976) (plurality opinion).

21 In the capital context, such excesses may inhere in the infliction of pain and
22 suffering of such extremity that civilized people cannot tolerate them. *See, e.g.,*
23 *Furman v. Georgia*, 408 U.S. 238, 332, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972)
24 (Marshall, J., concurring). Punishment similarly offends the Eighth Amendment
25 when it is inflicted in excess of what is necessary to achieve legitimate penological
26 goals. *See, e.g., Gregg*, 428 U.S. at 183 (“the sanction imposed cannot be so
27 totally without penological justification that it results in the gratuitous infliction of
28 suffering”) (citing *Wilkerson v. Utah*, 99 U.S. 130, 135-36, 25 L. Ed. 345 (1878),

1 *In re Kemmler*, 136 U.S. 436, 436, 10 S. Ct. 930, 34 L. Ed. 519 (1890)); *Furman*,
2 408 U.S. at 280 (Brennan, J., concurring) (punishment is excessive within
3 meaning of Punishments Clause if it “serves no penal purpose more effectively
4 than a less severe punishment”); *Furman*, 408 U.S. at 312 (White, J., concurring)
5 (finding that when death penalty ceases realistically to further social ends it was
6 enacted to serve, it violates the Eighth Amendment, results in “pointless and
7 needless extinction of life with only marginal contributions to any discernible
8 social or public purposes,” and is “patently excessive and cruel and unusual
9 punishment violative of the Eight Amendment”). As set forth above, the
10 administration of capital punishment in California has evolved to make impossible
11 the timely resolution of capital cases, retarding execution of sentence so extremely
12 that long-delayed or never carried out executions frustrate rather than further the
13 social ends they are required to serve. This state of affairs renders Mr. Jones’s
14 death sentence a violation of the Eighth Amendment.

15 **B. Specific Penological Justifications for Execution**

16 The Court has stated that the imposition of the death penalty, in order to be
17 constitutional, must further the penological goals of “retribution and deterrence of
18 capital crimes by prospective offenders.” *Gregg*, 428 U.S. at 183; *see also Roper*
19 *v. Simmons*, 543 U.S. 551, 571, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (“We have
20 held that there are two distinct social purposes served by the death penalty:
21 retribution and deterrence of capital crimes by prospective offenders.”) (internal
22 quotes omitted); *Kennedy v. Louisiana*, 554 U.S. 407, 441, 128 S. Ct. 2641, 171 L.
23 Ed. 2d 525 (2008) (“capital punishment is excessive when it is grossly out of
24 proportion to the crime or it does not fulfill the two distinct social purposes served
25 by the death penalty: retribution and deterrence of capital crimes.”); *Atkins v.*
26 *Virginia*, 536 U.S. 304, 318-19, 122 S. Ct. 2242, 153 L. Ed. 2d 345 (2002) (unless
27 execution of intellectually disabled defendants measurably contributes to
28 retribution or deterrence of prospective offenders, “it ‘is nothing more than the

1 purposeless and needless imposition of pain and suffering’ and hence an
2 unconstitutional punishment”) (quoting *Enmund v. Florida*, 458 U.S. 782, 798,
3 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982)).¹³ To pass constitutional muster the
4 penalty must advance these goals significantly or measurably; failure to satisfy
5 either ground may suffice to render it unconstitutional. *See Roper*, 543 U.S. at 571
6 (finding execution violative of Eighth Amendment where “it is unclear whether
7 the death penalty has a significant or even measurable deterrent effect on
8 juveniles”); *Atkins*, 536 U.S. at 318 (condemning execution as unconstitutional
9 punishment unless it “measurably contributes” to one or both of the “recognized”
10 goals of capital punishment); *Coker v. Georgia*, 433 U.S. 584, 592, 97 S. Ct. 2861,
11 53 L. Ed. 2d 982 (1977) (punishment is excessive if it makes no measurable
12 contribution to acceptable goals of punishment – retribution and deterrence – and
13 “might fail the test on either ground”). Because of the passage of time, Mr.
14 Jones’s execution, should it ever occur, will contribute to neither goal.
15 Consequently his sentence violates the Eighth Amendment.

16 **1. Retribution**

17 The *Gregg* Court cited earlier precedent establishing that “[r]etribution is no
18 longer the dominant objective of the criminal law,” *Williams v. New York*, 337 U.S.
19 241, 248, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949), but found retribution to be
20 neither a “forbidden objective” in criminal sentencing, “nor one inconsistent with
21 our respect for the dignity of men,” *Gregg*, 428 U.S. at 183. Regardless of its
22 status in criminal punishment generally, the Court subsequently identified

23
24 ¹³ Various members of the Court have occasionally discussed other possible
25 social benefits of execution, such as the prevention of repetitive criminal acts,
26 encouragement of guilty pleas and confessions, eugenics, and economy. Some of
27 these goals are manifestly unconstitutional. *See, e.g., Furman*, 408 U.S. at 342,
28 355-56 (Marshall, J., concurring). None has ever been found sufficient to justify
the sanction of death.

1 retribution as “the primary rationale for imposing the death penalty.” *Spaziano v.*
2 *Florida*, 468 U.S. 447, 461, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984).

3 The Supreme Court regularly describes retribution as justification for
4 execution in terms of social morality: “In part, capital punishment is an expression
5 of society’s moral outrage at particularly offensive conduct.” *Gregg* at 183. The
6 need to express such outrage is said to be primal: “The instinct for retribution is
7 part of the nature of man, and channeling that instinct in the administration of
8 criminal justice serves an important purpose in promoting the stability of a society
9 governed by law.” *Furman* at 308 (Stewart, J., concurring). Extreme punishment
10 that fails to fulfill the appropriately retributive purpose of giving voice to the
11 moral outrage of the community, however, may devolve into primitive expressions
12 of rage, vengeance, and retaliation forbidden by the Eighth Amendment. “The
13 ‘cruel and unusual’ language limits the avenues through which vengeance can be
14 channeled. Were this not so, the language would be empty and a return to the rack
15 and other tortures would be possible in a given case.” *Furman*, 408 U.S. at 345
16 (Marshall, J., concurring).

17 Although *Furman* and *Gregg* concerned “capital punishment,” the specific
18 element of capital punishment under consideration in these cases was execution
19 per se, *i.e.*, the question of whether the Eight Amendment forbade execution
20 imposed pursuant to existing state statutes under any circumstances. As set forth
21 above, however, the rubric “capital punishment” encompasses considerably more
22 than execution – as practiced in California, it entails lengthy incarceration under
23 threat of execution, sometimes, though seldom, followed by execution. The Court
24 did not address the constitutionality of the entire system of capital punishment in
25 *Furman* or *Gregg*, and questions relating to eligibility criteria, methods of
26 execution, and the effect of protracted incarceration on the continued
27 constitutional legitimacy of a given execution remain matters governed by the
28 same clearly established Eighth Amendment strictures on the imposition of cruel

1 and unusual punishment that governed the results in *Furman* and *Gregg*.

2 The “evolving standards of decency that mark the progress of a maturing
3 society” from which the Eighth Amendment derives its meaning, *Trop v. Dulles*,
4 356 U.S. 86, 101, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958), encompass society’s
5 considerable interest in ensuring that no human be executed in violation of the
6 law. The California Supreme Court has acknowledged that the state’s process of
7 postconviction review is in place to protect California’s state interest in
8 safeguarding the rights of capital defendants by ensuring compliance with the
9 Constitution and the correctness of procedures resulting in sentences of death as
10 set forth in California Government Code section 68662. *See In re Morgan*, 50 Cal.
11 4th 932, 941 n.7, 237 P.3d 993 (2010). Limitations on resources for the judicial
12 review essential to the integrity of our system of capital punishment so lengthen
13 the interval between the retributive impulse underlying the jury’s initial expression
14 of moral outrage and the final execution of sentence as to deprive that execution of
15 its retributive character. Given current delays, an execution may not be carried out
16 by the same generation of citizens that recommended the sentence, and may be
17 carried out on a very different person than the one once adjudged to warrant it.

18 The degenerative effect of time on whatever retributive character an
19 execution may have is so widely acknowledged and uncontroversial as to be
20 axiomatic, as reflected in the often-uttered maxim “justice delayed is justice
21 denied.” *See Coleman v. Balkcom*, 451 U.S. 949, 960, 101 S. Ct. 2994, 68 L. Ed.
22 2d 334 (1981) (Rehnquist, C.J., dissenting from denial of certiorari) (“There can
23 be little doubt that delay in the enforcement of capital punishment frustrates the
24 purpose of retribution.”); Alex Kozinski & Sean Gallagher, *Death: The Ultimate*
25 *Run-On Sentence*, 46 Case W. Res. L. Rev. 1, 4 (1995) (“Whatever purposes the
26 death penalty is said to serve – deterrence, retribution, assuaging the pain suffered
27 by victims’ families – these purposes are not served by the system as it now
28 operates.”); *Johnson v. Bredesen*, 558 U.S. 1067, 1069, 130 S. Ct. 541, 175 L. Ed.

1 2d 552 (2009) (Stephens, J., and Breyer, J., respecting the denial of certiorari)
2 (“the penological justifications for the death penalty diminish as the delay
3 lengthens”); Lewis Powell, *Capital Punishment*, 102 Harv. L. Rev. 1035, 1041
4 (1989) (“The retributive value of the penalty is diminished as imposition of
5 sentence becomes ever further removed from the time of the offense.”).

6 Beyond failing to “significantly” or “measurably” further the recognized
7 goals of capital punishment as the cases require, execution following protracted
8 incarceration may affirmatively undermine them. *See, e.g., People v. Simms*, 736
9 N.E.2d 1092, 1144 (Ill. 2000) (Harrison, J., dissenting) (“Retribution and
10 deterrence, the two principal social purposes of capital punishment, carry less and
11 less force” after substantial delay); Judge Arthur L. Alarcón, *Remedies for*
12 *California’s Death Row Deadlock*, 80 S. Cal. L. Rev. 697, 709 (2007) (“Inordinate
13 delays . . . undermine the stated purposes of having the death penalty, namely
14 retribution and deterrence.”); Carol S. Steiker & Jordan M. Steiker, *Entrenchment*
15 *and/or Stabilization: Reflections on (Another) Two Decades of Constitutional*
16 *Regulation of Capital Punishment*, 30 Law And Inequality 211, 230-31 (2012)
17 (“Deterrence is attenuated when it is widely understood that an execution will not
18 occur until many years after sentence, if at all. Moreover, the retributive value of
19 executions is diminished when the person executed has lived a ‘second lifetime’
20 on death row.”). Thus, Mr. Jones’s execution will not fulfill the purposes the
21 Supreme Court has declared essential for capital punishment to be constitutional –
22 it will, rather, subvert them.

23 **2. Deterrence**

24 The *Gregg* Court stated that, as of the time of its decision in 1976, evidence
25 relating to the deterrent effect of execution was equivocal. “Statistical attempts to
26 evaluate the worth of the death penalty as a deterrent to crimes by potential
27 offenders have occasioned a great deal of debate. The results simply have been
28 inconclusive.” *Gregg*, 428 U.S. at 184-85. Justice Brennan noted in his *Furman*

1 concurrence that proponents of the view that capital punishment deterred potential
2 offenders, “necessarily admit that its validity depends upon the existence of a
3 system in which the punishment of death is invariably and swiftly imposed.”
4 *Furman*, 408 U.S. at 302 (Brennan, J., concurring). Justice Marshall similarly
5 observed that, “[f]or capital punishment to deter anybody it . . . must . . . follow
6 swiftly upon completion of the offense.” *Id.* at 354 n.124 (Marshall, J.,
7 concurring). Whatever deterrent effect an execution may have, an execution that
8 is never carried out can have none.

9 In the period between Mr. Jones’s arrest and the time of this filing, ninety-
10 two men have died on California’s death row. Of that number, twelve were
11 executed at San Quentin; fifty-seven died of natural causes; fifteen are known to
12 have died of suicide; of the remaining eight, six died of various other causes and
13 the cause of death remains unresolved for two. Ex. 13 at 627-29. Even attributing
14 some deterrent effect to the executions carried out at San Quentin, eighty of the
15 ninety-two deaths since Mr. Jones’s arrival there were categorically incapable of
16 furthering any such effect because those prisoners were not executed. Statistically,
17 there is a roughly one-in-nine chance that a California death sentence might
18 further the goal of deterrence – a disparity that will increase as the death row
19 population ages and the process of developing an execution protocol in
20 compliance with the law continues. A one-in-nine chance of execution is too small
21 a percentage to render execution a meaningful deterrent or a constitutional
22 punishment. *See Gomez v. Fierro*, 519 U.S. 918, 117 S. Ct. 285, 136 L. Ed. 2d 204
23 (1996) (Stevens, J., dissenting) (noting that delay in the execution of death
24 judgments “frustrates the public interest in deterrence and eviscerates the only
25 rational justification for that type of punishment”).

26 An assessment of contemporary values concerning the infliction of a
27 challenged sanction is relevant to the application of the Eighth Amendment, and
28 “does not call for a subjective judgment. It requires, rather, that we look at

1 objective indicia that reflect the public attitude toward a given sanction.” *Gregg*,
2 428 U.S. at 173. Public attitudes toward capital punishment have been monitored
3 for decades. Public endorsement of deterrence as a justification for executions
4 was dominant in the 1950s, and remained widespread through the 1970s. Radelet
5 & Lacock, *Recent Developments: Do Executions Lower Homicide Rates?: The*
6 *Views of Leading Criminologists*, 99 J. Crim. L. & Criminology 489, 492 (2009).
7 The proportion of Gallup Poll respondents holding the view that the death penalty
8 acts as a deterrent to the commission of further murders has fallen steadily from
9 62% of respondents in 1985, to 61% in 1986, to 51% in 1991, to 35% in 2004, to
10 34% in 2006, to 32% in 2011, the last year for which there are available data.¹⁴ A
11 1995 survey of nearly 400 police chiefs and county sheriffs found that two-thirds
12 of them did not believe the death penalty significantly lowered the number of
13 murders. Radelet & Lacock, *Recent Development*, 99 J. Crim. L. & Criminology
14 at 492.

15 Although much of the concern underlying the *Furman* Court’s invalidation
16 of capital punishment stemmed from the arbitrary manner in which the sanction
17 was imposed, Justice White’s observations about the manner in which death
18 sentences were dispensed is equally applicable to the manner in which they are
19 now executed in California:

20 [I]t is difficult to prove as a general proposition that capital
21 punishment, however administered, more effectively serves the ends
22 of the criminal law than does imprisonment. But however that may
23 be, I cannot avoid the conclusion that as the statutes before us are
24 now administered, the penalty is so infrequently imposed that the

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26
27 ¹⁴ <http://www.gallup.com/poll/1606/death-penalty.aspx> (last visited June 8,
28 2014).

1 threat of execution is too attenuated to be of substantial service to
2 criminal justice.

3 *Furman*, 408 U.S. at 313 (White, J., concurring). Mr. Jones's execution will
4 amount to "the pointless and needless extinction of life with only marginal
5 contributions to any discernible social or public purpose" unless it realistically
6 furthers the goals of retribution or deterrence. It therefore constitutes "a penalty
7 with such negligible returns to the State" as to be "patently excessive and cruel
8 and unusual punishment violative of the Eighth Amendment." *Id.* at 312; *see also*
9 *Thompson v. McNeil*, 129 S. Ct. 1299, 129 S. Ct. 1299 (2009) (statement of Justice
10 Stevens respecting the denial of the petition for writ of certiorari); *Knight v.*
11 *Florida*, 528 U.S. 990, 120 S. Ct. 459, 145 L. Ed. 2d 370 (1999) (Breyer, J.,
12 dissenting from denial of certiorari); *Elledge v. Florida*, 525 US 944, 119 S. Ct.
13 366, 142 L. Ed. 2d 303 (1998) (Breyer, J., dissenting from denial of certiorari);
14 *Lackey v. Texas*, 514 U.S. 1045, 1047, 115 S. Ct. 1421, 131 L. Ed. 2d 304 (1995)
15 (Stevens, J., joined by Breyer, J., respecting the denial of certiorari); *Ceja v.*
16 *Stewart*, 134 F.3d 1368 (9th Cir. 1998) (Fletcher, J., dissenting from order denying
17 stay of execution).

18
19 **III. THE CONDITIONS OF CONFINEMENT TO WHICH MR.**
20 **JONES IS SUBJECTED WHILE AWAITING THE EXECUTION OF**
21 **HIS SENTENCE, AS WELL AS THE UNCERTAINTIES**
22 **SURROUNDING HIS EXECUTION, CONSTITUTE TORTURE IN**
23 **VIOLATION OF THE EIGHTH AMENDMENT.**

24 As set forth above, Mr. Jones's confinement under sentence of death for
25 what has already been over nineteen years, and what is certain to be at least
26 several more years before his execution can take place, constitutes cruel and
27 unusual punishment and violates his rights to due process and equal protection of
28 the law under the federal and state Constitutions. Because California state

1 appellate and postconviction processes fail entirely to provide Mr. Jones with full,
2 fair, and timely review of his convictions and sentence, Mr. Jones has been
3 subjected for an unconscionable period of time to severely dehumanizing and
4 brutal physical and psychological conditions of confinement, as well as to
5 uncertainty regarding whether, when, and how he will be executed. The
6 combination of the inhumane conditions of confinement and the psychological
7 duress imposed by the state's failure to establish procedures that limit the
8 uncertainty of the sentence to which Mr. Jones will be exposed exact torturous
9 physical and psychological tolls upon Mr. Jones that render his continued
10 confinement on death row, as well as his future execution, in violation of the
11 Eighth Amendment.

12 **A. The Conditions of Confinement on California's Death Row Are**
13 **Physically and Psychologically Torturous.**

14 **1. Physical Conditions on East Block.**

15 "Conditions of confinement . . . constitute[] cruel and unusual punishment
16 [where] they result[] in unquestioned and serious deprivation of basic human
17 needs." *Rhodes v. Chapman*, 452 U.S. 337, 347, 101 S. Ct. 2392, 69 L. Ed. 2d 59
18 (1981). Overcrowding, deprivation of nutrition, and denial of basic needs can
19 constitute an Eighth Amendment violation. *Hutto v. Finney*, 437 U.S. 678, 98 S.
20 Ct. 2565, 57 L. Ed. 2d 522 (1978) (holding that indeterminate confinement in
21 isolation cells, in which between four and eleven inmates were crowded into small
22 windowless cells containing no furniture and fed less than 1000 calories a day,
23 constituted cruel and unusual punishment). Deliberate indifference to an inmate's
24 medical and mental health needs also constitutes cruel and unusual punishment
25 under the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 103, 97 S. Ct. 285,
26 50 L. Ed. 2d 251 (1976).

27 The physical and psychological conditions of Mr. Jones's lengthy
28 confinement have been so dehumanizing, brutal, and severe as to constitute

1 torture. The physical conditions under which Mr. Jones has been confined are
2 deplorable and inhumane, and have required long-term judicial intervention and
3 oversight. *See, e.g., Thompson v. Enomoto*, 815 F.2d 1323 (9th Cir. 1987)
4 (alleging conditions and treatment on death row violated the Eighth and
5 Fourteenth Amendments); *Toussaint v. McCarthy*, 597 F. Supp. 1388 (N.D. Cal.
6 1984), *aff'd in part, rev'd in part*, 801 F.2d 1080 (9th Cir. 1986) (holding that
7 conditions of confinement in San Quentin, where Mr. Jones is and was housed,
8 were unconstitutional in many respects); *Lancaster v. Tilton*, No. C 79-01630
9 WHA, 2008 WL 449844 (N.D. Cal. Feb. 15, 2008) (continuation of *Thompson*
10 litigation).

11 For the past more than nineteen years, Mr. Jones has been housed at San
12 Quentin State Prison with several hundred other condemned inmates in a section
13 of the prison called East Block, “a looming warehouse-like structure constructed
14 in 1930,” that is the length of two football fields, forty yards wide, and six stories
15 high. *Lancaster v. Tilton*, No. C 79-01630 WHA, 2008 WL 449844 at *5 (N.D.
16 Cal. Feb. 15, 2008). Five of the tiers have two sides, and each side contains
17 approximately 54 cells, making approximately 250 cells per side, and 500 cells in
18 the block. *Id.* Mr. Jones’s cell is windowless, six feet wide by eight feet long, and
19 has three concrete walls. The cell front is constructed of bars fitted with metal
20 grating. *See Toussaint v. McCarthy*, 597 F. Supp. 1388, 1394-95 (N.D. Cal. 1984),
21 *aff'd in part, rev'd in part*, 801 F.2d 1080 (9th Cir. 1986).

22 East Block is a “crumbling, leaky maze of a place . . . echoing with the
23 incessant chatter and shrieking cacophony of prison.” Ex. 2 at 200. During Mr.
24 Jones’s tenure on death row, living conditions there have been found so
25 substandard, unhealthy, and inhumane, and the medical care determined to be so
26 deficient and below minimally acceptable constitutional standards – both on death
27 row and in other relevant areas of San Quentin – that lawsuits and the long-term
28 intervention and oversight of the courts have been required. *See, e.g., Plata v.*

1 *Brown*, Case No. C-01-1351 TEH (N.D. Cal.) (finding prison medical care,
2 including that on death row, to be deficient); *Coleman v. Wilson*, 912 F. Supp.
3 1282 (E.D. Cal. 1995) (concerning deficiencies in prison mental health care);
4 *Thompson v. Enomoto*, 815 F.2d 1323 (alleging conditions and treatment on death
5 row violate Eighth and Fourteenth Amendments); *Toussaint*, 597 F. Supp. 1388
6 (describing conditions in East Block); *Lancaster*, 2008 WL 449844 (continuation
7 of *Thompson* litigation).

8 East Block is “in significant disrepair in ways that make maintaining proper
9 sanitation in the unit, and consequently in prisoners’ cells, extremely difficult, if
10 not impossible.” Ex. 3 at ¶¶ 18. Disease vectors such as rodents, birds, and other
11 vermin have posed significant hazards to the health and safety of those housed and
12 employed in East Block. Bird droppings are caked on the tiers, gun rails, floors,
13 gurneys used for medical purposes, laundry carts, containers holding prisoners’
14 shaving razors, and lockers. Ex. 3 at ¶¶ 85-87; *see also* Ex. 3 at 249-50, 261-62,
15 270-73, 277; *Lancaster*, 2008 WL 449844, *24. Birds nest, fly, and ambulate
16 around East Block, settling on prisoners’ food trays. Disease transmission risk is
17 extremely high as a consequence of physical contact with bird feces, inhalation of
18 aerosolized feces, and through ingestion of feces that have contaminated food. Ex.
19 3 at ¶¶ 85-96; *Lancaster*, 2008 WL 449844, *24-25. Cockroaches, ants, spiders,
20 mice, worms, and other vermin are common in East Block; drain flies in larval
21 stages are found in the showers. Ex. 3 at ¶¶ 97-102.

22 Water pooling in the East Block showers and spilling out onto the tier, in
23 addition to the unsanitary condition of the showers themselves, pose serious risks
24 to health and safety. Ex. 3 at ¶¶ 19-24; *see also* Ex. 3 at 258-59, 264-65, 267-69.
25 The bars on the tiers in front of the showers (which are located in the middle of
26 each tier) are corroded and degraded from cascading shower water. Ex. 3 at ¶¶ 20,
27 31. “Mold and mildew populate the tier bars, floors, and ceilings in front of the
28 showers. Congealed strands of muck and slime, composed of soap scum, hair, and

1 bodily detritus dangle from the tier bars and ceilings. . . . It is readily apparent that
2 these strands, like stalactites, have formed over a long period of time as water
3 carrying shower debris has flowed over them. These slime stalactites are perfect
4 breeding grounds for mold and bacteria.” Ex. 3 at ¶ 20. Water from the upper
5 tiers falls “as if it were a light rain of scummy, filthy water” and dirty water from
6 the showers flows onto each tier before cascading to the tiers below. Ex. 3 at ¶ 19.
7 Disease is spread by the falling and standing water and by mist which forms as the
8 cascading water aerosolizes. This falling water poses a danger of electrocution as
9 it streams over light switches. Ex. 3 at ¶¶ 22-25.

10 In addition to the filth and disease generated by the birds, insects, and other
11 vermin, and by the pooled, falling, and aerosolized water, East Block is full of
12 debris and garbage that falls from the tiers above the second tier where Mr. Jones
13 is housed. Ex. 3 at ¶ 26; *see also* Ex. 3 at 257, 260, 262, 270-71, 275-76. Areas in
14 and around individual cells are grotesquely unsanitary and pose health hazards due
15 to toilet paper shortages; bedding in disrepair; the accumulation of dust in vents;
16 dirt and grime in areas the prisoners cannot reach to clean, or that are so degraded
17 that they cannot be made clean; pooling water; and water leaks in the plumbing in
18 and behind individual cells. Ex. 3 at ¶¶ 29-33; *see also* Ex. 3 at 250-56, 265-66,
19 275-76.

20 2. Isolation

21 The amount of time Mr. Jones is permitted to be outside his cell is extremely
22 limited, and when he is transported, he is handcuffed behind his back and escorted
23 by guards. East Block prisoners are confined to their cells and are allowed out of
24 their cells only to shower, go to the exercise yard and medical appointments,
25 attend visits and classification committee meetings, and for limited religious or
26 educational programs. There is no communal space in which prisoners may
27 interact other than the recreation yard. Ex. 4 at 308-09. Mr. Jones’s “yard time is
28 often shortened to two hours per day because of various delays, and it is frequently

1 not offered . . . for weeks at a time.” Ex. 4 at 308. “[U]p to 80 prisoners are
2 released at a time to share a single yard that is roughly 60 feet by 80 feet, about the
3 size of a basketball court. Little to no exercise equipment is available, and the
4 space is so uncomfortable and crowded that prisoners frequently decline recreation
5 time.” Ex. 4 at 309. Medical treatment and educational programs are limited by
6 the state’s resources and its willingness to supply such opportunities and
7 treatment. Ex. 4 at 307-13.

8 Mr. Jones’s contact with family members and friends is strictly limited.
9 Non-legal visits are limited to three days a week, Thursdays, Saturdays, and
10 Sundays. Condemned prisoners, unlike other prisoners, are not permitted private
11 family or conjugal visits and instead must conduct visits in the public visiting
12 room. Condemned prisoners are not permitted to demonstrate physical affection
13 toward their loved ones during visits other than a “brief kiss and/or hug at the
14 beginning and end of visit.”¹⁵ Mr. Jones, like other prisoners in his privilege
15 group, Grade A, is allowed two 15-minute telephone calls each week, but because
16 these calls are collect and expensive, it is difficult for Mr. Jones to utilize these
17 calls. Ex. 4 at 310.

18 **3. Deficiencies in Medical and Psychiatric Treatment**

19 The conditions on California’s death row have exacerbated Mr. Jones’s
20 mental health impairments that are set forth in the Amended Petition. Ex. 4 at 312
21 (noting that “death row only exacerbates [mental health] problems because of the
22 ‘lack of socialization’ and the ‘stress of not knowing when they’ll be executed.’”);
23 *see also* Terry A. Kupers, *Trauma and its Sequelae in Male Prisoners: Effects of*
24 *Confinement, Overcrowding, and Diminished Services*, 66 Am. J. Orthopsychiatry
25 189, 191 (1996) (noting that “[p]risoners with a history of mental disorder or a

26 _____
27 ¹⁵ <http://www.cdcr.ca.gov/Visitors/docs/InmateVisitingGuidelines.pdf> (last
28 visited June 8, 2014).

1 tendency to become emotionally incapacitated by stress have an especially hard
2 time”). Mental health treatment provided to Mr. Jones and others on California’s
3 death row is inadequate. *Brown v. Plata*, ___ U.S. ___, 131 S. Ct. 1910, 179 L. Ed.
4 2d 969 (2011) (finding prison medical care and mental health care, including that
5 provided to death row inmates, so deficient as to violate the Eighth Amendment);
6 *Coleman v. Wilson*, 912 F. Supp. 1282 (E.D. Cal. 1995) (finding inadequate
7 screening, understaffing, delays in access to care, deficiencies in medication
8 management and involuntary medication, and inadequacy of medical records at
9 California prisons, including San Quentin, where Mr. Jones is confined); *see also*
10 Ex. 4 at 312-13 (reporting that group therapy is conducted with prisoners seated
11 inside cramped individual “treatment cages” that are lined up in a room; that
12 prisoners are not eligible for transfer to medical facilities for specialized mental
13 health care; and that mental health treatment providers reveal confidential
14 information to correctional officers).

15 **4. Long Periods of Confinement Under These Conditions Constitute**
16 **Debilitating Psychological Torture**

17 Punishments that result in extreme mental or psychological distress can
18 violate the Eighth Amendment. *Trop v. Dulles*, 356 U.S. 86, 101-02, 78 S. Ct.
19 5902, L. Ed. 2d 630 (1958) (holding that denationalization as punishment is barred
20 by the Eighth Amendment and “is offensive to cardinal principles for which the
21 Constitution stands” because, although no physical mistreatment is implicated,
22 “[i]t subjects the individual to a fate of ever-increasing fear and distress”).
23 Confinement in jail or prison even under sentences less than death is documented
24 to take a serious physical and psychological toll on prisoners. *See, e.g.,* Craig
25 Haney & Philip Zimbardo, *The Past and Future of U.S. Prison Policy: Twenty-*
26 *Five Years After the Stanford Prison Experiment*, 33 Am. Psychologist 709, 719
27 (1998) (“The pains [of even limited periods of incarceration] [are] as much
28 psychological – feelings of powerlessness, degradation, frustration, and emotional

1 distress – as physical – sleep deprivation, poor diet, and unhealthy living
2 conditions.”); Terry A. Kupers, *Trauma and its Sequelae*, at 194 (reporting “the
3 immensity of the problem of stress response syndromes behind bars”).

4 The ordeals of the condemned are inherent and inevitable in any
5 system that informs the condemned person of his sentence and
6 provides for a gap between sentence and execution. Whatever one
7 believes about the cruelty of the death penalty itself, this violence
8 done the prisoner’s mind must afflict the conscience of enlightened
9 government and give the civilized heart no rest.

10 *District Attorney v. Watson*, 411 N.E.2d 1274, 1290 (Mass. 1980) (Liacos, J.,
11 concurring). Clifton Duffy, a former warden of San Quentin, in a book published
12 in 1962 about his experiences at San Quentin, observed: “One night on death row
13 is too long, and the length of time spent there by [many of the prisoners]
14 constitutes cruelty that defies the imagination. It has always been a source of
15 wonder to me that they didn’t all go stark, raving mad.” Clinton T. Duffy, *Eighty-*
16 *Eight Men and Two Women* 254 (1962).

17 The United States Supreme Court, the California Supreme Court, and other
18 federal and state courts have recognized that long periods of confinement under
19 sentence of death can be torturous. *See, e.g., In re Medley*, 134 U.S. 160, 172, 10
20 S. Ct. 384, 33 L. Ed. 835 (1890) (describing the period between the sentence of
21 death and the execution – in that case a mere four weeks – as engendering
22 “immense mental anxiety”); *People v. Anderson*, 6 Cal. 3d 628, 649 (1972),
23 *superseded by constitutional amendment as stated in People v. Hill*, 3 Cal. 4th
24 959, 1015 (1992) (“The cruelty of capital punishment lies not only in the
25 execution itself and the pain incident thereto, but also in the dehumanizing effects
26 of the lengthy imprisonment prior to execution during which judicial and
27 administrative procedures essential to due process of law are carried out.
28 Penologists and medical experts agree that the process of carrying out a verdict of

1 death is often so degrading and brutalizing to the human spirit as to constitute
2 psychological torture.”); *People v. Chessman*, 52 Cal. 2d 467, 499 (1979),
3 *overruled in part on other grounds by People v. Morse*, 60 Cal. 2d 631 (1964) (“It
4 is, of course, in fact unusual that a man should be detained for more than 11 years
5 pending execution of a sentence of death and we have no doubt that mental
6 suffering attends such detention.”); *see also Coleman v. Balkcom*, 451 U.S. 949,
7 952, 101 S. Ct. 2031, 68 L. Ed. 2d 334 (1981) (Stevens, J., concurring in denial of
8 certiorari) (recognizing that mental pain condemned prisoners suffer is “a
9 significant form of punishment” that “may well be comparable to the
10 consequences of the ultimate step itself”); *Furman v. Georgia*, 408 U.S. 238, 288,
11 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (Brennan, J., concurring) (commenting
12 that “mental pain is an inseparable part of our practice of punishing criminals by
13 death, for the prospect of pending execution exacts a frightful toll during the
14 inevitable long wait between the imposition of sentence and the actual infliction of
15 death”); *District Attorney v. Watson*, 411 N.E.2d at 1290 (Liacos, J., concurring)
16 (equating mental stress suffered by death row inmate with psychological torture);
17 *Commonwealth v. O’Neal*, 339 N.E.2d 676, 680 (Mass. 1975) (Tauro, J.,
18 concurring) (noting that “[t]he convicted felon suffers extreme anguish in
19 anticipation of the extinction of his existence”).

20 On California’s death row, the physical and psychological effects of the
21 torturous conditions to which Mr. Jones is exposed are not simply hypothetical;
22 they are starkly evident from the number of condemned prisoners who have
23 committed suicide while under sentence of death. Since November 1978, when
24 the current death penalty statute was enacted by California voters, of the 107
25 prisoners sentenced to death who have died, 22, or 21%, committed suicide. Ex.
26 13. Two additional condemned prisoners were executed after abandoning their
27 appeals.

28 Since 1979, more California death row inmates have taken their own lives

1 while under sentence of death than have been executed. Fourteen of the 107
2 condemned inmates who have died were executed (13 in California and one in
3 Missouri), as compared to the 22 (or 24, when including the individuals who
4 abandoned litigation challenging their sentences) who committed suicide. Ninety-
5 three condemned inmates have thus died of causes other than execution. Sixty-
6 three of these have died of natural causes. At least five other prisoners on
7 California's death row have died as a result of acts of violence by other prisoners
8 or prison officials. Ex. 13.¹⁶ This brings the total number of condemned inmates
9 who have died other than by execution or natural causes, and whose deaths can be
10 attributed at least in part to conditions of confinement under sentence of death, to
11 29, or 27% of the total California condemned inmate deaths. Ex. 13. Over 31% of
12 the 93 condemned inmate deaths of causes other than execution is attributable to
13 conditions of confinement under sentence of death.

14 As noted above, 21% of the deaths of condemned inmates since 1978 were
15 suicides. Fifty-nine percent of condemned inmate deaths were the result of natural
16 causes. That means that over a third as many California condemned inmates have
17 committed suicide than have died naturally. Moreover, *the suicide rate on*
18 *California's death row is more than 25 times the rate of suicide in the general*
19 *population of California and in the United States general population.* Ex. 15 ¶18
20 & Table 3.

21 Exposure to these inhumane physical and psychological conditions for
22 decades was not a punishment contemplated or authorized by California voters
23 when they enacted the death penalty statute by ballot in 1978, or by the jury when
24 it sentenced Mr. Jones to death in 1995. Mr. Jones has thus been unlawfully
25

26 ¹⁶ The CDCR has identified the cause of the death of another condemned
27 inmate as "Other" and that of two other condemned inmates as "Pending." Ex.
28 13.

1 subjected to punishment separate from and in addition to that authorized by
2 statute, selected by the jury, and imposed by the trial court. *See In re Medley*, 134
3 U.S. at 172 (holding that subjecting the defendant to solitary confinement during
4 the period between the judgment of death and the execution was an impermissible
5 increase in his punishment and violated the ex post facto clause because it was not
6 authorized by the death penalty statute at the time he committed his crime); *In re*
7 *Kemmler*, 136 U.S. 436, 447, 10 S. Ct. 930, 34 L. Ed. 519 (1890) (“Punishments
8 are cruel when they involve torture or a lingering death” or “something more than
9 the mere extinguishment of life”).

10 **B. The Many Uncertainties Inherent in California’s Death Penalty Scheme**
11 **Render Mr. Jones’s Years of Confinement Under Sentence of Death**
12 **Psychologically Torturous.**

13 “[W]hen a prisoner sentenced by a court to death is confined in the
14 penitentiary awaiting the execution of the sentence, one of the most horrible
15 feelings to which he can be subjected during that time is the uncertainty during the
16 whole of it . . . as to the precise time when his execution shall take place.” *In re*
17 *Medley*, 134 U.S. at 172. The effect on Mr. Jones and other condemned inmates
18 caused by the medieval conditions of confinement experienced by those housed at
19 San Quentin, is profoundly heightened by decades of uncertainty. As noted above,
20 the systemic failures of California’s death penalty scheme and state actors
21 implementing that scheme, including the failure to appoint counsel in a timely
22 fashion, engage in fact-finding during state court proceedings, and establish a
23 valid and constitutional method of execution, create psychologically torturous
24 conditions for those sentenced to death.

25 Under Justice Douglas’s and Justice Brennan’s definitions of
26 arbitrariness, life in the shadow of death is almost certainly cruel
27 and unusual. Life in the shadow of death is “irregularly” applied by
28 design. The state does not tell inmates whether they will suffer the

1 specter of execution for five years or thirty. Under Justice White's
2 and Justice Stewart's respective definitions of "arbitrary" and
3 "capricious," life in the shadow of death is cruel and unusual. As
4 the ultimate in-between punishment between life imprisonment and
5 the death penalty, life in the shadow of death puts the death row
6 inmate in purgatory. He cannot be certain when or even whether a
7 death sentence will "in fact [be] imposed," much like he cannot be
8 certain when or whether lightning will strike.

9 Angela Sun, Note, "*Killing Time*" in *the Shadow of Death: Why Systematic*
10 *Preexecution Delays on Death Row are Cruel and Unusual*, 113 Colum. L. Rev.
11 1585, 1620-21 (2013). Furthermore, the years of unpredictability and lack of
12 resolution associated with the methods of execution impose additional significant
13 psychological strain and terror upon Mr. Jones and others confined under sentence
14 of death in California.

15 **1. The Uncertainty of the Duration of Mr. Jones's Confinement Under**
16 **Sentence of Death Prior to Execution or to the Grant of Guilt and/or**
17 **Penalty Relief Renders His Confinement Psychologically Torturous.**

18 The stress associated with not knowing when a prisoner will be executed
19 exacts an immeasurable toll on that prisoner's mental health. *See, e.g.*, Ex. 4 at
20 314. Many courts, in interpreting the reach of statutory aggravating circumstances
21 permitting the imposition of a death sentence where the murder or the
22 circumstances thereof was "cruel," have held that the time period during which the
23 victim was held in fear for his or her life prior to death establishes the aggravating
24 circumstance. *See, e.g., Ex parte Key*, 891 So. 2d 384, 390 (Ala. 2004) (finding
25 the "heinous, atrocious, and cruel" aggravating circumstance was proved, and
26 holding that "[p]sychological torture can be inflicted where the victim is in intense
27 fear and is aware of, but helpless to prevent, impending death. Such torture must
28 have been present for an appreciable lapse of time, sufficient enough to cause

1 prolonged or appreciable suffering.”) (internal citation omitted); *State v. Cropper*,
2 225 P.3d 579, 583 (Ariz. 2010) (en banc) (under Arizona law, a first-degree murder
3 is “cruel” within the meaning of a statutory circumstance where “a victim’s
4 suffering existed *for a significant period of time*,” and approving a jury instruction
5 on this point) (emphasis in original); *State v. Hamlet*, 321 S.E.2d 837, 846 (N.C.
6 1984) (holding that North Carolina’s “especially heinous, atrocious, and cruel”
7 aggravating circumstance is met when a killing “involve[s] infliction of
8 psychological torture by leaving the victim in his last moments aware but helpless
9 to prevent impending death”); *Francois v. State*, 407 So. 2d 885, 890 (Fla. 1981)
10 (holding that “especially heinous, atrocious, or cruel” aggravating circumstance
11 “can be sustained on the basis of mental anguish inflicted on the victims as they
12 waited for their ‘executions’ to be carried out”) (internal citations omitted); *Rivers*
13 *v. State*, 298 S.E.2d 1, 8-9 (Ga. 1982) (finding evidence sufficient to sustain
14 finding that murder was “outrageously and wantonly vile, horrible, and inhuman in
15 that it involved torture to the victim” where victim was taken to a second location
16 and thus “her end did not arrive with little or no forewarning”).

17 **2. The Uncertainty and Years of Lack of Resolution Regarding the**
18 **Method by Which Mr. Jones Will Be Executed, and the Real**
19 **Possibility That the Method Will Result in a Painful Death, Renders**
20 **Mr. Jones’s Confinement Under Sentence of Death Psychologically**
21 **Torturous.**

22 As this Court noted in its order for additional briefing on this claim,
23 California lacks an execution protocol that is valid under state law. *See Morales v.*
24 *Cate*, Nos. 5-6-cv-219-RS-HRL & 5-6-cv-926-RS-HRL, 2012 WL 5878383, at *1-
25 3 (N.D. Cal. Nov. 21, 2012). Although California Penal Code section 3604
26 provides that the punishment of death shall be inflicted by the administration of
27 lethal gas or intravenous lethal injection, the California Department of Corrections
28 and Rehabilitation (CDCR) has no valid regulations in place to implement the

1 statute with regard to either method of execution. *Sims v. Dep't of Corrections and*
2 *Rehabilitation*, 216 Cal. App. 4th 1059, 1083-84, 157 Cal. Rptr. 3d 409 (2013)
3 (noting that the CDCR conceded that it cannot conduct executions by lethal gas
4 without promulgating regulations, which it has not done, and enjoining the CDCR
5 from carrying out lethal injection executions until and unless new regulations
6 governing lethal injection are promulgated in compliance with the state
7 Administrative Procedure Act).

8 As set forth in more detail in the First Amended Petition, California has not
9 conducted executions since January 2006, due to the failure of the CDCR to
10 lawfully promulgate an execution protocol that comports with constitutional
11 requirements. The execution methods used in California in the two decades prior
12 to the de facto moratorium on executions in 2006 were determined by federal
13 courts to violate the Eighth Amendment's prohibition on cruel and unusual
14 punishment. *Fierro v. Gomez*, 865 F. Supp. 1387 (N.D. Cal. 1994) (finding that
15 California's lethal gas method of execution was cruel and unusual in violation of
16 the Eighth Amendment), *vacated on other grounds in Fierro v. Terhune*, 147 F.3d
17 1158 (1998) (holding that current plaintiffs lacked standing); *Morales v. Tilton*,
18 465 F. Supp. 2d 972 (N.D. Cal. 2006) (ruling that California's three-drug lethal
19 injection method of execution violated the cruel and unusual punishment clause of
20 the Eighth Amendment). Although the CDCR, under Governor Brown's direction,
21 announced in April 2012 that it would "begin the process of considering
22 alternative regulatory protocols, including a one-drug protocol, for carrying out
23 the death penalty," Ex. 5 at 373, to date (more than two years later) no alternative
24 regulatory protocols have been published.

25 Mr. Jones, as well as all other prisoners confined to California's death row,
26 thus has been confined under sentence of death for more than eight years without
27 having any idea what method of execution will be imposed upon him in the event
28 that he is actually executed. During that time, and for years prior to that, Mr.

1 Jones has been confined under sentence of death aware that the methods most
2 recently used to execute California prisoners failed to pass constitutional muster –
3 that is, that the pain and suffering inflicted by the administration of lethal gas and
4 lethal injection due to numerous factors inherent in the protocols was significant
5 enough to compel courts to conclude that they were cruel and unusual in violation
6 of the Eighth Amendment. The knowledge that the methods devised to and
7 actually implemented by the state to execute prisoners demonstrated a substantial
8 risk of severe pain (and likely did cause severe pain to those executed by those
9 methods) has and will continue to be a direct and proximate cause of Mr. Jones’s
10 extreme distress, anxiety, and fear regarding an impending execution. Ex. 6 at ¶ 3
11 (former San Quentin warden describing prisoner’s questions about the execution
12 process and psychological need for comprehensive information about the method
13 of execution).

14 Furthermore, Mr. Jones and the other prisoners under sentence of death in
15 California have now suffered for many years and will continue to suffer anxiety
16 and fear due to the continuing uncertainty about what method of execution the
17 state will select. *See, e.g.*, The Capital Punishment Enforcement Act (to be
18 codified as amended at Tenn. Code Ann. § 40-23-114 (May 22, 2014)) (Tennessee
19 capital punishment statute recently amended to provide that if the correctional
20 department commissioner certifies to the governor that “an essential ingredient”
21 for lethal injection executions is unavailable, the mandatory method for carrying
22 out the execution is by electrocution); Ex. 7 (article describing amendment to
23 Tennessee’s death penalty statute); Ex. 8 (article observing that “[f]iring squads,
24 electric chairs and other methods of execution seen as cruel or antiquated could be
25 getting a fresh look after Oklahoma botched a lethal injection”); Ex. 9 (“Prompted
26 by the shortages of available drugs for lethal injections, Wyoming lawmakers are
27 considering changing state law to permit the execution of condemned inmates by
28 firing squad.”).

1 Mr. Jones further is constantly exposed to continuing, realistic fear that
2 whichever method California selects will not comport with constitutional
3 requirements. *See* Mot. for TRO and TRO, *Taylor v. Apothecary Shoppe, LLC.*,
4 No. 14-CV-063-TCK-TLW, (N.D. Ok. Feb. 11 and 12, 2014), ECF Nos. 3 and 8
5 (describing effect that uncertainty about whether drugs to be used in an execution
6 are defective and therefore might cause significant pain and suffering upon
7 administration has on the psychological state of a prisoner facing execution – and
8 issuing temporary restraining order preventing delivery of compounded
9 pentobarbital to department of corrections for use in execution); *see also, e.g.*, Ex.
10 10 (describing botched lethal injection execution of Clayton Lockett in April 2014
11 in which Mr. Lockett convulsed, writhed on the gurney, and spoke after execution
12 personnel had declared him unconscious and in which Mr. Lockett died of a heart
13 attack minutes after the execution was halted); Ex. 8 (“the botched execution [of
14 Clayton Lockett] has raised questions on whether these new protocols could be
15 ruled as cruel and unusual punishment by the court”); Ex. 11 (describing botched
16 execution in January 2014 of Dennis McGuire in Ohio by the novel lethal
17 injection combination of midazolam and hydromorphone during which Mr.
18 McGuire “appeared to gasp and convulse for roughly 10 minutes before he died”).

19 Not least, Mr. Jones also suffers the additional anxiety created by the
20 uncertainty engendered by the state’s inability to devise within the past two years a
21 valid method of execution despite its stated commitment to do so, and the
22 continuing uncertainty regarding the timeframe in which the state will devise an
23 execution protocol and submit it for public comment. These multiple layers of
24 uncertainty and unpredictability significantly increase the psychological torture
25 imposed on Mr. Jones by California’s death penalty scheme.
26
27
28

1 **3. Uncertainty Whether or Not Mr. Jones Will Be Executed by Any**
2 **Execution Method, at Any Time, Renders Mr. Jones’s Confinement**
3 **Under Sentence of Death Intolerable for Both Mr. Jones and the**
4 **State.**

5 As this Court recognized in its April 10, 2014, Order re: Briefing and
6 Settlement Discussions, “in this case, both petitioner and the States must labor
7 under the grave uncertainty of not knowing whether petitioner’s execution will
8 ever, in fact, be carried out.” Order, April 10, 2014, ECF No. 103, at 3-4. As set
9 forth above, only 14 of the 107 condemned inmates who have died since 1978, or
10 13%, have been executed. Eighty-seven percent of inmates sentenced to death
11 between 1978 and the present thus have died from causes other than execution.
12 The odds that Mr. Jones will be executed by any method, taking into account the
13 various factors described above, including (1) the likelihood that he will obtain
14 relief on the merits of his claims; (2) the ongoing litigation in federal court (and
15 possibly state court) which, due to the inordinate delay and unpredictability of the
16 federal and state appellate process, will result in additional years under sentence of
17 death before relief is granted; (3) the statistical probability that he will die of some
18 cause other than execution during those years; and (4) the significant possibility
19 that California will be unable to adopt a constitutional method of execution by
20 which to carry out Mr. Jones’s execution, are extremely low. Mr. Jones’s
21 continued incarceration under sentence of death under these conditions, with the
22 physically and psychologically torturous effects that a death sentence imposes, is
23 thus arbitrarily inflicted and unusually cruel, and his death sentence must be set
24 aside.

1 **IV. MR. JONES’S EXECUTION WOULD VIOLATE THE EQUAL**
2 **PROTECTION CLAUSE BECAUSE CALIFORNIA UNLAWFULLY**
3 **PENALIZES THOSE WHO SEEK REVIEW OF A CAPITAL**
4 **CONVICTION WITH INDEFINITE INCARCERATION AND**
5 **INORDINATE DELAY.**

6 As a result of the egregious dysfunction and delay in reviewing capital
7 convictions in California, Mr. Jones, and all other death-sentenced persons who
8 seek postconviction review, must endure a lengthy, tortuous, and extrajudicially
9 imposed incarceration in exchange for the right of review. Exacting such an
10 extraordinary price on the exercise of this fundamental right is constitutionally
11 intolerable — all the more so because non-capital petitioners who seek to overturn
12 serious convictions and sentences do not face a similar fate. A state process that
13 discriminates so profoundly against those who seek to vindicate constitutional
14 rights violates “the central aim of our entire judicial system — all people charged
15 with crime must, so far as the law is concerned, ‘stand on an equality before the
16 bar of justice in every American court.’” *Griffin v. Illinois*, 351 U.S. 12, 17, 76 S.
17 Ct. 585, 590, 100 L. Ed. 891 (1956) (quoting *Chambers v. Florida*, 309 U.S. 227,
18 241, 60 S. Ct. 472, 479, 84 L. Ed. 716 (1940)).

19 A capital inmate who seeks postconviction review currently faces an
20 average delay of 17.2 years from the time of capital sentencing to the California
21 Supreme Court’s ruling on state habeas corpus claims. Ex. 15 ¶15 (noting that
22 delay between sentencing and disposition of first state habeas corpus petitions
23 resolved between 2008 and 2014 was 17.2 years). During that time, he or she
24 suffers the deprivation of adequate medical and mental health care, unhealthy and
25 inhumane living conditions, and horrifying uncertainties about execution, among
26 other torturous indignities. *See* section III, *supra*. In addition to this heavy toll,
27 the delay — and the failure of the state to afford access to state court processes,
28 factual development, or provide reasoned judicial opinions – fundamentally impair

1 a capital petitioner's ability to adequately develop and present his claims in federal
2 court. See section I, *supra*. As the Ninth Circuit ruled in *Phillips v. Vasquez*, 56
3 F.3d 1030 (9th Cir. 1995):

4 The prejudice inherent in [indeterminate and excessive state court
5 delays in adjudicating habeas claims] is quite evident. For fifteen
6 years, Phillips has been compelled to remain in prison under a
7 possible sentence of death while being denied the opportunity to
8 establish the unconstitutionality of his conviction. In addition,
9 during so long a delay, there is a substantial likelihood that
10 witnesses will die or disappear, memories will fade, and evidence
11 will become unavailable. In short, the opportunity for a fair retrial
12 diminishes as each day passes.

13 *Id.* at 1036.

14 In these ways, the state not only imposes a cruel and unusual punishment on
15 capital petitioners, but also deprives them of access to the courts that is "adequate,
16 effective, and meaningful" in violation of the Fourteenth Amendment and its
17 Equal Protection guarantees. *Bounds v. Smith*, 430 U.S. 817, 822, 97 S. Ct. 1491,
18 52 L. Ed. 2d 72 (1977) (holding that "the state and its officers may not abridge or
19 impair petitioner's right to apply to a federal court for a writ of habeas corpus")
20 (internal quotation omitted). In *Bounds*, the Supreme Court expressly affirmed the
21 constitutional right of access to the courts for habeas corpus petitioners,
22 contrasting that right to discretionary appeals by explaining:

23 [W]e are concerned in large part with original actions seeking new
24 trials, release from confinement, or vindication of fundamental civil
25 rights. Rather than presenting claims that have been passed on by
26 two courts, they frequently raise heretofore unlitigated issues. As
27 this Court has constantly emphasized, habeas corpus and civil rights
28

1 actions are of fundamental importance in our constitutional scheme
2 because they directly protect our most valued rights.

3 *Id.* at 827-28 (internal quotation omitted); *see also Rinaldi v. Yeager*, 384 U.S.
4 305, 310, 86 S. Ct. 1497, 1500, 16 L. Ed. 2d 577 (1966) (holding that “it is now
5 fundamental that, once established, . . . avenues [of appellate review] must be kept
6 free of unreasoned distinctions that can only impede open and equal access to the
7 courts”).¹⁷

8 By imposing indefinite incarceration only on those death row inmates who
9 seek judicial review — those who forgo or abandon challenges to their convictions
10 can escape this fate — the state impermissibly discriminates against capital
11 petitioners for exercising their fundamental rights. *See, e.g., Attorney Gen. of New*
12 *York v. Soto-Lopez*, 476 U.S. 898, 911, 106 S. Ct. 2317, 2325, 90 L. Ed. 2d 899
13 (1986) (holding state law that effectively penalized veterans for exercising
14 fundamental right of interstate migration violated equal protection); *Idaho Coal.*
15 *United for Bears v. Cenarrusa*, 342 F.3d 1073, 1078 (9th Cir. 2003) (holding state
16 initiative process that required some voters to accumulate 18,054 signatures and
17 others only 61 before effectuating right to vote violated equal protection); *cf.*
18 *United States v. Windsor*, ___ U.S. ___, 133 S. Ct. 2675, 2695-96, 186 L. Ed. 2d 808
19 (2013) (holding federal Defense of Marriage Act violates equal protection
20 component of Fifth Amendment due process by imposing a disability on a class of
21 individuals who have taken advantage of the liberty of same-sex marriage afforded

22
23 ¹⁷ As currently implemented in California, the death penalty system also
24 functionally deprives Mr. Jones of his due process right of access to the courts.
25 *See, e.g., Jones v. State*, 740 So. 2d 520 (Fla. 1999) (holding twelve year delay in
26 holding competency hearing while defendant on death row violated due process).
27 In *Jones v. State*, the Florida Supreme Court likened the egregious delay in
28 conducting a competency hearing to the delays in death penalty appeals criticized
as excessive by Justice Breyer in *Elledge v. Florida*, 525 U.S. 944, 119 S. Ct.
366, 142 L. Ed. 2d 303 (1998).

1 by States).

2 The state also discriminates against capital petitioners by imposing heavy
3 burdens of delay on them that non-capital petitioners do not face. Although
4 complete information concerning the state court's resolution of challenges to non-
5 capital judgments is not currently available, a sample of non-capital habeas cases
6 involving convictions for murder or attempted murder reveals an average time of
7 thirty months between the date of sentencing and resolution of state habeas
8 claims.¹⁸ Ex. 15 ¶19. Thus, even with the added layer of appellate review by the
9

10 ¹⁸ See *McCoy v. Holland*, CV 13-3804-RGK DFM, 2014 WL 2094314 (C.D.
11 Cal. Apr. 21, 2014), *report and recommendation adopted*, CV 13-3804-RGK
12 DFM, 2014 WL 2094322 (C.D. Cal. May 20, 2014) (denying federal petition;
13 forty-seven months from sentencing to ruling on state habeas corpus petition;
14 *Lugo v. Miller*, CV 03-2004-CAS CW, 2014 WL 1956659 (C.D. Cal. Feb. 25,
15 2014), *report and recommendation adopted as modified*, CV 03-2004-CAS CW,
16 2014 WL 1957019 (C.D. Cal. May 15, 2014) (granting relief on ineffective
17 assistance of counsel claim; twenty-nine months from sentencing to ruling on
18 state habeas corpus petition); *Garrett v. McDonald*, CV 10-4102-PA SP, 2014 WL
19 696353 (C.D. Cal. Feb. 18, 2014) (denying federal petition; forty months from
20 sentencing to ruling on state habeas corpus petition); *Metzger v. Lopez*, CV 10-
21 8518-PSG SP, 2014 WL 1155416 (C.D. Cal. Feb. 11, 2014) (denying federal
22 petition; approximately three years from sentencing to ruling on state habeas
23 corpus petition); *Escalante v. Grounds*, CV 02-7711 AHM FMO, 2010 WL
24 8731905 (C.D. Cal. 2010), *report and recommendation adopted*, CV 02-7711
25 AHM FMO, 2012 WL 2180602 (C.D. Cal. 2012) (granting relief on *Batson*
26 claim; thirty-five months from sentencing to ruling on state habeas corpus
27 petition); *Griffin v. Harrington*, 915 F. Supp. 2d 1091, 1098 (C.D. Cal. 2012)
28 (granting relief on ineffective assistance of counsel claim; thirty-four months
from sentencing to ruling on state habeas corpus petition); *Blumberg v. Garcia*,
687 F. Supp. 2d 1074, 1077 (C.D. Cal. 2010) (granting relief on *Napue* claim;
seventy-five months from sentencing to ruling on state habeas corpus petition);
Lujan v. Garcia, CV 04-1127-MMM (RCF), 2008 WL 7674923 (C.D. Cal. Sept.
15, 2008), *report and recommendation adopted as modified*, CV 04-01127 MMM
(RCF), 2010 WL 1266422 (C.D. Cal. Mar. 30, 2010) (granting relief on *Miranda*
violation; thirty-eight months from sentencing to ruling on state habeas corpus
petition); *Lisker v. Knowles*, 651 F. Supp. 2d 1097, 1102 (C.D. Cal. 2009)

continued...

1 California Courts of Appeal, a defendant challenging a non-capital judgment
2 completes the state review process almost fourteen years before a capital
3 defendant does so. A system of state review that discriminates so profoundly
4 against capital petitioners is indefensible. As the Court ruled in *Romer v. Evans*,
5 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996), the effective
6 “disqualification of a class of persons from the right to seek specific protection
7 from the law is unprecedented in [Supreme Court] jurisprudence” and
8 “discriminations of an unusual character especially suggest careful consideration
9 to determine whether they are obnoxious to the constitutional provision.” *Id.* at
10 633 (internal quotation omitted).

11 Though these state actions warrant strict scrutiny under Equal Protection
12 analysis, *see City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S.
13 Ct. 3249, 3254, 87 L. Ed. 2d 313 (1985), California’s system for reviewing capital
14 convictions does not even pass a more deferential standard, as there is no
15 legitimate government interest supporting the state’s process. Indeed, as this
16 Court noted, the state process runs *counter* to state interests because “the State has
17 a strong interest in expeditiously exercising its sovereign power to enforce the
18 criminal law.” Order Re: Briefing and Settlement Discussions, filed April 10,

19 _____
20
21 (granting relief on ineffective assistance of counsel claim; nine months from
22 sentencing to ruling on state habeas corpus petition); *Roman v. Hedgpeth*, EDCV
23 04-1226JFW (FMO), 2008 WL 4553137 (C.D. Cal. June 30, 2008), *report and*
24 *recommendation adopted as modified*, EDCV 04-1226JFW(FMO), 2008 WL
25 4553091 (C.D. Cal. Oct. 8, 2008) (granting relief on juror misconduct claim;
26 twenty-seven months from sentencing to ruling on state habeas corpus petition);
27 *Sherrors v. Scribner*, 05CV1262IEG (LSP), 2007 WL 3276171 (S.D. Cal. Nov. 2,
28 2007) (granting relief on jury instruction issue; fifty-four months from sentencing
to ruling on state habeas corpus petition); *Nunez v. Garcia*, C 98-1345 SI, 2001
WL 940920 (N.D. Cal. Aug. 15, 2001) (granting relief on *Miranda* violation;
fifty-six months from sentencing to ruling on state habeas corpus petition).

1 2014, ECF No. 103 at 2.

2 **CONCLUSION**

3 In January 2008, former Chief Justice Ronald George informed the
4 Commission on the Fair Administration of Justice that “if nothing is done, the
5 backlogs in postconviction proceedings will continue to grow ‘until the system
6 falls of its own weight.’” Ex. 1 at 126. The experience of the past six years has
7 confirmed the accuracy of his prediction. In violation of the Eighth Amendment,
8 Mr. Jones has suffered, and will continue to suffer the unconscionable delay in the
9 resolution of his challenges to his convictions and sentence, be confined in horrific
10 conditions, and tortured by the uncertainty of whether and when he will be
11 executed. For the foregoing reasons, Mr. Jones is entitled to relief on Claim 27.

12
13 Dated: June 9, 2014

Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

14
15
16 By:

/ s / Michael Laurence

17 _____
Michael Laurence
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18 Attorneys for Petitioner Ernest DeWayne Jones
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10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE CENTRAL DISTRICT OF CALIFORNIA

<p>13 ERNEST DEWAYNE JONES, 14 Petitioner, 15 v. 16 KEVIN CHAPPELL, Warden of California State Prison at San Quentin, 18 Respondent.</p>	<p><u>CAPITAL CASE</u> Case No. CV 09-2158-CJC OPENING BRIEF ON CLAIM 27 THAT LENGTHY CONFINEMENT OF PETITIONER UNDER SENTENCE OF DEATH VIOLATES EIGHTH AMENDMENT Hon. Cormac J. Carney U.S. District Judge</p>
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1 Pursuant to this Court's Order of April 10, 2014, Respondent Kevin Chappell,
2 the Warden of the California State Prison at San Quentin, hereby files the instant
3 Opening Brief concerning recently amended Claim 27 of the Petition alleging that
4 Petitioner's lengthy confinement while under a sentence of death constitutes cruel
5 and unusual punishment in violation of the Eighth Amendment. As discussed
6 below, habeas corpus relief is unavailable on this claim.

7 Dated: June 6, 2014

Respectfully submitted,

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 In 1995, a Los Angeles County Superior Court jury convicted Petitioner of
4 capital murder and sentenced him to death. On March 17, 2003, the California
5 Supreme Court affirmed the judgment of conviction and death sentence on direct
6 appeal. *People v. Jones*, 29 Cal. 4th 1229, 131 Cal. Rptr. 2d 468 (2003). On
7 October 14, 2003, the United States Supreme Court denied a petition for writ of
8 certiorari. *Jones v. California*, 540 U.S. 952, 124 S. Ct. 395, 157 L. Ed. 2d 286
9 (2003).

10 On October 21, 2002, Petitioner filed a petition for writ of habeas corpus in
11 the California Supreme Court. The petition contained twenty-seven claims for
12 relief, was 429 pages long, and had over 3,000 pages of exhibits. On October 16,
13 2007, Petitioner filed another petition for writ of habeas corpus in the California
14 Supreme Court. On March 11, 2009, the California Supreme Court denied both
15 petitions.

16 On March 10, 2010, Petitioner filed the Petition for Writ of Habeas Corpus in
17 the instant proceedings. On April 6, 2010, Respondent filed an Answer. On
18 February 17, 2011, Petitioner filed a Motion for Evidentiary Hearing. The Supreme
19 Court thereafter issued its decision in *Cullen v. Pinholster*, 131 S. Ct. 1388, 179 L.
20 Ed. 2d 557 (2011). On April 6, 2011, this Court ordered the parties to submit briefs
21 on the effect of *Pinholster* on Petitioner's entitlement to an evidentiary hearing.
22 After the *Pinholster* briefing was filed, the Court denied Petitioner's Motion for
23 Evidentiary Hearing without prejudice and ordered the parties to submit briefs
24 addressing the application of 28 U.S.C. § 2254(d) to Petitioner's claims. On
25 December 10, 2012, Petitioner filed his opening § 2254(d) brief. On June 14, 2013,
26 Respondent filed an Opposition. On January 27, 2014, Petitioner filed a Reply.

27 On April 10, 2014, this Court issued an Order requiring the parties to address
28 Claim 27 of the Petition alleging that Petitioner's death sentence constitutes cruel

1 and unusual punishment in violation of the Eighth Amendment. The Order
2 indicates the Court's belief that the claim may have merit in light of the long delay
3 in the execution of death sentences in California, caused by the protracted post-
4 conviction litigation of constitutional claims in state and federal court and the
5 current stay of executions while the courts resolve the constitutionality of
6 California's lethal injection protocol.

7 On April 14, 2014, this Court issued an Order directing Petitioner to file an
8 amendment to the Petition alleging a claim that the long delay in execution of
9 sentence in the case, coupled with the grave uncertainty of not knowing whether
10 Petitioner's execution will ever be carried out, renders his death sentence
11 unconstitutional. On April 28, 2014, Petitioner filed a First Amended Petition,
12 which supplements Claim 27 with these brand new allegations, never before raised
13 in any court.

14 ARGUMENT

15 **I. THE CLAIM THAT PETITIONER'S DEATH SENTENCE VIOLATES THE** 16 **EIGHTH AMENDMENT BECAUSE OF DELAY BASED ON THE LACK OF** 17 **AN EXECUTION PROTOCOL IS UNEXHAUSTED**

18 In Claim 27 of the First Amended Petition ("FAP"), Petitioner now contends
19 that the long delay in execution of sentence in this case, coupled with the grave
20 uncertainty of not knowing whether Petitioner's execution will ever be carried out,
21 renders his death sentence unconstitutional. (FAP at 414-27.) A portion of recently
22 amended Claim 27 now alleges an Eighth Amendment violation based on delay
23 caused by the current lack of an execution protocol in California. (FAP at 421-22.)
24 To the extent these new allegations place the claim in a fundamentally different
25 light, the claim is unexhausted.¹

26 ¹ Petitioner's original version of Claim 27 alleged unconstitutionality solely
27 on the basis of delay in execution caused by a slow litigation process. As argued in
28 prior briefing, and as discussed below, relief on that claim is barred under
U.S.C. § 2254(d) because there is no "clearly established" United States Supreme
(continued...)

1 Exhaustion of state remedies is a prerequisite to a federal court's consideration
2 of claims sought to be presented by a state prisoner in federal habeas corpus. 28
3 U.S.C. § 2254(b); *Picard v. Connor*, 404 U.S. 270, 275, 92 S. Ct. 509, 30 L. Ed. 2d
4 438 (1971); *Wooten v. Kirkland*, 540 F.3d 1019, 1025 (9th Cir. 2008). To satisfy
5 the state exhaustion requirement, the petitioner must fairly present his federal
6 claims to the state's highest court. *Rose v. Lundy*, 455 U.S. 509, 515, 102 S. Ct.
7 1198, 71 L. Ed. 2d 379 (1982). A claim has not been fairly presented unless the
8 prisoner has described in the state court proceedings both the operative facts and the
9 federal legal theory on which his contention is based. *See Gray v. Netherland*, 518
10 U.S. 152, 162-63, 116 S. Ct. 2074, 135 L. Ed. 2d 457 (1996); *Gatlin v. Madding*,
11 189 F.3d 882, 888 (9th Cir. 1999).

12 During his direct appeal in the California Supreme Court, Petitioner presented
13 a *Lackey* claim, arguing that his death sentence violated the Eighth Amendment
14 because of the long delay between sentencing and execution.² (NOL B1 at 229-43.)
15 However, Petitioner never argued in the California Supreme Court, either in his
16 direct appeal or in any habeas corpus petition, that his death sentence violated the

17 _____
18 (...continued)

19 Court case endorsing such a right. The new allegations do not change that calculus
20 at all, and the claim is still meritless from a "clearly established law" standpoint.
21 However, if this Court determines that the claim as now presently alleged warrants
22 habeas corpus relief, the new allegations of an absent-lethal-injection protocol place
the claim in a fundamentally different light, thus rendering the claim unexhausted.
Dickens v. Ryan, 740 F.3d 1302, 1318 (9th Cir. 2014).

23 ² This claim is termed a "*Lackey*" claim, but neither *Lackey* nor any other case
24 holds that such an Eighth Amendment claim is viable. In a memorandum opinion
25 respecting the *denial of certiorari* in *Lackey v. Texas*, 514 U.S. 1045, 115 S. Ct.
26 1421, 131 L. Ed. 2d 304 (1995), Justice Stevens questioned whether executing a
27 prisoner who has spent many years on death row constitutes cruel and unusual
28 punishment prohibited by the Eighth Amendment. The Supreme Court, however,
has *never* addressed the issue in any manner on the merits, let alone held that such a
constitutional right exists.

1 Eighth Amendment because of delay based on the lack of an execution protocol in
2 California. Therefore, to the extent these new allegations place this claim in a
3 fundamentally different light, Claim 27 is unexhausted and relief may not be
4 granted. *Dickens v. Ryan*, 740 F.3d 1302, 1318 (9th Cir. 2014). However, as
5 demonstrated in Section III below, it is perfectly clear that this ground raises no
6 colorable claim for habeas corpus relief, and therefore should be denied on its
7 merits, even though it is unexhausted. *See* 28 U.S.C. § 2254(b)(2); *Cassett v.*
8 *Stewart*, 406 F.3d 614, 623-24 (9th Cir. 2005).

9 **II. ANY CLAIM THAT PETITIONER'S DEATH SENTENCE VIOLATES THE**
10 **EIGHTH AMENDMENT BECAUSE OF DELAY BASED ON THE LACK OF**
11 **AN EXECUTION PROTOCOL IS NOT RIPE FOR REVIEW**

12 Article III of the Constitution limits the jurisdiction of federal courts to
13 deciding actual “Cases” or “Controversies.” *Hollingsworth v. Perry*, 133 S. Ct.
14 2652, 2661, 186 L. Ed. 2d 768 (2013). The “ripeness” doctrine is drawn from
15 Article III’s limitations on judicial power and from prudential reasons for refusing
16 to exercise jurisdiction. *National Park Hospitality Ass’n v. Department of Interior*,
17 538 U.S. 803, 808, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 (2003). The purpose of the
18 ripeness doctrine “is to prevent the courts, through avoidance of premature
19 adjudication, from entangling themselves in abstract disagreements.” *Abbott Labs.*
20 *v. Gardner*, 387 U.S. 136, 148, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967); *Poland v.*
21 *Stewart*, 117 F.3d 1094, 1104 (9th Cir. 1997). “An issue is not ripe for review
22 ‘where the existence of the dispute itself hangs on future contingencies that may or
23 may not occur.’” *Poland v. Stewart*, 117 F.3d at 1004.

24 Here, to the extent Petitioner directly claims that *his* death sentence violates
25 the Eighth Amendment because California currently lacks an execution protocol,
26 that claim is not ripe for review. Any delay in the execution of *Petitioner’s* death
27 sentence has *not* been attributable to the lack of an execution protocol. The
28 execution of Petitioner’s death sentence has been stayed pending final disposition
of the Petition for Writ of Habeas Corpus, and all of the claims have been briefed

1 under 28 U.S.C. § 2254(d), and are awaiting final disposition by this Court, as well
2 as further appellate review. At the current time, Petitioner’s constitutional claims
3 are still being litigated and there has been no final disposition. In other words,
4 Petitioner cannot say that but for the absence of a valid lethal injection protocol, his
5 execution would be imminent. Until execution is imminent, the existence of a valid
6 protocol is wholly irrelevant to this petitioner, thus making any harm attributable to
7 the lacking protocol speculative and hypothetical, which are the hallmarks of an
8 unripe claim. *Hillblom v. United States*, 896 F.2d 426, 430 (9th Cir. 1990). The
9 claim is therefore properly treated in the same manner as a claim under *Ford v.*
10 *Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986). The claim
11 does “not become ripe until after the denial of [petitioner’s] first habeas petition.”
12 *Magwood v. Patterson*, 561 U.S. 320, ___, 130 S. Ct. 2788, 2805, 177 L. Ed. 2d
13 592 (2010). Therefore, a claim that the lack of an execution protocol violates
14 Petitioner’s Eighth Amendment rights is not justiciable.

15 **III. THE CLAIM THAT PETITIONER’S DEATH SENTENCE VIOLATES THE**
16 **EIGHTH AMENDMENT BECAUSE OF HIS LENGTHY CONFINEMENT**
17 **UNDER A SENTENCE OF DEATH IS BARRED BY 28 U.S.C. § 2254(D)**

18 Even assuming an exhausted and justiciable claim, or one based exclusively
19 on delay supposedly attributable to state and federal litigation, Petitioner’s claim
20 that his death sentence violates the Eighth Amendment because he has been
21 confined under a sentence of death since 1995 is barred by 28 U.S.C. § 2254(d).
22 The claim is barred because there is no clearly established law from the United
23 States Supreme Court endorsing a claim of cruel and unusual punishment for a
24 lengthy delay between conviction and execution of a capital sentence. Accordingly,
25 this Court is forbidden from granting relief on these grounds.

26 As amended by the Antiterrorism and Effective Death Penalty Act of 1996
27 (“AEDPA”), 28 U.S.C. § 2254(d) constitutes a “threshold restriction,” *Renico v.*
28 *Lett*, 559 U.S. 766, 773 n.1, 130 S. Ct. 1855, 176 L. Ed. 2d 678 (2010), on federal
habeas corpus relief that “bars relitigation of any claim ‘adjudicated on the merits’

1 in state court” subject to two narrow exceptions. *Harrington v. Richter*, 131 S. Ct.
2 770, 784, 178 L. Ed. 2d 624 (2011). These exceptions require a petitioner to show
3 that the state court’s previous adjudication of the claim either (1) was ““contrary to,
4 or involved an unreasonable application of, clearly established Federal law, as
5 determined by the Supreme Court of the United States,”” or (2) was ““based on an
6 unreasonable determination of the facts in light of the evidence presented at the
7 State Court proceeding.”” *Id.* at 783-84 (quoting 28 U.S.C. § 2254(d)). “Section
8 2254(d) reflects the view that habeas corpus is a ‘guard against extreme
9 malfunctions in the state criminal justice systems,’ not a substitute for ordinary
10 error correction through appeal.” *Id.* at 786 (quoting *Jackson v. Virginia*, 443 U.S.
11 307, 332 n.5, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). Accordingly, to overcome
12 the bar of § 2254(d), a petitioner is required to show at the threshold that “the state
13 court’s ruling on the claim being presented in federal court was so lacking in
14 justification that there was an error well understood and comprehended in existing
15 law beyond any possibility for fairminded disagreement.” *Id.*; *see also Johnson v.*
16 *Williams*, 133 S. Ct. 1088, 1091, 1094, 185 L. Ed. 2d 105 (2013) (standard of
17 § 2254(d) is “difficult to meet” and “sharply limits the circumstances in which a
18 federal court may issue a writ of habeas corpus to a state prisoner whose claim was
19 ‘adjudicated on the merits in State court proceedings’”).

20 Here, relitigation of Petitioner’s Eighth Amendment claim is barred by
21 § 2254(d). Because the Supreme Court has never held that execution following a
22 long period of confinement under a sentence of death—for any reason
23 whatsoever—constitutes cruel and unusual punishment, the California Supreme
24 Court’s rejection of Petitioner’s Eighth Amendment claim was neither contrary to
25 nor an unreasonable application of any “clearly established” Supreme Court
26 precedent. *See Wright v. Van Patten*, 552 U.S. 120, 126, 128 S. Ct. 743, 169 L. Ed.
27 2d 583 (2008) (“Because our cases give no clear answer to the question presented,
28 let alone one in [petitioner’s] favor, ‘it cannot be said that the state court

1 “unreasonabl[y] appli[ed] clearly established Federal law””); *Allen v. Ornoski*, 435
2 F.3d 946, 958 (9th Cir. 2006) (denial of habeas relief proper because Supreme
3 Court has never held that execution after long tenure on death row constitutes cruel
4 and unusual punishment); *see also Blair v. Martel*, 645 F.3d 1151, 1157 (9th Cir.
5 2011) (denial of habeas relief proper because Supreme Court has never held that
6 delay in direct appeal violates due process). A federal court may not grant relief
7 under § 2254(d) even if it believes that it would be unreasonable for a state court to
8 refuse to extend a governing legal principle to a context where it should control.
9 *White v. Woodall*, 572 U.S. ___, ___, 2014 WL 1612424 *7-*8 (2014). Section
10 2254(d)(1) “does not require state courts to *extend* [Supreme Court] precedent or
11 license federal courts to treat the failure to do so as error.” *Id.* at *8 (emphasis in
12 original). Thus, federal habeas relief is barred.³

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20 ³ In our view, the statistical data referenced in the two articles the Court cited
21 in its Order of April 10, 2014, shed no light on either the merits or cognizability of
22 a “*Lackey*” claim. Likewise, because none of the delay Petitioner has experienced
23 toward his execution is in any sense attributable to the absence of a finalized
24 protocol, we submit that any “public records addressing the delay associated with
25 the administration of California’s death penalty” are not likely illuminating, though
26 we include here for the Court’s consideration three pleadings that speak to the point
27 of the Court’s inquiry. *See* Attachment 1 (Special appearance by the California
28 Department of Corrections and Rehabilitation filed in *People v. Mitchell Carlton Sims*); Attachment 2 (Declaration of Thomas S. Patterson filed in *People v. Mitchell Carlton Sims*); Attachment 3 (Opposition to Petition for Writ of Mandate filed in *Bradley Winchell v. Matthew Cate, et al.*).

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CONCLUSION

For the foregoing reasons, granting habeas relief on Claim 27 of the First Amended Petition would be impermissible.

Dated: June 6, 2014

Respectfully submitted,
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/s/ Herbert S. Tetef

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ATTACHMENT 1

06/28/2012

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1 of 6

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 John A. Clarke, Executive Clerk
 BY W. J. Warren, Deputy
 Attorney General

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 10 COUNTY OF LOS ANGELES
 11

12
 13 **PEOPLE OF THE STATE OF**
CALIFORNIA,

Plaintiff,

v.

17 **MITCHELL CARLTON SIMS,**

Defendant.

Case Nos. A591707

SPECIAL APPEARANCE BY THE
CALIFORNIA DEPARTMENT OF
CORRECTIONS AND
REHABILITATION IN RESPONSE TO
THE ORDERS TO SHOW CAUSE

Date: July 13, 2012
 Time: 10:00 a.m.
 Dept: 106
 Judge: Judge Larry Fidler
 Action Filed: May 2, 2012

BY FAX

06/28/2012

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INTRODUCTION

The Los Angeles District Attorney has asked this Court to order the California Department of Corrections and Rehabilitation to execute condemned inmates Tiequon Cox and Mitchell Sims by a one-drug method that is not contained in California’s regulations. CDCR is not a party to these criminal actions, and is specially appearing here in an effort to provide helpful information to the Court. Because CDCR is not a party, the Court has no jurisdiction over it to order the relief the District Attorney seeks. Moreover, the Marin County Superior Court has permanently enjoined CDCR from carrying out the execution of any condemned inmate by lethal injection unless and until new regulations governing lethal-injection executions are promulgated in compliance with the Administrative Procedure Act. (Decl. Patterson, ex. 1) If the Court were to order CDCR to carry out the requested executions, the Court’s order would necessarily conflict with the permanent injunction. Any such order would place CDCR in an untenable position because it would not be able to simultaneously comply with one order directing it to carry out executions and another order barring it from doing so.

ARGUMENT

I. CDCR IS NOT A PARTY TO THESE CRIMINAL PROCEEDINGS, AND THE COURT LACKS JURISDICTION TO ORDER CDCR TO CARRY OUT THE REQUESTED EXECUTIONS.

The Court lacks jurisdiction over CDCR to order it to carry out the executions of Sims and Cox using a one-drug method because CDCR is not a party to these criminal proceedings. The proceedings here are between the People and the two condemned inmates. No statute or court rule permits this Court to exercise authority over CDCR in a criminal case to inquire about certain lethal-injection methods, and to potentially dictate a particular method. Although Penal Code section 1193 allows a superior court to serve a death warrant on the Warden of San Quentin, this statute does not subject CDCR to this Court’s authority in the manner that the District Attorney requests. (See Pen. Code, §§ 1193 and 3604; Cal. Rules of Court, rule 4.315.)

Further, the District Attorney’s motion mistakenly contends that this Court can be the first to dictate an execution method, by relying on a miscellaneous provision from the Code of Civil

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1 Procedure, section 187. That provision grants a trial court the means necessary to carry out its
2 jurisdiction—primarily regarding procedural matters—only if the court has jurisdiction over
3 whomever it would exercise power (*Tokio Marine & Fire Ins. Corp. v. Western Pacific Roofing*
4 *Corp.* (1999) 75 Cal.App.4th 110, 116-117) and if no statute has previously allocated whatever
5 power the court would exercise (*Phillips, Spallas & Angstadt LLP v. Fotouhi* (2011) 197
6 Cal.App.4th 1132, 1142). Here, because there is no jurisdiction over CDCR in this criminal
7 proceeding, and because the Legislature already granted to CDCR the authority to establish
8 lethal-injection standards (Pen. Code, § 3604, subd. (a)), the Court cannot grant the District
9 Attorney’s motion.

10 **II. CDCR IS PERMANENTLY ENJOINED FROM CARRYING OUT THE EXECUTION OF**
11 **ANY CONDEMNED INMATE BY LETHAL INJECTION.**

12 In February, the Marin County Superior Court permanently enjoined CDCR from carrying
13 out the execution of any condemned inmate by lethal injection unless and until new lethal-
14 injection regulations are promulgated in compliance with the Administrative Procedure Act.
15 (Decl. Patterson, ex. 1.) This injunction bars CDCR from executing any condemned inmate by
16 lethal injection, regardless of whether a one-drug or three-drug method is used, until new
17 regulations have been promulgated under the APA. If this Court were to issue an order directing
18 CDCR to carry out the executions of inmates Sims and Cox, the order would conflict with the
19 injunction. And it would put CDCR in the impossible position of having to somehow comply
20 with contradictory orders from two different superior courts. In addition, a federal district court
21 has granted Sims a stay against “all proceedings related to the execution of [the condemned
22 inmate’s] sentence of death, including but not limited to preparations for an execution and the
23 setting of an execution date” (Decl. Patterson, ex. 3.) The relief requested by the District
24 Attorney regarding Sims would also conflict with this federal stay.

25 **III. CDCR IS CURRENTLY WORKING TO DEVELOP A ONE-DRUG PROTOCOL IN**
26 **COMPLIANCE WITH ITS LEGAL OBLIGATIONS.**

27 CDCR is committed to faithfully carrying out its obligations under the law. And to this end,
28 CDCR is defending the State’s current lethal-injection regulations against legal attack (Cal. Code

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4 of 6

1 Regs., tit. 15 §§ 3349, et seq.), while it is simultaneously considering alternatives to the current
 2 lethal-injection method. Specifically, CDCR is appealing both the Marin County Superior
 3 Court's invalidation of the state's three-drug protocol and that court's injunction against CDCR
 4 performing any lethal-injection executions until CDCR promulgates new regulations under the
 5 Administrative Procedures Act. (Decl. Patterson, exs. 1, 2.) In addition, under the Governor's
 6 direction, CDCR has begun the process of considering alternative regulatory protocols, including
 7 a one-drug protocol, for carrying out the death penalty. (*Id.*, at ex. 2.)

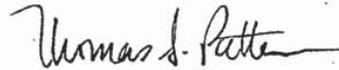
8 **CONCLUSION**

9 As a threshold issue, there is no jurisdiction over nonparty CDCR in these criminal cases.
 10 Moreover, CDCR has been enjoined from carrying out any executions by lethal injection until
 11 new regulations have been promulgated. Accordingly, even if this Court had jurisdiction to order
 12 CDCR to carry out the requested executions, any such order would necessarily conflict with the
 13 permanent injunction barring CDCR from carrying out executions by lethal injection.

14
15 Dated: June 28, 2012

Respectfully Submitted,

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17 Attorney General of California

18 

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 21 JAY M. GOLDMAN
 22 Deputy Attorney General
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 California Department of Corrections and
 Rehabilitation*

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5 of 6

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People of the State of California v. Mitchell Carlton Sims and Tiequon Aundray Cox**
No.: **A591707 A758447**

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 with postage thereon fully prepaid that same day in the ordinary course of business.

On **June 28, 2012**, I served the attached **SPECIAL APPEARANCE BY THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION IN RESPONSE TO THE ORDERS TO SHOW CAUSE; DECLARATION OF THOMAS S. PATTERSON SUPPORTING THE SPECIAL APPEARANCE BY THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION IN RESPONSE TO THE ORDERS TO SHOW CAUSE; EXHIBITS 1 TO 3** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Steve Cooley, District Attorney
Patrick Dixon, Assistant Attorney
Gary Hearnberger, Head Deputy
Michele Hanisee, Deputy Attorney
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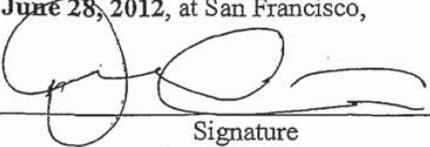
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on ~~June 28~~, 2012, at San Francisco, California.

D. Criswell
Declarant



Signature

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ATTACHMENT 2

06/27/2012

Ace Attorney Service (213) 623-7527

1 of 3

1 KAMALA D. HARRIS
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 8 California Department of Corrections and
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CONFORMED COPY
 OF ORIGINAL FILED
 Los Angeles Superior Court

JUN 28 2012

John A. Clarke, Executive Officer/Clerk
 BY Wendy Warren, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
 COUNTY OF LOS ANGELES

13 **PEOPLE OF THE STATE OF**
 14 **CALIFORNIA,**

Plaintiff,

15 v.

17 **MITCHELL CARLTON SIMS,**

Defendant.

Case Nos. A591707

DECLARATION OF THOMAS S. PATTERSON SUPPORTING THE SPECIAL APPEARANCE BY THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION IN RESPONSE TO THE ORDERS TO SHOW CAUSE

Date: July 13, 2012
 Time: 10:00 a.m.
 Dept: 106
 Judge: Judge Larry Fidler
 Action Filed: May 2, 2012

BY FAX

06/27/2012

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1 I, Thomas S. Patterson, declare:

2 1. I am a Supervising Deputy Attorney General in the California Attorney General's
3 Office, and am assigned to represent and specially appear for the California Department of
4 Corrections and Rehabilitation in this matter. I am competent to testify to the matters set forth in
5 this declaration, and if called to do so, I would and could so testify. I submit this declaration in
6 support of CDCR's response to the two orders to show cause issued in the above-captioned cases,
7 which order CDCR to appear before this Court and show cause why an execution using a single-
8 drug method sought by the Los Angeles District Attorney cannot be performed on two
9 condemned inmates, Defendants Cox and Sims.

10 2. The Marin County Superior Court, in the case of *Sims v. CDCR*, Case No
11 CIV1004019, issued a permanent injunction on February 21, 2012, which prohibits the CDCR
12 from "carrying out the execution of any condemned inmate by lethal injection unless and until
13 new regulations governing lethal injections are promulgated in compliance with the
14 Administrative Procedure Act." A copy of this judgment and injunction is attached as exhibit 1.

15 3. CDCR is already considering the relief that the Los Angeles District Attorney seeks,
16 namely, the development of a single-drug protocol, although CDCR's protocol would apply to all
17 condemned inmates, not just Sims and Cox. The notice of appeal in the *Sims* action, which was
18 filed on April 26, 2012, states that the Governor has directed CDCR to "begin the process of
19 considering alternative regulatory protocols, including a one-drug protocol, for carrying out the
20 death penalty." A copy of the notice of appeal filed in the *Sims* action is attached as exhibit 2.

21 4. The United States District Court for the Northern District of California in *Morales v.*
22 *Cate*, Case Nos. 5-6-cv-219 and 5-6-cv-926, issued an order granting Defendant Sims's motion to
23 intervene and for a stay of execution on January 19, 2011. A true and correct copy of this order is
24 attached as exhibit 3. The order granted Sims a stay to the same extent as the court had
25 previously granted some of the other plaintiffs in that matter against "all proceedings related to
26 the execution of [the condemned inmate's] sentence of death, including but not limited to
27 preparations for an execution and the setting of an execution date"

28

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3 of 3

1 I declare under penalty of perjury that the foregoing is true and correct. Executed at San
2 Francisco, California, on June 28, 2012.

3
4 
5 Thomas S. Patterson
6 Supervising Deputy Attorney General

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EXHIBIT 1

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Attorneys for Plaintiff
MITCHELL SIMS

FILED

FEB 21 2012

KIM TURNER
Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: E. Turner, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF MARIN
UNLIMITED JURISDICTION

MITCHELL SIMS,

Plaintiff,

v.

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION, et
al.,

Defendants.

No. CIV1004019

Action Filed: August 2, 2010

[PROPOSED] FINAL JUDGMENT AS TO
PLAINTIFF MITCHELL SIMS

Dep't: E.
Judge: Hon. Faye D'Opal

ALBERT GREENWOOD BROWN, JR. and
KEVIN COOPER,

Plaintiffs-in-Intervention.

[PROPOSED] FINAL JUDGMENT

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1 Plaintiffs' motion for summary judgment came on for hearing by this Court on December 16,
2 2011, at 8:30 a.m. Sara Eisenberg and Jaime Huling Delaye appeared on behalf of Plaintiff Mitchell
3 Sims. Sara Cohbra specially appeared on behalf of Plaintiff-in-intervention Albert Greenwood
4 Brown. Cameron Desmond appeared on behalf of Plaintiff-in-intervention Kevin Cooper. Deputy
5 Attorneys General Jay M. Goldman, Michael Quinn and Marisa Kirchenbauer appeared on behalf of
6 Defendants California Department of Corrections and Rehabilitation and Matthew Cate.

7 After considering the moving, opposing and reply papers, the file in this matter, and the
8 arguments presented at the December 16, 2011 hearing, and good cause appearing therefor, the
9 Court GRANTED summary adjudication on Plaintiffs' second cause of action for declaratory relief
10 to invalidate Defendant California Department of Corrections and Rehabilitation's lethal injection
11 protocol (Cal. Code Regs., tit. 15, §§3349-3349.4.6, "Administration of the Death Penalty"), and
12 DENIED summary adjudication on Plaintiffs' first cause of action. Subsequently, Plaintiff Mitchell
13 Sims filed a request for dismissal of his first cause of action, and the dismissal of Sims' first cause
14 of action was entered by the Court on January 26, 2012.

15 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that final judgment is entered
16 in favor of Plaintiff Mitchell Sims and against Defendants California Department of Corrections and
17 Rehabilitation and Matthew Cate as follows:

18 1. Defendants substantially failed to comply with the requirements of California's
19 Administrative Procedure Act ("APA") when the lethal injection protocol (Cal. Code Regs., tit. 15,
20 §§ 3349-3349.4.6, "Administration of the Death Penalty") was enacted, in violation of Government
21 Code Section 11350(a), as is more fully set forth in the Court's December 19, 2011 Final Ruling,
22 attached hereto as Exhibit A and incorporated into this judgment as if set forth in full.

23 DECLARATORY RELIEF

24 2. The lethal injection protocol (Cal. Code Regs., tit. 15, §§ 3349-3349.4.6,
25 "Administration of the Death Penalty") is invalid for substantial failure to comply with the
26 requirements of the APA.

27 INJUNCTION

28 3. Defendant California Department of Corrections and Rehabilitation is permanently

-1-

[PROPOSED] FINAL JUDGMENT

06/28/2012

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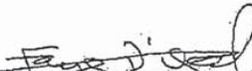
4 of 23

1 enjoined from carrying out the execution of any condemned inmate by lethal injection unless and
2 until new regulations governing lethal injection executions are promulgated in compliance with the
3 Administrative Procedure Act.

4 4. Defendant California Department of Corrections and Rehabilitation is permanently
5 enjoined from carrying out the execution of any condemned inmate by lethal gas unless and until
6 regulations governing execution by lethal gas are drafted and approved following successful
7 completion of the APA review and public comment process, as set forth at page 14, line 26 through
8 page 15, line 3 of the Court's Final Ruling, attached hereto as Exhibit A.

9 5. Defendant California Department of Corrections and Rehabilitation is permanently
10 enjoined from carrying out the execution of any female inmate unless and until regulations
11 governing the execution of female inmates are drafted and approved following successful
12 completion of the APA review and public comment process, as set forth at page 14, line 26 through
13 page 15, line 3 of the Court's Final Ruling, attached hereto as Exhibit A.

14 DATED: 2-21, 2012.

15
16 
17 HONORABLE FAYEZ D'OPAL
18 JUDGE OF THE SUPERIOR COURT
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EXHIBIT A

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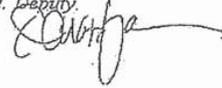
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FILED

DEC 10 2011

KIM TURNER
Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: J. Charifa, Deputy



SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF MARIN

MITCHELL SIMS,

Plaintiffs,

vs.

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,
et.al.,

Defendants.

CIV 1004019

FINAL RULING RE PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

ALBERT GREENWOOD BROWN, JR. and
KEVIN COOPER,

Plaintiffs-in-intervention.

After issuance of the court's tentative ruling regarding Plaintiffs' motion for summary judgment, argument requested by defendants was heard on December 16, 2011. Attorneys Sara J. Eisenberg and Jaime Huling-Delays appearing on behalf of Plaintiff Mitchell Sims, attorney Sara Cohbra on behalf of intervenor Albert Brown, and attorney Cameron Desmond on

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1 behalf of Intervenor Kevin Cooper. Attorneys Jay Goldman, Michael Quinn and Marisa
2 Kirchenbauer appeared on behalf of Defendant California Department of Corrections and
3 Rehabilitation, et al. Following respective arguments by attorney Goldman and attorney
4 Eisenberg, the Court finds no new evidence or other grounds on which to base a change in its
5 tentative ruling, the core of which establishes that Plaintiffs met their burden to prove that the
6 identified defects within the entire regulatory scheme, collectively, if not singly, constitute a
7 substantial failure by the Department to comply with the procedures mandated by the
8 Administrative Procedures Act, resulting in invalidation of the lethal injection administration
9 and protocol. The court adopts its tentative ruling, as briefly modified, as the Final Ruling.
10
11

12 RULING

13 Plaintiffs' motion for summary judgment (Code Civ. Proc. § 437c(p)(1)), on their
14 Declaratory Relief action to invalidate Defendant California Department of Corrections and
15 Rehabilitation's three-drug lethal injection protocol (Cal. Code Regs., tit. 15, §§ 3349-3349.4.6,
16 "Administration of the Death Penalty" (hereafter Regs., § _____), is granted as follows:
17

18 A. For the reasons discussed below, the court finds the undisputed evidence supports
19 Plaintiffs' second cause of action alleging Defendant substantially failed to comply with the
20 mandatory procedural requirements of the Administration Procedures Act (APA) when it
21 adopted these regulations, in violation of Govt. Code § 11350(a).
22

23 1.
24 The Initial Statement of Reasons (ISOR) and the Final Statement of Reasons (FSOR) each
25 *substantially failed to comply* with the APA requirements by not considering and describing
26 alternative methods to the three-drug protocol; by failing to provide a sufficient rationale for
27 rejecting these alternatives; and by failing to explain, with supporting documentation, why a
28

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1 one-drug alternative would not be as effective or better than the adopted three-drug
2 procedure, in violation of § 11346.2(b)(3)(A) and § 11346.9(a)(4). "If an agency adopts a
3 regulation without complying with the APA requirements it is deemed an 'underground
4 regulation' (Cal. Code Regs., tit. 1, § 250) and is invalid. [Citation]." (*Naturist Action Committee*
5 *v. California State Dept. of Parks & Recreation* (2009) 175 Cal.App.4th 1244, 1250.)
6

7 In the ISOR, which statement was repeated verbatim in the FSOR, the Department described
8 the purpose and rationale of the three-drug procedure and its decision to reject alternatives to
9 the three-chemical protocol it was proposing, in its effort to comply with Govt. Code §
10 11346.2(b)(1):
11

12
13 In light of the Memorandum of Intended Decision, and as directed by the
14 Governor, the CDCR reviewed all aspects of the lethal injection process and its
15 implementation. As an integral part of the review, the CDCR considered
16 alternatives to the existing three-chemical process, including a one-chemical
17 process. Additionally, in developing this proposed regulation, the CDCR was
18 guided by the United States Supreme Court's decision in *Baze v. Rees* (2008) 553
19 U.S. 35, which held that the State of Kentucky's lethal injection process, and the
20 administration of the three-chemicals, did not constitute cruel and unusual
21 punishment under the Eighth Amendment. CDCR also reviewed all available
22 lethal injection processes from other states and the Federal Bureau of Prisons,
23 and reviewed the transcripts and exhibits in the *Morales v. Tilton* case. Based on
24 the information considered, the CDCR revised the lethal injection process as set
25 forth in this proposed regulation. (Ex. 6, p. 2; Ex. 7, p. 2 emphasis added.)

26 The rationale for adoption of the three-drug procedure, as underlined, is false.

27 Defendant concedes that the decision to adopt the three-drug protocol was decided in May
28 2007, before the decision in the U.S. Supreme Court case of *Baze v. Rees* (2008) 553 U.S. 35,

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1 upholding Kentucky's similar three-drug lethal injection protocol from an Eighth Am. challenge.

2 (Undisputed Fact No. 8-10)

3 In its opposition, the Department admits:

4
5 The ISOR and FSOR inaccurately stated that CDCR's decision to adopt the three-
6 drug lethal-injection method found in the regulations and to reject the one-drug
7 alternative preferred by Plaintiffs, was primarily based on the United States
8 Supreme Court's decision in *Baze v. Rees* (2008) 553 U.S. 35. (Oppo. p. 20, n. 6 ¶
9 4.)

10 The CDCR also concedes:

11 The decision to use the three-drug procedure was made in May 2007 by
12 Governor Schwarzenegger. (Undisputed Fact No. 9) Thereafter, in 2008, the
13 Supreme Court upheld the constitutionality of a three-drug method, and refused
14 to determine the constitutionality of a one-drug method, in *Baze v. Rees*.
15 Subsequently, the decision to use the three-drug procedure was not revisited by
16 Governor Schwarzenegger in the course of drafting the lethal injection
17 regulations. (Undisputed Fact No. 10, Ex. 9, p. 4)

18 Additionally, the Undisputed Evidence shows the ISOR did not provide any description of the
19 "one-chemical process". (Undisputed Fact No. 2) The ISOR did not identify or describe any
20 alternatives to the "one-chemical process." (Undisputed Fact No. 3); nor did Defendant provide
21 any reasons for rejecting any alternative to the three-chemical process that were purportedly
22 considered. (Undisputed Fact No. 4)

23
24
25 The FSOR states, in conclusory language, the same reason for selecting the three-drug
26 procedure as described in the ISOR, *ante*. It is also undisputed the FSOR states, without
27 elaboration: "The Department has determined that no alternative considered would be more
28

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1 effective in carrying out the purpose of this action or would be as effective and less
2 burdensome to affected persons." (Undisputed Fact No. 5, Ex. 7 p. 9).

3 Also, nowhere in the FSOR is there any *description* of the alternative(s) the CDCR considered; or
4 any discussion "*with supporting information*" explaining why the one-drug method would not
5 be: 1 – more effective in carrying out the purpose of the regulation than the three-drug
6 procedure; or 2 – would be as effective and less burdensome to the condemned inmate, all in
7 violation of §.11346.9(a) (4).
8

9
10 The failure to discuss the one-drug method is a particularly significant omission, since use of a
11 barbiturate-only protocol was raised by at least one commenter (Ex. 13, p. 48, no. 13); several
12 commenters make the identical assertion that use of pancuronium bromide is unnecessary,
13 dangerous, and creates a risk of excruciating pain. (Ex. 13, p. 48, no. 12; p. 50, no. 18, 19; p. 51,
14 no. 20); the CDCR stated in its responses to the court's inquiry in the federal action *Morales v.*
15 *Cate, et al.*, a single-drug formula consisting of five grams of sodium thiopental is sufficient to
16 bring about the death of a condemned inmate. (Undisputed Fact No. 12); and CDCR's own
17 expert John McAuliffe testified that after conducting substantial research for his review of OP
18 770, he recommended to top CDCR officials to adopt the single-drug formula. (Undisputed Fact
19 No. 13.)
20
21
22

23 The Department's attempt to fix any omission through its brief statement in the Addendum to
24 the FSOR, that it selected the three-drug method in reliance on the decision in *Baze v. Rees*
25 (2008) 553 U.S. 35, is unavailing. As conceded by the Department, *Baze v. Rees* was not the
26 reason it chose the three chemical method, nor was it the reason for rejecting the one drug
27 method, since Governor Schwarzenegger chose the three chemical method in 2007 before the
28

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1 Supreme Court decision was issued and there was never any discussion of an alternative
2 method by the Governor at that time.

3
4 Also, the Addendum fails to describe any alternative, and does not describe Defendant's
5 reasons for rejecting an alternative "with supporting information that no alternative considered
6 by the agency would be more effective in carrying out the purpose for which the regulation is
7 proposed or would be as effective and less burdensome to affected private persons than the
8 adopted regulation." (Govt. Code §11346.9(a) (4).)

9
10 Importantly, inclusion of this information only in the Addendum to the FSOR, even if adequate,
11 does not promote "meaningful public participation" (*Pulaski v. Occupational Safety & Health*
12 *Stds. Board.* (1999) 75 Cal.App.4th 1315, 1327-1328), as the public had no opportunity to
13 comment before the corrections were submitted to OAL.

14
15
16 These defects infect the entire regulatory scheme, and the lethal injection administration and
17 protocol, as a whole, is declared to be invalid.

18
19 2.

20 The ISOR fails to describe the purpose and/or the rationale for the agency's determination why
21 certain regulations to be implemented five days prior to the execution, were reasonably
22 necessary. (Govt. Code § 11346.2; Regs., tit. 1, § 10 (b).) The ISOR does not explain why it is
23 necessary for unit staff to monitor the inmate and to complete documentation *every fifteen*
24 *minutes* starting five days before execution (§ 3349.3.4(a)(2)); why *all* personal property must
25 be removed from the inmate's cell (§ 3349.3.4(b)(3)); or why inmates must be bound with waist
26 restraints during visits. (§ 3349.3.4(c) (3).) The ISOR merely summarizes the different
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1 procedures required five days prior to the execution, without explaining why the specific
2 provisions are necessary and/or how a specific provision fills that need. (Undisputed Fact No.
3 20) (ISOR Ex. 6, p. 16)

4
5 Likewise, Regs., tit. 15, § 3349.4.5, which discusses the chemicals to be used in the lethal
6 injection and the administration of these chemicals, summarizes the procedure but does not
7 contain information explaining the rationale for the agency's determination that the three-drug
8 protocol is "reasonably necessary to carry out the purpose for which it is proposed." (Govt.
9 Code § 11346.2(b).) This regulation itself refers to the *Baze v. Rees* decision, but as noted
10 above, this decision was not the basis upon which the Department decided to adopt the three-
11 drug protocol.
12

13
14 Defendant's attempt to cure this deficiency in its Addendum to the FSOR comes too late in the
15 rulemaking process. Accordingly, these individual regulations are deemed invalid.

16
17 Additional regulations Plaintiffs have cited in Appx. B to the memorandum of points and
18 authorities (p. 12, n. 4), are not properly before the court as that document exceeds the page
19 limit approved by the court.

20
21 3.

22
23 The undisputed evidence establishes the FSOR did not summarize and/or respond to two dozen
24 or so public comments, in violation of Govt. Code § 11346.9(a) (3). (Undisputed Fact No. 22-30)
25 It is also undisputed that in all, the Department received over 29,400 comments in writing and
26 from the public hearings. (Defendant's Undisputed Fact No. 2)
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1 "Substantial compliance, as the phrase is used in the decisions, means *actual* compliance in,
2 respect to the substance essential to every reasonable objective of the statute. Where there is
3 compliance as to all matters of substance, technical deviations are not to be given the stature
4 of noncompliance. Substance prevails over form." (*Pulaksi, supra*, 75 Cal.App.4th at p. 1328.)
5
6 Despite the large number of public comments properly addressed by the Department, the
7 failure to summarize or respond to these comments is not a "technical defect." Defendant
8 does not assert that the crux of any of these comments was addressed in other responses. The
9 purpose of the APA – "to advance meaningful public participation in the adoption of
10 administrative regulations by state agencies", is met by giving "interested parties an
11 opportunity to present statements and arguments at the time and place specified in the notice
12 and calls upon the agency to consider all relevant matter presented to it." (*Voss v. Superior*
13 *Court* (1996) 46 Cal.App.4th 900, 908-909.)
14
15 By not summarizing and responding to these comments, the Department did not give substance
16 to the central APA requirement that all interested persons be afforded a meaningful chance to
17 have their objections heard and to inform the rulemaker's decision; i.e., to allow agencies "to
18 learn from the suggestions of outsiders and [] benefit from that advice." (*San Diego Nursery Co.*
19 *v. Agricultural Labor Relations Board* (1979) 100 Cal.App.3d 128, 142-143.) Additionally, the
20 undisputed evidence establishes that some of the Department's responses to comments are
21 incomplete, incorrect, or inadequate. (Undisputed Fact No. 31-36)
22
23 For example, about 15 commenters submitted comments objecting to the use of the second
24 drug, pancuronium bromide (the paralytic), on various medical and humanitarian grounds.
25
26 (Undisputed Fact No. 31) Despite the different grounds, the Department answered with the
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1 identical response to each comment summary: "The United States Supreme Court in *Baze v.*
2 *Rees* (2008) 553 U.S. 35 upheld the use of the three chemicals, including pancuronium bromide,
3 identified in these regulations. Accommodation: None." (Undisputed Fact No. 32) This
4 broad, conclusory response is not a sufficient answer to explain why the Department initially
5 selected, and continues to endorse the use of the second drug—pancuronium bromide, in light
6 of the specific medical and humanitarian concerns raised in these comments. The inadequacy
7 of the response is especially troubling when considering the Department's admission that the
8 three-drug protocol was originally adopted without regard to the decision in *Baze v. Rees*
9 (2008) 553 U.S. 35, and with no consideration of an alternative, one-drug protocol at that time;
10 nor since that time has the Department described any alternative or explained why any
11 alternatives would not be equally or more effective than the method with pancuronium
12 bromide.
13
14
15

16 On this record, the court finds the FSOR substantially failed to comply with this requirement,
17 invalidating the adoption of these regulations.
18

19
20 4.

21 It is undisputed that Defendant did not mail a Notice of the Proposed Action to three civil
22 rights groups prior to the close of the initial public comment period (January 20, 2009), and
23 seven condemned inmates, all of whom had requested notice, in violation of Govt. Code §
24 11346.4 (a)(1). (Undisputed Fact No. 38-41) It is also undisputed that the three organizations
25 and these inmates submitted comments during the initial comment period, ending January 20,
26 2009. (Undisputed Fact No. 38-41).
27
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1 As to the population of inmates generally, Defendant presented evidence it posted the Notice
2 of Proposed Regulations throughout the departments and cell blocks in San Quentin, and at
3 other penal institutions in the State. (Undisputed Fact No. 41) Plaintiffs have presented
4 evidence that this may have been inadequate, as only the top sheet of these regulations was
5 visible through the glass cases. (Reply p. 10, Delaye decl. Ex. A) However, Govt. Code §
6 11346.4(f) provides: "The failure to mail notice to any person as provided in this section shall
7 not invalidate any action taken by a state agency pursuant to this article." In light of the
8 statute, and the fact the comments of these organizations and persons were prepared and
9 submitted to the Department, a triable issue exists whether Defendant's violation of the APA is
10 sufficient to invalidate the regulations. Summary judgment is not granted on this ground.
11
12
13

14 5.

15 The undisputed evidence establishes Defendant did not make the complete rulemaking file
16 available for public review as of the date the Notice of the Proposed Action was published, in
17 violation of Govt. Code § 11347.3(a).
18

19 The Department did not make the rulemaking file available for public inspection until June 11,
20 2009, six weeks after the publication of the notice of proposed action on May 1st, and less than
21 three weeks before the end of the public comment period on June 30, 2009. (Undisputed Fact
22 No. 45)
23

24 This violation is a substantial failure to comply with the APA, which defect undermined
25 meaningful public participation in the rulemaking process.
26
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06/28/2012

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1 Contrary to Mr. Goldman's argument, this court finds no support in the legislative purpose
2 behind the APA to require Plaintiffs to show prejudice from Defendant's significant delay in
3 making the rulemaking record available for public review.

4
5 6.

6 The rulemaking file itself was incomplete, in violation Govt. Code § 11347.3(b). It is undisputed
7 the rulemaking file did not contain several documents upon which the Department stated it
8 relied in drafting these regulations: the San Quentin Operational Procedure, OP 770, on which
9 much of the proposed regulations were based; the transcripts, Judge Fogel's Statement of
10 Intended Decision, and the experts reports or declarations admitted as exhibits in the *Morales*
11 *v. Tilton* case; the lethal-injection process for the Federal Bureau of Prisons; responses by 15
12 states to the survey sent out by the CDCR and upon which it considered in drafting the revision
13 to OP 770. (Oppo. p. 12, Undisputed Fact No. 50-63)

14
15
16
17 In light of this defect, the court finds the Department substantially failed to comply with this
18 requirement of the APA.

19
20 7.

21 Some of the regulations do not comply with the "Clarity" standard under the APA, which is
22 defined as "written or displayed so that the meaning of the regulations will be understood by
23 those persons directly affected by them." (Govt. Code § 11349(c); Regs., tit. 1, §.16.)

24
25 Regs. § 3349.3.2.(a)(1), which discusses the Warden's review of information bearing on the
26 inmate's sanity, conflicts with the agency's description of the effect of this regulation in the
27 Addendum to the FSOR. (See Ex. 8, p.11)

11

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1 The explanation that information about the inmate's sanity can be received at any time prior to
2 the execution, conflicts with the language of the regulation which limits information from the
3 inmate's attorney to 7 days prior to the execution, at the latest. This creates an ambiguity in
4 violation of the APA and this individual regulation is invalid. (Regs., tit. 1, § 16(a)(2).)

5 Conversely, the court finds no conflict between the regulation distinguishing the places a state-
6 employed chaplain and a non-state employed "Spiritual Advisor" may communicate with the
7 inmate (Regs. § 3349.3.4(e)), and the Department's explanation of the effect of this regulation
8 in its responses to comments. (Ex. 50, pp. 61-63)

9
10
11 The use of the term "reputable citizen" in Regs. § 3349.2.3, which provision restricts the
12 number of witnesses in the viewing area, may have more than one meaning and is ambiguous
13 in violation of Cal. Code Regs., tit. 1, § 16 (a)(1). It is undisputed that this term is nowhere
14 defined in the regulations or in Pen. Code § 3605(a). It is also undisputed the term "citizen" can
15 mean the citizen of the United States or the citizen of a foreign country, or any non-
16 governmental employee. (Undisputed Fact No. 67) This term is archaic and ambiguous, and is
17 invalid. The Department should include a definition of this term along with the other
18 definitions currently found in Regs. § 3349.1.1.

19
20 Plaintiffs have attached Appendix C, which contains other putative examples of ambiguous
21 terms. These additional arguments are not properly before the court as they exceed the
22 expanded 35-page limit approved by the court.
23

24
25
26 8.

27 Plaintiffs' claim that certain regulations fail to meet the "Consistency" standard of the APA
28

12

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1 defined as "being in harmony with, and not in conflict with or contradictory to, existing
2 statutes, court decisions, or other provisions of law." (Govt. Code § 11349(d)), is rejected.

3
4 Plaintiffs have no standing to argue that the treatment of female condemned inmates under
5 Regs. § 3349.3.6(e) violates the Equal Protection Clauses of the state and federal constitutions,
6 claiming the operation of that provision denies female inmates, who have to be transferred 150
7 miles from the Central California Women's Facility to San Quentin, some the same rights as
8 male condemned inmates housed at San Quentin, e.g., 24-hour telephone access to their
9 counsel (§ 3349.3.4(d),(4)(C); access to spiritual advisors (§§ 3349.3.4(e); 3349.4.2(b)(1)); and
10 priority visiting privileges. (§ 3349.3(i)(1).)

11
12 The all-male plaintiffs do not have standing to raise the Equal Protection challenges on behalf of
13 condemned female inmates, because they do not claim to suffer the disparate treatment they
14 hypothesize. (See *Neil S. v. Mary L.* (2011) 199 Cal.App.4th 240, 255.) "One who seeks to raise
15 a constitutional question must show that his rights are affected injuriously by the law which he
16 attacks and that he is actually aggrieved by its operation. [Citations.]" (*People v. Superior Court*
17 (2002) 104 Cal.App.4th 915, 932, internal quotations and citations omitted; 7 Witkin, Summ.
18 Cal. Law (10th ed. 2005) Const. Law, §76, pp. 168-169.)

19
20
21
22 Also, there is no merit to Plaintiffs' claim that Regs. § 3349.1.2(a)(4)(B), "Recruitment and
23 Selection Process", conflicts with the order by the Federal District Court in the 2005 decision of
24 *Plata v. Schwarzenegger*, where the Judge appointed a Receiver to take control over positions
25 "related to the delivery of medical health care" at CDCR: "The Receiver shall have the duty to
26 control, oversee, supervise, and direct all administrative, personnel, financial, accounting,
27
28

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1 contractual, legal, and other operational functions of the medical delivery component of the
2 CDCR." (Request to Take Judicial Notice, Ex. D, p. 4, Undisputed Fact No. 72) Plaintiffs present
3 no evidence that the District Court's order was at all concerned with the execution protocols at
4 San Quentin. Also, execution is not tantamount to the delivery of medical services. (See
5 *Morales v Tilton* (N.D. Cal. 2006) 465 F.Supp. 2d 972, 983 ["Because an execution is not a
6 medical procedure, and its purpose is not to keep the inmate alive but rather to end the
7 inmate's life, . . .".])
8

9
10 9.

11 There is no merit to Plaintiffs' next contention that the regulations substantially fail to comply
12 with the APA because the regulation incorporates documents by reference, without subjecting
13 those documents to the APA review process, in violation of Cal. Code Regs., tit. 1, § 20. In
14 responses to comments about the procedures for execution by lethal gas and the execution of
15 condemned female inmates, the Department indicated these areas would be the subjects of
16 separate documents and/or regulations. (Undisputed Fact No. 75-76)
17

18
19 At the time of approval of the subject regulations, neither referenced document existed, nor
20 are these documents referred to in the language of the regulations. On this record, there is
21 insufficient evidence to show the regulations under review attempted to incorporate by
22 reference these proposed documents within the meaning of the law, and therefore the
23 regulations do not violate this requirement of the APA.
24

25
26 That said, unless and until these prospective, separate documents/regulations have been
27 drafted and approved following successful completion of the APA review and public comment
28

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1 process, the Department has no authority under Regs., tit. 15, §§ 3349-3349.4.6, to carry out
2 the execution of condemned inmates by lethal gas, or to execute any condemned female
3 inmate.

4
5 10.

6 The Department has failed to include a fiscal impact assessment of the administration of
7 execution by lethal injection as proposed by these regulations, in violation of Govt. Code §
8 11346.5(a). There is uncontradicted evidence that there will likely be increased costs from
9 hiring and/or training of additional members for the lethal injection sub-teams; plus overtime
10 compensation for the supporting staff; as well as the additional costs of the three drug method
11 vs. the one-drug method; and also the reimbursement by the CDCR for extra state and local law
12 enforcement personnel to handle security matters, crowd control, and traffic closures prior to
13 and on the night of the execution. (Undisputed Fact No. 78-80) Former San Quentin Warden
14 Jeanne Woodford stated in a public comment, that past executions by lethal injection have cost
15 between \$70,000.00 and \$200,000.00 each. (Undisputed Fact No. 79) It is no excuse, as
16 Defendant argues, that either fiscal estimates or supporting documents were not required
17 because "the costs and fiscal impacts of lethal injection executions are caused by the fact that
18 the Penal Code, not a regulation, mandates this type of execution." (Oppo. p. 13:20-21)

19
20
21
22
23 The APA gives the public a right to know and to comment on the fiscal impact of implementing
24 a regulation adopted pursuant to a state statute, if for no other reason than to recommend
25 more efficient or less costly methods of accomplishing the statutory purpose. The Department
26
27
28

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1 was required to prepare the fiscal estimate as prescribed by the Department of Finance. Its
2 failure to do so was substantial noncompliance with the procedural requirements of the APA.

3
4 B. Separately, the court denies Plaintiffs' motion for summary judgment on their
5 first cause of action, which alleges there is no substantial evidence in the rulemaking file to
6 show the use of the second drug – pancuronium bromide and/or the third drug – potassium
7 chloride are "reasonably necessary" to effectuate the purpose for which the regulations are
8 proposed, as required by Govt. Code §§ 11342.2, and 11350(b) (1). (Complaint ¶s 30-41)

9
10 Since this is Plaintiffs' motion for summary judgment, Plaintiffs have the burden to show there
11 is no substantial evidence in the rulemaking file, *when considered in its entirety*, to support the
12 agency's determination the three-drug injection protocol is reasonably necessary to effectuate
13 the purpose of the statute. (Govt. Code §§ 11349(a) [defining "Necessity"], 11350(b) (1);
14 *Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 336-337.)

15
16 For our purposes, "substantial evidence" is defined as whether, based on the entire record,
17 there is evidence which is reasonable in nature, credible, and of solid value, contradicted or
18 uncontradicted, which will support the agency's determination. (*Desmond, supra*, 21
19 Cal.App.4th at p. 336.)

20
21 It is undisputed the rulemaking file contains documents favorable to Defendant; e.g., that
22 caution against acceptance of using thiopental alone to guarantee a lethal effect. (Undisputed
23 Fact No. 85, Ex. 55); or confirms the experience in other states that proper application of the
24 same three-drug method will result in a rapid death of the inmate without undue pain or
25 suffering. (Undisputed Fact No. 86, Ex. 56, p. 931)

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1 In fact, one of the articles relied upon by Plaintiffs (Undisputed Fact No. 90) indicates that it
2 might not be possible to administer enough thiopental by itself, to guarantee a lethal effect.
3 (Undisputed Fact No. 90, Ex. 58, pp. 2, 12)
4

5 On this record, the court finds that a triable issue of fact exists over whether the rulemaking file
6 contains substantial evidence to support Defendant's determination that the three-drug
7 protocol is reasonably necessary to implement the statutory mandate to provide for a lethal
8 injection alternative. The motion for summary judgment on this ground is denied.
9

10 Plaintiffs also argue in a footnote that the rulemaking file does not contain substantial evidence
11 to support the CDCR's determination of necessity of several other regulations. (MPA p. 34, n.
12 20.) It is improper to briefly raise these issues in a footnote and expect the court to conduct
13 a substantial evidence review. Plaintiffs have provided no citation to the law, to the record, or
14 any analysis of the law to the facts. By attempting to raise these additional issues in a footnote,
15 Plaintiffs are violating the intent and spirit of the court's order allowing them to file an
16 oversized brief. These issues are not properly before the court, and the court refuses to
17 address these issues at this time.
18
19
20

21 Plaintiffs' Request to Take Judicial Notice of documents filed in separate federal actions, is
22 granted. (Ev. Code § 452(d).) Defendant's objections to these requests are Overruled.
23 Defendant's evidentiary objections Nos. 1-3 are all Overruled.
24

25 Plaintiffs' shall submit a Judgment in this matter.
26

27 Dated: December 19, 2011
28


Judge Faye D'Opal

17

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STATE OF CALIFORNIA)
COUNTY OF MARIN)

MITCHELL SIMS VS. CALIFORNIA DEPARTMENT OF CORRECTIONS AND
REHABILITATION

ACTION NO.: CIV 1004019

(PROOF OF SERVICE BY MAIL - 1013A, 2015.5 C.C.P.)

I AM AN EMPLOYEE OF THE SUPERIOR COURT OF MARIN; I AM OVER THE
AGE OF EIGHTEEN YEARS AND NOT A PARTY TO THE WITHIN ABOVE-
ENTITLED ACTION; MY BUSINESS ADDRESS IS CIVIC CENTER, HALL OF
JUSTICE, SAN RAFAEL, CA 94903. ON December 19, 2011 I SERVED THE
WITHIN

FINAL RULING RE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN
SAID ACTION TO ALL INTERESTED PARTIES, BY PLACING A TRUE COPY
THEREOF ENCLOSED IN A SEALED ENVELOPE WITH POSTAGE THEREON
FULLY PREPAID, IN THE UNITED STATES POST OFFICE MAIL BOX AT SAN
RAFAEL, CA ADDRESSED AS FOLLOWS:

<p>SARA EISENBERG HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN, A PROFESSIONAL CORPORATION THREE EMBARCADERO CENTER, 7TH FLOOR SAN FRANCISCO, CA 94111</p>	<p>JAY GOLDMAN DEPUTY ATTORNEY GENERAL 455 GOLDEN GATE AVENUE, STE. 11000 SAN FRANCISCO, CA 94102</p>
<p>JAN NORMAN 1000 WILSHIRE BLVD. #600 LOS ANGELES, CA 90017</p>	<p>NORMAN HILE 400 CAPITOL MALL SUITE 300 SACRAMENTO, CA 95814</p>

I CERTIFY (OR DECLARE), UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE
STATE OF CALIFORNIA THAT THE FOREGOING IS TRUE AND CORRECT.

DATE: 12-19-11



06/28/2012

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EXHIBIT 2

06/28/2012

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COPY

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 5 Fax: (415) 703-5843
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 6 Attorneys for Defendants
 California Department of Corrections and
 7 Rehabilitation and Matthew Cate

FILED

APR 26 2012

KIM TURNER
 Court Executive Officer
 MARIN COUNTY SUPERIOR COURT
 By: S. McConnell, Deputy

(Exempt from filing fees—
 Gov. Code, § 6103.)

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 11 COUNTY OF MARIN

13 MITCHELL SIMS,

14 Plaintiff,

Case No. CIV1004019

NOTICE OF APPEAL

15 v.

17 CALIFORNIA DEPARTMENT OF
 CORRECTIONS AND
 18 REHABILITATION, et al.,

19 Defendants.

21 TO THE CLERK OF THE ABOVE-ENTITLED COURT:

22 NOTICE IS HEREBY GIVEN that defendants the California Department of Corrections
 23 and Rehabilitation and its Secretary, Matthew Cate, appeal to the Court of Appeal for the First
 24 District from the judgment filed on February 21, 2012, in favor of plaintiff Mitchell Sims.

25 The state has expended significant time and resources developing a three-drug lethal-
 26 injection protocol for carrying out the death penalty, and this protocol conforms with a procedure
 27 that has been upheld by the United States Supreme Court. This notice of appeal is filed because
 28 the state's three-drug protocol is the law of California and should not be abandoned without

By Fax

06/28/2012

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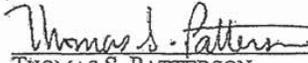
3 of 4

1 appellate review, and because the superior court made fundamental errors in issuing its decision.
2 At the same time, appellants recognize that the availability of the three drugs comprising the
3 current protocol is uncertain. If it becomes certain in the future that the drugs needed to
4 implement the protocol have, in fact, become unavailable, appellants will reevaluate whether this
5 appeal, or any portions of it, should continue to be prosecuted. In the meantime, under the
6 Governor's direction, the California Department of Corrections and Rehabilitation will also begin
7 the process of considering alternative regulatory protocols, including a one-drug protocol, for
8 carrying out the death penalty.

9
10 Dated: April 26, 2012

Respectfully Submitted,

11 KAMALA D. HARRIS
12 Attorney General of California

13
14 
15 THOMAS S. PATTERSON
16 Supervising Deputy Attorney General
17 Attorneys for Defendants
18 California Department of Corrections and
19 Rehabilitation and Matthew Cate

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06/28/2012

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4 of 4

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **M. Sims v. CDCR, et al.**
No.: **CIV1004019**

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 with postage thereon fully prepaid that same day in the ordinary course of business.

On April 26, 2012, I served the attached

NOTICE OF APPEAL

by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

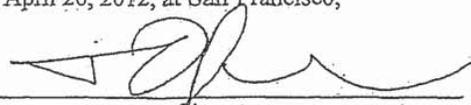
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 26, 2012, at San Francisco, California.

T. Oakes
Declarant


Signature

SF2010201806
20597697.doc

06/28/2012

Ace Attorney Service (213) 623-7527

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EXHIBIT 3

06/28/2012

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E-Filed 1/19/2011

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Michael Angelo MORALES et al.,
Plaintiffs,
v.
Matthew CATE, Secretary of the California
Department of Corrections and Rehabilitation,
et al.,
Defendants.

Case Number 5-6-cv-219-JF-HRL
Case Number 5-6-cv-926-JF-HRL

DEATH-PENALTY CASE

ORDER GRANTING MOTION TO
INTERVENE

[Doc. No. 467]

Plaintiff Michael Angelo Morales, a condemned inmate at San Quentin State Prison, initiated this challenge to the constitutionality of Defendants' protocol for executions by lethal injection. Plaintiff Albert Greenwood Brown, also a condemned prisoner, subsequently moved to intervene. The Court granted the motion, noting that "Brown's federal claims are virtually identical to those asserted by . . . Morales." *Morales v. Cate*, No. 5-6-cv-219-JF-HRL, 2010 WL 3751757, at *1 (N.D. Cal. Sept. 24, 2010). Pursuant to guidance from the Court of Appeals, this Court also stayed Brown's execution. *Morales v. Cate*, No. 5-6-cv-219-JF-HRL, 2010 WL 3835655 (N.D. Cal. Sept. 28, 2010).

Now before the Court is the motion of Mitchell Carlton Sims and Stevie Lamar Fields to intervene as Plaintiffs in this litigation. Both Sims and Fields are similarly situated to Morales

Case Nos. 5-6-cv-219-JF-HRL & 5-6-cv-926-JF-HRL
ORDER GRANTING MOTION TO INTERVENE
(DPSAGOK)

06/28/2012

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Case5:06-cv-00219-JF Document473 Filed01/19/11 Page2 of 2

1 and Brown in that they are condemned prisoners whose executions are not otherwise stayed and
 2 whose claims in their complaint in intervention are virtually identical to those asserted by
 3 Morales and Brown. Accordingly, Sims and Fields are entitled to intervene and, like Morales
 4 and Brown, to have their executions stayed until the present litigation is concluded.

5 Defendants do not oppose the motion on the merits, (Doc. No. 472 at 2), but they urge the
 6 Court to defer ruling on the motion until the California Supreme Court has determined whether
 7 the proposed intervenors' attorneys, Michael Laurence and Sara Cohbra, who are affiliated with
 8 the Habeas Corpus Resource Center (HCRC), are authorized to participate in actions such as this
 9 one. However, Laurence and Cohbra are members of the bar of this Court, and as such, they
 10 "may practice in this Court." Civil L.R. 11-1(a). The question of the scope of the HCRC's
 11 authority under state law is not a federal question and has no bearing on the merits of the present
 12 motion. If the California Supreme Court ultimately determines that Laurence and Cohbra must
 13 withdraw as counsel in this case, this Court will permit an appropriate substitution of counsel at
 14 that time.

15 Accordingly, and good cause appearing therefor, the motion of Mitchell Carlton Sims and
 16 Stevie Lamar Fields to intervene as Plaintiffs in this litigation is granted; the motion hearing
 17 presently calendared for February 4, 2011, is hereby vacated. All proceedings related to the
 18 execution of the intervenors' sentences of death, including but not limited to preparations for an
 19 execution and the setting of an execution date, are hereby stayed on the same basis and to the
 20 same extent as in the case of Plaintiffs Morales and Brown.

21 IT IS SO ORDERED.

22
23 DATED: January 19, 2011

24 
 25 JEREMY FOGEL
 26 United States District Judge

27
28

ATTACHMENT 3

ATTORNEY GENERAL'S
OFFICE COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

MAY 22 2014

COURT OF APPEAL THIRD DISTRICT
DEENA C. PAWLOTT

BY _____

BRADLEY S. WRIGHT

Plaintiff

Case No. C070851

MATTHEW CALE, Secretary, California
Department of Corrections and Rehabilitation,
et al.

Respondents

MICHAEL ANGELO MORALES

Real Party in Interest

OPPOSITION TO PETITION FOR WRIT OF
MANDATE

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MAY 22 2014

Court of Appeal
Third Appellate District

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INTRODUCTION

Petitioner Bradley Winchell asks this Court to issue a writ of mandate requiring the California Department of Corrections and Rehabilitation to develop a new state lethal-injection process in the manner he believes makes the most sense. The petition does not seek to compel the performance of a ministerial duty, which is the primary purpose of mandamus relief. Rather, it mistakenly asserts that CDCR has abused its discretion—not because CDCR’s choices have been arbitrary or unreasonable—but because litigation challenging the lethal-injection protocol has delayed implementation of the death penalty. These allegations cannot support mandamus relief.

The Legislature vested CDCR with discretion in developing the state’s lethal-injection process. And CDCR has exercised its discretion appropriately. CDCR’s current lethal-injection protocol is similar to a protocol deemed constitutional by the United States Supreme Court in *Baze v. Rees* (2008) 553 U.S. 35. Although condemned inmates’ legal challenges have unfortunately delayed the protocol’s implementation, CDCR has appropriately defended the protocol against these challenges. And to reduce further delay from the current litigation challenging the protocol, CDCR has begun considering alternative protocols for the purpose of developing new regulations for an alternative lethal-injection process. Although Petitioner disagrees with how CDCR is proceeding, he concedes that CDCR’s actions have been reasonable.

The petition should be denied because mandamus is unavailable to substitute Petitioner’s judgment for CDCR’s. The petition should also be denied because the relief sought—namely, the development of an alternative lethal-injection protocol—is already underway. Finally, even if the petition could frame a facially viable request for writ relief (which it cannot), it should be denied because the requested relief should be sought

in the First District Court of Appeal, which is currently reviewing CDCR's regulatory obligations related to its lethal-injection protocol.

STATEMENT OF FACTS

The Legislature has vested CDCR with discretion to develop procedures for the execution of condemned inmates by lethal injection. (Pen. Code, § 3604 subd. (a).) In May 2007, CDCR issued Operational Procedure 770 (O.P. 770), which set forth a detailed protocol that addressed the entire process of housing and executing condemned inmates at San Quentin. (*Morales v. Cal. Dept. of Corrections and Rehabilitation* (2008) 168 Cal.App.4th 729, 733-35.)

Condemned inmates Michael Morales and Mitchell Sims filed a complaint in Marin County Superior Court for declaratory and injunctive relief against CDCR, seeking to bar any executions until the state's execution protocol was promulgated as regulations under the Administrative Procedure Act (APA). (Ex. 1, pp. 1-8.) In October 2007, the court granted their summary-judgment motion and enjoined O.P. 770's enforcement until and unless it was promulgated under the APA. (Ex. 2, pp. 40-43.)

CDCR appealed that ruling, and on November 21, 2008, the Court of Appeal for the First Appellate District upheld the superior court's decision. (*Morales v. Cal. Dept. of Corrections and Rehabilitation, supra*, 168 Cal.App.4th at p. 732.) The opinion affirmed in full the superior court's summary-judgment ruling. (*Ibid.*) The court concluded that O.P. 770 was a rule of general application because it declared how a certain class of inmates will be treated, and that it was not subject to the single-facility exception because "it directs the performance of numerous functions beyond San Quentin's walls." (*Id.* at pp. 739-740.)

In compliance with *Morales*, CDCR promulgated regulations for a three-drug-lethal-injection protocol. In August 2010, Sims again filed a

lawsuit in Marin County Superior Court seeking to invalidate the regulations for failing to substantially comply with the APA. (Ex. 3.) In December 2011, the superior court granted plaintiff summary judgment in favor of plaintiffs, ruling that CDCR did not substantially comply with the APA's procedural requirements. (Ex. 4, p. 88.) On February 21, 2012, the court issued judgment, invalidating CDCR's lethal-injection protocol, and permanently enjoining CDCR from executing any condemned inmate by lethal injection until new regulations were promulgated in compliance with the APA. (Ex. 5, p. 106:18-107:13.)

On April 26, 2012, CDCR filed a notice of appeal from the Marin County Superior Court's judgment. (Ex. 6.) In the notice of appeal, the Department explained that it was pursuing an appeal because, among other reasons, the regulations conformed to the procedure the United States Supreme Court upheld in *Baze v. Rees*. (*Id.* at p. 127:25-128:8) It further stated that "under the Governor's direction, the California Department of Corrections and Rehabilitation [would] . . . begin the process of considering alternative regulatory protocols, including a one-drug protocol, for carrying out the death penalty." (*Id.* at p. 128:5-8.)

ARGUMENT

I. THE COURT SHOULD NOT EXERCISE ITS DISCRETION TO GRANT WRIT RELIEF BECAUSE THE PETITION DOES NOT SEEK ENFORCEMENT OF A MINISTERIAL DUTY BUT SIMPLY TRIES TO DICTATE HOW CDCR SHOULD EXERCISE ITS DISCRETION.

The primary purpose of a writ of mandate is to compel the performance of a ministerial legal duty. (See Code Civ. Proc., § 1085, subd. (a); *Ridgecrest Charter School v. Sierra Sands Unified School Dist.* (2005) 130 Cal.App.4th 986, 1002.) Even when addressing ministerial duties, courts have a great amount of discretion in determining whether to exercise original jurisdiction to issue a writ, and in the vast majority of

cases, they decline to do so. (1 *Cal. Civil Writ Practice* (Cont.Ed.Bar 4th ed. 2011) § 15.4, p. 352.) Mandamus generally “may be used only to compel the performance of a duty that is purely ministerial in character,” and it “may not be invoked to control an exercise of discretion, i.e., to compel an official to exercise discretion in a particular way.” (*Ibid.*) “[T]he writ will not lie to control discretion conferred upon a public officer or agency.” (*People ex rel. Younger v. County of El Dorado* (1971) 5 Cal.3d 480, 491.)

In unusual circumstances where a ministerial duty is not at issue, mandamus may be appropriate to compel the exercise of discretion by a governmental agency where, under the facts, discretion can only be exercised in one way. (*Ghilotti Construction Co. v. City of Richmond* (1996) 45 Cal.App.4th 897, 904.) But a court generally cannot issue a writ of mandate to dictate how an agency must exercise the discretion with which it has been vested. (*Lindell Co. v. Bd. of Permit Appeals for the City and County of S.F.* (1943) 23 Cal.2d 303, 315.)

If a ministerial duty is not at issue, a writ of mandate is only appropriate where petitioners have shown that the agency abused its discretion. (*Galbiso v. Orosi Public Utility Dist.* (2010) 182 Cal.App.4th 652, 673.) Determining whether an agency abused its discretion turns not on whether the agency’s findings were supported by substantial evidence, but whether the agency’s actions were arbitrary or capricious, or entirely without evidentiary support. (*Ibid.*) A party seeking mandamus must show that the public official or agency invested with discretion acted arbitrarily, capriciously, fraudulently, or without due regard for his rights, and that the action prejudiced the party. (*Gordon v. Horsley* (2001) 86 Cal.App.4th 336, 351.) Additionally, in determining whether an agency has abused its discretion, the court may not substitute its judgment for that of the agency, and if reasonable minds may disagree about the wisdom of the agency’s

action, its determination must be upheld. (*American Federation of State, County and Municipal Employees v. Metropolitan Water Dist. of Southern California* (2005) 126 Cal.App.4th 247, 261.)

The Court should not grant the relief requested here because the petition does not seek to compel a ministerial duty. Rather, it simply takes issue with how CDCR has exercised its discretion in developing the state's lethal-injection protocol. But as explained below, writ relief is unavailable because CDCR has properly exercised its discretion.

II. WRIT RELIEF MUST BE DENIED BECAUSE CDCR HAS NOT ABUSED ITS DISCRETION IN IMPLEMENTING A LETHAL-INJECTION PROTOCOL. IN FACT, CDCR HAS RESPONDED APPROPRIATELY TO EVERY COURT-IMPOSED OBLIGATION.

The Legislature has vested CDCR with discretion to develop procedures for the execution of condemned inmates by lethal-injection. (Pen. Code, § 3604, subd. (a).) The petition concedes that section 3604 "implies considerable discretion" to CDCR in establishing the state's lethal-injection standards. (Pet. at p. 18.) In the course of developing these standards, CDCR has repeatedly been confronted with legal challenges and court rulings defining its legal obligations. At every juncture over the course of these legal proceedings, CDCR has appropriately exercised its discretion to establish lethal-injection standards. Because CDCR has not acted arbitrarily, capriciously, fraudulently, or in a manner prejudicial to Petitioner's rights, writ relief must be denied. (See *Gordon v. Horsley*, *supra*, 86 Cal.App.4th at p. 351.)

In 2007, CDCR issued Operational Procedure No. 770 (O.P. 770), establishing a three-drug-lethal-injection protocol. (*Morales v. Cal. Dept. of Corrections and Rehabilitation*, *supra*, 168 Cal.App.4th at p. 732.) Condemned inmates challenged the validity of O.P. 770 in Marin County Superior Court on the ground that it was adopted without compliance with the Administrative Procedure Act. (*Ibid.*) The superior court agreed and

struck down the protocol. (*Ibid.*) CDCR appealed, and argued that compliance with the APA was not required under the single-prison exception because all executions are conducted at San Quentin. (*Ibid.*)

The First District Court of Appeal rejected this argument, and held that CDCR was obligated to promulgate regulations for its lethal-injection process in compliance with the APA. (*Morales v. Cal. Dept. of Corrections and Rehabilitation, supra*, 168 Cal.App.4th at p. 732.) The court found that O.P. 770 was a rule of general application because it declared how a certain class of inmates—condemned inmates—would be treated. (*Id.* at p. 739.) It further noted that the protocol was not subject to the single-facility exception because “it directs the performance of numerous functions beyond San Quentin’s walls.” (*Id.* at p. 740.) For example, to ensure that the execution team is comprised of qualified members, the protocol authorized CDCR to recruit qualified staff from other institutions if a sufficient number could not be fielded from San Quentin. (*Ibid.*)

In compliance with *Morales*, CDCR promulgated regulations providing for a three-drug-lethal-injection process, similar to the process upheld as constitutional by the United States Supreme Court. (See *Baze v. Rees, supra*, 553 U.S. at pp. 62-63.) As soon as those regulations were promulgated, condemned inmates again sued in Marin County Superior Court, asserting that CDCR did not substantially comply with the APA when it promulgated the regulations. The superior court agreed, granted summary judgment against CDCR, and, on February 21, 2012, permanently enjoined CDCR from executing any condemned inmate by lethal injection until new regulations have been promulgated in compliance with the APA. (Pet. Ex. H.)

CDCR is currently appealing that ruling in the First District. (Ex. 6.) CDCR’s decision to defend the three-drug protocol on appeal certainly cannot be deemed an abuse of discretion, given the time and resources the

state invested to develop it, the *Baze* decision, and the fact that numerous other states and the federal government still use the three-drug method. (Death Penalty Information Center, *State by State Lethal Injection* <<http://www.deathpenaltyinfo.org/state-lethal-injection>> [as of May 22, 2012] [identifying the 35 states that have lethal injection as at least a potential for capital punishment, and noting that most use a three-drug method, while only six have changed to a single-drug method].) In fact, the petition admits that CDCR's three-drug protocol is similar to or better than the protocol upheld in *Baze*, and admits that it was within CDCR's discretion to attempt to establish and defend the three-drug protocol. (Pet. at p. 20.) It also correctly admits that CDCR's decision to fight the challenge to its protocol rather than switching the protocol was within the CDCR's discretion. (*Id.*)

The petition simply argues that although those decisions were within CDCR's discretion, CDCR is now abusing its discretion because the litigation has not been quickly resolved. (*Id.*) The apparent frustration with the delays caused by the litigation brought by condemned inmates is understandable. But the subjective argument that the litigation has now taken too long is not a sufficient basis to engage mandamus relief.

Moreover, the state is already taking action to reduce further delays by considering alternative protocols for the purpose of developing new lethal-injection regulations. (See Ex. 6 and Section III, below.) CDCR's development of new regulations cannot reasonably be deemed an abuse of discretion given the *Morales* appellate decision and the *Sims* injunction. Against this backdrop, the petition's legally dubious suggestion that CDCR should develop an alternative protocol *without* promulgating new regulations amounts to nothing more than second-guessing. Mandamus is not available to second-guess CDCR's considered judgments. (See *American Federation of State, County and Municipal Employees v.*

Metropolitan Water Dist. of Southern California, supra, 126 Cal.App.4th at p. 261.)

III. THE PETITION SHOULD BE DENIED BECAUSE CDCR IS ALREADY DEVELOPING AN ALTERNATIVE LETHAL-INJECTION PROCESS.

The petition essentially seeks an order compelling CDCR to develop an alternative lethal-injection process. But, at the Governor's direction, CDCR has already begun the process of considering alternative regulatory protocols, including a one-drug protocol, for carrying out the death penalty. (See Ex. 6.)

The petition suggests that CDCR should simply draft a single-drug, single-prison, lethal-injection protocol *without* promulgating new regulations. But doing so would put CDCR in apparent violation of *Morales* and the permanent injunction in *Sims*. Rather than expediting the development of a protocol free of legal impediments, the petition's proposed course of action would inevitably subject CDCR to new litigation, and a possible injunction (if not sanctions) from the Marin County Superior Court or the First District Court of Appeal, causing further delay. The First District already rejected CDCR's arguments that the single-prison exception to the APA applies. (*Morales v. Cal. Dept. of Corrections and Rehabilitation, supra*, 168 Cal.App.4th at p. 740.) And mandamus is not available to second-guess CDCR's determination that an effective lethal-injection protocol requires involvement by individuals at CDCR headquarters and elsewhere.

Rather than proceed in the ill-advised manner the petition proposes, CDCR has begun the process of considering alternative lethal-injection protocols to develop new regulations so that it complies with its legal obligations under *Sims*, *Morales*, and the APA. In sum, the petition is

unnecessary and should be denied because CDCR already is considering alternative lethal-injection protocols.

IV. THE PRIORITY-OF-JURISDICTION DOCTRINE MILITATES AGAINST GRANTING WRIT RELIEF BECAUSE LITIGATION IS PENDING IN THE FIRST DISTRICT COURT OF APPEAL CONCERNING CDCR'S OBLIGATIONS UNDER THE APA RELATED TO ITS LETHAL-INJECTION PROTOCOL.

Under the doctrine of priority of jurisdiction (sometimes called the rule of exclusive concurrent jurisdiction), the first superior court to assume and exercise jurisdiction in the case acquires exclusive jurisdiction until the matter is disposed of. (*Plant Insulation Co. v. Fibreboard Corp.* (1990) 224 Cal.App.3d 781, 786-787.) The doctrine avoids conflict of jurisdiction, multiplicity of suits, confusion, and contradictory decisions. (*Ibid*; see also *Levine v. Smith* (2006) 145 Cal.App.4th 1131, 1135.) If the court exercising original jurisdiction has the power to bring before it all the necessary parties, even though the parties in the second action are not identical, that will not preclude the application of the rule. (*Plant Insulation Co.*, at p. 788.) Some courts have viewed the doctrine as implicating the subsequent court's jurisdiction, while other courts have viewed the doctrine as implicating considerations of comity and judicial discretion. (Compare *Plant Insulation Co*, *supra*, 224 Cal.App.3d at pp. 786-787 and *Levine v. Smith*, 145 Cal.App.4th 1131, with *Childs v. Eltinge* (1973) 29 Cal.App.3d 843; *In re Marriage of Gray* (1988) 204 Cal.App.3d 1239; see also 2 Witkin, Cal. Procedure (5th ed. 2008) Jurisdiction, § 427, p. 1077.)

The writ petition clearly presents APA issues that are intertwined with those in CDCR's appeal in *Sims*, which is currently pending in the First District Court of Appeal. That case involves, among other things, the procedures CDCR must follow before conducting any executions by lethal injection. The judgment CDCR is challenging on appeal permanently

enjoins it from “carrying out the execution of any condemned inmate by lethal injection *unless and until new regulations governing lethal injection executions are promulgated in compliance with the Administrative Procedure Act.*” (Ex. 5, pp. 106:28-107:3, emphasis added.) The petition’s view that CDCR should develop a new protocol *without* promulgating new regulations would seem to place CDCR in direct violation of a plain reading of the permanent injunction.

Regardless of whether the priority-of-jurisdiction doctrine is deemed mandatory or discretionary, the policy reasons behind it, such as avoiding multiplicity of suits, jurisdictional conflicts, contradictory decisions, and confusion, militate against this Court exercising its discretion to grant relief here. The relief that the petition seeks would be more appropriately sought in the First District Court of Appeal, where the *Sims* appeal is currently pending.

CONCLUSION

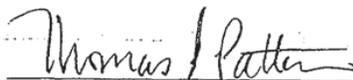
The Court should not exercise its discretion to issue a writ of mandate because the manner in which CDCR has chosen to implement the lethal-injection protocol is reasonable and appropriate. CDCR’s actions have not been arbitrary, capricious, or entirely without evidentiary support. And the Court cannot compel CDCR to exercise its discretion in a particular manner. Moreover, the Governor has directed CDCR to begin the process of considering alternative regulations, so the relief Petitioner essentially seeks is already underway. Finally, the relief sought (assuming for argument that it is substantively viable) should be sought in the First District Court of

Appeal, which has already considered CDCR's APA obligations once and is now considering those obligations again in the *Sims* appeal. For all of these reasons, the petition should be denied.

Dated: May 22, 2012

Respectfully submitted,

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SUPREME COURT
FILED

APR 22 2010

Frederick K. Onizich Clerk

Deputy

S180926

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re ERNEST DEWAYNE JONES on Habeas Corpus.

The Motion to Withdraw Petition for Writ of Habeas Corpus, filed by petitioner Ernest Dewayne Jones on April 5, 2010, is granted. The petition for writ of habeas corpus filed on March 11, 2010, is ordered withdrawn. The Application to Defer Informal Briefing on Petition for Writ of Habeas Corpus, filed together with the petition on March 11, 2010, is denied as moot.

GEORGE

Chief Justice

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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ERNEST DEWAYNE JONES,
Petitioner,

v.
**ROBERT K. WONG, Acting Warden
of California State Prison at San
Quentin,**
Respondent.

CV-09-2158-CJC
DEATH PENALTY CASE
**ANSWER TO PETITION FOR
WRIT OF HABEAS CORPUS**

The Honorable Cormac J. Carney, U.S.
District Judge

1 Vincent Cullen, the Acting Warden of the California State Prison in San
2 Quentin, California,¹ by and through his attorneys of record, files this Answer to the
3 Petition for Writ of Habeas Corpus filed on March 10, 2010, and hereby generally
4 and specifically denies each and every allegation therein, including but not limited
5 to the allegations contained in subject headings, subheadings, and footnotes, except
6 as expressly set forth herein. Respondent answers the Petition by admitting,
7 denying, and affirmatively alleging as follows:

8 Dated: April 6, 2010

Respectfully submitted,

9 EDMUND G. BROWN JR.
10 Attorney General of California
11 DANE R. GILLETTE
12 Chief Assistant Attorney General
13 PAMELA C. HAMANAKA
14 Senior Assistant Attorney General
15 A. SCOTT HAYWARD
16 Deputy Attorney General

17 /s/ Herbert S. Tetef
18 HERBERT S. TETEF
19 Deputy Attorney General
20 *Attorneys for Respondent*

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26 ¹ Respondent notes that Vincent Cullen is now the Acting Warden of the
27 California State Prison in San Quentin, California. Pursuant to Federal Rule of
28 Civil Procedure 25(d), Respondent respectfully requests that he be substituted as
Respondent in this matter.

1 **PROCEDURAL AND JURISDICTIONAL STATEMENT**

2 **A. Custody**

3 Petitioner, Ernest Dewayne Jones, is in the custody of the California
4 Department of Corrections and Rehabilitation in San Quentin, California, pursuant
5 to the judgment and conviction in *People v. Ernest Dwayne Jones*, Los Angeles
6 County Superior Court case number BA063825.

7 Petitioner received a fair guilt and penalty trial by an impartial jury. No errors
8 of federal constitutional dimension occurred in connection with his criminal
9 proceedings. The convictions for which he is held in custody and his sentence of
10 death are valid and proper and do not violate the Constitution or laws or treaties of
11 the United States. Petitioner is entitled to no relief on any of the claims or
12 subclaims alleged in the Petition for Writ of Habeas Corpus.

13 **B. Trial Court Proceedings**

14 On February 1, 1995, a jury convicted Petitioner of the first degree murder
15 (Cal. Penal Code § 187(a); count 1) and forcible rape (Cal. Penal Code § 261(a)(2);
16 count 3) of Julia Ann Miller. As to the murder, the jury found true a special
17 circumstance that it was committed while Petitioner was engaged in the
18 commission of a rape (Cal. Penal Code § 190.2(a)(17)). As to both offenses, the
19 jury found that Petitioner personally used a knife (Cal. Penal Code § 12022(b)) and
20 had served a prior prison term (Cal. Penal Code § 667.5(a)&(b)).² (CT at 365,
21 367.)

22 On February 16, 1995, following a penalty trial, the jury fixed the penalty for
23 the murder at death. (CT at 428.) On April 7, 1995, the court pronounced a

24 ² Respondent is filing, concurrently with this Answer, a Notice of Lodging
25 (“NOL”), which describes the documents being lodged pursuant to Local Rule 83-
26 17.7, including the Clerk’s Transcript (“CT”), the Reporter’s Transcript (“RT”),
27 and the briefs, opinion, and/or orders filed in connection with Petitioner’s direct
28 appeal (case number S046117) and the habeas corpus proceedings (case numbers
S110791, S159235, & S180926) in the California Supreme Court. All further
references to particular lodged documents herein will be to “NOL” letter and
number (e.g., NOL A1) or “CT” or “RT” unless otherwise specifically indicated.

1 judgment of death in accordance with the jury's verdict. In addition, it imposed a
2 prison sentence of twelve years for the rape, which was stayed. (CT at 512, 515-
3 16.)

4 **C. State Post-Conviction Proceedings**

5 **1. Appeal to the California Supreme Court**

6 On March 17, 2003, the California Supreme Court affirmed the judgment of
7 conviction and death sentence on direct appeal (case number S046117). *People v.*
8 *Jones*, 29 Cal. 4th 1229, 131 Cal. Rptr. 2d 468 (2003). (NOL B4.) On October 14,
9 2003, the United States Supreme Court denied a petition for writ of certiorari.
10 *Jones v. California*, 540 U.S. 952, 124 S. Ct. 395, 157 L. Ed. 2d 286 (2003). (NOL
11 B7.)

12 **2. California Supreme Court Habeas Corpus Petitions**

13 On October 21, 2002, Petitioner filed his first petition for writ of habeas
14 corpus in the California Supreme Court (case number S110791). (NOL C1.) On
15 October 16, 2007, Petitioner filed his second petition for writ of habeas corpus in
16 the California Supreme Court (case number S159235). (NOL D1.) On March 11,
17 2009, the California Supreme Court denied both petitions for writ of habeas corpus.
18 (NOL C7 & D6.) On March 11, 2010, the day after he filed the instant Petition for
19 Writ of Habeas Corpus, Petitioner filed a third petition for writ of habeas corpus in
20 the California Supreme Court (case number S180926). (NOL E1.) That petition is
21 pending.³

22 ///

23 ///

24 ³ At the time Petitioner filed his third habeas corpus petition in the California
25 Supreme Court, he also filed a motion in the California Supreme Court to defer
26 briefing on the petition pending resolution of exhaustion issues in the instant federal
27 proceedings. In the motion, Petitioner indicated that he would withdraw the state
28 petition if it were determined that all claims in the instant federal Petition are
exhausted. Since Respondent is not asserting that any claims in the instant federal
Petition are unexhausted, Respondent anticipates that Petitioner will be
withdrawing the California Supreme Court habeas petition.

1 **D. Federal Habeas Corpus Proceedings**

2 On March 27, 2009, Petitioner filed in this Court a request for appointment of
3 counsel, a request for stay of execution and status conference, and a notice of
4 intention to file a petition for writ of habeas corpus. On March 31, 2009, this Court
5 issued an order staying execution of the death sentence until ninety days after the
6 appointment of counsel. On April 14, 2009, current counsel was appointed to
7 represent Petitioner in these proceedings.

8 On March 10, 2010, Petitioner filed the instant Petition for Writ of Habeas
9 Corpus (“Petition” or “Pet.”), which contains thirty claims for relief.

10 **PREAMBLE TO ANSWER**

11 The Petition is subject to 28 U.S.C. § 2254 et seq., as amended by the
12 Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”).⁴ The
13 California Supreme Court denied each of Petitioner’s claims and subclaims on the
14 merits. As a result, Petitioner cannot obtain federal habeas relief because the
15 California Supreme Court’s denial of each claim and subclaim was not contrary to
16 any clearly established Supreme Court authority, did not involve an unreasonable
17 application of clearly established Supreme Court authority, and did not involve an
18 unreasonable determination of the facts based on the evidence presented to it within
19 the meaning of § 2254(d). As to each claim for which no clearly established
20 Supreme Court authority existed at the time of the California Supreme Court’s
21 denial of the claim, federal habeas relief is precluded by § 2244(d). As to each
22 claim and subclaim that fails to allege a cognizable claim in a federal habeas
23 proceeding, or fails to allege a prima facie federal constitutional claim for relief, the
24 claim fails.

25 As to the statements contained in the “Introduction” section of the Petition,
26 Respondent denies, or lacks sufficient knowledge to admit or deny, every allegation

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⁴ All further statutory references are to Title 28 of the United States Code
28 unless otherwise specified.

1 contained in the “Introduction” section. As to the statements contained in the
2 “Procedural History and Background” section of the Petition, Respondent denies, or
3 lacks sufficient knowledge to admit or deny, every allegation contained in the
4 “Procedural History and Background” section. As to the statements contained in
5 the “Jurisdiction” section of the Petition, Respondent denies, or lacks sufficient
6 knowledge to admit or deny, every allegation contained in the “Jurisdiction”
7 section. In addition, as to the factual allegations made in support of Petitioner’s
8 thirty claims for relief (including all subclaims), Respondent denies, or lacks
9 sufficient knowledge to admit or deny, every factual allegation made in support of
10 Petitioner’s thirty claims for relief (including all subclaims); alternatively,
11 Respondent denies that the alleged facts, if true, entitle Petitioner to federal habeas
12 relief. Additionally, Respondent does not respond to argumentative or conclusory
13 statements in the Petition, because these statements do not require an admission or
14 denial.

15 Further, Petitioner is not entitled to an evidentiary hearing on any claim or
16 subclaim alleged in the Petition because a proper application of § 2254(d) requires
17 that each claim be adjudicated on the basis of the record before the California
18 Supreme Court. *Holland v. Jackson*, 542 U.S. 649, 652, 124 S. Ct. 2736, 159 L.
19 Ed. 2d 683 (2004) (per curiam) (“we have made clear that whether a state court’s
20 decision is unreasonable must be assessed in light of the record the court had before
21 it”), citing *Yarborough v. Gentry*, 540 U.S. 1, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003),
22 *Miller-el v. Cockrell*, 537 U.S. 322, 348, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003),
23 *Bell v. Cone*, 535 U.S. 685, 697 n.4, 122 S. Ct. 1843, 152 L. Ed. 2d (2002) (*Bell I*)
24 (declining to consider evidence not presented to state court in determining whether
25 its decision was contrary to federal law). Permitting an evidentiary hearing to allow
26 Petitioner to more fully develop the factual basis of a claim would render any such
27 claim unexhausted, and a sound application of § 2254(d) impossible. *Schriro v.*
28 *Landrigan*, 550 U.S. 465, 474, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007)

1 “due diligence” within the meaning of § 2254(e), and cannot otherwise meet the
2 stringent requirements of § 2254(e)(2).

3 **CLAIM TWENTY-SEVEN: CONSTITUTIONAL AND INTERNATIONAL LAW**
4 **VIOLATIONS BECAUSE OF LENGTHY PERIOD OF CONFINEMENT UNDER**
5 **SENTENCE OF DEATH**

6 In Claim Twenty-Seven, Petitioner claims various federal constitutional
7 violations and a violation of international law on the ground that California’s death
8 penalty post-conviction procedures permit execution following a long period of
9 confinement under a sentence of death. (Pet. at 414-18.) Petitioner raised this
10 claim in his opening brief on appeal in the California Supreme Court. (NOL B1 at
11 229-43.) The California Supreme Court rejected the claim on the merits in its
12 reasoned published opinion on appeal. (NOL B4; *People v. Jones*, 29 Cal. 4th at
13 1267.)

14 The non-retroactivity doctrine forecloses federal habeas corpus relief as to the
15 constitutional provisions alleged by Petitioner in support of this claim because, at
16 the time his conviction became final, existing precedent did not “compel” the result
17 he now seeks. *See Teague v. Lane*, 489 U.S. at 299-301. And, in any event, none
18 of the recognized exceptions to the non-retroactivity doctrine apply to this claim.

19 In addition, Petitioner is precluded from obtaining federal habeas relief
20 because the California Supreme Court’s denial of each claim and subclaim was not
21 contrary to any clearly established Supreme Court authority, did not involve an
22 unreasonable application of clearly established Supreme Court authority, and did
23 not involve an unreasonable determination of the facts based on the evidence
24 presented to it within the meaning of § 2254(d). To the extent that no governing
25 clearly established Supreme Court authority existed at the time of the California
26 Supreme Court’s denial of the claim, federal habeas relief is precluded by §
27 2254(d). To the extent that Petitioner overcomes the § 2254 bar, the claim fails
28 under a de novo standard of review. To the extent that the claim fails to allege a

1 cognizable claim in a federal habeas proceeding, or fails to allege a prima facie
2 federal constitutional claim for relief, it fails.

3 As to the factual allegations made in support of Claim Twenty-Seven,
4 Respondent denies, or lacks sufficient knowledge to admit or deny, every
5 allegation; alternatively, Respondent denies that the alleged facts, if true, entitle
6 Petitioner to federal habeas relief. Further, Petitioner is not entitled to an
7 evidentiary hearing on this claim, including all subclaims, because a proper
8 application of § 2254(d) requires that the claim be adjudicated on the basis of the
9 record before the California Supreme Court. *Holland v. Jackson*, 542 U.S. at 652
10 (“we have made clear that whether a state court’s decision is unreasonable must be
11 assessed in light of the record the court had before it”), citing *Yarborough v.*
12 *Gentry*, 540 U.S. 1, *Miller-el v. Cockrell*, 537 U.S. at 348, *Bell v. Cone*, 535 U.S. at
13 697 n.4 (declining to consider evidence not presented to state court in determining
14 whether its decision was contrary to federal law). Permitting an evidentiary hearing
15 to allow Petitioner to more fully develop the factual basis of the claim would render
16 his claim unexhausted, and a sound application of § 2254(d) impossible. *Schriro v.*
17 *Landrigan*, 550 U.S. at 474 (“Because the deferential standards prescribed by §
18 2254(d) control whether to grant habeas relief, a federal court must take into
19 account those standards in deciding whether an evidentiary hearing is
20 appropriate.”). Moreover, no evidentiary hearing should be held because, to the
21 extent that Petitioner’s claim is not fully factually developed, he failed to exercise
22 “due diligence” within the meaning of § 2254(e), and cannot otherwise meet the
23 stringent requirements of § 2254(e)(2).

24 **CLAIM TWENTY-EIGHT: INEFFECTIVE ASSISTANCE OF APPELLATE**
25 **COUNSEL**

26 In Claim Twenty-Eight, Petitioner claims various federal constitutional
27 violations on the ground that appellate counsel rendered ineffective assistance by
28

MICHAEL LAURENCE (Bar No. 121854)
CLIONA PLUNKETT (Bar No. 256648)
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SUPREME COURT
FILED

APR - 5 2010

Frederick K. Ohlrich Clerk

Deputy

Attorneys for Petitioner Ernest Dewayne Jones

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE ERNEST DEWAYNE JONES,

Petitioner,

On Habeas Corpus.

) CASE NO. S180926
) Related Automatic Appeal
) Case No. S046117
)
) Los Angeles Superior Court
) Case No. BA063825

**REPLY TO RESPONDENT’S RESPONSE TO DEFER INFORMAL
BRIEFING ON PETITION FOR WRIT OF HABEAS CORPUS AND
MOTION TO WITHDRAW PETITION FOR WRIT OF HABEAS
CORPUS**

TO: THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE OF CALIFORNIA AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Petitioner Ernest Dewayne Jones, by and through his attorneys, the Habeas Corpus Resource Center (“HCRC”) respectfully submits this Reply to Respondent’s Response To Application to Defer Informal Briefing on Petition For Writ Of Habeas Corpus, and independently applies to this Court for an order granting petitioner’s motion to withdraw the Petition for Writ of Habeas Corpus, filed March 11, 2010, and the Application to Defer Informal Briefing filed concurrently therewith.

Petitioner's request is based on the Petition for Writ of Habeas Corpus filed on March 11, 2010, the Application to Defer Informal Briefing on Petition for Writ of Habeas Corpus; respondent's Response to Defer Informal Briefing on Petition for Writ of Habeas Corpus; the pleadings and documents already on file in *People v. Jones*, Case No. S046117; *In re Ernest Dewayne Jones*, Case No. S110791; *In re Ernest Dewayne Jones*, Case No. S159235; and, on the attached memorandum of points and authorities.

Dated: April 5, 2010

Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER



By: Michael Laurence

Attorneys for Petitioner:
Ernest Dewayne Jones

MEMORANDUM OF POINTS AND AUTHORITIES

FACTUAL BACKGROUND

Petitioner filed timely Petitions for Writ of Habeas Corpus, on October 21, 2002 (Case No. S110791), and October 16, 2007 (Case No. S159235). This Court issued an order denying both petitions, on March 11, 2009.

On March 10, 2010, petitioner filed a Petition for Writ of Habeas Corpus by a Prisoner in State Custody in the United States District Court for the Central District of California (“Federal Petition”). On March 11, 2010, petitioner filed a Petition for Writ of Habeas Corpus (“Petition”) with this Court that contained identical claims to those filed in the district court. On March 11, 2010, petitioner also filed an Application to Defer Informal Briefing on the Petition for Writ of Habeas Corpus (“Application”), requesting the Court to defer any informal briefing, were it to be requested, to permit the parties to first resolve any dispute as to whether or not all claims in the Federal Petition were properly exhausted. On March 26, 2010, respondent filed a Response to Application to Defer Informal Briefing on Petition for Writ of Habeas Corpus (“Response”). In his Response, respondent stated that he had examined the Federal Petition and determined that all claims therein appeared to be exhausted. Accordingly, based on respondent’s concession that the claims contained in the Federal Petition have been fairly presented to this Court in the direct appeal and the previous petitions for writ of habeas corpus, petitioner moves this Court to withdraw the Petition filed March 11, 2010.

ARGUMENT

“If the district court determines that all claims have been exhausted or respondent waives exhaustion, petitioner will seek an order dismissing the petition filed in this Court on March 11, 2010.” (Application at 4.)

Respondent’s determination that all claims within the Federal Petition have been properly exhausted, and its assertion that it “will therefore be filing an answer to the federal petition and will not be asserting that any claims are unexhausted” (Response at 1), render moot the necessity for the Petition, as set forth in the Application.

Granting the requested order to withdraw the Petition and Application will serve the interests of justice and preserve this Court’s scarce judicial resources for those cases that require this Court’s review.

CONCLUSION

For the foregoing reasons, this Court should issue an order granting petitioner’s request to withdraw the Petition for Writ of Habeas Corpus filed on March 11, 2010 and the concurrently filed Application to Defer Informal Briefing.

DATED: April 5, 2010

Respectfully submitted,
Habeas Corpus Resource Center



Michael Laurence
Attorney for Ernest Dewayne Jones

PROOF OF SERVICE

I, Carl Gibbs, declare that I am a citizen of the United States, employed in the City and County of San Francisco, I am over the age of 18 years and not a party to this action or cause, and my current business address is 303 Second Street, Suite 400 South, San Francisco, California 94107.

On April 5, 2010, I served a true copy of the following:

REPLY TO RESPONDENT'S RESPONSE TO DEFER INFORMAL BRIEFING ON PETITION FOR WRIT OF HABEAS CORPUS AND MOTION TO WITHDRAW PETITION FOR WRIT OF HABEAS CORPUS

in said cause by placing true copies thereof in a sealed envelope, with first class postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as follows:

Herbert S. Tetef
Deputy Attorney General
California Attorney General's Office
300 South Spring Street
Los Angeles, CA 90013

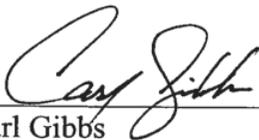
California Appellate Project
101 Second Street, Ste. 600
San Francisco, CA 94105

Harry Cauldwell
Pepperdine University School of Law
24255 Pacific Coast Hwy
Malibu, CA 90265

Ernest Jones
P.O. Box J-60400
San Quentin, CA 94974

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

Executed on April 5, 2010.



Carl Gibbs

In the Supreme Court of the State of California

In re

ERNEST DEWAYNE JONES,

On Habeas Corpus.

CAPITAL CASE

Case No. S180926

(Judgment Affirmed,
March 17, 2003, in
Related Direct Appeal
(S046117) 29 Cal.4th
1229)

**RESPONSE TO APPLICATION TO DEFER
INFORMAL BRIEFING ON PETITION FOR
WRIT OF HABEAS CORPUS**

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
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Attorneys for Respondent

Respondent, the People of the State of California, hereby file this response to petitioner's "Application to Defer Informal Briefing on Petition for Writ of Habeas Corpus" (hereinafter "Application to Defer"). The purpose of this response is to neither oppose nor agree with petitioner's request, but to simply inform the Court of the present procedural posture of the federal case. As explained below, in light of that procedural posture, petitioner should immediately withdraw the petition that he recently filed in this Court.

On March 11, 2010, petitioner filed the instant petition for writ of habeas corpus. On March 10, 2010, petitioner filed a petition for writ of habeas corpus in the United States District Court in *Ernest Dewayne Jones v. Robert K. Wong* (CV-09-2158-CJC). In the Application to Defer, petitioner requests that this Court defer informal briefing on the instant habeas corpus petition to allow the parties and the federal court an opportunity to resolve whether the claims in the federal petition are exhausted. Petitioner indicates that he will withdraw the instant petition if the federal court determines that all claims in the federal petition are exhausted or if respondent waives exhaustion. (Application to Defer at 4.)

Petitioner has apparently assumed that respondent would be asserting that the federal petition is unexhausted. However, respondent has examined the federal petition and has determined that all claims therein appear to be exhausted. Further, respondent recently informed petitioner's counsel of this determination. Respondent will therefore be filing an answer to the federal petition and will not be asserting that any claims are unexhausted. Accordingly, since respondent will not be asserting that the federal petition is unexhausted, and the parties will not be litigating the issue of exhaustion in federal court, petitioner should immediately withdraw the instant petition, consistent with his representation in the Application to Defer that he would do so. This Court should order that if

the state petition is not withdrawn by April 9, 2010, respondent will be ordered to file an informal response.¹

Dated: March 25, 2010

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
A. SCOTT HAYWARD
Deputy Attorney General



HERBERT S. TEFET
Deputy Attorney General
Attorneys for Respondent

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¹ Assuming that petitioner withdraws the petition, the issue whether the petition is procedurally barred will not arise. However, respondent notes that petitioner indicates in both the Application to Defer (at p. 4) and the petition for writ of habeas corpus (at p. 23) that he believes all claims in the petition have already been presented to this Court either on appeal or in previous habeas corpus petitions. Thus, petitioner's representation essentially concedes that the petition is procedurally barred, either because it is successive, repetitive, untimely, and/or barred by *In re Waltreus* (1965) 62 Cal.2d 218, 225.

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONSE TO APPLICATION TO DEFER INFORMAL BRIEFING ON PETITION FOR WRIT OF HABEAS CORPUS uses a 13 point Times New Roman font and contains 332 words.

Dated: March 25, 2010

EDMUND G. BROWN JR.
Attorney General of California

A handwritten signature in black ink, appearing to read 'HT', followed by a horizontal line.

HERBERT S. TEF
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re Ernest Dewayne Jones**
No.: **S180926**

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 March 25, 2010, I served the attached **RESPONSE TO APPLICATION TO DEFER INFORMAL BRIEFING ON PETITION FOR WRIT OF HABEAS CORPUS** 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:

Michael Laurence
Cliona Plunkett
Patricia C. Daniels
Habeas Corpus Resource Center
303 Second Street, Suite 400 South
San Francisco, CA 94107

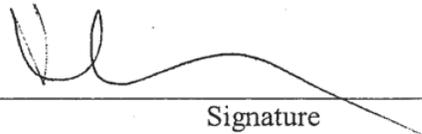
Los Angeles Superior Court - Central
District - Stanley Mosk Branch
Los Angeles Superior Court
111 North Hill Street
Los Angeles, CA 90012

California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105-3647

Second Appellate District
Division One
Court of Appeal of the State of California
300 South Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

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 March 25, 2010, at Los Angeles, California.

D. A. Dvorak
Declarant



Signature

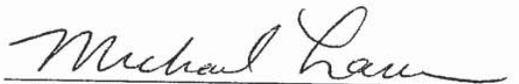
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Case No. S159235; and, on the attached memorandum of points and authorities.

Dated: March 11, 2010

Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

By: 
MICHAEL LAURENCE

Attorneys for Petitioner:
Ernest Dewayne Jones

MEMORANDUM OF POINTS AND AUTHORITIES

A. STATEMENT OF FACTS

On October 20, 2000, the Court appointed the Habeas Corpus Resource Center (HCRC) to represent petitioner in post-conviction proceedings before this Court. Pursuant to that appointment, the HCRC filed timely Petitions for Writ of Habeas Corpus on October 21, 2002 (Case No. S110791), and October 16, 2007 (Case No. S159235). Both Petitions were denied on March 11, 2009.

On March 26, 2009, the HCRC filed a motion for “Ex Parte Application For Appointment Of Counsel; Request For Stay Of Execution And Status Conference; Notice Of Intention To File Petition For Writ Of Habeas Corpus; And Declarations In Support,” in the United States District Court for the Central District of California (“district court”). The HCRC was appointed to represent petitioner in his federal habeas corpus proceedings on October 26, 2009.

On March 10, 2010, petitioner filed a petition for habeas corpus in the district court that contains the same claims as the Petition filed in this Court on March 11, 2010.

B. GRANTING THIS APPLICATION WILL PRESERVE JUDICIAL RESOURCES AND ENABLE A PROMPT RESOLUTION OF PETITIONERS CLAIMS.

“The law mandates prompt disposition of habeas corpus petitions ([Pen. Code] § 1476), and the interest of the state in the finality of judgment weighs heavily against delayed disposition of pending petitions.” (*In re Clark*, 5 Cal. 4th 750, 782 (1993).) Consistent with the legitimate interests identified in *Clark*, petitioner seeks to promptly and efficiently resolve the issue of potentially unexhausted claims.

Petitioner is subject to the statute of limitations imposed by the Anti-Terrorism and Effective Death Penalty Act (AEDPA) for filing his federal habeas corpus petition. Under the AEDPA, petitioner must file his federal habeas corpus petition within either (1) one year following the date on which judgment on the direct appeal becomes final. *See* 28 U.S.C. § 2244(d)(1). The limitations period is tolled for the period “during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.” *Id.* at § 2244(d)(2). In petitioner’s case, the federal statute of limitations began running the day after this Court denied the state habeas corpus petitions on March 11, 2009.

Petitioner believes that all claims presented in the Petition to be filed in the district court before or on March 11, 2010, have been properly exhausted in this Court either on direct appeal or in the previous petitions for a writ of habeas corpus. Nevertheless, respondent may not share the view that all claims in the Petition have been properly exhausted.

Petitioner requests, therefore, that informal briefing on the petition filed March 11, 2010, be deferred pending respondent’s identification of any potentially unexhausted claims in federal court, and the district court’s determination of whether the federal petition contains any unexhausted claims. If the district court determines that all claims have been exhausted or respondent waives exhaustion, petitioner will seek an order dismissing the petition filed in this Court on March 11, 2010. In the alternative, should the district court determine that some claims have not been fairly presented to this Court, petitioner will notify the Court and request an order for informal briefing. In any event, deferring informal briefing will serve the interests of judicial economy and will permit the resolution of any dispute

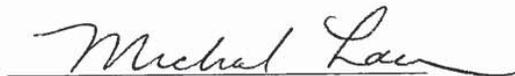
as to which claims have not been exhausted, prior to the expiration of the statute of limitations period. 28 U.S.C. 2244(d).

C. CONCLUSION

For the reasons set forth above, petitioner respectfully requests that this application be granted, so that any dispute as to which claims have not been exhausted may be resolved.

DATED: March 11, 2010

Respectfully submitted,
Habeas Corpus Resource Center

A handwritten signature in cursive script that reads "Michael Laurence". The signature is written in black ink and is positioned above a horizontal line.

Michael Laurence
Attorney for Ernest Dewayne Jones

PROOF OF SERVICE

I, Carl Gibbs, declare that I am a citizen of the United States, employed in the City and County of San Francisco, I am over the age of 18 years and not a party to this action or cause, and my current business address is 303 Second Street, Suite 400 South, San Francisco, California 94107.

On March 11, 2010 I served a true copy of the following:

**APPLICATION TO DEFER INFORMAL BRIEFING ON PETITION
FOR WRIT OF HABEAS CORPUS**

in said cause by placing true copies thereof in a sealed envelope, with first class postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as follows:

Herbert S. Tetef
Deputy Attorney General
California Attorney General's Office
300 South Spring Street
Los Angeles, CA 90013

California Appellate Project
101 Second Street, Ste. 600
San Francisco, CA 94105

Harry Cauldwell
Pepperdine University School of Law
24255 Pacific Coast Hwy
Malibu, CA 90265

Ernest Jones
P.O. Box J-60400
San Quentin, CA 94974

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

Executed on March 11, 2010.



Carl Gibbs

SUPREME COURT
FILED

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA MAR 11 2010

Frederick K. Ohineh Clerk

In re

ERNEST DEWAYNE JONES,

On Habeas Corpus.

Case No.

Related to California Supreme Court
No. S110791 & S159235

Los Angeles County Superior Court No.
BA063825

PETITION FOR WRIT OF HABEAS CORPUS

MICHAEL LAURENCE (Bar No. 121854)
PATRICIA DANIELS (Bar No. 162868)
CLIONA PLUNKETT (Bar No. 256648)
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Attorneys for Petitioner
Ernest Dewayne Jones

treated alike”); (*supra* Claims Sixteen and Twenty-three.). Petitioner’s moral culpability was substantially diminished by the severity of his mental illness, making his death verdict unlawfully disproportionate to his actual, personal responsibility for the crime. *Gregg v. Georgia*, 428 U.S. 153 (1976) (joint opinion of Stewart, Powell and Stevens, JJ) (a sentence that is “grossly out of proportion to the severity of the crime” violates the Eighth Amendment).

23. Petitioner’s convictions and death sentence also are unlawful because the conduct of criminal proceedings and the imposition of the death penalty in a racially discriminatory manner violate provisions of international treaties binding upon the United States. (*See supra* Claims Fourteen, Nineteen, Twenty-two, and Twenty-five.)

24. State and federal procedural laws, rules or practices may not be applied to deprive petitioner of his international rights.

AA. CLAIM TWENTY-SEVEN: EXECUTION FOLLOWING A LONG PERIOD OF CONFINEMENT UNDER A SENTENCE OF DEATH WOULD VIOLATE PETITIONER’S RIGHT TO BE FREE FROM CRUEL, TORTUROUS, AND UNUSUAL PUNISHMENT.

Petitioner’s sentence of death and continued confinement are unlawful and unconstitutional under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and international law as set forth in treaties, customary law, international human rights law, and under the doctrine of *jus cogens* because the California death penalty post-conviction procedures failed to provide petitioner with a constitutionally full, fair, and timely review of his conviction and sentence.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate

funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Petitioner was sentenced to death on April 7, 1995. (2 CT 504.)

2. Through no fault of petitioner, more than four years passed before the California Supreme Court appointed counsel on April 13, 1999, to represent petitioner on appeal.

3. Through no fault on petitioner's part, Appellant's Opening Brief was not filed until June 19, 2001, more than two years after the initial appointment of counsel. Respondent's Brief on appeal was filed on November 6, 2001, and Appellant's Reply Brief was filed on February 26, 2002.

4. Petitioner's conviction and sentence were affirmed by the California Supreme Court on March 17, 2003, and petitioner's petition for a writ of certiorari to the United States Supreme Court was denied on October 14, 2003, over eight years after he was sentenced to death.

5. Petitioner's state habeas petition was filed on October 21, 2002. His state habeas petition was denied by the California Supreme Court on March 11, 2009, fourteen years after he was sentenced to death.

6. California's procedure for review of death judgments does not permit a condemned person to choose whether he wishes to appeal his sentence, as the appeal is automatic. Cal. Penal Code § 1239(b). But even if it did, petitioner's right to make use of the automatic appeal and habeas corpus remedies provided by law in California does not negate the cruel and degrading character of the length of continuous confinement of many years under a judgment of death. Petitioner had no control over the major causes of delay in his case, including delays in the appointment of his counsel.

7. Petitioner was received at San Quentin on April 24, 1995, and assigned to Death Row, where he currently lives.

8. Since petitioner's confinement at San Quentin in 1995, eleven men have been executed, several inmates came within hours of their execution before those executions were stayed, eight more committed suicide, and forty-five more have died of natural causes or violent means, and the cause of death of one additional man is still being investigated by the Marin County Coroner. During this time, several of the executions have been botched, and unprecedented publicity has focused on the torturous nature of the method of execution currently employed in California.

9. Petitioner lives in a solitary cell, a 5-by-10 foot box, consisting of three concrete walls and a fourth wall of bars and wire mesh. Petitioner cannot see other prisoners through the bars. Either in or out of his cell, petitioner is under surveillance by one or more guards armed with loaded weapons. He eats meals in his cell, and is restricted severely in the amount and type of personal property that he is permitted to possess. His time out of his cell is restricted and whenever he is transported he is handcuffed behind his back.

10. The United States stands virtually alone among the nations of the world in confining individuals for periods of many years continuously under a sentence of death.

a. The international community recognizes that, without regard for the question of the appropriateness or inappropriateness of the death penalty itself, prolonged confinement under these circumstances is cruel and degrading and in violation of international human rights law. *Pratt v. Attorney General for Jamaica*, 4 All.E.R. 769 (P.C. 1993); *Soering v. United Kingdom*, 11 E.H.R.R. 439, 440-41 (1989) (Eur. Ct.

H.R.).

b. *Soering* specifically held that, for this reason, it would be unlawful for the government of Great Britain to extradite a man under indictment for capital murder in the State of Virginia, in the absence of assurances that he would not be sentenced to death.

c. The developing international consensus demonstrates that, in addition to being cruel and degrading, what the Europeans refer to as the “death row phenomenon” in the United States is also “unusual,” within the meaning of the Eighth Amendment, entitling petitioner to relief for that reason as well.

d. The delay in final resolution of cases in California far exceeds that of any other state with capital punishment. The excessive delay thus violates the Eighth Amendment’s evolving standards of decency.

11. Execution of petitioner following such confinement under a sentence of death for this lengthy period of time would constitute cruel and unusual punishment because of the physical and psychological suffering inflicted on petitioner.

a. Given the psychologically torturous, degrading, brutalizing, and dehumanizing experience of living on Death Row, the confinement itself constitutes cruel and unusual punishment.

b. “[W]hen a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it.” *In re Medley*, 134 U.S. 160, 172 (1890) (four week period of confinement); *see also Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., joined by Breyer, J., respecting the denial of certiorari) (seventeen years).

12. Execution of petitioner following such confinement under a sentence of death for this lengthy period of time would constitute cruel and unusual punishment because the State's ability to exact retribution and to deter other serious offenses by actually carrying out such a sentence is drastically diminished, such that this extraordinary sentence does not serve any legitimate state interest.

a. Imposition of a death sentence must serve legitimate and substantial penological goals that could not otherwise be accomplished in order to survive Eighth Amendment scrutiny.

b. If the punishment serves no penal purpose more effectively than a less severe punishment, then it is unnecessarily excessive within the meaning of the Punishments Clause. *Furman v. Georgia*, 408 U.S. 238, 280 (Brennan, J. concurring) (1974); *id.* at 312-13, (White, J. concurring); *Ceja v. Stewart*, 134 F.3d 1368, 1373-78 (9th Cir. 1998) (Fletcher, J. dissenting from order denying stay of execution).

c. A death sentence executed against petitioner serves neither a deterrent nor retributive purpose given his extended existence on Death Row. The acceptable state interest in retribution has been satisfied by the psychological and physical severity of his sentence and the additional deterrent effect after many years in prison (and a continuing lifetime of incarceration) is minimal at best.

13. Because of the following circumstances, the state has no legitimate penological interest (deterrent or retributive) in executing petitioner and his execution would involve the needless infliction of avoidable mental anguish and psychological pain and suffering were it to occur.

a. The facts and exhibits set forth in claims One, Four, Sixteen, and Twenty-three concerning petitioner's mental state at the time

of the crime, his character and background, and his neurocognitive and mental vulnerabilities are incorporated by this reference.

b. Eighteen years have passed since his arrest and approximately fifteen years have passed since the judgment of death occurred; several more years likely will pass before his sentence, if affirmed, will be implemented.

14. Petitioner's sentence of death under these circumstances is prohibited by the Constitution and must be set aside and modified.

BB. CLAIM TWENTY-EIGHT: PETITIONER WAS DEPRIVED OF THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL.

Petitioner's conviction, sentence, and confinement were unlawfully obtained in violation of petitioner's Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights. Petitioner was denied his right to due process, equal protection, the right to counsel and the effective assistance thereof, full and fair appellate proceedings, and a reliable determination of his guilt, death eligibility, and punishment due to appellate counsel's representation, which prejudicially fell below minimally acceptable standards of competence by counsel acting as a zealous advocate in a capital case.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing.

1. The California Supreme Court appointed appellate counsel to represent petitioner in his automatic appeal on April 13, 1999. The court certified the record on April 28, 2000. Thereafter, appellate counsel requested and received seven extensions of time. Appellate counsel filed