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12
13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

17 CLARENCE RAY ALLEN,
18 Plaintiff,
19 v.

20 RODERICK HICKMAN, SECRETARY,
CALIFORNIA DEPARTMENT OF
21 CORRECTIONS AND REHABILITATION,
STEVEN ORNOSKI, WARDEN, CALIFORNIA
22 STATE PRISON AT SAN QUENTIN, ARNOLD
SCHWARZENEGGER, GOVERNOR OF
23 CALIFORNIA, AND DOES 1 THROUGH 25,
INCLUSIVE,

24
25 Defendants.

Case No. C 05 5051 JSW

**PLAINTIFF'S REPLY IN SUPPORT
OF HIS APPLICATION FOR A
TEMPORARY RESTRAINING
ORDER TEMPORARY
RESTRAINING ORDER AND
ORDER TO SHOW CAUSE**

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INTRODUCTION

Plaintiff Allen submits this reply memorandum in support of his application for a TRO staying his execution and all proceedings related to his execution until he is provided with the medical care necessary to enable him to properly prepare his clemency petition. Mr. Allen's opening brief set forth facts demonstrating both the inevitable and irreparable injury he will suffer without the relief he requests and the strong likelihood that he will prevail on his claims. Shockingly, Defendants' response contends that the public interest in executing an elderly and infirm man whose physical deterioration can be traced to medical treatment which violates the Eighth Amendment, somehow trumps the irreparable injury that Mr. Allen will suffer—death. The relief requested by Mr. Allen is simple and narrow—he requests that this Court grant him a full and adequate opportunity to present his clemency petition to the Governor. It is the last hope he has to plead for mercy in order to spare his life, and the Constitution requires that he be given a fair opportunity to do so.

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I. THE FACTS CENTRAL TO THIS APPLICATION ARE UNDISPUTED

Defendants' opposition scours the record of the underlying prosecution and subsequent appeals to set forth facts that impugn Mr. Allen. These facts are completely irrelevant to Mr. Allen's application for a temporary restraining order.

This motion concerns Mr. Allen's right to present a full and adequate clemency petition as one of his last hopes to save his life. Defendants admit — as they must — that Mr. Allen has Due Process rights in his clemency proceedings. Mr. Allen set forth specific facts establishing that Defendants' improperly interfered with the preparation for clemency — facts that Defendants do not dispute — in violation of Mr. Allen's rights to Due Process:

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1. Even though Mr. Allen has suffered from chronic heart disease for years, Defendants withheld critical medication between June and August 2005, shortly before Mr. Allen suffered a massive heart attack on September 2, 2005.
 2. After his heart attack Defendants failed to give him adequate medical care, including surgery that was recommended and to which Mr. Allen consented.

- 1 3. Defendants arbitrarily shuffled Mr. Allen back and forth between medical
2 facilities. And, after sending Mr. Allen back to San Quentin's Outpatient Housing
3 Unit, Defendants abused Mr. Allen by subjecting him to extreme cold, shackling
4 Mr. Allen to the toilet, forcing him to his knees to receive his insulin shots, and for
5 two weeks cutting off his insulin.
- 6 4. Defendants' treatment of Mr. Allen prevented Mr. Allen from assisting Dr. Dale
7 Watson with his investigation of Mr. Allen's cognitive deterioration.
- 8 5. Defendants refused to provide Mr. Allen the eye surgery that was recommended
9 by an independent doctor and that is necessary for Mr. Allen's expert, Dr. Watson,
10 to complete his work for Mr. Allen's clemency petition.
- 11 6. Defendants refused to give Mr. Allen a SPECT test or MRI procedures, which are
12 also needed for Mr. Allen to complete his clemency petition.

13 These facts are undisputed. They are consistent with the findings of this Court in *Plata v.*
14 *Schwarzenegger* No. C01-1351 THE, 2005 U.S. Dist. LEXIS 8878 (N.D. Cal. May 10, 2005),
15 and confirm that Defendants have subjected Mr. Allen to years of medical neglect.

16 These facts lead to the inescapable conclusion that Defendants' have improperly interfered
17 with Mr. Allen's preparation of his clemency petition. By this application, Mr. Allen simply
18 seeks to remedy this predicament by obtaining sufficient time to prepare his clemency petition.

19 **II. PLAINTIFF MEETS THE STANDARD FOR A TRO**

20 Mr. Allen's opening papers accurately set forth the standards for seeking a temporary
21 restraining order from this Court staying his execution. The Court may stay the execution if
22 Mr. Allen demonstrates "either a combination of probable success on the merits and the
23 possibility of irreparable injury or that serious questions are raised and the balance of hardships
24 tips sharply in his favor." *Johnson v. Cal. State Bd. Of Accountancy*, 72 F.3d 1427, 1430 (9th
25 Cir. 1995) (internal quotation marks and citation omitted). And, "the greater the relative hardship
26 to the party seeking the preliminary injunction, the less probability of success must be established
27 by the party."¹ *Beardslee v. Woodford*, 395 F.3d 1064, 1067-68 (9th Cir. 2005).

28 ¹ Defendant's citation to *Perry v. Brownlee*, 122 F.3d 20, 22, (8th Cir. 1977), for the
proposition that a stay can be granted only if there are "substantial grounds" for relief is wrong.
Not only is there no such standard for staying an execution under Ninth Circuit law, see *Wilson v.*
United States Dist. Court, 161, F.3d 1185 (9th Cir. 1998) (identifying no such burden), and
Beardslee v. Woodford, 395 F.3d 1064, 1067 (9th Cir. 2005) (same), but the Eighth Circuit in
(Footnote continues on next page.)

1 Contrary to Defendants' opposition, Mr. Allen has shown both (1) that the hardships tip
2 sharply in his favor and that he has raised serious questions and (2) probability of success on the
3 merits and the possibility of irreparably injury. Under either formulation, the Court should stay
4 Mr. Allen's execution.

5 **A. Absent a TRO, Mr. Allen Is Likely to Suffer Irreparable Injury and**
6 **the Hardships Tip Sharply in Mr. Allen's Favor.**

7 Defendants' opposition attempts to minimize Mr. Allen's death. Defendants' contention
8 that Mr. Allen will at most suffer only some "diminution in the quality of his clemency petition"
9 ignores the point that Mr. Allen's clemency proceeding is one of his last opportunities to save his
10 life, and that the Governor's life or death decision will be based on the content and quality of the
11 clemency petition. At issue here is Mr. Allen's ability to save his life by putting his best case
12 before the Governor. Due Process prohibits Defendants from interfering with that right. As
13 established in Mr. Allen's opening papers, Defendants plainly have impeded Mr. Allen's ability
14 to prepare the petition, and their interference may well lead to Mr. Allen's execution unless this
15 Court grants a stay.

16 Defendants, on the other hand, have no interest in executing Mr. Allen under these
17 circumstances. The Court cannot allow Defendants to benefit from their own culpable conduct by
18 pushing Mr. Allen's execution through despite their interference with his constitutional rights.
19 And, the public interest is not served by executing an inmate who has been denied Due Process.

20 The balance of hardships clearly tips in Mr. Allen's favor. And the possibility of
21 irreparable injury to Mr. Allen — execution — is inescapable.

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26 (Footnote continued from previous page.)

27 *Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000), specifically disapproved of *Perry*, stating that
28 the general discussion in *Perry* about due process in clemency proceedings was not controlling.

1 **B. Mr. Allen Has Raised Serious Questions and Established a Likelihood**
2 **of Success on the Merits.**

3 Mr. Allen has raised serious questions regarding his claims for violation of Fifth, Sixth,
4 Eighth, and Fourteenth Amendments and established a likelihood of success.

5 **1. Defendants Violated Mr. Allen's Due Process By Interfering**
6 **With His Clemency Preparation**

7 Defendants concede that Mr. Allen has Due Process rights in his clemency proceedings.
8 *See Wilson v. United States Dist. Court*, 161 F.3d 1185 (9th Cir. 1998) (state interfered with
9 clemency proceeding because its communication misled counsel); *Young v. Hayes*, 218 F.3d 850
10 (8th Cir. 2000) (state interfered with clemency proceeding by threatening to dismiss lawyer who
11 cooperated with defendants); *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998)
12 (recognizing due process rights in clemency proceedings). These decisions stand for the
13 proposition that Defendants may not unfairly impede Mr. Allen's efforts to prepare his clemency
14 petition.

15 As stated by the United States Supreme Court in *Woodard*, 523 U.S. 272, 288-89
16 (O'Connor, J., concurring in part and concurring in the judgment, joined by Souter, Ginsburg, and
17 Breyer, JJ.)

18 A prisoner under a death sentence remains a living person and
19 consequently has an interest in his life... Thus, although it is true
20 that 'pardon and commutation decisions have not traditionally been
21 the business of courts'...and that the decision whether to grant
22 clemency is entrusted to the Governor..., I believe that the Court of
23 Appeals correctly concluded that some *minimal* procedural
safeguards apply to clemency proceedings. Judicial intervention
might, for example, be warranted in the face of a scheme whereby a
state official flipped a coin to determine whether to grant clemency,
or in a case where the State arbitrarily denied a prisoner any access
to its clemency process.

24 (Citations omitted, emphasis in original.)

25 Contrary to Defendants' contention, the Eighth Circuit's decision in *Young v. Hayes* is
26 directly on point. In *Young*, the Court granted a stay of execution where the state attempted to
27 dissuade a witness from providing evidence as part of the clemency proceedings. The basis for
28 the Court's decision was not that the conduct amounted to witness tampering as Defendants

1 contend, but that the state’s conduct was fundamentally unfair and constituted a denial of Due
2 Process. Defendants do not deny that their conduct has impeded the preparation of Mr. Allen’s
3 clemency petition. Rather, Defendants attack the evidence that Mr. Allen’s legal team is
4 attempting to adduce in support of that petition. The ultimate merit of the clemency evidence is
5 irrelevant to this motion — the issue here is Defendants’ interference with Mr. Allen’s ability to
6 adduce that evidence.

7 Defendants claim that “the existence of organic brain damage is” “speculation” and
8 “suspicious.” (Opp. at 14.) But Dr. Dale Watson has stated, “Although I have not completed my
9 analysis, the tests that I have been able to administer thus far *already show signs of*
10 *neuropsychological deterioration*. Accordingly, I have reason to believe that completing the
11 battery of tests after Mr. Allen’s vision has improved will provide a more complete picture of his
12 brain functioning and may provide further evidence of cognitive deterioration.” (Watson Decl.,
13 ¶ 8 (emphasis added).) And, Defendants’ failure to provide Mr. Allen the eye surgery that has
14 been recommended and failure to provide the SPECT test and MRI that has been requested have
15 prevented Dr. Watson from completing his work. (Watson Decl. ¶¶9-10) Accordingly,
16 Defendants’ assertion that Mr. Allen presents “no specific evidence that indicates that additional
17 mental examinations would actually assist him in his final bid for clemency” is flatly wrong.
18 (Opp. at 16:25-26.)

19 Moreover, the declaration of forensic psychiatrist Pablo Stewart, which Mr. Allen has
20 obtained since he submitted his application, further supports the need for additional investigation.

21 Dr. Stewart states:

22 Brain damage may have resulted from a violent beating inflicted by
23 a sheriff in Las Cruces, New Mexico in 1946, as well as Mr.
24 Allen’s affliction with severe viral encephalitis that same year. The
25 possibility of brain damage and related behavioral impacts also
26 appears to be supported by testimonial evidence in the record of
changes in Mr. Allen’s personality subsequent to these events. It is
therefore important that neurological testing be performed to
elucidate those matters.

27 (Stewart Decl., ¶ 6.) Dr. Stewart recommends that Mr. Allen undergo the eye surgery and
28 SPECT test and MRI procedures to permit him to complete his evaluation. (*Id.*, ¶ 8.)

1 Defendants' reference to reports by Dr. Eric Morgenthaler and Dr. Gretchen White are
2 beside the point. At most, they go to the weight of evidence in the clemency proceedings. Those
3 reports in no way contradict the fact that Defendants have interfered with Mr. Allen's ability to
4 adduce evidence of cognitive deterioration to support his clemency petition.

5 Defendants' assertion that Mr. Allen is currently able to communicate and comprehend
6 certain matters is also irrelevant. Evidence of cognitive deterioration that might have affected
7 Mr. Allen's conduct and judgment may mean the difference between death by execution and life
8 in prison. As Defendants acknowledge, the Governor's clemency powers are broad and can be
9 exercised for whatever reason the Governor wishes. *See Connecticut Board of Pardons v.*
10 *Dumschat*, 452 U.S. 458, 464 (1981). Mr. Allen need not show that he is completely
11 incapacitated in order to receive clemency.

12 Defendants' assertion that Mr. Allen has had over ten months to prepare his clemency
13 petition is misleading. First, the eye surgery necessary for Mr. Allen to complete his neurological
14 assessments was requested by an independent doctor in June and July 2005. (Ferry Decl., ¶¶ 3
15 and 4, Exh. 1.)² Yet Defendants, consistent with their unconstitutional medical care, have not
16 provided the eye surgery. Second, Michael Satris was only confirmed as appointed counsel for
17 clemency purposes on November 14, 2005. (Satris Decl., ¶ 1.) Third, Defendants' medical
18 neglect of Mr. Allen, which led to his heart attack, and his medical deterioration which has
19 prevented him from meaningfully assisting his counsel has been ongoing. Mr. Allen has
20 attempted many times to seek adequate medical treatment. Fourth, Defendants' interference with
21 Mr. Allen's clemency preparation cannot be justified in any event.

22 Defendants' claim that members of Mr. Allen's legal team have had some access to
23 Mr. Allen since September 21 does not contradict the evidence that Mr. Allen's team and experts
24 were denied access to him during critical moments. Defendants do not deny that, other than for
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26 ² Defendant's reference to Mr. Allen's glasses is further misdirection. Mr. Allen is
27 functionally and legally blind. (Pompei Decl. ¶ 3) Mr. Allen's glasses are old and have out-of-
28 date prescriptions. In recent years, Defendants' doctor declined to give Mr. Allen eye
prescriptions because Mr. Allen is legally blind.

1 two days, between September 2, 2005, and October 6, 2005, Defendants denied Mr. Allen's legal
2 team access to him. (See Satris Decl., ¶¶ 5, 6.) That denial, during a critical period before the
3 state court set an execution date, stalled Mr. Allen's legal team's preparation for the case for
4 clemency. (*Id.*, ¶ 6.) For example, Dr. Watson was scheduled to see Mr. Allen on September 20,
5 but Defendants had Mr. Allen at another facility. After seeing Mr. Allen on September 21,
6 Dr. Watson planned to see Mr. Allen the next day, but Defendants' moved Mr. Allen to Corcoran.
7 And, during the September 21 session, Mr. Allen was shackled and exhausted, which impeded
8 Dr. Watson's assessments. Because of the conditions Defendants created, Dr. Watson had to
9 truncate his session on September 21 and was unable to resume until October 25. (Watson Decl.,
10 ¶ 4.)

11 Defendants' assertion that Mr. Allen has no right to counsel for clemency fails to address
12 the issue of a denial of Due Process. Mr. Allen indeed has a right to counsel in his application for
13 clemency under California law. *In re Anderson*, 69 Cal. 2d 613, 633 (1968). California has
14 appointed counsel to prepare Mr. Allen's clemency petition. Consistent with Due Process
15 requirements, Defendants cannot interfere with and frustrate counsel's preparation — which is
16 exactly what Defendants did in this case. *See Hicks v. Oklahoma*, 447 U.S. 343 (1980) (arbitrary
17 denial of jury sentence defendant was entitled to under state law violated Fourteenth Amendment
18 Due Process).

19 **2. Defendants Have Violated Mr. Allen's Eighth Amendment**
20 **Right to Adequate Medical Care through its Deliberate**
21 **Indifference, which Interfered with Mr. Allen's Clemency**
Petitions

22 Defendants set forth no facts to deny Mr. Allen's allegations of inadequate medical care
23 and a violation of his Eighth Amendment rights. Defendants' are incorrect in asserting that the
24 alleged harm asserted in the First Cause of Action has already occurred. (Opp. at 10-11.) The
25 harm has occurred, is occurring, and has interfered with Mr. Allen's clemency preparation.

26 Defendants' assertion that the allegations of inadequate medical care which form the basis
27 for a violation of his Eighth Amendment rights do not support his stay of execution is also wrong.
28 Defendants' failure to provide adequate medical care cannot be separated from Defendants'

1 interference with Mr. Allen's clemency petition. By failing to provide adequate medical care —
2 including cutting off medication, failing to provide recommended medical procedures, including
3 eye surgery, and housing Mr. Allen in substandard conditions — Defendants placed Mr. Allen in
4 a situation where he has been unable to meaningfully assist counsel in preparing for clemency and
5 failed to provide the procedures necessary to fully prepare Mr. Allen's case.

6 **3. Mr. Allen has No Administrative Process To Seek A Stay to**
7 **Remedy Defendants' Due Process Violations and Exhausting**
8 **Administrative Remedies Would Be Futile**

8 Defendants' claim that Mr. Allen has failed to exhaust administrative remedies provides
9 no basis to oppose this application for a stay of execution. Defendants do not claim that there are
10 any administrative procedures that permit him to seek a stay of execution for violation of his right
11 to Due Process.

12 Further, the Prison Litigation Reform Act does not provide a defense to Mr. Allen's
13 request for a TRO. The obligation to exhaust remedies does not apply when there are no
14 pertinent remedies available. *Booth v. Churner*, 532 U.S. 731, 736 (2001); *Brown v. Valoff*, 422
15 F.3d 926, 935 (9th Cir. 2005) ("the statutory language does not require exhaustion when no
16 pertinent relief can be obtained through the internal process"). Here, time is of the essence, and
17 Mr. Allen seeks an immediate stay of execution and all procedures tied to the January 17, 2006
18 execution date, including the clemency procedures set by the Governor; (Mr. Allen's petition for
19 clemency is due today). Mr. Allen cannot obtain such relief, let alone timely relief, through the
20 California Department of Corrections' four-level administrative appeals process.

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CONCLUSION

For all of the foregoing reasons, plaintiff respectfully requests that the Court grant the requested relief.

Dated: December 13, 2005

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