No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re CLARENCE RAY ALLEN on Habeas Corpus	Related to No. S004483 (Crim. 22879) **IMMEDIATE STAY REQUESTED** **EXECUTION DATE IMMINENT:** January 17, 2006

PETITION FOR WRIT OF HABEAS CORPUS AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

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

COMES NOW CLARENCE RAY ALLEN, through his attorneys, to petition this Court for a writ of habeas corpus, and by this verified petition alleges as follows:

I.

INTRODUCTION

1. Petitioner Clarence Ray Allen faces execution on January 17, 2006. He seeks a preliminary order that would immediately stay his execution, and a final order that would modify his sentence from death to life without the possibility of parole. As detailed below, Mr. Allen seeks that relief because his execution would inflict cruel and unusual punishment upon him in light of his advanced age and infirmities following more than two decades of confinement on Death Row. Mr. Allen also seeks a stay of execution as a matter of fundamental fairness and due process, because his debilitated condition and the obstacles to adequate medical care and legal access interposed by prison authorities combined to deprive him of a reasonable opportunity to prepare his application for clemency to the Governor, as detailed below. He therefore requests appropriate orders that would secure for him a reasonable opportunity to prepare a full clemency application for submission to the Governor.

3. The allegations that establish Mr. Allen's claims to relief are set forth in Section IV, below. They have already largely been set forth in the Petition for Clemency that he submitted to the Governor on December 13,

2005, pp. HP0037-0053 and HP0064-0069, and are supported by the Appendix of Exhibits to that petition, exhibits A-1-12 (HP0037-0290) and A-20-21 (HP0588-576). Mr. Allen requests that the Court take judicial notice of that petition and appendix, which he served on this Court at the same time he submitted it to the Governor. For the convenience of the Court, a copy of the Petition for Clemency and the supporting Appendix of Exhibits is attached hereto as Exhibit A ("Exh.") to the Exhibits in Support of Petition For Writ Of Habeas Corpus.

II.

PARTIES

4. Clarence Ray Allen is a prisoner of the California Department of Corrections and Rehabilitation (CDCR) condemned to death and confined at the California State Prison at San Quentin on its Death Row (CDCR number B-91240). He is the petitioner in this proceeding.

5. Steven Ornoski is the Warden of San Quentin. He has custody of Mr. Allen and is charged with carrying out his execution. Warden Ornoski is the respondent in this action.

III.

PROCEDURAL HISTORY

6. On November 18, 2005, the Honorable Roy G. MacFarland of the Glenn County Superior Court issued a commitment order that commanded the Warden of San Quentin to put Mr. Allen to death. (A copy of that commitment order constitutes Exh. A-4, pp. HP0082-0085.) The procedural history of the case is recounted in that commitment order, which Mr. Allen incorporates by reference as if fully set forth here.

7. Mr. Allen has not filed any petitions for a writ of habeas corpus in any lower state court or any federal court challenging the judgment, save the federal petition that is referred to in the commitment order and is the subject of the Ninth Circuit's published decision, *Allen v. Woodford* (9th Cir. 2005) 395 F.3d 979, 1011. Mr. Allen has lodged the federal petition with this petition in compliance with California Rules of Court, rule 60 (b) (3). In addition, the decision of the district court that comprehensively addressed that petition has previously been provided to this Court. (See Petition for Clemency, Exh. A-13, pp. HP0331-0497.) Mr. Allen also filed on December 9, 2005, a civil rights action in the United States District Court, Northern District of California, No. C 05 5051 JCW, seeking a stay of his execution among other relief. That court dismissed the action without prejudice in an order filed December 15, 2005. Pursuant to this Court's letter of November 18, 2005, inviting the parties to provide it with courtesy copies of any filings in any action filed in any other court that bears on Mr. Allen's scheduled execution, the Attorney General has furnished the Court with the filings in the civil rights action and has agreed to undertake the responsibility of providing courtesy copies to the Court of any further filings in any other court related to Mr. Allen's scheduled execution.

IV.

ALLEGATIONS OF FACT

A. Execution of Mr. Allen Would Constitute Cruel and Unusual Punishment.

1. The Age and Infirmities of Ray Allen.

8. Mr. Allen is the oldest prisoner on California's Death Row and is scheduled for execution the minute his 76th birthday on January 16, 2006, draws to a close.[1] California has never executed a person so old.[2] Only six people in the history of this country were older than Mr. Allen when they were executed; three of those were executed in the 1800s, the fourth in 1916, and the fifth more than fifty years ago.[3] Among the minority of countries in the world that still retain capital punishment, at least one – Iraq – specifically bars the execution of anyone over 70.[4] Execution of a person as elderly as Mr. Allen is contrary to our state norms, our national norms, and international norms of civilized behavior.

9. As Mr. Allen has aged on Death Row, he has suffered a stroke and been afflicted with a number of chronic ailments and infirmities, including two that are especially serious and advanced: a heart condition and diabetes. He has a long history of coronary artery disease with

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[1] (Exh. A-2, p. HP0039; see also Exh. A-1, pp. HP0037-0038, which depict Mr. Allen.)

[2] (Exh. A-3, p. HP0040.)

[3] (*Ibid.*)

[4] (Exh. N, p. HP0751.) (See transcript of "NewsHour with Jim Lehrer," October 19, 2005, interview of *Los Angeles Times* Baghdad correspondent Borzhou Daraghi, available at http://www.pbs.org/newshour/bb/middle_east/july-dec05/saddam_10-19.html.)

myocardial infarction, cardiac arrest and coronary artery stenting. He also has long suffered from Type-two diabetes, with end organ damage, including damage to his nervous system, heart, kidneys, and eyes.[5]

10. These afflictions have been compounded by, or in some instances precipitated by, the shockingly substandard medical care system at San Quentin.[6] A federal district court recently found that at San Quentin "[e]ven the most simple and basic elements of a minimally adequate medical care system were obviously lacking." (*Plata v. Schwarzenegger* (N.D. Cal. May 10, 2005, No. C-01-1351 TEH) 2005 U.S. Dist. Lexis 8878, at *8 .) San Quentin's indifference to Mr. Allen's failing health has included sporadic interruptions of his medication and failure to provide him with necessary care for his eyes, his heart and his diet, all of which have accelerated his decline and debilitation.[7] The cumulative damage has left Mr. Allen legally blind, weak, unable to stand unsupported, bound to a wheelchair when he is out of his cell, and with seriously diminished vitality.[8]

11. Mr. Allen's fragility was dramatically illustrated by the serious heart attack that he suffered on September 2, 2005, following recurrent chest pains. He was brought to Marin General Hospital, where he suffered cardiac arrest. Treating doctors were able to resuscitate him and performed angioplasty procedures. Doctors inserted an intra-aortic balloon and

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[5] (Exh. A-4, pp. HP0042-0043, HP0061, and HP0095-0096.)

[6] (Exh. A-4, p. HP0045.)

[7] (See generally Exh. A-4, pp. HP0041-0046, HP0061-0062, and HP0088-0152.)

[8] (Exh. A-4, pp. HP0042-0043.)

stented his left main coronary artery with a drug-eluting stent — a risky procedure undertaken only because he was desperately ill and at grave risk of immediate death. Those procedures proved successful and saved his life.[9]

12. While recuperating from those procedures, Mr. Allen developed a staphylococcal infection that required his continued hospitalization. Treating physicians at Marin General Hospital recommended a cardiac catheterization for definitive evaluation of the coronary anatomy, and found that Mr. Allen would "benefit greatly from coronary artery bypass grafting surgery" — *i.e.*, he should undergo open heart surgery for his coronary artery disease. He was discharged from Marin General Hospital on September 18, 2005, with the following notes: "Given the severity of LAD and right coronary artery disease, it was felt that definitive revascularization with coronary artery bypass graft surgery was indicated, given his diabetic status. It was felt by the medical staff at San Quentin that the patient should be transferred to Queen of the Valley Hospital to continue antibiotic therapy and consider coronary artery bypass graft surgery."[10]

13. Over the course of almost two weeks, without ever obtaining the recommended surgery, Mr. Allen was shuttled to Queen of the Valley Hospital, then to San Quentin, then to Corcoran State Prison, and finally back to Queen of the Valley Hospital for the surgery.[11] Although upon his initial reception at Queen of the Valley Hospital he was described as suffering from "[s]evere three-vessel disease, affecting left coronary, right

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[9] (Exh. A-4, pp. HP0043, HP0062, HP0111-0115 and HP0123.)

[10] (See generally Exh. A-4, pp. HP0043, HP0062, and HP0116-0118.)

[11] (*Id.*, at pp. HP0043-0045, HP0062, HP0119-0142.)

coronary and circumflex" and needed "to undergo coronary artery bypass graft per Cardiothoracic Surgery," he was asymptomatic when he was eventually returned to that hospital the second time for the surgery. Thus, on September 28, 2005, doctors determined that surgery was no longer necessary, even though he still suffered from two-vessel coronary artery disease, and he was returned to San Quentin.[12]

14. Mr. Allen in fact remains at serious risk of suffering another heart attack or even sudden cardiac death, "with multiple risk factors for coronary artery disease ...."[13] According to a geriatric specialist who has recently examined him, "It is as if Mr. Allen were sitting on a time bomb that could go off at any moment."[14] He currently requires additional medical procedures to adequately assess the ongoing risk of heart attack and sudden cardiac arrest, including consideration of testing his vulnerability to stress for assessment of his need for further surgery.[15] Prison officials have not provided that necessary testing and treatment to this point, however, despite considered medical opinion that the pre-execution process itself may be the tipping point that precipitates another heart attack or sudden cardiac arrest for Mr. Allen.[16]

15. Mr. Allen's serious chronic diseases and age have left him enfeebled, incapacitated, near death, and a danger to no one. His execution under these circumstances would not measurably advance any of the

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[12] (*Id.*, at pp. HP0044-0045 and HP0131-0142.)

[13] (*Id.*, at p. HP0114.)

[14] (*Id.*, at p. HP0045.)

[15] (*Ibid.*)

[16] (*Id.*, at pp. HP0045, HP0061 and HP0086.)

interests that the State relied upon to impose his death judgment. Rather, it would impose purely gratuitous and unprecedented punishment. California has never executed a prisoner so physically decrepit. To wheel Mr. Allen, a blind, aged, crippled, and enfeebled man into the execution chamber at San Quentin to be put to death would be a bizarre spectacle that shocks the conscience and offends fundamental notions of human decency .

2. The Pain and Suffering that Ray Allen has Endured on Death Row for More Than Two Decades Anticipating His Execution.

16. The physical and mental toll that confinement on Death Row takes on a condemned prisoner is commonly known as the "death row phenomenon."[17] This dehumanizing aspect of Mr. Allen's sentence has caused him unusual anguish and pain because of both the particularly long time that he has been exposed to it, including the fearsome approach of several dates for execution, and the particularly substandard conditions of San Quentin's Death Row. That pain and anguish have intensified to intolerable mental and emotional torment with his escalating physical deterioration and the recent setting of January 17, 2006, for his execution.[18] Because Mr. Allen's confinement for more than two decades under the physical deprivations of Death Row — all the while suffering the emotional and mental agony of his looming execution — has so fully served the State's interests in retribution and deterrence relied upon to justify the imposition of his death judgment, his actual execution pursuant to that judgment would now be pointless and excessive. His execution would

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[17] (See, e.g., *Soering v. United Kingdom*, 161 Eur. Ct. H.R (ser. A), at p. 34 (reprinted in 11 Eur. Hum. Rts. Rep. 439, 440).)

[18] (See generally Exh. A-12, pp. HP0318-0324.)

needlessly and gratuitously inflict pain and extinguish life, contrary to the core values of our democratic society reflected in our state and our federal constitutional bars to the imposition of cruel and unusual punishment. As Justice Stephens observed when considering the constitutionality of extended confinement on death row — confinement significantly shorter than Mr. Allen has experienced: "[A]fter such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted,"[19] and "the deterrent value of incarceration during that period of uncertainty may well be comparable to the consequences of the ultimate step itself."[20]

17. This Court more than thirty years ago recognized that "[t]he cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out."[21] It noted, "Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture."[22]

18. Time has only deepened that realization, for courts around the world since then have found that extended confinement awaiting execution on Death Row — even for periods of time much shorter than

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[19] (*Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., respecting the denial of certiorari) [17-year interval].)

[20] (*Coleman v. Balkcom* (1981) 451 U.S. 949, 952 (Stevens, J., respecting the denial of certiorari).)

[21] (*People v. Anderson* (1972) 6 Ca1.3d 628, 649.)

[22] (*Ibid.*)

Mr. Allen's — constituted "torture or ... inhuman or degrading punishment" in violation of the applicable constitutions or charters banning such punishment. For example, the Privy Council of the British House of Lords, the highest court in England, sitting en banc for the first time in 50 years, unanimously acted to commute the death sentences of two inmates who had been on death row for 14 years and who had been read execution warrants on three occasions because execution following that experience would constitute "torture or ... inhuman or degrading punishment" in violation of section 17(1) of the Jamaican Constitution.[23] Likewise, the Supreme Court of Zimbabwe held that execution following the prolonged death row incarceration suffered by four prisoners confined under death sentence for up to 6 years would constitute "inhuman or degrading punishment" in violation of its constitution, and commuted their sentences.[24] South Africa has taken a similar view of its constitution.[25] Finally, the European Court of Human Rights found that that the protracted delays in carrying out death sentences in Virginia, which averaged six to eight years, constituted inhuman and degrading punishment in violation of Article 3 of the European Human Rights Convention for purposes of determining whether Great Britain should be permitted to extradite a

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[23] (Exh. L, pp. HP0732-0746 (*Pratt & Morgan v. Attorney General for Jamaica*, 3 WLR 995, 2 AC 1,4 All ER 769 (Privy Council 1993) (en banc).)

[24] (*Catholic Comm'n for Justice & Peace in Zimbabwe v. Attorney General* (Zimb. June 24,1993, No. S.C. 73) (reported in 14 Hum. Rts. L.J. 323 (1993).)

[25] (See *State v. Makwanyane & Mahuna*, Case No. CCT/3/94 (So. Afr. Const. Ct June 6, 1995).)

German national to Virginia to face capital murder charges that risked exposure to the "death row phenomenon."[26]

19. Since this Court first spoke on the question, other state court judges have also concluded that the death penalty is cruel and unconstitutional under the pertinent state constitution, in part because "it will be carried out only after agonizing months and years of uncertainty."[27] Justices on our federal Supreme Court as well have questioned whether such lengthy confinement on Death Row may be cruel and unusual under our federal Constitution.[28]

20. The death row phenomenon is the product of the stress of living under the restrictive conditions of confinement typically found on death rows, exacerbated by the mortal threat posed by an impending judgment of death. The length of time spent in that condition, the setting and re-setting of an execution date, the personal circumstances of the condemned prisoner, and his particular experiences on Death Row all inform that phenomenon. All these ingredients of the phenomenon are present and greatly magnified in Mr. Allen's case.

21. To begin with, Mr. Allen has spent an extraordinarily long time on Death Row. His death judgment was imposed on November 22, 1982,

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[26] (*Soering v. United Kingdom*, *supra*, 11 Eur. Hum. Rts. Rep. 439.)

[27] (*Suffolk County District Attorney v. Watson* (1980) 381 Mass. 648, 673, 411 N.E.2d 1274, 1287 (Braucher, J., concurring); *id.*, at pp. 675-686, 411 N.E.2d at 1289-1295 (Liacos, J., concurring).)

[28] (See, e.g., *Lackey v. Texas*, *supra*, 514 U.S. 1045 (memorandum of Stephens, J., respecting the denial of certiorari; *Knight v. Florida* (1999) 528 U.S. 990, 993 (Breyer, J., dissenting from denial of certiorari); *Foster v. Florida* (2002) 537 U.S. 990, 991 (Breyer, J., dissenting from denial of certiorari).)

more than 23 years ago. California has only once executed a person who has been on Death Row for so long.[29]

22. Upon his commitment to San Quentin following imposition of his death judgment, Mr. Allen was placed in North Seg, California's traditional Death Row that is sealed from the rest of a decrepit old cellblock. There sits the ghoulish gas chamber in which Mr. Allen is scheduled to die — albeit now by lethal injection rather than asphyxiation. Conditions were so intolerable on Death Row that in October 1980 they had produced a consent decree in a civil rights action brought to upgrade those conditions to minimum constitutional acceptability.[30] Although the action is subject to dismissal once the terms of the decree have been implemented,[31] it remains before the court because prison authorities have yet to implement all of the terms of the decree necessary to correct the violation of the inmates' constitutional rights.[32] The conditions on Death Row at San Quentin include all the ones that typically contribute to the death row phenomenon: sequestration from the prison's mainline or general population; constant supervision by guards and gunmen; a small cell; little daylight; in-cell feeding; limited exercise out of the cell; limited property; restricted visitation; and restraints under escort. On top of those

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[29] (Exh. A-9, p. HP0286); that person was Stanley Tookie Williams, who was executed this month and did not challenge his execution on the basis of the length of time he had already spent on Death Row.

[30] (See *Thompson v. Enomoto* (9th Cir. 1990) 915 F.2d 1383, 1384-1385.)

[31] (*Id.*, at p. 1385, incl. fn. 1.)

[32] (See, e.g., *Gilmore v. State of California* (9th Cir. 2000) 220 F.3d 987; see also Exh. A-8, pp. HP0240-0284, particularly p. HP0247.)

incidents of confinement is a range of substandard conditions peculiar to San Quentin that aggravates the phenomenon.

23. While Mr. Allen's confinement on North Seg was painful in itself, the expansion of Death Row and Mr. Allen's deteriorated physical condition led to his transfer in early 2001 to East Block, where conditions were even worse.[33] As described by one federal court in the course of finding conditions there unconstitutional before it became part of Death Row:

> South Block, East Block, and North Block at San Quentin ... are five-tier cell blocks. That is, they contain five rows, or "tiers," of cells stacked vertically atop one another. Outside the barred fronts of the cells runs a walkway, also enclosed by bars, and outside the walkway, approximately 20 to 30 feet of open space extends unbroken from the bottom of the first tier to above the top of the fifth tier. On the wall behind the open space, opposite the cell fronts, other walking platforms called "gunwalks" are mounted. This wall also contains windows. For most of the cells in these cell blocks, the windows across the open space and behind the gunwalks are the sole source of natural light.[34]

24. The court found the physical conditions in these cellblocks were appallingly unconstitutional in a number of basic ways dangerous to health and life, including lack of heat; "a 'chilly mist' that dampens everything in the cell blocks, particularly at night"; "putrid odor"; "plumbing and sewage disposal systems [that] are antiquated, deteriorated, and in need of replacement"; "[i]n-cell plumbing [that] is hardly better"; inadequate light;

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[33] (See, e.g., *Thompson v. Enomoto*, *supra*, 915 F.2d at pp. 1384-1385; see also Exh. A-12, p. HP0321.)

[34] (*Toussaint v. McCarthy* (N.D. Cal. 1984) 597 F.Supp. 1388, 1394.)

an "unrelenting, nerve-racking din that fills the ... units" and creates "bedlam"; "antiquated" electrical wiring and "fire hazards [that] abound"; "deplorable filth" in the cells; "serious deficiencies" in food service; generally inadequate services in clothing, bedding, laundry, and personal hygiene; "confinement ...locked inside a cell less than 50 square feet in dimension [that] allows very little meaningful exercise and is physically debilitating" in light of the "irregular" and "insufficient" opportunity of exercise out of the cell; "prolonged idleness" and "extreme boredom" that causes "psychological pain and loneliness" and that "adversely affects the mental health of a number of inmates."[35] The court found that these conditions "are inconsistent with human decency, and violate the Eighth Amendment."[36]

25. The substandard conditions in the facilities at San Quentin that house condemned prisoners are chronic and endemic to the age of the physical plant. For example, in a recent article on Death Row, East Block was described as "five crumbling tiers, ... in the poorest condition."[37] A report of a court inspection of San Quentin earlier this year noted Death Row's substandard condition posed a hazard to health:

> Sewer lines in one of the condemned housing units leak, and has [sic] leaked for years. Waste water therefore continually drips down from the overhanging walkways of the tiers above onto the floor below creating pools of waste water ....[38]

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[35] (*Id.*, at pp. 1396-1403.)

[36] (*Id.*, at p. 1409.)

[37] (Exh. A-5, p. HP0170, which also depicts East Block.)

[38] (Exh. A-6, p. HP0174.)

Prison officials recognize that the current facilities are totally unsuitable for housing condemned prisoners, and are proceeding with plans to build a new Death Row on the premises.[39]

26. While adequate medical and psychological services that address the physical debilitation and psychological suffering resulting from long confinement under these conditions might somewhat mitigate those effects, in fact these services at San Quentin are themselves shockingly deficient. In still other litigation, those conditions have themselves been found or implicitly acknowledged to impose cruel and unusual punishment.[40] Medical care at San Quentin is chronically and notoriously sub-standard, as encapsulated in the Executive Summary of the Medical Experts' Report on San Quentin in *Plata v. Schwarzenegger*, N.D. Cal. C-01-1351 TEH, dated April 8, 2005:

> San Quentin is a facility that only in the last decade satisfactorily terminated a Federal settlement agreement designed to improve medical conditions. Also, San Quentin is a 2004 roll out facility so that at the time of our visits Defendants have had over a full year to initiate and establish the infrastructure and operational procedures required in the original Plata Stipulation in a facility that less than 10 years ago was found constitutionally adequate. Given that in the past decade care had improved sufficiently to satisfy the Federal Court and that it had a full year to prepare, we were extremely disappointed with existing conditions. We found overall compliance with the Stipulated Order and subsequent Court Orders was non-existent. In fact, it was clear that for most areas we reviewed there has

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[39] (Exh. A-8, p. HP0240.)

[40] (See *Plata v. Schwarzenegger*, N.D. Cal., No. Civ-01-1351 (medical care) and *Coleman v. Davis*, E.D. Cal., No. CIV S-90-0520 LKK JF (psychiatric care); see also Exhs. A-6 and A-7, pp. HP0171-0239.)

> been indifference to beginning the process required in the Stipulated Order. The system of organizational structure within the CDC that permitted this facility to deteriorate over the past 10 years to the state described in this report must be addressed as well. These problems have not occurred overnight.
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> *We found a facility so old, antiquated, dirty, poorly staffed, poorly maintained, with inadequate medical space and equipment and over-crowded that it is our opinion that it is dangerous to house people there with certain medical conditions* and is also dangerous to use this facility as an intake facility. In addition, the overcrowding and facility life-safety and hygiene conditions create a public health and life-safety risk to inmates who are housed there. We therefore strongly recommend as a life-safety issue that a census cap be initiated, that the existing Outpatient Housing Unit be closed or used for a different purpose, and that the mission of reception be re-directed to a different facility.
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> In summary, San Quentin should be viewed as needing to start from the beginning. Its mission should be re-evaluated. In determining that mission, its physical structure and staffing must be evaluated before deciding what types of medical patients should be housed there and what types of custody functions (e.g. reception screening) should be engaged in.[41]

27. Mr. Allen not only has endured extraordinarily cruel and unusual physical conditions of confinement on Death Row, but he also has also endured them for an extraordinarily long time — during all of which he suffered "the anguish and mounting tension of living in the ever-present shadow of death" awaiting execution.[42] Mr. Allen has suffered the diverse excruciations of Death Row for almost a quarter-century. He has experienced more than a half-score of times the loss by execution of a

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[41] (Exh. A-6, pp. HP0171-0172 (italics added).)

[42] (*Soering v. United Kingdom*, *supra*, 11 Eur. Hum. Rts. Rep. at p. 476.)

fellow condemned inmate that brings with it not also its own pain but also the terrible reminder of an approaching similar fate.[43] To protect his almost sightless eyes from the light, he wears to this day the sunglasses inscribed with "S.W.A." that condemned inmate Stephen Ray Anderson bequeathed to him upon execution.[44] Mr. Allen more than once has experienced the enormous grief and terror of the execution of still other fellow inmates to whom he had grown close.[45] Mr. Allen had been a particularly close friend of Danny Williams and members of his family before he was executed.[46] Mr. Allen suffered paroxysms of tears when he said his final goodbye to Manny Babbitt on the latter's way to the execution chamber, having become particularly close to him and his family over the years.[47] Mr. Allen also has watched those around him die from "natural" causes after years on Death Row, as well as by their own hand when life on the Row awaiting execution had become more than a man could bear.[48]

28. Adding to Mr. Allen's agony has been the terror of his own execution bearing down on him.[49] He has repeatedly experienced the approach of dates for which his execution was scheduled. On April 3, 1987, Mr. Allen was served with his first execution warrant, for May 22,

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[43] (See, e.g., Exh. A-9, p. HP0285; Exh. A-12, p. HP0322.)

[44] (Exh. A-12, p. HP0322; see also Exh. 10, p. HP0292.)

[45] (Exh. 12, p. HP0322.)

[46] (*Ibid.*)

[47] (*Ibid*; see also Exh. A-10, p. HP029.)

[48] Even considering those who have volunteered for execution to end their misery, more prisoners on California's Death Row have committed suicide than been executed since modern reinstatement of the death penalty. (See Exh. A-8, pp. HP0285-0290.)

[49] (Exh. A-12, p. HP0322.)

1987.[50] He endured that date until he heard on May 4, 1987, that it had been stayed.[51] On November 18, 1987, the trial court designated 10:00 a.m. on January 8, 1988 for his execution.[52] Mr. Allen gave away all his property in anticipation of that date,[53] and prison psychiatrists examining him on December 7, 1987, found him suffering from anxiety as his scheduled execution approached.[54] He suffered that anguish until December 24, 1987, when he learned that the California Supreme Court had stayed that execution date the day before.[55] On July 26, 1988, the trial court issued yet another warrant for his execution — this time for September 9, 1988.[56] Mr. Allen endured the approach of that execution until it was stayed by a federal court on September 1, 1988.[57] Conflicting reports from his keepers about the stay, however, caused him to suffer up to the very day scheduled for his execution, so that when he dressed at the command of guards to "get ready," he thought it was for his execution until the guards later laughingly clarified that it was for yard.[58]

29. January 17, 2006, is Mr. Allen's fourth execution date, a date that from the cumulative stress of facing execution could trigger a heart attack, and that becomes more horrifying for him every day that it draws

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[50] (Exh. A-11, p. HP0300.).

[51] (*Id.*, at p. HP0301.)

[52] (*Id.*, at pp. HP0302-0306.)

[53] (*Id.*, at p. HP0307.)

[54] (*Id.*, at p. HP0308.)

[55] (*Id.*, at pp. HP0316-0317.)

[56] (*Id.*, at pp. HP0312-0315.)

[57] (*Id.*, at p. HP0316-0317.)

[58] (Exh. A-12, p. HP0322.)

nearer.[59] As the Privy Council observed in the case where it found that execution following incarceration on death row for 14 years for two inmates who had been read execution warrants on three occasions would constitute "torture or ... inhuman or degrading punishment" in violation of section 17(1) of the Jamaican Constitution:

> There is an instinctive revulsion against the prospect of [executing] a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over an extended period of time.[60]

30. Likewise, our community's sense of humanity, its moral sense of decency, recoils from the prospect of the execution of Mr. Allen after he has been held under sentence of death for so many years under the circumstances that have attended that sentence. This is especially so because during all the suffering of his confinement on Death Row, Mr. Allen has been a conforming prisoner who has been virtually disciplinary- and trouble-free during his long tenure there.[61] As attested to by those who have known him best on Death Row, Mr. Allen has been a positive, peaceful, and steadying force on the Row.[62]

31. The execution of Mr. Allen would be the torturous capstone to punishment that has already so debilitated and diminished him. His

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[59] (*Id.*, at p. HP0323.)

[60] Exh. L, pp HP0732-0746 (*Pratt & Morgan v. Attorney General for Jamaica, supra,* 3 WLR 995, 2 AC 1, 4 All ER 769, 142 NLJ 1639).)

[61] (Exh. A-12, p. HP0321.)

[62] (Exh. A-10, pp. HP0291-0299.)

scheduled execution shocks the conscience and offends fundamental notions of human decency under contemporary state, national and international norms of civilized conduct.

B. Mr. Allen's Execution on January 17, 2006 Would Deprive Him of His Life Without Due Process of Law.

32. The ill-timing of Mr. Allen's serious heart attack on September 2, 2005, and a long history of delayed and substandard medical treatment for him up to and including the time of this writing, have disabled him from preparing his case for clemency. That disability was aggravated by the conduct and practices of prison authorities that made him inaccessible to his counsel during critical preparation times, and that caused counsel to devote their resources to efforts simply to gain access to him rather than to the preparation of his case for commutation. Consequently, Mr. Allen has not had a fair opportunity to present in his petition for clemency all the bases that support commutation of his sentence, as detailed below.

33. The investigation for clemency had just been undertaken, with Mr. Allen scheduled for visits with several expert consultants, when he suffered his life-threatening heart attack.[63] His medical treatment and extended hospitalization following that heart attack deprived counsel of any access to him during that time because of prison regulations that forbade such access during confinement in a community hospital.[64] That denial of access caused the cancellation of scheduled visits.[65] It was only through

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[63] (Exh. A-4, p. HP0067.)

[64] (Exh. A-4, pp. HP0042, HP0067 and HP0155.)

[65] (*Ibid.*)

concerted effort and fortuity of timing that counsel's representative was able to see Mr. Allen when he was briefly returned to San Quentin on September 20, 2005, and that Dr. Watson, one of the defense consultants, was able to conduct one day of his planned three-day testing.[66] San Quentin's arbitrary transfer of Mr. Allen to Corcoran State Prison immediately thereafter, rather than back to the hospital for the surgery that he then urgently required, rendered him again inaccessible to counsel.[67] That inaccessibility became further prolonged as authorities continued to move Mr. Allen around without notice to counsel.[68] As earlier recounted, the recommended surgery was never performed , and he was returned to San Quentin with no further surgical treatment prescribed for his heart condition. Yet he remains at serious risk of suffering another heart attack or even sudden cardiac death due to his coronary artery disease, and prison authorities have ignored the treatment recommendations of the defense's medical consultant, who was finally able to examine Mr. Allen on October 17, 2005.[69] That doctor has further warned that the stress of Mr. Allen's impending execution may itself trigger another heart attack with fatal consequences.[70] Until the precariousness of Mr. Allen's heart condition is fully assessed, the risk that pre-execution procedures will trigger a fatal heart attack is good cause by itself to stay his execution.

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[66] (*Id.*, at pp. HP0068 and HP0155.)

[67] (*Id.*, at pp. HP0068-0069.)

[68] (*Id.*, at p. HP0069.)

[69] (*Id.*, at p. HP0042.)

[70] (*Id*, at pp. HP0045-0046.)

34. Administrative impediments to access to counsel continued up to the time of filing of the petition for clemency. For example, prison officials barred any legal visits with Mr. Allen from December 10-13, the four days up to and including the due date for the clemency petition. This bar was a product of prison policy that generally restricts weekends to personal visits and reportedly permits such weekend legal visits only for a condemned prisoner who is within thirty days of execution and an administrative decision to preclude all visitation on December 12 & 13 due to the prison's plans to execute another prisoner on December 13. Counsel had intended to schedule in that time an attorney visit as well as an interview of Mr. Allen by a consultant to further develop grounds for clemency, which could not be included in the clemency application. Counsel had also attempted to schedule this consultant and others for earlier visits, but had not received a timely response from the prison administration. Counsel was later advised that the responsible administrator had been busy with other matters, including cancellation of appointments already scheduled for December 12 and 13 because of the prison's decision to preclude legal visits on those days. Counsel was not able to arrange for a visit with Mr. Allen by the consultant until December 20, 2005.

35. Most critically, due to Mr. Allen's deteriorated physical condition and impediments imposed by prison authorities, counsel for Mr. Allen were unable to adequately investigate and determine whether he suffers from brain damage. Although the evidence suggests that he may suffer from such damage,[71] the defense was unable to complete that

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[71] (Exh. A-4, p. HP0156; Exh. A-20, pp. HP0589-0590.)

investigation, and its retained doctors were unable to make that determination, because of Mr. Allen's weakness from his heart attack and loss of vision from his diabetes, and the need to conduct further tests offered only at a community hospital.[72] Prison authorities were supposed to address Mr. Allen's vision problems with surgery that was recommended for him back in June 2005, but they have yet to provide that surgery.[73] Moreover, the tests that defense doctors need performed to inform their determinations require transportation by prison authorities to a community facility, and they have yet to agree to permit such movement.[74]

36. Completion of the investigation for brain damage is vital to Mr. Allen's clemency application. Though the district court in Mr. Allen's federal habeas corpus proceedings found that the mitigation evidence available to counsel but never presented to the jury was overall "important,"[75] and in particular respects "especially valuable,"[76] the Ninth Circuit was not persuaded because that evidence was "bereft of explanatory or exculpatory attributes, which are at the core of our belief in the importance of mitigation evidence."[77] As it further explained, quoting the United States Supreme Court: "Evidence regarding social background and mental health is significant, as there is a 'belief, long held by this society, that defendants who commit criminal acts that are attributable to a

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[72] (Exh. A-4, pp. HP0153-0156; Exh. A-20, pp. HP0588-0591.)

[73] (*Id.*, at p. HP0165.)

[74] (Exh. A-4, pp. HP0061, HP0086 and HP0156; Exh. A-20, pp. HP0588-0591.)

[75] (Exh. A-13, p. HP0446.)

[76] (*Id.*, at p. HP0441.)

[77] (*Allen v. Woodford, supra*, 395 F.3d at p. 1005.)

disadvantaged background or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'"[78]

37. Evidence of brain damage or other mental condition would supply that core explanation for Mr. Allen's criminality that makes him less culpable, and would have special force in moving the Governor to commute his sentence. Indeed, the last commutation of a death sentence in California, extended by then-Governor Ronald Reagan, was to a victim of brain damage whose condition was not discovered until after his trial.[79] Mr. Allen thus needs a stay of execution and appropriate orders from the Court to prison officials that permit him to develop and present all of the evidence that favors clemency.

V.

ALLEGATIONS OF TIMELINESS

38. Mr. Allen has proceeded without substantial delay in bringing this petition. He could not have made these claims at the time he filed his prior habeas corpus petitions in this Court because his claims are based on factual developments since those filings. His claim for relief based on cruel and unusual punishment is based on the totality of circumstances that exist now and will exist at the time of his scheduled execution, and that came to a head with his heart attack on September 2, 2005, and the setting of an execution date. Only then did his claim ripen with an accumulation of facts that established the unconstitutionality of his scheduled execution. His claim for relief based on due process is based on facts that largely occurred

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[78] (*Ibid.*)

[79] (Exh. A-21, p. HP0613.)

following his heart attack on September 2, 2005. Since learning of the operative facts, Mr. Allen and his counsel have been occupied with preparing his petition for clemency by its due date of December 13, 2005. Counsel has prepared this petition for writ of habeas corpus as soon as he could thereafter.

VI.

CONTENTIONS

A.

EXECUTION OF RAY ALLEN ON JANUARY 17, 2006 WOULD CONTRAVENE THE BARS TO CRUEL AND UNUSUAL PUNISHMENT SET FORTH IN THE UNITED STATES CONSTITUTION, AMENDMENTS 8 AND 14, AND THE CALIFORNIA CONSTITUTION, ARTICLE 1, SECTION 17.

B.

EXECUTION OF RAY ALLEN ON JANUARY 17, 2006 WOULD DEPRIVE HIM OF HIS LIFE WITHOUT DUE PROCESS OF LAW, IN VIOLATION OF THE UNITED STATES CONSTITUTION, AMENDMENT 14, AND THE CALIFORNIA CONSTITUTION, ARTICLE 1, SECTIONS 7 AND 15.

VI.

PRAYER FOR RELIEF

Allen is without remedy, save by habeas corpus or other extraordinary writ. WHEREFORE, he requests that the Court:

1) Immediately stay his execution;

2) Issue an order to show cause or a writ of habeas corpus;

3) After hearing the matter, modify his sentence from death to life without the possibility of parole;

4) Alternatively, restrain the warden from executing Allen until he provides Allen with the eye surgery that is due him, the stress test and any further surgery that test may show is medically necessary or appropriate, and facilitates the testing that needs to be conducted to determine if Allen suffers from brain damage, and the Governor has an opportunity to consider his application for clemency in light of such; and

5) Grant any and all further relief warranted.

DATED: December 21, 2005

Respectfully submitted,

Michael Satris
Law Office of Michael Satris

Charles E. Patterson
Somnath Raj Chatterjee
Morrison & Foerster, LLP

MICHAEL SATRIS
Attorneys for Petitioner
Clarence Ray Allen

NEXT FRIEND VERIFICATION

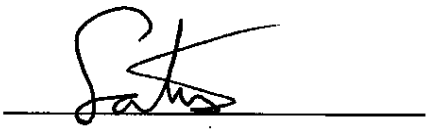
I, the undersigned, declare under penalty of perjury under the laws of the State of California:

I am an attorney admitted to practice law in the State of California. I am verifying this petition as the attorney for petitioner Clarence Ray Allen, appointed by order of this Court filed December 10, 1987, to represent him in state post-appeal proceedings before this Court concerning the death judgment imposed in this case. I also represented Allen in federal habeas corpus proceedings challenging his death judgment. By order filed November 14, 2005, the Court expanded my appointment to include representation of him in clemency proceedings.

Allen has authorized me to file this petition for writ of habeas corpus on his behalf. I am making this verification because many of these matters are as much or more within my knowledge than his, and because securing his verification would only needlessly delay the filing of the petition when time is of the essence. (See *In re Davis* (1979) 25 Cal.3d 384.)

I have read the foregoing petition for writ of habeas corpus and declare that the contents of the petition are true.

Dated: December 21, 2005



MICHAEL SATRIS

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

A.

THIS COURT SHOULD STAY THE EXECUTION OF RAY ALLEN ON JANUARY 17, 2006, AND MODIFY HIS SENTENCE TO LIFE WITHOUT THE POSSIBILITY OF PAROLE, BECAUSE HIS EXECUTION WOULD INFLICT CRUEL AND UNUSUAL PUNISHMENT UPON HIM IN VIOLATION OF THE CONSTITUTIONAL BARS TO CRUEL AND UNUSUAL PUNISHMENT.

I. THIS PETITION IS PROPERLY FILED IN THIS COURT

California Constitution, article VI, section 10, grants original jurisdiction in habeas corpus proceedings to all the courts of the State, including this Court. Consistent with its exclusive appellate jurisdiction over judgments of death set forth in article VI, section 11 of the California Constitution, this Court typically hears habeas corpus challenges to death judgments that invoke its original jurisdiction, and has established regular procedures for doing so. (See Supreme Court Polices Regarding Cases Arising From Judgments Of Death, adopted June 6, 1989, as last amended November 20. 2002 ["Supreme Court Policies"], Policy 3.)

While the trial court has concurrent subject matter jurisdiction to hear this case as well because it concerns a challenge to the judgment that could not have been raised on direct appeal (see, e.g., *In re Carpenter* (1995) 9 Cal.4th 634 645-646), no purpose would be served by requiring this petition to first be filed in that court. Mr. Allen presented these claims to that court when he opposed the setting of his execution date and the court found that they did not establish a legal basis not to set a date for his

execution. (See Exh. A-4, pp. HP0078.) Moreover, given this Court's experience in capital jurisprudence compared to the lower courts and Mr. Allen's critical need for timely and definitive determination of it, this Court is the proper venue for filing of this petition.

II. THE PETITION IS TIMELY

The petition is timely, for it shows on its face that it "was filed within a reasonable time after petitioner or counsel (a) knew, or should have known, of facts supporting a claim and (b) became aware, or should have become aware, of the legal basis of the claim." (Supreme Court Policies, Policy 3, 1-1.2.) As set forth in the petition, facts continued to develop and accumulate until they fully ripened only recently into the claim of cruel and unusual punishment that Mr. Allen here makes. Moreover, the facts underlying Mr. Allen's due process claim also occurred only recently. As Mr. Allen has set forth in the petition, he brought this petition to the Court as soon as he practically could have, and without any delay.

III. THE EQUITIES FAVOR AN IMMEDIATE STAY OF EXECUTION

"[The] province [of the Great Writ], shaped to guarantee the most fundamental of all rights, is [from the time of the Magna Carta] to provide an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person." (*Carrafas v. LaVallee* (1968) 391 U.S. 234, incl. fn. 11.) The provisional relief of a stay thus is in accordance with the historic function of the writ.

> The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action. Its pre-eminent role is recognized by the admonition in the Constitution that: "The Privilege of the Writ of Habeas shall not be

> suspended." The scope and flexibility of the writ--its capacity to reach all manner of illegal detention--its ability to cut through barriers of form and procedural mazes--have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.

(*Harris v. Nelson* (1969) 394 U.S. 286, 290-291.)

This Court likewise has admonished that "it must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired ...." (*In re Bell* (1942) 19 Cal.2d 488, 493, quoting *Bowen v. Johnston* (1939) 306 U.S. 19, 26-27.) "[T]he high purpose of the writ of habeas corpus" (*In re Crow* (1971) 4 Cal.3d 613, 623) is to provide "an efficacious means of vindicating an individual's fundamental rights." (*Ibid.*) Recognizing that habeas corpus at its heart is a matter of equity,[80] the Legislature granted the courts broad powers and flexibility to determine the writ and to fashion the appropriate remedy whenever injustice is shown. (Pen. Code, § 1484.) That section provides in relevant part that if a court finds potential merit to a petition:

> The court or judge must thereupon proceed in a summary way to hear such proof as may be produced against such imprisonment or detention, or in favor of the same, and to dispose of such party as the justice of the case may require and have full power and authority to require and compel the attendance of witnesses by process of subpoena and attachment, and to do and

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[80] (See, e.g., *People v. Snyder* (1990) 218 Cal.App.3d 480, 497 fn. 1 and associated text (conc. and dis. opn. of Work, P.J.), discussing the historical antecedents of "the equitable doctrine of habeas corpus.")

perform all other acts and things necessary to a full and fair hearing and determination of the case.

This Court's power on habeas corpus to effect substantial justice is at its zenith where a petitioner alleges that his execution would be unconstitutional. As the United States Supreme Court has aptly noted: "[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice." (*Gregg v. Georgia* (1976) 428 U.S. 153, 188, 96 S.Ct. 2909, 49 L.Ed.2d 859.) It is "unique in its severity and irrevocability." (*Id.* at p. 187.) Thus, when faced with a showing that an impending execution will inflict cruel and unusual punishment or deprive an individual of fundamental fairness, this Court has especially broad powers to act to stop an execution to avert those constitutional violations. (Cf. *People v. Dillon* (1983) 34 Cal.3d 441, 489 [to avoid imposition of cruel or unusual punishment, the Court modified the judgment].)

B.

THE COURT SHOULD MODIFY MR. ALLEN'S DEATH SENTENCE TO ONE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE TO PROTECT HIM FROM THE INFLICTION OF CRUEL AND UNUSUAL PUNISHMENT.

I. EXECUTING MR. ALLEN, WHO IS A BLIND AND WHEELCHAIR-BOUND, 75-YEAR-OLD, AND RIDDLED WITH INFIRMITIES, VIOLATES THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT AND THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE

Mr. Allen was born on January 16, 1930, at the height of the depression. He is scheduled to be executed on January 17, 2006, minutes

after his 76th birthday. He is woefully infirm. Ailing from chronic heart disease, on September 2, 2005, he suffered a massive heart attack that nearly killed him. Another heart attack could strike him at any moment. He has been an insulin-dependent diabetic for over 20 years. He is legally blind, disabled, unable to walk, and confined to a wheelchair. Executing him in his condition would violate the Eighth Amendment prohibition against cruel and unusual punishment. The execution would violate contemporary standards of decency, would not serve the purposes of retribution and deterrence of capital crimes by prospective offenders, and would amount to "nothing more than the purposeless and needless imposition of pain and suffering" banned by the Eighth Amendment. (See *Enmund v. Florida* (1982) 458 U.S. 782, 798.)

A. EXECUTING MR. ALLEN WOULD VIOLATE EVOLVING STANDARDS OF DECENCY AND SERVE NO PENOLOGICAL INTEREST

The Eighth Amendment prohibits "excessive" sanctions. It provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Because the death penalty, which is reserved for a narrow category of crimes, is the most severe punishment, the Eighth Amendment applies to it with "special force." (*Roper v. Simmons* (2005) 125 S.Ct. 1183, 1194.)

Punishments that entail exposure to a risk that "serves no 'legitimate penological objective'" and that result in gratuitous infliction of suffering violate the Eighth Amendment. (*Farmer v. Brennan* (1994) 511 U.S. 825, 833, quoting *Hudson v. Palmer* (1984) 468 U.S. 517, 548 (Stevens, J., concurring in part & dissenting in part); *Gregg v. Georgia* (1976) 428 U.S. 153, 182-83 (lead opn.) (punishment must "comport[s] with the basic concept of human dignity" and "cannot be so totally without penological

justification that it results in the gratuitous infliction of suffering") (citation omitted).) Punishments must also comport with the basic concept of human dignity, which is at the core of the Amendment. (*Gregg, supra,* 428 U.S. at pp. 182-83.) To comply with the Eighth Amendment, the death penalty must serve the social purposes of retribution and deterrence. (*Gregg, supra,* 428 U.S. at pp. 182-83.)

The Eighth Amendment is not a static concept. (*Id.* at p. 173.) Whether the death penalty violates the Eighth Amendment must be judged by the standards that "currently prevail" — not those of the past. (*Atkins v. Virginia* (2002) 536 U.S. 304, 311.) "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 100-01.) As the court held in *Atkins v. Virginia, supra,* 536 U.S. 304, the standards of decency evolve and, practices once permitted, may be held to violate the Eighth Amendment.[81] The Court must "take[] into account objective evidence of contemporary values before determining whether a particular punishment comports with the fundamental human dignity that the [Eighth] Amendment protects." (*Ford v. Wainwright* (1986) 477 U.S. 399, 406.) Accordingly, an assessment of contemporary values regarding the death penalty is relevant to an Eighth Amendment analysis. (*Gregg, supra,* 428 U.S. at p. 173.)

In the post-*Furman* era, the Supreme Court has found that evolving standards of decency have narrowed the range of defendants who qualify

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[81] The Court in *Penry v. Lynaugh* (1989) 492 U.S. 302, held that the Eighth Amendment did not prohibit the execution of the mentally retarded; based on standards of decency that evolved thereafter, however, the Court in *Atkins* held that executing mentally retarded defendants indeed violated the Eighth Amendment.

for the death penalty, holding that the execution of certain types of persons is unconstitutional under the Eighth Amendment:

- Execution for offenses short of murder is unconstitutional. (*Coker v. Georgia* (1977) 433 U.S. 584.)
- Executing those who aided a felony but did not kill or intend to kill is unconstitutional. (*Enmund v. Florida* (1982) 458 U.S. 782.)
- Executing the mentally incompetent is unconstitutional. (*Ford v. Wainwright* (1986) 477 U.S. 399.)
- Executing youths under age 16 at the time of the offence is unconstitutional. (*Thompson v. Oklahoma* (1988) 487 U.S. 815.)
- Executing the mentally retarded is unconstitutional. (*Atkins v. Virginia* (2002) 536 U.S. 304.)
- Executing juveniles who committed the offense while under 18 is unconstitutional. (*Roper v. Simmons* (2005) 125 S.Ct. 1183.)

Those same evolving standards that mark the progress of a maturing society mandate that the execution of Ray Allen, who is 75-years-old, blind, disabled, and suffering from chronic heart disease and diabetes, is not now acceptable. Such an execution "offends humanity"; provides no deterrence value; and does not serve any retributive purpose. (See *Ford, supra*, 477 U.S. at 407-08.)[82]

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[82] In *Hubbard v. Campbell* (11th Cir. 2004) 379 F.3d 1245 , cert. denied, 125 S. Ct. 15, the court did not rule on the merits of whether the Eighth Amendment prohibited the execution because of the advanced age of the inmate. The appeals court upheld the district court's dismissal of Hubbard's petition for lack of subject matter jurisdiction because it was a second or successive petition. A dissent in the Eleventh Circuit urged that a

The execution of Mr. Allen would provide no more deterrent value than allowing him to spend his brief remaining time alive in prison, and is therefore excessive. (See *Lackey v. Texas* (1995) 514 U.S. 1045 (Memorandum of Justice Stevens, respecting the denial of certiorari) (observing that neither retribution nor deterrence is served when prisoners serve 17 years under a sentence of death; penalty with negligible returns to the State is patently excessive and constitutes cruel and unusual punishment violative of the Eighth Amendment).) Ray Allen has been on Death Row since 1982 — over 23 years. In accord with Justice Stevens' observation, there would be no material deterrence or retribution value in executing Mr. Allen after holding him for over 23 years. Killing him now, in his condition, so far attenuated from the crimes for which he was convicted, at the twilight of his life, rather than letting him live the few remaining days of his natural life span in a maximum security prison, would not deter offenders of any age. Executing Mr. Allen shortly before his natural death adds no measurable deterrence to capital crimes than the punishment of 23-years of imprisonment on Death Row that Mr. Allen has already suffered.

Also as Justice Stevens observed, the retributive purpose of execution described in *Ford* — "the need to offset a criminal act by a punishment of equivalent 'moral quality'"— is also absent, given Mr. Allen's age, failing health, and the length and conditions of his confinement on Death Row. Executing Mr. Allen at this late stage would provide no moral benefit. As a 75-year-old blind, disabled, and chronically

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stay of execution be granted so that Hubbard's attorneys could argue in the proper forum that he was incompetent to be executed. (*Hubbard v. Campbell, supra*, 379 F.3d at 1247-49 (Barkett, J., dissenting).)

sick man, Mr. Allen bears little resemblance to the person who was convicted of capital offenses over 23 years ago. Inflicting the death penalty would not impose retribution on the same person who the jury found committed homicide at the age of 50. Further, Mr. Allen has already suffered the "Death Row Phenomenon" described in the petition. He has been forced to suffer for over 23 years the substandard, unconstitutional medical care delivered by San Quentin and California's prisons described in *Plata v. Schwarzenegger*; and he has been forced to endure the horrific housing conditions described in the petition. Mr. Allen has suffered enough to satisfy the retribution purposes of the death penalty. Killing him now would only be gratuitous.

A criminal defendant's "punishment must be tailored to his personal responsibility and moral guilt." (*Enmund v. Florida, supra*, 458 U.S. at 801.) Putting to death a 76-year-old, infirm man for a crime committed almost a quarter-century ago, in the words of *Enmund*, "does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts." This is particularly true for Mr. Allen, who has already endured as his just deserts the horror and torment of over 23 years on California's Death Row.

As powerful support for this conclusion, Daniel Vasquez, who served as Warden of San Quentin State Prison for ten years and who has devoted 36 years to correctional sciences, concurs that executing Mr. Allen would serve no measurable deterrence or retributive purposes. (Declaration of Daniel Vasquez, Exh. O, pp. HP0761.) Mr. Vasquez has known Mr. Allen for years. He describes Mr. Allen's condition as of December 20, 2005 as a "pathetic sight"; Mr. Allen was "aged, downcast, dejected,

isolated, oblivious to his surroundings, cuffed to his wheelchair, and utterly defeated." (*Id.*, p. HP0756.) Mr. Allen is "a shadow of his former self." (*Id.*, p. HP0757.) Mr. Vasquez concludes that "general deterrence" "would not be measurably enhanced by the execution of Mr. Allen at this late date and this late in his life. Similarly, Mr. Allen's execution would not measurably add to the State's retributive purpose, which also has been substantially fulfilled by the punishment the death judgment has already imposed upon him." (*Id.*, p. HP0761.)

B. STATE LAWS AND PRACTICES AND INTERNATIONAL NORMS ESTABLISH A STANDARD OF DECENCY THAT ABHORS EXECUTING THE AGED AND THE WOEFULLY INFIRM

The evolving standards of decency that abhor the execution of a 76-year-old man in failing health are reflected in the legislation and actual practices of the various states. There are 12 states with no death penalty on the books. (See *Roper*, *supra*, 543 U.S. 551,125 S.Ct. at p. 1198.) Two additional states, Kansas and New York, currently have no operative death penalty statutes.[83] And, two additional states, New Jersey and Illinois, currently have moratoriums on the death penalty. (See Readoption with Amendments of Death Penalty Regulations N.J.A.C. 10A:23 (2004) 367 N.J. Super. 61, 842 A.2d 207.) A decision to bar the death penalty altogether demonstrates judgment that the penalty is inappropriate for all offenders, including the aged and infirm. (*Roper*, *supra*, 543 U.S. 551,125 S.Ct. at p. 1198 (holding that "a State's decision to bar the death

[83] Kansas and NY have death penalty statutes on their books that both their Supreme Courts ruled unconstitutional.

penalty altogether of necessity demonstrates a judgment that the death penalty is inappropriate for all offenders, including juveniles").) Accordingly, decisions by 16 states to bar or not to apply the death penalty altogether demonstrate their contemporary judgment that the death penalty is inappropriate for *aged and infirm* prisoners such as Mr. Allen.

Aside from *de jure* prohibitions, the practice of the 50 states in the modern era show that executing a 76-years-old and infirm person is beyond the standards of decency. Nationally, of more than 800 persons executed since 1973, only two were more than 70 years old.[84] With the exception of Mississippi's recent and highly unusual execution of a man in his 70s, if Mr. Allen is executed tomorrow, he will be the oldest of the more than 800 persons who have been executed in the United States in the past 30 years. Mr. Allen would also be the oldest and sickest person ever executed by the State of California. Under current California law, the oldest person to be executed was Donald Beardslee at age 61 on January 19, 2005. (Exh. A-9, p. HP0285.) Since California began executing people in 1892, no one as old as Mr. Allen has ever been executed in the state. The oldest prisoner executed by California was Robert Perry, who was 71 years when he was gassed at San Quentin on July 19, 1940. (Exh. A-3, p. HP0040 (excerpt from M. WATT EPSY AND JOHN ORTIZ SMYKLA (4th ICPSR ed. 2004) EXECUTIONS IN THE UNITED STATES, 1608-2002: THE ESPY FILE [Computer file]).) Only two others have been 70: Fred Stroble, who was

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[84] James Hubbard was 74 when he was executed in Alabama in 2004 after state and federal courts declined to hear his Eighth Amendment arguments for procedural reasons; and, recently, John B. Nixon was 77 when he was executed on December 14, 2005, by Mississippi.

gassed at San Quentin in 1952; and Benito Lopez, who was hanged at Folsom in 1897. (*Id.*)

Before the modern era, executing even healthy and robust septuagenarians was rare. According to one study that attempted to identify every person executed in the United States between 1608 to 2002, 7,311 people whose age was ascertainable have been executed, and only 27 of them were age 70 or older (00.369%). (See *id.*)

Executing Mr. Allen would constitute a highly unusual punishment. Objective factors, such as the rarity of the imposition of a punishment, from which may be inferred a consensus that it is inappropriate, are a primary measure of the "evolving standards of decency" embodied in the Eighth Amendment. (*Atkins v. Virginia, supra*, 536 U.S. at 312-313.) It is highly "unusual," to say the least, to execute an individual as old and decrepit as Mr. Allen.

Indeed, surviving on death row past the age of 70 is itself unusual. The California Department of Corrections and Rehabilitation reported that as of October 20, 2005, it had custody of 647 condemned inmates. Of that number, five (0.77%) were over the age of 70. (See Exh. B, p. HP0614 (Condemned Inmate Summary List, www.corr.ca.gov/ CommunicationsOffice/CapitalPunishment/ PDF/ Summary.pdf.).) Since the enactment of California's current death-penalty in the late 1970s, 48 inmates have died of natural causes and other causes not including execution. Exh. C, p. HP0618 (Summary of Condemned Inmates Who Have Died Since 1978, http://www.corr.ca.gov/CommunicationsOffice/ CapitalPunishment/PDF/CIWHD.pdf).) The average age at death was 47; only two were over 70. In this country a prisoner is considered "elderly" at

age 50. (Exh. D, pp. HP0621-0660 (Nadine Curran, NOTE: *Blue Hairs in the Bighouse: The Rise in the Elderly Inmate Population, Its Effect on the Overcrowding Dilemma and Solutions to Correct It* (2000) 27 N.E. J. On Crim & Civ. Con. 225, 238).) Legal scholars suggest that prison wardens are not comfortable with the prospect of having to execute elderly inmates, and the call of Daniel Vasquez, former Warden at San Quentin, to commute the death sentence of Mr. Allen in light of his age and physical decline illustrates the point. (Exh. O, p. HP0754-0769 (Declaration of Daniel B. Vasquez in Support of Ray Allen's Petition for Clemency and Petition for Writ of Habeas Corpus).) Jonathan Turley, a law professor at George Washington University, said: "'Dead man walking' is one thing. 'Dead man being pushed along to the execution chamber in a wheelchair' has a different feel." (Exh. E, p. HP0661 (Richard Willing, *Death Row Population is Graying,* USA TODAY, Feb. 10, 2005, at p. 3A.).)

The laws of other countries and international legal principles and practices also inform the meaning of the cruel and unusual punishment clause. (*Roper, supra,* 543 U.S. 551, 125 S.Ct at p. 1198; *Atkins v. Virginia* (2002) 536 U.S. 304, 316 n.21.) Like domestic law and practices, international law and practices militate in favor of abolishing the death penalty for the aged and infirm. At least four international treaties direct states not to execute individuals:

- The Second Optional Protocol to the International Covenant on Civil and Political Rights, which has been ratified by 56 states. Eight other states have signed the Protocol, indicating their intention to become parties to it at a later date. (Exh. F, pp. HP0664-0666).

- The Protocol to the American Convention on Human Rights to Abolish the Death Penalty, which has been ratified by eight states and signed by one other in the Americas. (Exh. G, pp. HP0667-0670.)
- Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), which has been ratified by 45 European states and signed by one other. (Exh. H, p. HP0671.)
- Protocol No. 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), which has been ratified by 33 European states and signed by 10 others. (Exh. I, pp. HP0683-0684.)

In addition, Article 4, paragraph 5 of the American Convention on Human Rights specifically provides that the death penalty may not be imposed for offenses committed by persons over the age of 70. Exh. J, p. HP0686 (1144 U.N.T.S. 123).) The United States has signed but not yet ratified the American Convention. Article 18 of the Vienna Convention on the Law of Treaties (1979) obligates a state which has signed but not yet ratified a treaty to do nothing which would defeat the object or purpose of the treaty. (Exh. K, p. HP0713 (1155 U.N.T.S. 331).) Since norms of international law preclude imposition of the death penalty after delays of five or more years, *see, e.g.*, Exh. L, *supra*, pp. HP0732-0768 *(Pratt v. Attorney General of Jamaica*, 3 WLR 995, 2 AC 1, 4 All ER 769, at ¶ 101 (Privy Council)); see also authorities cited in *Knight v. Florida* (1999) 528 U.S. 990, 995-96 (Breyer, J., dissenting from denial of certiorari), the

American Convention was drafted in contemplation that an execution would occur, if at all, within a few years after the commission of the capital crime. The object and purpose of the American Convention would therefore be defeated by the execution of a person well over 70, regardless of the age of the defendant at the time of the capital crime.

Similarly, 86 countries have abolished the death penalty for all crimes;[85] 25 countries have not executed a prisoner for the past 10 years, although they formally have the death penalty; and 11 countries have abolished the death penalty for ordinary crimes only. (*Id.*) As a measure of evolving standards of decency, *virtually every Western country has abolished the death penalty for all crimes and for all offenders — including the aged and infirm*, such as Mr. Allen. Some countries have specifically abolished the death penalty based on the advanced age of the defendant. For example, Article 59 (2) of the Russian Criminal Code states that men

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[85] Amnesty International identifies the following countries that have abolished the death penalty for all offenders — *including the aged*: Andorra, Angola, Armenia, Australia, Austria, Azerbaijan, Belgium, Bhutan, Bosnia-Herzegovina, Bulgaria, Cambodia, Canada, Cape Verde, Colombia, Costa Rica, Cote D'ivoire, Croatia, Cyprus, Czech Republic, Denmark, Djibouti, Dominican Republic, Ecuador, Estonia, Finland, France, Georgia, Germany, Greece, Guinea-Bissau, Haiti, Honduras, Hungary, Iceland, Ireland, Italy, Kiribati, Liberia, Liechtenstein, Lithuania, Luxembourg, Macedonia (Former Yugoslav Republic), Malta, Marshall Islands, Mauritius, Mexico, Micronesia (Federated States), Moldova, Monaco, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niue, Norway, Palau, Panama, Paraguay, Poland, Portugal, Romania, Samoa, San Marino, Sao Tome And Principe, Senegal, Serbia And Montenegro, Seychelles, Slovak Republic, Slovenia, Solomon Islands, South Africa, Spain, Sweden, Switzerland, Timor-Leste, Turkey, Turkmenistan, Tuvalu, Ukraine, United Kingdom, Uruguay, Vanuatu, Vatican City State, and Venezuela. (Exh. M, p. HP0747 (Amnesty International: Abolitionist and Retentionist Countries.)

who have reached the age of 65 by the time that the court passes sentence cannot be executed. And, evidence suggests that Iraq has recently abolished the death penalty for anyone over 70. (Ex. N., p. HP0751 (See transcripts of "NewsHour with Jim Lehrer," October 19, 2005, interview of *Los Angeles Times* Baghdad correspondent, Borzhou Daraghi ("Under current Iraqi law, those over 70 can't be subjected to the death penalty"), available at http://www.pbs.org/newshour/bb/middle_east/july-dec05/saddam_10-19.html).)

Mr. Allen is frail, weak and vulnerable. If confined to prison for the remainder of his natural life, Mr. Allen bears no practical risk of harm to anyone. The spectacle of his execution — rolling him in severely ill health to the death chamber in a wheelchair — would "offend humanity." In his dissent from the denial of certiorari in *Foster v. Florida* (2002) 537 U.S. 990, Justice Breyer concluded that confining a man on death row for 27 years violated international law and constituted cruel and unusual punishment. "If executed, Foster, now 55, will have been punished both by death and also by more than a generation spent in death row's twilight. It is fairly asked whether such punishment is both unusual and cruel." (*Id.* at p. 993.) Even more so for Mr. Allen who is now 75 years old and has spent nearly a quarter-century in the fearsome twilight of San Quentin's death row.

II. EXECUTING MR. ALLEN WOULD VIOLATE THE EIGHTH AMENDMENT BECAUSE OF INORDINATE LENGTH AND CONDITIONS OF HIS CONFINEMENT

An inordinate length of confinement that obviates the deterrence and retribution purposes of the death penalty may violate the Eighth

Amendment. (*See Lackey v. Texas* (1995) 514 U.S. 1045 (J. Stevens dissenting from denial of certiorari); *Elledge v. Florida* (1998) 525 U.S. 944 (J. Breyer dissenting from denial of certiorari) (23 years on in prison under a death sentence may violate the Eighth Amendment). Although California courts have held that mere delay between sentencing and the execution of the death penalty does not violate the Eighth Amendment, here Mr. Allen has had to endure not only over 23 years of Death Row Phenomenon, but also substandard and unconstitutional medical care that has led to two heart attacks, a stroke, and other abuses described in the petition. He has also had to endure the horrific conditions at San Quentin described in the petition. Executing Mr. Allen after the inordinate delay of over 23 years on Death Row compounded by the conditions that he has had to endure would violate the Eighth Amendment.

III. EXECUTING MR. ALLEN WOULD VIOLATE THE CALIFORNIA CONSTITUTION'S PROHIBITION AGAINST CRUEL OR UNUSUAL PUNISHMENT

Executing Mr. Allen would also violate the California Constitution's prohibition on cruel or unusual punishment. Article I, section 17, provides: "Cruel or unusual punishment may not be inflicted or excessive fines imposed."[86] The California Constitution prohibition is broader than its

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[86] As explained in *People v. Ramos* (1984) 37 Cal.3d 136, 152 fn.6, article I, section 27 of the California Constitution — enacted by initiative in 1972 — does not insulate the application of the death penalty to Mr. Allen from state constitutional review. The 1972 initiative was intended simply to clarify that section 27 validates the death penalty as a permissible type of punishment under the California Constitution. (See also *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797, 808 (section 27 was not intended to

Eighth Amendment counterpart. As the California Supreme Court explained, "the California Constitution, unlike the Eighth Amendment to the United States Constitution, prohibits the infliction of cruel or unusual punishments. Thus, the California Constitution prohibits imposition of the death penalty if, judged by contemporary standards, it is either cruel or has become an unusual punishment." (*People v. Anderson* (1972) 6 Cal.3d 628, 634 (superseded by statute on other grounds).) The California Constitution's prohibition against cruel or unusual punishment is also construed separately from the Eighth Amendment. (*People v. Cartwright* (1995) 39 Cal.App.4th 1123.) A punishment may violate the California Constitution although not "cruel or unusual" in its method, if "it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424.) In making this determination, courts (1) consider the nature of the offense and/or the offender, (2) compare the punishment to other punishments imposed by the same jurisdiction for more serious offenses, and (3) compare the punishment to other punishments imposed by other jurisdictions for the same offense. (*Id.* at p. 427.) The nature of the offender focuses on the particular person before the court. (*People v. Martinez* (1999) 76 Cal.App.4th 489, 494.)

For the reasons described above, executing a 76-year-old, blind, frail and disabled man is both cruel *and* unusual. Yet either suffices to render the execution unconstitutional under the California Constitution. As stated, the rarity of executing someone so old and sick — which has never before

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insulate a death penalty statute from the general strictures of the state Constitution").)

been done in California — makes the execution unusual and therefore unconstitutional. For the reasons set forth above, executing Mr. Allen in his condition shocks the conscience and offends fundamental notions of human dignity.

C.

THE COURT SHOULD ISSUE SUCH ORDERS AS ARE NECESSARY TO ENSURE AS A MATTER OF DUE PROCESS THAT MR. ALLEN HAS A REASONABLE OPPORTUNITY TO DEVELOP AND PRESENT TO THE GOVERNOR ALL OF THE EVIDENCE THAT SUPPORTS HIS APPLICATION FOR EXECUTIVE CLEMENCY.

Clemency procedures are subject to procedural safeguards guaranteed by due process. (*Wilson v. United States Dist. Court* (9th Cir. 1998) 161 F.3d 1185, 1187.) In *Young v. Hayes* (8th Cir. 2000) 218 F.3d 850, 853, the court held that the state's interference with plaintiff's preparation of his clemency petition violated his Due Process rights and granted plaintiff a stay of execution. The state had threatened to dismiss a lawyer if she cooperated with plaintiff's preparation of his clemency petition. The court rejected the argument that clemency is committed to the discretion of the executive and that no procedural safeguards are required. "The Constitution of the United States does not require that a state have a clemency procedure, but, in our view, it does require that, if such a procedure is created, the state's own officials refrain from frustrating it by threatening the job of a witness." (*Id.*) The court relied in part on the Supreme Court's holding in *Ohio Adult Parole Authority v. Woodard* (1998) 523 U.S. 272, 288-89 (O'Connor, J., concurring in part and concurring in the judgment, joined by Souter, Ginsburg, and Breyer, JJ.); *id.* at p. 290 (Stevens, J., concurring in part and dissenting in part) in which

Justice O'Connor stated: "I do not . . . agree with the suggestion in the principal opinion that, because clemency is committed to the discretion of the executive, the Due Process Clause provides no constitutional safeguards."

Here, the state denied Mr. Allen a reasonable opportunity to prepare his clemency petition. The state's acts are part of a pattern of disregard for the medical needs of the inmates that a federal court found unacceptable in *Plata* v. *Schwarzenegger* (N.D. Cal. May 10, 2005, No. C01-1351TEH) 2005 U.S. Dist. LEXIS 8878, at *1. The federal court specifically found that at San Quentin "[e]ven the most simple and basic elements of a minimally adequate medical system were obviously lacking." (*Id.*, at *8.)

In June 2005, the state arbitrarily cut off vital medications used to treat Mr. Allen's heart disease, blood pressure, and diabetes. The medications were not restored until August 2005, which apparently was too late to protect Mr. Allen from the heart attack he suffered one month later. After Mr. Allen's heart attack, he never received the care recommended by the physicians who treated him. Instead, Mr. Allen was repeatedly moved to different facilities without being provided necessary treatment. As a result, for a critical period of time the medical experts his counsel had retained could not examine him to gather evidence for the clemency petition, nor could his counsel meet with him for that purpose. The state also arbitrarily withheld recommended eye surgery for Mr. Allen designed to improve his vision, and which would have permitted him to participate in tests necessary to the preparation of his clemency petition. The state's repeated failures have prevented Mr. Allen from adducing evidence of organic brain damage as a result of an episode of pediatric encephalitis and

prior head trauma. Such evidence of brain damage would serve as powerful mitigating conditions in support of clemency.[87]

CONCLUSION

For the reasons here set forth, the Court should immediately stay Mr. Allen's execution, and issue an order to show cause why he should not be granted the permanent relief he seeks in his petition.

DATED: December 22, 2005

Respectfully submitted,

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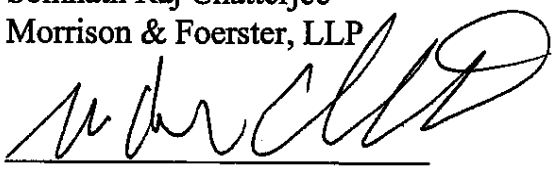

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Attorneys for Petitioner
Clarence Ray Allen

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[87] The U.S. District Court in *Allen v. Hickman*, U.S. District Court, Northern District of California Case No. C 05 5051, found that the State did not violate Mr. Allen's due process rights. Mr. Allen respectfully submits that he has alleged sufficient interference by the State that frustrated his preparation of his clemency petition to sustain a due process violation.

PROOF OF SERVICE

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 425 Market Street, San Francisco, California 94105-2482. I am not a party to the within cause, and I am over the age of eighteen years.

I further declare that on December 23, 2005, I served a copy of:

PETITION FOR WRIT OF HABEAS CORPUS AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

APPENDIX OF EXHIBITS SUBMITTED IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

☐ **BY FACSIMILE [Code Civ. Proc sec. 1013(e)]** by sending a true copy from Morrison & Foerster LLP's facsimile transmission telephone number 415.268.7522 to the fax number(s) set forth below, or as stated on the attached service list. The transmission was reported as complete and without error. The transmission report was properly issued by the transmitting facsimile machine.

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Mr. Ward Campbell
Deputy Attorney General
California Attorney General's Office
1300 I Street, Suite 940-25
Sacramento, CA 95814

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

Executed at San Francisco, California, this 23rd day of December 2005.

Pat A. Wolfe	
(typed)	(signature)