No. S139857

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

PETITIONER'S REPLY TO INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS AND OPPOSITION TO REQUEST FOR A STAY OF EXECUTION

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Clarence Ray Allen hereby submits this Reply to the State's Informal Response to Petition for Writ of Habeas Corpus and Opposition to Request for a Stay of Execution.

I. INTRODUCTION

Mr. Allen will be 76 years old on January 17, 2006, the date set for his execution. Without question, he is infirm. Mr. Allen is blind. As his legs have failed, he is confined to a wheelchair. He has chronic coronary artery disease, suffered a massive heart attack on September 2, 2005, when his heart stopped three times, and is at risk of suffering another one at any moment. He has been an insulin-dependent, Type-two diabetic for over 20 years, with resulting organ damage to his eyes, legs, liver, and heart. Indeed, the State's own doctors describe Mr. Allen as "chronically ill." (Response Exh. D at 19.)[1] For over 23 years, he has been restricted to Death Row at San Quentin, living with the perpetual torment of a looming, impending execution. During those 23 years, the State has forced Mr. Allen to live in inhumane and medieval conditions that a federal court found to be unconstitutional (see Petition, Paras. 22-25)[2] and inflicted on

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[1] The State's own exhibits also confirm Mr. Allen's condition. *See, e.g.*, Exh. D (State assesses Mr. Allen to have: "Diabetes Mellitus, Insulin Dependent with end organ damage"; "Coronary Artery Disease . . ."; "Hypertension-controlled"; "Blindness Secondary to Diabetes"; "Peripheral Vascular Disease Secondary to Diabetes"; and "Peripheral Neuropathy Secondary to Diabetes.") (Response Exh. D at 18.)

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

Mr. Allen a healthcare system so shockingly substandard that another federal court found it to constitute cruel and unusual punishment.[3] Indeed, the State cut off Mr. Allen's heart medication for a two-month period shortly before he had his September 2 heart attack, and then abruptly cut off his insulin as soon as he had recovered from his heart attack. Time — the 23 years the State confined Mr. Allen to Death Row — exacerbated by the conditions the State inflicted on Mr. Allen have reduced him to a mere shadow of his former self. And, if executed, Mr. Allen will be the oldest and sickest person California has ever executed, and the second oldest inmate executed in the modern era in the United States.

These material facts are largely undisputed. Executing Mr. Allen under these conditions would violate the Eighth Amendment's prohibition of cruel and unusual punishment as well as the corollary but broader

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[3] (*Plata v. Schwarzenegger* (N.D. Cal., May 10, 2005, No. C-01-1351 TEH) 2005 U.S. Dist. Lexis 8878, at *8 .) The State's assertion that Mr. Allen "contracted his various ailments at a time when San Quentin's services were constitutionally adequate" (Response, p. 16, fn. 10) is unsupported and misleading. For its support, the State cites the Medical Experts' Report on San Quentin, which states that "San Quentin . . . only in the last decade satisfactorily terminated a Federal settlement agreement designed to improve medical conditions." (HP172.) There is no indication of how long before that termination the conditions were constitutionally inadequate or how soon after the termination the facility declined. The same report states that the experts "found [San Quentin] 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. . . . ." (*Id.*) These are the kinds of

prohibition of cruel or unusual punishment under the California Constitution.

The State's informal response largely misses the point of the . Petition. In an effort to convince the Court that Mr. Allen's Petition is without merit, the State confounds the issues, ignores the operative facts, asserts matters regarding the underlying case that are not at issue here,[4] and resorts to hyperbole — all in an effort to proceed with an unconstitutional execution.

Contrary to the State's assertion, the criminal justice system would hardly be "rendered ultimately hapless and powerless" by avoiding an unconstitutional execution and allowing Mr. Allen to spend the short time he has remaining in a secure prison. (See Response at 4.) The State's effort to cast Mr. Allen as someone who should be executed because he is a current menace is baseless and contradicts the facts. (See Response at 3.) Despite the State's repeated refrains otherwise, Mr. Allen is currently no threat to anyone, inside or outside of San Quentin, as attested to by Daniel Vasquez — who served for 10 years as Warden of San Quentin and Mr. Allen's keeper. (Exh. O, pp. HP756-59.) And, for the past 23 years,

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conditions to which Mr. Allen has been subjected, particularly during the recent years leading to his current debilitating condition.

[4] The State's recitation of events at issue in the underlying trial has nothing to do with the issues in this Petition. The deaths of the victims were

Mr. Allen has had an exemplary record of behavior, which the State does not dispute. (See *id.*)

The State agrees that, if the Court finds that Mr. Allen's Petition has potential merit, this petition should be set for a full and fair hearing, which would require a stay of the execution. (Response, p. 10.) The Petition does. Mr. Allen has shown in detail how the State's proposed execution would violate the U.S. Constitution and the California Constitution and has established ample foundation to show that his Petition has potential merit. The Court should stay Mr. Allen's execution and issue its order to show cause.

II. THE PETITION IS TIMELY

The Petition is timely. The State's argument to the contrary and its assertion of a procedural bar are frivolous.

Mr. Allen's due process claim is based in large part on events that occurred since September 2005. It rests on allegations that medical complications and deprivations of access to counsel ensuing from a heart attack that he suffered on September 2, 2005, disabled him from preparing his clemency petition, and that this disability was aggravated by the fact that prison authorities inexcusably failed to correct his blindness by providing him with the eye surgery that has been prescribed for him since

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without question tragic. But the issues in this Petition concern the State's

June 2005. (See Petition, pp. 6-8 and 21-25.) The State's response confirms that Mr. Allen suffered a heart attack on September 2, 2005, that resulted in cardiac arrest and extended hospitalization; that he has become "frail and chronically ill"; and that an ophthalmology appointment for laser treatment of his eye "has been approved and is pending ... [and] should be scheduled." (See, e.g., Exhibits in Support of Response, Exh. D, pp. 15-19.)

The State nevertheless asserts that the filing on December 23, 2005, of "the present 'eleventh-hour' petition" (Response, p. 5) that includes this claim is "substantially delayed and good cause has not been established to excuse the untimeliness." (Response, p. 9.) The State bases this assertion on the fact that "Allen's execution date was set on November 18, 2005." (Response, p. 8.) But this Court has never found untimeliness or substantial delay when a petition is filed within weeks of the events giving rise to the claim, and the State cites no case that even remotely supports its assertion of a procedural bar here.

The State seeks to bolster its procedural objection with its assertion that there was "full development" of the claims by the time that Mr. Allen "on December 7, 2005, ... filed a 42 U.S.C. section 1983 action, and, on December 13, 2005, a clemency petition," but that he "engaged in further

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efforts to execute Mr. Allen given his current condition.

delay before filing the present petition" on December 23, 2005." (Response, p. 8.) First, Mr. Allen's claims were not fully developed until he could overcome the impediments to his access to counsel as described in the petition, and obtain access to counsel's consultant, Daniel Vasquez, on December 20, 2005. (See Petition, p. 23, ¶ 34; see also Petition, Exh. O, HP0755.) Counsel for Mr. Allen thereafter promptly secured the declaration of Mr. Vasquez, signed December 21, 2005, and the petition was finalized and filed two days later. Moreover, even if the claims had been fully developed as early as December 7, 2005, the assertion that the filing of a petition for writ of habeas corpus little more than two weeks thereafter was "dilatory" (Response, p. 5) is absurd. It is particularly absurd because the marshaling and exposition of the law as it related to those facts, as well as production of the petition and its voluminous exhibits, still remained to be accomplished. Even if counsel had all the resources of the State at its disposal, as does the Attorney General, the lapse of two weeks from development of the facts to filing of a petition would be reasonable. Given the limited resources of private counsel, however, the short amount of time that elapsed between the events giving rise to the claims and the filing of the petition making those claims was salutary, if not heroic — especially when one considers that counsel at the same time was preparing both Mr. Allen's petition for clemency and his reply to the State's opposition to that petition, the latter of which counsel was filed on

December 27, 2005. Under these circumstances, the petition for writ of habeas corpus indisputably meets this Court's requirement that it be "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." (See Petition for Writ, p. 30, quoting Supreme Court Policies, Policy 3, 1-1.2.) A petition is untimely only if a petitioner has failed to "explain and justify any substantial delay in presenting a claim" – not any delay no matter how slight. (*In re Clark* (1993) 5 Cal.4th 750, 783.)

The State's assertion of untimeliness and substantial delay in presentation of the claim that Mr. Allen's execution on January 17, 2006 would impose cruel and unusual punishment upon him is meritless for other reasons as well.

The State contends that Mr. Allen alleged only in "general terms" the timeliness of this claim. (Response, pp. 5-6.) That contention is undermined by the State's acknowledgement that Mr. Allen specifically alleged that "the '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." (Response, p. 5, quoting Petition at p. 30.) The State misleadingly characterizes this as "only [a] general statement" (Response, p. 6), for it omitted the statement's introductory clause, "[a]s set

forth in the petition." (Compare Response, p. 6, with Petition, p. 30.) As Mr. Allen noted in his petition, the claim "shows on its face" that it is timely, for it alleges very specifically the recent events that contributed to his current condition. (Petition, p. 30; see also the averments of timelines at Petition, ¶ 38, p. 25.)

As explained in paragraph 38 of the petition, this claim is based on a confluence of factors that have gradually worsened until they converged on September 2, 2005, and established a basis for relief. As Mr. Allen alleged, the "totality of circumstances ... came to a head with his heart attack on September 2, 2005, and the setting of an execution date" in the face of that culmination of facts (Petition, p. 25), so that his "execution ... would be the torturous capstone to punishment that has already so debilitated and diminished him." (Petition, p. 20.) The State's assertion of undue delay is premised on a fundamental misconception of this claim. For example, the State contends that Mr. Allen "claims that he should be sparred [sic] simply because of the period of time he has spent on Death Row." (Response, p. 20.) Rather, as the State elsewhere acknowledged, Mr. Allen's claim is based on allegations that "his age, infirmities, conditions of imprisonment, and the closely-related alleged 'Death Row Phenomenon [together with the State's contribution to his deteriorated condition] render his execution now a violation of the Cruel and Unusual Punishment Clause of the Eighth

Amendment of the Constitution of the United States and the 'Cruel or Unusual Clause' of the California Constitution." (Response, p. 11; italics added.)

The State's assertion that "nothing prevented Allen from raising and preserving this claim on his first petition" (Response, p. 6) ignores the nature of his claim, which is based on the totality of the circumstances that form Mr. Allen's current condition. Mr. Allen's claims are based on events and circumstances that arose after his previous habeas corpus petitions were filed and considered. Seen in the light of a convergence of circumstances that only presently caused Mr. Allen's execution to violate the Constitution, the State's attempt to isolate each strain of his claim to establish delay is unavailing. This Court has recognized that it is proper to wait until the development of facts or strains of a claim come together to establish a basis for relief, where the facts or strains of a claim prior to such development fail to establish a prima facie case. (See, e.g., *In re Robbins* (1998) 18 Cal.4th 770, 806) ["petitioner's briefing does not advance, expressly or implicitly, any assertion that Claim I must be viewed as a symbiotic whole, the subclaims of which do not independently warrant relief, and that the whole claim must be found timely if any component part is timely"]; *id.* at pp. 820-821 (dis. opn. of Kennard, J.) [" The majority appears to concede that a habeas corpus petitioner has no obligation to promptly present a

subclaim that, by itself, fails to state a prima facie case for relief. The obligation to present without undue delay applies only to developed claims--that is, claims that state a prima facie claim for relief. A subclaim that fails to meet this threshold need not be presented unless and until the petitioner discovers and develops other subclaims that, in habeas corpus counsel's judgment, may be combined with the previously known subclaim to state a prima facie case for relief."].)

Moreover, the State's assertion of undue delay fails on its own terms even when the strains of Mr. Allen's claims are isolated. For example, the portion of Mr. Allen's claim based on 23 years of confinement on Death Row obviously could not have been raised earlier; a claim based on 11 years on Death Row would have been fundamentally different. Similarly, while Mr. Allen's physical deterioration began some years ago, it increasingly worsened to the point where it grew dire this past September.

Further, the State unfairly attempts to ensnare Mr. Allen in a legal catch-22. Had Mr. Allen brought a claim along these lines earlier, the State surely would have defended against it with argument that Mr. Allen was not old enough, infirm enough, or on Death Row long enough to state a claim for relief. The State's notion that Mr. Allen could have "preserved" the claim he is making now in a petition filed a decade or more ago by forecasting future facts is faulty. As this Court has stated:

> Summary disposition of a petition which does not state a prima facie case for relief is the rule. [Citations.] This practice is too well established [citation] to warrant any inference that petitioners are justified in believing that the court will routinely delay action on a filed petition to permit amendment and supplementation of the petition....
>
> The inclusion in a habeas corpus petition of a statement purporting to reserve the right to supplement or amend the petition at a later date has no effect. The court will determine the appropriate disposition of a petition for writ of habeas corpus based on the allegations of the petition as originally filed and any amended or supplemental petition for which leave to file has been granted.

(*In re Clark, supra*, 5 Cal.4th at p. 781 and fn. 16.)

III. CLAIM I: 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.

A. The State Confounds the Issues

On Mr. Allen's first claim, the issue is whether executing Mr. Allen under the totality of the circumstances here presented — including the undisputed facts set forth above — would violate the Eighth Amendment and the California Constitution. The State confounds this issue by breaking apart the various factors — such as Mr. Allen's age, his health, his 23 years on Death Row, and the State's inadequate conditions of confinement and healthcare system — to argue the none of those factors by themselves would render executing Mr. Allen cruel and unusual punishment. By doing

so, the State constructs straw arguments and fails to address Mr. Allen's actual claim: That the extraordinary duration of Mr. Allen's confinement on death row, his very advanced age, his multiple, grave medical impairments, and the State's unconscionable contributions to his failing health — *together* — render executing him under these present circumstances unconstitutional.

B. The State Fails to Refute that Executing Mr. Allen Violates Standards of Decency and Serves No Legitimate Penological Interest

The State has failed to refute Mr. Allen's claim that executing him under these circumstances 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.

The Supreme Court has set forth parameters of the Eighth Amendment applicable here. (See, e.g., *Coker v. Georgia* (1977) 433 U.S. 584; *Enmund v. Florida* (1982) 458 U.S. 782; *Ford v. Wainwright* (1986) 477 U.S. 399; *Thompson v. Oklahoma* (1988) 487 U.S. 815; *Atkins v. Virginia* (2002) 536 U.S. 304; and *Roper v. Simmons* (2005) 543 U.S. 551, 125 S.Ct. 1183.) Under the reasoning and paradigm set forth in *Roper*, *Atkins*, and *Ford*, executing a 75-year-old, infirm man, who has suffered as

Mr. Allen has would be an unconstitutional, gratuitous execution. These cases hold that, unless the death penalty measurably contributes to the social purposes of deterrence and retribution in a particular circumstance, the execution would be "'nothing more than the purposeless and needless imposition of pain and suffering' and hence an unconstitutional punishment." (*Atkins, supra,* 536 U.S. at p. 319 (quoting (*Enmund v. Florida* (1982) 458 U.S. 782)) (executing mentally retarded individuals unconstitutional); (see also *Roper, supra,* 543 U.S. 551, 125 S.Ct. at pp. 1196-1197) (executing defendants under 18-years-old unconstitutional).) The State's attempt to distinguish these cases on the grounds that the specific facts concerning the application of the Death Penalty to the mentally retarded and juveniles differ from those here is unavailing and misses the point. The reasoning of those cases is directly applicable and lead to the same conclusion — that the Death Penalty as applied here is unconstitutional — because executing someone in Mr. Allen's condition is a highly rare practice that would not measurably advance deterrence of capital crimes or retribution.

The State presents no facts to contradict the conclusion that executing Mr. Allen now, over 23 years after his conviction, given the facts of this case, would not measurably contribute to deterring others from

committing capital crimes.[5] The proposed execution in no way measurably adds to the deterrence created by the 23 years of confinement on Death Row and the unconstitutional confinement conditions and substandard medical care imposed by the State already. Executing Mr. Allen would be akin to shooting a man on his death bed. It would be pointless as well as inhumane.

The Honorable Joseph Grodin, Associate Justice of this Court (Ret.), who authored the Court's decision affirming the death judgment in the underlying case, agrees. He stated in a letter to the Governor:

> [T]he issue now . . . is whether the execution of Mr. Allen would serve any legitimate societal interest in either retribution or deterrence. My own judgment, considering the time that has elapsed, the physical suffering that Mr. Allen has endured, and the state's likely involvement in that suffering, is that it would not. On the contrary, to execute Mr. Allen now under these conditions, for a crime which he committed more than a century ago, would itself violate standards of decency.

(Exh. P, p. HP0770 (attached hereto).) The State attempts to dismiss Justice Grodin's statements by contending that they are a reflection of his personal opinion in opposition to the death penalty in general. (Response, p. 19.) However, statements like this one from the very Justice of this Court who wrote the opinion affirming the death sentence is rare, highly

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[5] The State merely quotes general language from *Gregg v. Georgia* (1976), 428 U.S. 153, and claims as a bald conclusion that executing Mr. Allen

significant, and should be given serious weight. And, Justice Grodin's letter itself makes clear that it reflects his opposition to Mr. Allen's execution in the particular circumstances at issue here, not to the death penalty generally.

The State's parallel efforts to dismiss summarily the considered opinion of former San Quentin Warden Vasquez — who also concludes that executing Mr. Allen would advance neither deterrence nor retributive purposes — is similarly unpersuasive. Mr. Vasquez supports the Death Penalty, has had 36 years of experience in correctional science, including 30 years in the California State Department of Corrections and 10 years of service as Warden of San Quentin, and has presided over executions. (Exh. O, ¶ 7, Exh. 1, at HP0755, 763-69.) He has known Mr. Allen for years and reviewed Mr. Allen's CDC Central File. So contrary to the State's assertions, Mr. Vasquez is familiar with Mr. Allen's trial and the events leading to his conviction. (Exh. O, ¶ 5, HP0755.) That he did not sit on the jury in Glenn County and does not provide the details of his conversation with Mr. Allen in his declaration are irrelevant. The State's assertion that Mr. Vasquez's views deserve no more weight than that of any other person is incomprehensible. His firsthand experience with executions

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would serve as a deterrent. (Response, p. 17.)

generally, and with Mr. Allen in particular, renders his opinion uniquely valuable and credible.

The State also fails to show how executing Mr. Allen now would measurably add any retributive value. As fully described in the Petition, Mr. Allen has already been thoroughly punished. And, Mr. Allen is simply not the same person he was 23 years ago.

The State provides no *facts* to contradict Mr. Vasquez's conclusion that Mr. Allen is a "shadow of his former self." Contrary to the State's characterizations, the opinion of Dr. Paul Good is consistent with Mr. Vasquez's conclusions. Dr. Good describes Mr. Allen as "an old sick man." "After 23 years of being battered by the stress and strain of Death Row, his physical and psychological health have steadily deteriorated." "Mr. Allen's depression and demoralization are readily apparent." Dr. Good describes Mr. Allen as "not as a "whole man.'" (Exh. A, 12 at HP0324.)[6]

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[6] The State's assertion that Mr. Allen is "angry and defiant" is both incorrect and immaterial. Further, because Mr. Allen is seeking eye surgery and a stress test to improve his heart in no way undermines Mr. Vasquez's and Dr. Good's conclusions. Among other things, the eye surgery is necessary for Mr. Allen's clemency petition. And, the State's suggestion that Mr. Allen forgo a recommended stress test and lose concern over his heart condition is distressing. Indeed, the State's position here appears to be consistent with Judge Henderson's findings in *Plata* v. *Schwarzenegger*.

C. Mr. Allen's Current Circumstances Are Directly Relevant to the Constitutionality of the Proposed Execution.

To the extent that the State contends that Mr. Allen's current circumstances — as opposed to Mr. Allen's condition during the 1982 trial — are irrelevant to the Eighth Amendment's application here, the State is wrong. An Eighth Amendment analysis applies to the conditions of inmates at the time of the trial, as well as the time of the execution. In *Ford v. Wainwright* (1986) 477 U.S. 399, the Supreme Court held that executing an incompetent inmate was unconstitutional even though the inmate was competent at the time of his offense, at trial, and at sentencing.

The State's contention that Mr. Allen proffers no age limits above which an execution would be prohibitive is a red herring. (Response at 14.) The Court must decide this case on the facts at issue here: Executing a 75-year-old man who is medically infirm and who has suffered over 23 years of Death Row confinement and the conditions inflicted on Mr. Allen by the State. That proposed execution here is unconstitutional. And that is all the Court need hold. See *Penry v. Lynaugh* (1989) 492 U.S. 302, 317 (holding that the "Eighth Amendment mandates an individualized assessment of the appropriateness of the death penalty"). No "bright line rule" is necessary.

D. Executing a 76-Year-Old Prisoners Is Very Rare, Unusual, and Contrary to Practices Inside and Outside the United States

The State cannot hide from the indisputable fact that states in practice do not execute septuagenarians and certainly not inmates as old as Mr. Allen, except in the extremely rare case. And the rareness of executing aged an infirm inmates militates strongly in favor of holding the practice unconstitutional. (See *Atkins v. Virginia, supra,* 536 U.S. at pp. 312-313 (rarity of the imposition of a punishment is a primary measure of the "evolving standards of decency" embodied in the Eighth Amendment).)

Not only is it true that 16 states currently have no operative death penalty, but it is highly unusual in this country to execute someone who is over 70: only 29 in over 300 years, as the State concedes. In that time, only 6 people who were 76 or older have been executed. (Exh. A, Exh. 3, HP40 (identifying five such executions).) But in its analysis, the State fails to acknowledge that the Eighth Amendment is an evolving standard, so the Court must look to *contemporary practices* to determine standards of decency. Other than one highly unusual occurrence in Mississippi, of the 800 or so executions since 1973, *no one as old as Mr. Allen has been executed.* (See HP40.) Executing a 76-year-old infirm man is highly unusual indeed.

The State's claim that the law and practices of other nations and international principles and practices are irrelevant is mystifying. (Response at 14.) Without question, they are relevant to the meaning of the Eighth Amendment. (*Roper, supra,* 543 U.S. 551, 125 S.Ct at p. 1198; *Atkins v. Virginia, supra,* 536 U.S. at p. 316, fn.21.) The State does not deny that countries such as Iraq and Russia limit executions based on advanced age. The State also admits that the American Convention on Human Rights ("American Convention"), which the United States signed, prohibits the execution of defendants who are 70 at the time of the offence. (Response, p. 14.) But the State ignores the principle that under international norms, the death penalty is to be carried out within five years after the commission of the crime, so the American Convention does not contemplate that individuals as old as Mr. Allen would be executed. (Petition, p. 42.)

E. The State Unfairly Minimizes the Torment of 23 Years on Death Row that the State Has Inflicted on Mr. Allen

Twenty-three years of torment on Death Row with an impending execution looming over his head forms a critical component of Mr. Allen's claim. At least two Supreme Court Justices have opined that such confinement by itself may violate the Eighth Amendment. (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; a penalty with negligible returns to the State is patently excessive and constitutes cruel and unusual punishment violative of the Eighth Amendment); (*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). But such Death Row confinement, when combined with the other factors at issue here, certainly makes the execution here unconstitutional.

The State, however, without any factual support minimizes the torment it has inflicted on Mr. Allen during the 23 years it has confined him to Death Row. (Response at 20-21.) In essence, the State blames Mr. Allen for the 23 years of confinement it has inflicted. Mr. Allen, however, properly asserted his legal rights to contest a flawed trial — which included prosecutorial misconduct,[7] erroneous jury instructions,[8] defense counsel who failed to do his job,[9] and witnesses who recanted.[10] The 23 year process shows that there were fundamental flaws in the prosecution against Mr. Allen that took years to process and evaluate. And, the State contributed to the length of the process by raising virtually every

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[7] (*Allen v. Woodford* (9th Cir. Cal. 2005) 395 F.3d 979, 998, 1013, 1015-1016.)

[8] (*Id.* at p. 1017.)

[9] (*Id.* at p. 984.)

legal objection it could, as the State has done here, to Mr. Allen's rightful access to justice. (See, e.g., HP0341.) Mr. Allen simply cannot be blamed for exercising his rights.[11]

IV. CLAIM II: 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.

The State's informal response fails to show that Mr. Allen's claim for a due process violation has no potential merit. The State unfairly interfered with Mr. Allen's preparation for executive clemency, and cannot now benefit from its interference. Indeed, the State fails to address Mr. Allen's claims that it interfered with his preparation. Mr. Allen has a right to have his counsel and his counsel's experts examine him. (See *In re Ketchel* (1968) 68 Cal.2d 397, 402) ["counsel [has] broad discretion in deciding how to investigate and develop all potentially available arguments. The principle applies with special force in a case involving the penalty of death" (holding that defense counsel may have defendant examined by independent psychiatric expert)]. The State's interference with Mr. Allen's preparation of his clemency petition fully justifies a stay of his execution.

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[10] Exh. A; HP23-28.

[11] The State's claim that the Court has already rejected Mr. Allen's claim under the California Constitution (Response at 19) is inaccurate. Mr. Allen did not — and could not — have raised in his previous petition the claim that his execution would be disproportional given his current physical conditions plus 23 years on Death Row that he has already suffered.

(See *Espinoza-Matthews v. California* (9th Cir. Cal., Dec. 28, 2005, No. 04-56805) 2005 U.S. App. Lexis 28784, at *2 (holding that statute of limitations on habeas petition was equitably tolled because petitioner was denied access to legal materials).

The State's reliance on the district court opinion in *Allen v. Hickman* (Response Exh. F) is unavailing. The district court dismissed Mr. Allen's federal complaint without prejudice on jurisdictional grounds for failure to exhaust administrative remedies. That dismissal does not in any way dictate how this Court should rule.

The State's reference to past medical exams are also irrelevant. Mr. Allen has not had the medical exams he needs now to support his clemency petition. As noted, defense counsel has broad discretion on how to develop available arguments, and the State's contention that Mr. Allen needs no further psychological examination should be rejected. Nor has Mr. Allen had the eye treatment he needs to take those tests, although San Quentin has promised it for weeks. He is being stonewalled, presumably so the State can proceed with his execution without providing any of these necessary services. In a separate motion, filed January 6, 2006, Mr. Allen asks the Court to order San Quentin to perform the medically required eye surgery, and to permit Mr. Allen's counsel to have the necessary MRI and SPECT tests performed at the appropriate institution. Mr. Allen has indeed explained in the Petition the potential relevance of the MRI and SPECT tests to his claim for clemency.

V. CONCLUSION

For the reasons set forth here and in Mr. Allen's Petition, 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: January 6, 2006

Respectfully submitted,

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Exhibit P

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December 23, 2005

Hon. Arnold Schwarzenegger
c/o Andrea Lynn Hoch
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Re: Clarence Ray Allen Petition for Clemency

Dear Governor Schwarzenegger,

In 1986 I authored the California Supreme Court's opinion in *People v. Clarence Ray Allen*, 42 Cal. 3d 122 (1986), affirming Mr. Allen's conviction and the judgment imposing the death penalty sentence. I did so because, based on the record developed to that point, I thought Mr. Allen had received a fair trial and that the procedures which led to the sentence conformed to what the law required.

Now, twenty years later, the issue is no longer whether Mr. Allen was guilty or whether the procedures leading to his death sentence conformed to law. Mr. Allen has been on death row for over 23 years. He is 75 years old. I am informed he is legally blind, that he has recently suffered a massive coronary, and that he is confined to a wheelchair. The outdated and inadequate physical conditions at San Quentin, and particularly the substandard medical care at the facility recently revealed by the lawsuit that caused Judge Henderson to put the entire medical care system of the Department of Corrections into receivership raise the strong suspicion that his physical deterioration is not simply a consequence of old age and the passage of time, but that it is attributable in part to the actions of the state itself.

In any event, the issue now -- for you as Governor and for me as private citizen -- is whether the execution of Mr. Allen would serve any legitimate societal interest in either retribution or deterrence. My own judgment, considering the time that has elapsed, the physical suffering that Mr. Allen has endured, and the state's likely involvement in that suffering, is that it would not. On the contrary, to execute Mr. Allen now, under these conditions, for a crime which he committed more than a quarter century ago, would itself violate societal standards of decency. I hope you share this judgment and that you will grant Mr. Allen's petition for clemency.

Sincerely,

Joseph R. Grodin
Associate Justice, California Supreme Court (Ret.)