No. 06-99001

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLARENCE RAY ALLEN,

Plaintiff-Appellant,

vs.

STEVEN ORNOSKI, WARDEN OF THE CALIFORNIA STATE PRISON AT SAN QUENTIN, AND THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA

Defendants-Appellees.

On Appeal From the United States District Court for the Eastern District of California, The Honorable Frank C. Damrell, Jr. (Case No. 2:06-CV-00064-FCD-DAD)

MOTION FOR ORDERS AUTHORIZING THE DISTRICT COURT TO CONSIDER A SECOND OR SUCCESSIVE APPLICATION FOR PETITION FOR WRIT OF HABEAS CORPUS, AND STAYING ALLEN'S EXECUTION UNTIL FINAL DETERMINATION OF THE MOTION; AND SUPPORTING DECLARATION AND POINTS AND AUTHORITIES

EXECUTION IMMINENT
Jan. 17, 2006, at 12:01 A.M.

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CLARENCE RAY ALLEN, through counsel, moves for an order that authorizes the filing of a second or successive (SOS) application for a writ of habeas corpus, and for a stay of his execution until this motion is finally resolved. This motion is filed pursuant to 28 U.S.C. § 2244. The application is based on the declaration and points and authorities made a part of it, and the records on file in *Allen v. Ornoski*, United States District Court, Eastern District of California, No. Civ. S-06-64 FCD/DAD, copies of which have been lodged with this Court in anticipation of the filing of this motion and any appellate review that Allen may seek of rulings in that case adverse to him.

DECLARATION OF COUNSEL IN SUPPORT OF MOTION FOR ORDER AUTHORIZING THE FILING OF AN SOS APPLICATION FOR A WRIT OF HABEAS CORPUS IN THE DISTRICT COURT

I, MICHAEL SATRIS, declare under penalty of perjury under the laws of the State of California and the United States as follows:

I am one of the attorneys for moving party Clarence Ray Allen, a prisoner of the State of California who is incarcerated on Death Row at the California State Prison at San Quentin and scheduled to be executed at 12:01 a.m. January 17, 2006. I am also the attorney appointed by the District Court to represent Mr. Allen in *Allen v. Ornoski*, United States District Court, Eastern District of California, No. Civ. S-06-64-FCD/DAD.

I was appointed as lead counsel in the court below to represent Mr. Allen in the prior petition for writ of habeas corpus that he filed in *Allen v. Woodford*, United States District Court, Eastern District of California, No. CV. 88-01123-FCD/JFM. This Court affirmed the lower court's denial of that petition, in *Allen v. Woodford*, 395 F.3d 979 (2005). Mr. Allen petitioned the United States Supreme Court for a writ of certiorari from that judgment, which the Court denied in *Allen v. Brown*, 126 S.Ct. 134, 163 L.Ed.2d 137 (2005).

On October 3, 2005, the same day that the Court issued that denial, the State requested that the trial court set an execution date of January 17, 2006. Mr. Allen opposed that application on various grounds, including the ground for relief that he seeks leave to allege in his SOS petition; namely, that his execution would impose cruel and unusual punishment upon him in view of the 23 years of substandard and unconstitutional conditions of confinement that he has suffered on San Quentin's Death Row, including substandard treatment from its medical care system, all of which contributed to and accelerated his physical decline.

On November 18, 2005, the trial court nevertheless set January 17, 2006, as the date for execution of Mr. Allen.

On December 23, 2005, Mr. Allen filed a petition for writ of habeas corpus with the California Supreme Court pursuant to California Penal Code section 1473

et seq. that prayed for a stay of and relief from the judgment on various grounds, including the cruel and unusual punishment one identified above.

The California Supreme Court denied the petition by order filed January 10, 2006.

On January 12, 2006, Mr. Allen filed a petition for writ of habeas corpus in *Allen v. Ornoski*, United States District Court, Eastern District of California, No. Civ. S-06-64-FCD/DAD, seeking relief from the death judgment and a stay of his execution on the ground that his execution on January 17, 2006, would impose cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. His claim was based on his age, his deteriorated physical condition, the length of time that he has suffered the conditions on Death Row under his death judgment, and the fact that those conditions had contributed to and accelerated his physical decline. In that petition, Allen explained why it was not a SOS petition within the meaning of 28 U.S.C. § 2244, which requires prior authorization of this Court to file a SOS petition. On the same date, the State filed an opposition to the petition and motion in which it claimed that the petition should be dismissed for want of jurisdiction because it was subject to the SOS provisions of 28 U.S.C. § 2244.

On the same date, January 12, 2006, the District Court entered judgment denying the petition, as well as the requests for a stay and for a certificate of

Appealability (COA). In its Memorandum and Order ("Order"), the court treated the petition as presenting two different claims. As it analyzed the petition:

> Petitioner presents two distinct claims. First, because he. is elderly and 'woefully infirm,' petitioner argues his execution would violate the Eighth Amendment.... The essence of this claim is petitioner's physical condition. Second, petitioner argues that executing him after his extended tenure on death row, now more than 23 years, along with the 'horrific' conditions of his confinement, would also violate his Eighth Amendment rights.

Order at 2-3. The District Court found that what it described as his first claim was properly before it and outside the ambit of the SOS provisions of 28 U.S.C. section 2244. Order at 6-7. Accordingly, it considered the claim, denying it on its merits. Order at 13. It found, however, that his "duration of confinement claim is entirely different," and "falls within the ambit of section 2244(b)." Order at 7. Accordingly, it concluded that it "lack[ed] jurisdiction to consider [the] claim . . . because he has not sought permission from the Court of Appeals to file the claim here." *Id.*, citing 28 U.S.C. § 2244(b)(3)(A).

By separate motion, Mr. Allen is seeking a COA on the whole of the District Court's denial of his claim, including its splitting of the claim into two parts, its denial of the first part on the merits, and its denial of the second part as an SOS claim not authorized for filing by this Court. Mr. Allen files this motion in the event that this Court affirms the District Court's splitting of his claim into two

claims and denial of the latter portion of it as a SOS claim unauthorized by this Court.

If the Court denies this motion for authorization, I intend to file on behalf of Mr. Allen a petition for writ of habeas corpus or other appropriate writ with the Supreme Court to obtain review of any such denial.

Executed in San Francisco on January 13, 2006

MICHAEL SATRIS

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION

I. ASSUMING THE DISTRICT COURT PROPERLY FOUND THAT THE PORTION OF MR. ALLEN'S CLAIM CONCERNING THE DURATION OF HIS CONFINEMENT ON DEATH ROW AND ITS EFFECT UPON HIM IS A SOS CLAIM, THE COURT SHOULD AUTHORIZE THE DISTRICT COURT TO CONSIDER IT.

Mr. Allen seeks authorization to file a SOS application for a writ of habeas corpus pursuant to 28 U.S.C. § 2244(b)(2)(B). To meet that standard, he must make a prima facie showing "that (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244 (b)(2)(B). "By '*prima facie* showing we understand simply a sufficient showing of *possible* merit to warrant a fuller exploration by the district court." *Cooper* v. *Woodford*, 358 F.3d 1117, 1119 (9th Cir. 2004) (en banc) (quoting *Woratzeck v. Stewart*, 118 F.3d 648, 650 (9th Cir. 1997)) (quoting *Bennett v. United States*, 119 F.3d 468 (5th Cir. 1997)) (emphasis added by 9th Cir.); *see also Bell v. United States*, 296 F.3d 127, 128 (2nd Cir. 2002) (per curiam) ("a prima facie showing is not a particularly high standard"). "[If] . . . it appears reasonably likely that the application satisfies the stringent requirements for the filing of a second or successive petition, we shall

grant the application." *Woratzeck*, 118 F.3d at 650. Evaluation of the prima facie case is based on the assumption that the facts supporting the petitioner's claim are true. *See, e.g., In re Boshears*, 110 F.3d 1538.(11th Cir. 1997).

Satisfaction of the due diligence prong of the standard is met by showing that Mr. Allen has "some good reason why he or she was unable to discover the facts supporting the motion before filing the first habeas motion [sic: petition]." *In re Boshears*, 110 F.3d 1538, 1540 (11th Cir. 1997); *see also Felker v. Turpin*, 101 F.3d 657, 662 (11th Cir. 1996), *cert. denied*, 519 U.S. 989 (1996) (denying application because applicant failed to demonstrate that the factual predicate for the claim was not "just as available before he filed his first habeas petition as it was after he had unsuccessfully litigated that petition"). Mr. Allen clearly meets that standard, since his claim is based on 23 years of confinement and its effect on him, so that the factual predicate for his claim was not available to him when he filed his first petition many years earlier.

That Mr. Allen's claim is based on factual developments long after trial that render the execution of his death sentence unconstitutional, however, makes his case a difficult fit into the other requirement of section 2244(b) here – namely, a showing that "but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." Read literally, that language simply does not consider or imagine a claim based on post-judgment facts that

disqualify a prisoner from execution after a death sentence was lawfully imposed upon him, since it requires an error at trial and speaks in terms of the factfinder's verdict. But "[c]ourts considering the construction of § 2244(b) have uniformly rejected a literal reading." *Crouch v. Norris*, 251 F.3d 720, 723 (8th Cir. 2001). This Court should do so here, for Congress obviously did not have claims such as Mr. Allen's in mind when it defined when "the ends of justice" permit consideration of a successive claim: It is indisputable that an execution of a person who no longer qualified for the death judgment originally imposed upon him due to post-judgment developments would be a miscarriage of justice that the Great Writ is designed to prevent.

For example, in *Sawyer v. Whitely*, 505 U.S. 333, 335 (1995), "[t]he issue before the Court [was] the standard for determining whether a petitioner bringing a successive, abusive, or defaulted federal habeas claim has shown he is 'actually innocent' of the death penalty to which he has been sentenced so that the court may reach the merits of the claim." As the Court explained *Sawyer* in a later case:

> [I]n *Sawyer,* the Court examined the miscarriage of justice exception as applied to a petitioner who claimed he was 'actually innocent of the death penalty.' In that opinion, the Court struggled to define 'actual innocence' in the context of a petitioner's claim that his death sentence was inappropriate. The Court concluded that such actual innocence 'must focus on those elements which render a defendant eligible for the death penalty.' [Citation.]

Schlup v. Delo, 513 U.S. 298, 323 (1995). Thus, a prisoner who claims in a second petition that his death sentence is inappropriate must show that he is ineligible for it in order to have his claim heard on the merits. That is precisely what Mr. Allen's claim here shows.

"[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*, 391 U.S. 234, incl. n. 11 (1968) The reading of the exception to the bar on filing a SOS petition that Mr. Allen here urges 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, 394 U.S. 286, 290-91 (1969).

Our High Court "has repeatedly noted the interplay between statutory language and judicially managed equitable considerations in the development of habeas corpus jurisprudence." *Schlup v. Delo*, 513 U.S. 298, 323. Moreover:

> [T]he Court has adhered to the principle that habeas corpus is, at its core, an equitable remedy. This Court has consistently relied on the equitable nature of habeas corpus to preclude application of strict rules of res judicata. Thus, for example, in *Sanders v. United States,* 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963), this Court held that a habeas court must adjudicate even a successive habeas claim when required to do so by the "ends of justice." *Id.,* at 15-17, 83 S.Ct., at 1077-1078.... The *Sanders* Court applied this equitable exception even to petitions brought under 28 U.S.C. § 2255, though the language of § 2255 contained no reference to an "ends of justice" inquiry. [Citation.] We firmly established the importance of the equitable inquiry required by the ends of justice in "a trio of 1986 decisions" handed down on the same day. *Sawyer,* 505 U.S., at 339, 112 S.Ct., at 2518 (referring to *Kuhlmann v. Wilson,* 477 U.S. 436, 106 S.Ct. 2616, *Murray v. Carrier,* 477 U.S. 478, 106 S.Ct. 2639, and *Smith v. Murray,* 477 U.S. 527, 106 S.Ct. 2661). In *Kuhlmann,* seven Members of this Court squarely rejected the argument that in light of the 1966 amendments, "federal courts no longer must consider the 'ends of justice' before dismissing a successive petition." [Citations]; see also *Sawyer,* 505 U.S., at 339, 112 S.Ct., at 2519 (noting that in *Kuhlmann,* "[w]e held that despite the removal of [the reference to the ends of justice] from 28 U.S.C. § 2244(b) in 1966, the miscarriage of justice exception would allow successive claims to be heard").... "[Ultimately], the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.' " [Citation.]... [W]e have consistently reaffirmed the existence and

> importance of the exception for fundamental miscarriages of justice. [Citations.]

Id. at 319-321.

The language of the current section 2244(b) must be read to include the availability of habeas relief for a claim like Mr. Allen's, which depends upon post-judgment events to show that his execution would violate the constitutional bar to the infliction of cruel and unusual punishment. Otherwise, "the implications for habeas corpus practice would be far-reaching and seemingly perverse," *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998), for they would portend that a claim like Mr. Allen's might never be heard.

The District Court likened "Petitioner's duration of confinement claim" to the claim concerning "Justice Stevens' memorandum respecting the denial of certiorari in *Lackey v. Texas*, 514 U.S. 1045 (1995), where the petitioner alleged "that his seventeen years on death row amounted to cruel and unusual punishment in violation of the Eighth Amendment." Citing a line of decisions of this Court, the District Court found it "quite clear that in this circuit a *Lackey* claim falls within the ambit of section 2244(b)." Order at 7. Conceding that it "may be true" that Mr. Allen's claim "is more than just a *Lackey* claim," the District Court nevertheless found that it came within the ambit of § 2244 because it "could have been raised years earlier." Order at 8. But how many years? The District Court opined "[c]ertainly, prior to 2001, when the final decision was rendered in

petitioner's first habeas case here." *Id.* Mr. Allen's claim remained inchoate then, however, and lacked the showing of cumulative punishment inflicted by the effects of his confinement, and the interaction between the conditions of his confinement and his medical difficulties that now make his execution now cruel and unusual. Moreover, the court here overlooks the law, set forth above, that the second or successive nature of a petition is determined by reference to the facts known at the time the first petition was filed.

In addition, whether a *Lackey* claim by itself constitutes a SOS claim within the meaning of § 2242 is controversial within this circuit. For example, in a concurring and dissenting opinion in *Gerlaugh v. Stewart*, 167 F.3d 1222, 1224 (9th Cir 1999), Judge Reinhardt stated: "I am compelled by our court's precedent to concur in the decision that the AEDPA bars consideration of Gerlaugh's *Lackey* claim, although I would have held otherwise were I free to do so." Similarly, in a dissenting opinion in *Ceja v. Stewart*, 134 F.3d 1368, 1369 (9th Cir. 1998), Judge Fletcher found that the claim of a petitioner who had been confined on Death Row for 23 years should be heard on its merits, stating. "If Ceja is executed, his de facto sentence will be 23 years of solitary confinement in the most horrible portion of the prison-death row-followed by execution. There has never been such a sentence imposed in this country-or any other, to my knowledge. Neither Arizona nor any other state would ever enact a law calling for such a punishment."

Judge Fletcher further noted that "claims involving the circumstances of a prisoner's execution ... do not become ripe for adjudication until the state has issued a warrant for the prisoner's execution," so that § 2244 cannot be read to bar them. *Id.* at 1371. As further explained:

> Ceja's claim that it would serve no legitimate penological purpose to carry out his execution under the present circumstances is one that only became ripe for adjudication upon the issuance of the present death warrant. If we read the AEDPA to foreclose Ceja from bringing his claim in a successive petition, we would provoke [a] conflict with the Suspension Clause ....[1]

Id. at 1372.

Thus, Mr. Allen suggests that in the event the panel denies the motion for authorization for the District Court to consider this claim, the Court should *sua sponte* grant rehearing en banc to reconsider that denial. *See, e.g., Cooper v. Woodford*, 358 F.3d at 1118 ("The statute does not allow a petition for rehearing of a denial of authorization to file a second or successive application, but we have *sua sponte* power to rehear such a denial en banc.").

II. THE COURT SHOULD GRANT A STAY PENDING FINAL DETERMINATION OF THIS MOTION.

For all the reasons set forth in Mr. Allen's motion for stay pending final determination of his motion for COA and, if the COA issues, his ensuing appeal,

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[1] Article I, § 9, clause 2, of the Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

the Court should also stay his execution pending final determination of this motion, and, if granted, disposition of his claim. Likewise, the Court should stay Mr. Allen's execution even if it denies his motion for authorization, until the United States Supreme Court has had an opportunity to review that denial. *See Felker v. Turpin,* 518 U.S. 651, 654 (1996) ("the Act [AEDPA] does not preclude this Court from entertaining an application for habeas corpus relief" following denial by the Court of Appeals of a motion to file a SOS petition, although "[t]he Act does remove our authority to entertain an appeal or a petition for a writ of certiorari to review a decision of a court of appeals exercising its 'gatekeeping' function over a second petition." *Id.* at 661. As Judge Reinhardt observed in his concurring and dissenting opinion in *Gerlaugh v. Stewart*, 167 F.3d at 1224:

> Although Gerlaugh's claim is foreclosed under *this court's* precedent, ...(1) reasonable jurists differ concerning whether execution after extended tenure on death row violates the Eighth Amendment [citations], and (2) the Supreme Court has also not decided whether a *Lackey* claim becomes ripe before an execution is imminent.

Thus, even if this Court denies authorization for the District Court to consider Mr. Allen's claim, a stay of his execution is appropriate to grant him the opportunity to secure consideration of the United States Supreme Court of whether an order authorizing the district court to consider his claim should issue.

III. CONCLUSION

For the reasons set forth above, the Court should authorize the District Court to consider the portion of Mr. Allen's claim concerning the duration of his confinement on Death Row and its deleterious effects upon him as a basis to preclude his execution, and should meanwhile stay his execution.

Respectfully submitted,

Dated: January 13, 2006

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