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)

CLARENCE ALLEN RAY'S MOTION FOR CERTIFICATION OF APPEALABILITY — [DEATH PENALTY CASE] EXECUTION IMMINENT: JANUARY 17, 2006

MICHAEL SATRIS
LAW OFFICE OF MICHAEL SATRIS
Post Office Box 337
Bolinas, CA 94924
Telephone: (415) 868-9209

CHARLES E. PATTERSON
MORRISON & FOERSTER LLP
555 West 5th Street, Suite 3500
Los Angeles, CA 90013
Telephone: (213) 892-5553

ANNETTE P. CARNEGIE
SOMNATH RAJ CHATTERJEE
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105
Telephone: (415) 268-7537

Attorneys for Appellant
CLARENCE RAY ALLEN

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

CLARENCE RAY ALLEN, Petitioner and Appellant, moves this Court for a certification of appealability ("COA").[1] After exhausting remedies under state law, on January 12, 2006, Mr. Allen filed a Petition for a Writ of Habeas Corpus with the district court requesting the court to stay Mr. Allen's execution set for January 17 2006. After a response from the State opposing Mr. Allen's request, the district court denied Mr. Allen's petition and entered judgment against Mr. Allen on January 12. Mr. Allen was denied both a hearing and relief on his claim that the State's proposed execution on January 17, 2006, will violate the Eighth Amendment prohibition of cruel and unusual punishment and was denied a stay of execution. Mr. Allen has since filed a timely notice of appeal. The district court also declined to issue a COA. Mr. Allen hereby moves this Court to issue a COA to permit him to appeal the denial of his claim.[2]

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[1] Should the Court grant Mr. Allen's motion, Mr. Allen requests that the Court treat this motion as a brief on the merits given the exigencies of Mr. Allen's January 17, 2006, execution date. Should the Court grant Mr. Allen's motion for a stay of execution as well as this motion, Mr. Allen requests leave to file a formal petitioner's brief on the merits.

[2] Citation to exhibits in the record are made to Exhibits in Support of Clarence Ray Allen's Petition for Writ of Habeas Corpus by Person in State Custody, volumes one through three, filed with the district court that have been provided to this Court. The underlying facts supporting Mr. Allen's Petition are set forth in Clarence Ray Allen's Petition for Writ of Habeas

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I. THIS COURT SHOULD ISSUE A CERTIFICATE OF APPEALABILITY ALLOWING ALLEN TO APPEAL THE JUDGMENT OF THIS COURT.

28 U.S.C. § 2253, subdivisions (b) and (c)(1) provide that a COA must issue in order for a prisoner to appeal a denial of his petition for a writ. Subdivision (c)(2) provides that such a COA "may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." Finally, subdivision (c)(3) provides that the COA "indicate which specific issue or issues satisfy [that] showing ...."

A petitioner makes a substantial showing of the denial of a constitutional right when he shows that jurists of reason could find this Court's assessment of his claim debatable if not wrong or that jurists could conclude that the issue is adequate to deserve encouragement to proceed further. *See Banks v. Dretke*, 540 U.S. 668, 704-05 (2004); *Slack v. McDaniel*, 529 U.S. 473, 482 (2000); *see also Miller-El v. Cockrell,* 537 U.S. 322, 337 (2003); *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). Any doubt regarding whether to grant a COA is resolved in favor of the petitioner, and the severity of the sentence at issue should also inform the Court's determination. *Valerio v. Crawford*, 306 F.3d 742, 767 (9th Cir.

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Corpus by a Person in State Custody, a copy of which has been provided to
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2002) (en banc). A certificate should issue under this standard if there is any reasonable doubt that the district court fully and fairly adjudicated the matter, including providing for any additional evidentiary development the claim may have required. *See, e.g., Smith v. Wainwright*, 737 F.2d 1036, 1037 (11th Cir. 1984) (certificate granted because "district court refused to hold an evidentiary hearing to develop the true factual setting in which this claim must be judged.").

It is debatable whether the district court properly denied Mr. Allen's Eighth Amendment claim that executing him now given the totality of his very advanced age of 75 (76 on the date of execution), his multiple, grave medical impairments, and the State's unconscionable contributions to his failing health, and the extraordinary duration — over 23 years — of Mr. Allen's confinement on Death Row at San Quentin under the extraordinarily harsh conditions that obtain there.

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this Court.

II. IT IS DEBATABLE WHETHER THE DISTRICT COURT ERRED BY SPLITTING MR. ALLEN'S EIGHTH AMENDMENT CLAIM AND HOLDING THAT IT LACKED JURISDICTION TO CONSIDER PART OF MR. ALLEN'S CLAIM UNDER 28 U.S.C. § 2244(B)

The district court divided Mr. Allen's claim by isolating the portion of Mr. Allen's claim based on Mr. Allen's health and age from the portion of the claim based on the 23-years of confinement on Death Row. The district court held that it lacked jurisdiction under the Antiterrorism Effective Death Penalty Act ("AEDPA") as codified in 28 U.S.C. § 2244(b) to consider the latter.[3] The court found that portion of the claim to fall

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[3] 28 U.S.C. § 2244(b) provides:

> (b) (1) A claim presented in a second or successive habeas corpus application under section 2254 [28 USCS § 2254] that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 [28 USCS § 2254] that was not presented in a prior application shall be dismissed unless--
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

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under *Lackey v. Texas*, 514 U.S. 1045 (1995), and held that portion of the claim to constitute a "second or successive" petition subject to AEDPA. The court ruled that Ninth Circuit authority precluded Mr. Allen from now bringing that portion of his claim. *See Ceja v. Stewart*, 134 F.3d 1368, 1369 (9th Cir. 1998); *Gerlaugh v. Steward*, 167 F.3d 1222 (9th Cir. 1999); *Oritz v. Stewart*, 149 F.3d 923 (9th Cir. 1998), and *Gretzler v. Stewart*, 146 F.3d 675 (9th Cir. 1998).

It is debatable, however, whether Mr. Allen's claim may be divided in this manner. In doing so, the Court fundamentally revised the nature and import of Mr. Allen's claim. Properly analyzed, Mr. Allen's claim is more than just a *Lackey* claim. It is based on the *totality* of the circumstances that come together to render Mr. Allen's execution in violation of the Eighth Amendment. The 23 years that Mr. Allen spent in substandard conditions on Death Row cannot be separated from the other factors. By dividing Mr. Allen's claim the district court failed to rule on the full strength of

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> (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 factfinder would have found the applicant guilty of the underlying offense.

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Mr. Allen's Eighth Amendment challenge and deprives a reviewing court of doing so.

Even if Mr. Allen's claim can be divided in this manner, Mr. Allen should be able to bring a claim based on 23 years of confinement now. His claim simply was not ripe in 1988 when he filed his first petition or in 1991 when he amended his first petition. Mr. Allen was convicted in 1982. A claim based on 6 or 9 years on Death Row, if it has any force, simply is not the same as a claim based on 23 years on Death Row. Given that this portion of Mr. Allen's claim was not ripe until after his first petition was filed, Mr. Allen must be allowed to bring this claim now. *See, e.g., Hill v. Alaska*, 297 F.3d 895, 898-99 (9th Cir. 2002) ("Supreme Court has declined to read Section 2244 to preclude prisoners from bringing habeas claims that could not have been brought in earlier petitions")[4]

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[4] *See also Coe v. Bell*, 209 F.3d 815, 823 (6th Cir. 2000) (habeas application raising competency to be executed claim after unsuccessful first petition not "second or successive" because claim not ripe until execution imminent); *Singleton v. Norris*, 319 F.3d 1018, 1023 (8th Cir. 2003) (applying "abuse of writ" doctrine and holding that a claim relating to mandatory administration of antipsychotic medication after execution date set was not barred because it could not have been raised in previous petition); *James v. Walsh*, 308 F.3d 162, 167-68 (2nd Cir. 2002) (applying

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In addition, there are serious issues regarding whether a *Lackey* claim should be subject to AEDPA's restrictions. *See Ceja v. Stewart*, 134 F.3d 1368 (9th Cir. 1998) (Fletcher, J., dissenting); *Gerlaugh v. Stewart*, 167 F.3d 1222 (9th Cir. 1999) (Reinhardt, J., concurring and dissenting). The district court's ruling that a *Lackey* claim is subject to AEDPA would require a petitioner to knowingly assert a premature claim based on speculative future occurrences in a first petition for writ of habeas corpus. This rule has far reaching deleterious consequences and is arguably at odds with an attorney's ethical obligation not to bring premature claims. It is also in conflict with *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643-45 (1998), which held that a second habeas petition that reasserted an earlier claim (that the Eighth Amendment prohibited the execution because the petitioner was insane) that had been previously dismissed as premature was not barred as a second or successive petition.

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"abuse of writ" doctrine and holding that claim relating to incorrect application of credit for time served and miscalculation of prisoner's conditional release date was not barred because it could not have been raised in previous petition); *see also Poland v. Stewart*, 41 F. Supp. 2d 1037, 1039 (D. Ariz. 1999) (holding *Ford* claim not barred because the prisoner "could not have brought his *Ford* claim any earlier, and certainly not in his first federal petition.").

Even if the Court were to find that its precedent bars portions of Mr. Allen's claim based on *Lackey*, a certificate of appealability should issue to permit Mr. Allen to raise his *Lackey* claim and whether it is barred by AEDPA with the Supreme Court. Doing so would be consistent with Judge Reinhardt's observations in *Gerlaugh*, 167 F.3d at 1224.

III. IT IS HIGHLY DEBATABLE WHETHER EXECUTING MR. ALLEN GIVEN HIS CIRCUMSTANCES IS BARRED BY THE EIGHT AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

Given the totality of Mr. Allen's circumstances — a 76 woefully infirm man who spent over 23 years on Death Row subject to unconstitutionally substandard conditions and medical care — executing him 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,* 458 U.S. 782, 798 (1982); *Gregg v. Georgia,* 428 U.S. 153, 182-83 (1976).

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,* 511 U.S. 825, 833 (1994), *quoting Hudson v. Palmer*, 468 U.S. 517, 548 (1984) (Stevens, J., concurring in part & dissenting in part); *Gregg v. Georgia,* 428 U.S. 153, 182-83 (1976) (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*, 428 U.S. at 182-83. To comply with the Eighth Amendment, the death penalty must serve the social purposes of retribution and deterrence. *Id.*

The Eighth Amendment is not a static concept. *Id.* at 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,* 536 U.S. 304, 311 (2002). "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,* 356 U.S. 86, 100-01 (1958). As the court held in *Atkins v. Virginia*, 536 U.S. 304, the standards of decency evolve and, practices once permitted, may be held to

violate the Eighth Amendment.[5] 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,* 477 U.S. 399, 406 (1986). Accordingly, an assessment of contemporary values regarding the death penalty is relevant to an Eighth Amendment analysis. *Gregg,* 428 U.S. at 173.

In the post-*Furman* era, the Supreme Court has found that evolving standards of decency have narrowed the range of defendants who qualify 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,* 433 U.S. 584 (1977).
- Executing those who aided a felony but did not kill or intend to kill is unconstitutional. *Enmund v. Florida,* 458 U.S. 782 (1982).

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[5] The Court in *Penry v. Lynaugh,* 492 U.S. 302 (1989), 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

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- Executing the mentally incompetent is unconstitutional. *Ford v. Wainwright,* 477 U.S. 399 (1986).
- Executing youths under age 16 at the time of the offence is unconstitutional. *Thompson v. Oklahoma,* 487 U.S. 815 (1988).
- Executing the mentally retarded is unconstitutional. *Atkins v. Virginia,* 536 U.S. 304 (2002).
- Executing juveniles who committed the offense while under 18 is unconstitutional. *Roper v. Simmons,* 125 S. Ct. 1183 (2005).

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 now unacceptable. Such an execution "offends humanity"; provides no deterrence value; and does not serve any retributive purpose. *See Ford,* 477 U.S. at 407-08.

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

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Atkins held that executing mentally retarded defendants indeed violated the Eighth Amendment.

therefore excessive. *See Lackey,* 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 beyond the punishment of 23 years of imprisonment on Death Row that Mr. Allen has already suffered. Executing Mr. Allen would be akin to shooting a man on his deathbed — pointless and inhumane.

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 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.

As powerful support for this conclusion, Daniel Vasquez, who 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 (Ex. O, ¶ 7, Ex. 1, at HP0755, 763-69), concurs that executing Mr. Allen would serve no measurable deterrence or retributive purposes. (Declaration of Daniel Vasquez, Ex. O, 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.* at HP0756.) Mr. Allen is "a shadow of his former self." (*Id.* at 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.* at HP0761.)

Echoing Mr. Vasquez's conclusion that the time that Mr. Allen has spent on San Quentin's Death Row have substantially reduced him as a person is the opinion of Dr. Paul Good, a clinical and forensic psychologist. 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."" (Ex. A, 12 at HP0324.)

Similarly, the Honorable Joseph Grodin, Associate Justice of the California Supreme Court (Ret.), who authored the California Supreme Court decision affirming the death judgment in the underlying case, agrees

that executing Mr. Allen now would not serve any legitimate penological interest. 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.

(Ex. P, HP0770 (attached hereto).) Statements like this one from the very Justice of this Court who wrote the opinion affirming the death sentence is rare, highly significant, and should be given serious weight.

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*, 543 U.S. 551,125 S. Ct. at 1198. Two additional states, Kansas and New York, currently have no operative death penalty statutes.[6] 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:23 367 N.J. Super. 61 (2004). A decision to bar the death penalty altogether demonstrates judgment that the penalty is inappropriate for all offenders, including the aged and infirm. *Roper*, 543 U.S. 551, 125 S. Ct. at 1198 (holding that "a State's decision to bar the death 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.[7] 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

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

[7] James Hubbard was 74 when he was executed in Alabama in 2004 after state and federal courts declined to hear his Eighth Amendment

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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. (Ex. A-9, 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. (Ex. A-3, 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 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

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arguments for procedural reasons; and, recently, John B. Nixon was 77 when he was executed on December 14, 2005, by Mississippi.

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*, 536 U.S. at 312-13. 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* Ex. B, 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. (Ex. C, 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. (Ex. D, 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,* 27 N.E. J. On Crim. & Civ. Con. 225, 238 (2000).) 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. (Ex. O, 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." (Ex. E, HP0661 (Richard Willing, *Death Row Population is Graying*, USA TODAY, Feb. 10, 2005, at 3A).)

The laws of other countries and international legal principles and practices also inform the meaning of the cruel and unusual punishment clause. *Roper*, 543 U.S. 551, 125 S. Ct at 1198; *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002). 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. (Ex. F, 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. (Ex. G, 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. (Ex. H, 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. (Ex. I, 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. Ex. J, 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 that has signed but not yet ratified a treaty to do nothing which would defeat the object or purpose of the treaty. (Ex. K, 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.*, Ex. L, 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*, 528 U.S. 990, 995-96 (1999) (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;[8] 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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[8] 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. (Ex. M, 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, 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").)

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*, 537 U.S. 990 (2002), 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 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.

IV. IT IS DEBATABLE WHETHER AEDPA'S RESTRICTIONS UNDER 28 U.S.C. § 2254(D) ON THE DISTRICT COURT'S POWER TO REVIEW MR. ALLEN'S PETITION VIOLATES SEPARATION OF POWERS, THE SUPREMACY CLAUSE, AND CASE OR CONTROVERSY REQUIREMENTS[9]

It is debatable whether AEDPA's restrictions on the district court's ability to review the constitutionality of Mr. Allen's execution are constitutional. The district court held that 28 U.S.C. § 2254(d) limited its ability to review the state court's decision denying Mr. Allen's petition on the merits.[10] The district court ruled that its ability to examine the

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[9] The State raised AEDPA's restrictions under 28 U.S.C. § 2254(d) in its reply to Mr. Allen's petition in the district court. The district court entered judgment against Mr. Allen before Mr. Allen had an opportunity to reply and raise the constitutional issues set forth here.

[10] This section provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
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> -
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> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

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constitutionality of Mr. Allen's execution was limited to determining whether "the state court clearly erred in its application of Supreme Court law" and "still defer[] to the state court's ultimate decision." (Memorandum and Order at 10:2-12 (quoting *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002). The district court then held that Mr. Allen cannot prevail because there is no "'clearly established' United States Supreme Court law which renders petitioner's execution, at his advanced age and with his current physical infirmities" unconstitutional. (Memorandum and Order at 10:13-17.) Congress' limitation on the district courts power to review violations of the U.S. Constitution, however, is unconstitutional in violation of separation of powers and the Supremacy Clause. The district court erred in ruling that it was bound in any way by the state court ruling and should have reviewed Mr. Allen's claim that his execution would inflict cruel and unusual punishment based on its own independent judgment of the law.

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28 U.S.C. § 2254(d).

A. Application of 28 U.S.C. § 2254(d)(1) to Bar Mr. Allen's Habeas Relief Violates Separation of Powers

1. Congress Has Conferred Habeas Jurisdiction on Lower Federal Courts; Congress Cannot Limit Judicial Power, Once Conferred.

Congress has granted the "inferior" federal courts jurisdiction to review the constitutionality of the custody of state prisoners. *E.g.*, 28 U.S.C. § 2254(a)[11]. Until the 1996 amendments to section 2254(d)(1), Congress had not passed a statute which attempted to change the qualitative manner in which the Judicial Branch was to address the constitutional claim presented the court. *See Wright v. West,* 505 U.S. 277, 305 (1992) (noting past failed legislative efforts to adopt deferential standard). The reason is simple. As early as 1803, it was settled that once Congress vested judicial power in "inferior" federal courts, it was required under the Constitution's

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[11] Section 2254(a) of Title 28 of the United States Code is the jurisdictional grant that codified, at least by the time of the Judiciary Act of 1948, the district court's power to review a prisoner's challenges to a state court judgment resulting in his custody. *See 28 U.S.C.* § 2254(a), note; *Ex parte Hawk,* 321 U.S. 114, 118 (1944) (recognizing district court jurisdiction over state prisoner habeas petitions). It reads: "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

"judicial power" provision, U.S. Const., art III, section 1, " to vest the whole judicial power." *Martin v. Hunter's Lessee,* 14 U.S. 304, 330 (1816). This includes the power to say what the law is and the power to resolve a case by fashioning a remedy.

Article III and the Supremacy Clause of the Constitution are not subject to legislative revision. An Article III court must decide independently each "case or controversy" presented to it over which it has jurisdiction. The Article III court's decision regarding the Constitution- the supreme law -must have effect and matter to the outcome of the case and controversy. Thus, the Judicial Branch must be able to impose a remedy that, in the process of binding the parties to the court's judgment, effectuates supreme law and neutralizes contrary law.

a. The Judicial Branch's Plenary Review of Mixed Questions is Based on the Constitution's Supremacy Clause and the Separation of Powers

It is the Constitution itself that imposes on the Judicial Branch the obligation to conduct independent or plenary review of mixed constitutional questions. *Marbury v. Madison, 5* U.S. (1 Cranch.) 137, 174-76 (1803), rejects the view that an Article III court must defer to Congress's interpretation of the Constitution. In *Martin v. Hunter's Lessee,* 14 U.S.

304 (1816), and in *Ableman v. Booth, 62* U.S. 506 (1858), the Court addressed the scope of the Judicial Branch's judicial power vested it by Article III.

In *Martin,* the Court held that state courts lack authority to revise the United States Supreme Court's mandate, even when the federal court's judgment is based in part on an erroneous understanding of state law. *Martin,* 14 U.S. at 355. Rather, the constitutionally created power to render judgment on matters within the Court's jurisdiction necessarily included the power to effectuate that judgment, even against state courts that (perhaps accurately) dispute its validity. *Id.* at 372.

Thus, *Martin* holds that because the Supreme Court is vested with the duty and responsibility of being the ultimate Supremacy Clause decisionmaker, its Judicial Power must include the power to effectuate it decision in the face of state court disagreement. In *Ableman,* the Supreme Court made explicit that the plenary or independent Judicial Power the constitution vests in the Supreme Court is held by any "inferior" federal courts Congress creates. *Ableman* thus extended the holding in *Martin v. Hunter's Lessee* to lower *federal* court judgments. *Id.* at 518, 526.

It is incorrect to suggest that plenary review has been traditionally used in federal habeas simply because Congress's intended plenary review

of constitutional issues and so passed statutes calling for such independent review. Certainly, pre AEDPA statutes called for *de novo* federal court review of the legal and mixed questions the state prisoner's habeas petition presented.[12] On that much even the splintered plurality opinions in *Wright v. West* agreed. *See* 505 U.S. at 289 (opinion of Justice Thomas, in which Chief Justice Rehnquist and Justice Scalia joined)[13]; *Id.* at 298-304 (opinion of Justice O'Connor, in which Justices Blackmun and Stevens joined)[14]; *id.*

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[12] Deference to state court findings of historical facts was set out in the 1966 amendments that created the former section 2254(d)(l)-(8).

[13] Justice Thomas's treatment of this history certainly suggests that he questions the wisdom of *de novo* federal review of state prisoner habeas cases. *Id.* at 285-89. His opinion also asserted that the Supreme Court had "implicitly questioned that [*de novo* habeas] standard, at least with respect to pure legal questions, in our recent retroactivity precedents." *Id.* at 291, citing *Penry* v. *Lynaugh,* 492 U.S. 302, 313-314 (1989), and *Teague v. Lane,* 489 U.S. 288 (1989). Justice Thomas insisted that *Teague,* whether or not one viewed it as imposing a deference standard of review or simply as a retroactivity rule, imposed a "reasonable jurists" standard in the assessment of the purported "new" rule. He concludes that "Teague insulates on habeas review the state courts' 'reasonable, good-faith interpretations of existing precedents. "' *Id.* at 291 n.8, *quoting Sawyer v. Smith,* 497 U.S. 227, 234 (1990) (other internal quotes omitted).

[14] Justice O'Connor's concurring opinion took pains to disagree with Justice Thomas's version of the history of the plenary federal habeas review and with his characterization of *Teague* as a deference rule. *Id.* at 298-304. Justice O'Connor emphasized that it was not simply the United States Supreme Court that bore the obligation to independently exercise its judgment. Quoting Justice Frankfurter, she explained: "'where the ascertainment of the historical

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at 306-307 (Justice Kennedy).[15] As Justice O'Connor's concurrence explained it: "We have always held that federal courts, even on habeas, have an independent obligation to say what the law is." *Id.* at 305.

The district court here erred by deferring in any way to the state court decision denying Mr. Allen's petition on the merits. The Supreme Court's *Ableman* decision is important for its recognition that it is the Constitution's Supremacy Clause that requires the federal courts which Congress established to act independently *of* the state courts. The Judicial Branch at all its levels *is* to be "altogether independent *of* State power, to

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facts does not dispose of the claim but calls for interpretation of the legal significance of such facts, *the District Judge must exercise his own judgment* on this blend of facts and their legal values. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge."' *Id.* at 300-01 (emphasis added by Justice O'Connor) *quoting Brown v. Allen,* 344 U.S. 443, 507 (1953).

[15] Justice Kennedy's concurrence expressed his view "that neither, the purpose for which *Teague* was adopted nor the necessary means for implementing its holding creates any real conflict with the requirement of *de novo* review of mixed questions." 505 U.S. at 306-07. Kennedy's opinion went on to explain that the purpose behind *Teague's* retroactivity rule "provides added justification for retaining *de novo* review, not a reason to abandon it." *Id.* at 309.

carry into effect its own laws..." 62 U.S. at 518.[16] *Ableman* explained that a supreme tribunal needed to exist "in which all cases which might arise under the Constitution and laws and treaties of the United States, whether in a State court or a court of the United States, should be finally and conclusively decided." 62 U.S. at 518. Such a supreme court was needed for without it "there would be no uniformity of judicial decision; and *that the supremacy, (which is but another name for independence,)* so carefully provided in the clause of the Constitution ... could not possibly be maintained peacefully, unless it was associated with this paramount judicial authority." 62 U.S. at 518 (emphasis added).

Ableman also specifically rejected the notion that Congress has the power under the Constitution to create a "more subservient"[17] supreme

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[16] In contrast to *Martin v. Hunter's Lessee,* the context in *Ableman* suggests that Court believed Congress was not constitutionally obligated to create the inferior federal courts, but could have relied on the state courts to enforce all federal law so long as there existed a single supreme court of the United States to finally, conclusively, and supremely decide matters of federal constitutional law. *See Ableman,* 62 U.S. at 518.

[17] *Ableman* plainly recognized that federal court decisions would "sometime come in conflict with individual ambition or interests, and powerful political combinations," that would motivate Congress to establish "another [tribunal] more subservient to the predominant political influences or excited passions of the day." *Id.* at 521. But, the Constitution prevents such reactions by creating an independent supreme court. *Id.*

court. *Id.* at 521. The Constitution under Art. I, section 8, ¶ 18, imposed on Congress "the duty ... to pass such laws as were necessary and proper to carry into execution the powers vested in the judicial department." 62 U.S. at 521-22. In carrying out this duty, Congress could not interfere with the Supremacy Clause: "And no power is more clearly conferred by the Constitution and laws of the United States, than the power of this court to decide, ultimately and finally, all cases arising under such Constitution and laws; and for that purpose to bring here for revision, by writ of error, the judgment of a State court, where such questions have arisen, and the right claim under them denied by the highest tribunal in the State." *Id.* at 525. *See also Marbury,* 5 U.S. at 173; *City of Boerne v. Flores,* 521 U.S. 507, 516 (1997); *Gordon v. United Stares,* 117 U.S. 697 (1864) (dismissing appeal from court of claims decision for want of jurisdiction based on Separation of Powers and Supremacy Clause: because court of claims decisions could not be effectuated without Congressional action, Congress did not create an Article III court subject to Supreme Court appellate jurisdiction);[18] *Plaut v.*

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[18] *See* William Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1875,* XIII Amer. J. Leg. Hist. 333, 353-355 (1969) (discussing creation of Court of Claims, observing when Congress amended

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Spendthrift Farm, Inc., 514 U.S. 211, 218-219, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995) (Article III "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy."); *Accord, Nixon v. Administrator of General Service,* 433 U.S. 425, 443 (1977) (recognizing violation of separation of powers if the law "prevents the [one] branch from accomplishing its constitutionally assigned function" unless that "impact is justified by an overriding need to promote objectives within the constitutional authority of Congress."); *Truax v. Corrigan,* 257 U.S. 312, 324-25 (1921) (review on nondiscretionary writ of error from state court ruling regarding the constitutionality of a state law; Supreme Court recognized its *de novo* review as "an incident of its power to determine whether a federal right has been wrongly denied" required by Supremacy Clause); *Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Group,* 515 U.S. 557, 567-68 (1995) (constitution imposes duty on federal court "to conduct an independent examination of the record as a whole, without deference to the trial court.")(Souter, J., for unanimous court); *Feiner v. New York,*

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statute to conform with *Gordon,* "Congress necessarily gave up its power to revise the judgment of the court ....").

340 U.S. 315, 316 (1951) (federal courts independently determine whether constitutional rights were violated); *Pennekamp v. Florida,* 328 U.S. 331, 335 (1946) (recognizing constitution as source of federal court's duty to be the "final authority" to independently determine whether state court contempt citation against newsman violated the First Amendment as adopted by Due Process Clause of Fourteenth Amendment); *Old Dominion Branch No. 496 v. Austin,* 418 U.S. 264 (1974) (in case reversing state-law based libel judgment, federal court's duty included the need to "make an independent examination of the whole record ... so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression. ")(internal quotations & citations omitted).

b. The Supreme Court's Retroactivity, Procedural Default, and Exhaustion Line of Cases Support the Thesis that the Judicial Branch's "Judicial Power" Requires Plenary Review of Mixed Questions

The Supreme Court's subsequent development of the law concerning federal court review of state prisoner habeas petitions has not retreated from these principles of independent federal court review.[19] As Justice

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[19] Far more detailed discussions than can be given here can be found in the scholarly writing regarding these issues. Regarding the historical

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O'Connor's concurrence in *Wright* details, at least since the Supreme Court's decision in *Brown v. Allen,* 344 U.S. 443 (1953), federal courts have undertaken *de novo* review of federal law questions in habeas proceedings, even though the prisoner had raised and adjudicated the same federal question in prior state court proceedings. 344 U.S. at 464.[20] [FN13] The Supreme Court has recognized that federal habeas review of mixed questions of law and fact is also *de novo. Miller v. Fenton,* 474 U.S. 104,112, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985) (recognizing that mixed constitutional questions

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developments and the Supreme Court's understanding of the substantive scope of the Bill of Rights and the Fourteenth Amendment. *See, e.g.,* William F. Duker, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (Greenwood Press, 1980); Alan K. Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory and the Nature of Legal Rules,* 2 Buff. Crim. L. R. 535 (1999); James S. Liebman & William F. Ryan, "*Some Effectual Power*": *The Quantity and Quality of Decisionmaking that Article III and the Supremacy Clause Demand of the Federal Courts,* 98 Colum. L. Rev. 696, 865-66, 882-84 (1998) (explaining Article III and Supremacy Clause restraints on congressional control of Judicial Power).

[20] *Brown* recognized that this independence did not require federal courts to ignore the state court proceedings: "Although they have the power, it is not necessary for federal courts to hold hearings on the merits, facts or law a second time when satisfied that federal constitutional rights have been protected." 344 U.S. at 464.

In his concurrence, Justice Frankfurter explicitly made the connection between the federal court's plenary review of "so-called mixed questions" to the constitution's mandates. *Id.* at 507510. Mr. Scheidegger's assertion to the
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are subject to "independent federal determination"); *Townsend v. Sain,* 372 U.S. 293, 318 (1963) (permitting deference to state court's findings of historical fact, but recognizing that "[i]t is the district judge's duty to apply the applicable federal law to the state court fact findings independently'); *Brewer v. Williams,* 430 U.S. 387, 403-04 (1977) (waiver of right to counsel mixed question subject to plenary review).

The Supreme Court's development of retroactivity and procedural default rules supports the thesis that it is the Constitution that dictates the Judicial Branch's duty to independently review mixed questions in state prisoner habeas cases. When applicable, these affirmative defenses have the practical effect of stopping a federal court from reviewing a state prisoner's federal constitutional claim, and as a result, bars a federal court from giving a remedy to constitutional violations the prisoner suffered. Nonetheless, the fundamental principle that drives the *Teague* and *Coleman v. Thompson,* 501 U.S. 722, 729 (1991), line of cases is the Supremacy Clause and the Judicial Branch's need to have a true "case and controversy" focused on a federal constitutional claim that is capable of being remedied. *See Teague,*

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contrary, *see Response: Habeas Corpus, Relitigation, and the Legislative Power,* 98 Colum. L. Rev. 888, 956, n.485 (1998), misreads this opinion.

489 U.S. at 306307 (discussing and adopting Justice Harlan's retroactivity rule premised on viewing habeas as a tool for enforcing the Supremacy Clause: "the threat of habeas serves a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards."); *Coleman*, 501 U.S. at 729 (adopting procedural bar to federal habeas review of constitutional claims if adequate and independent state law ground would render federal court decision advisory). *See also Liebman & Ryan, Some Effectual Power,* 98 Colum L. Rev. at 783-84 (viewing the "adequate and independent state ground" and harmless error cases as examples of the Supremacy Clause's requirement that federal court decision must be capable of being effectuated).

As discussed in William Duker's work, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS, the development of the exhaustion requirement recognized the state courts' primary role as enforcers of federal constitutional rights and protections. *Id.* at 194-210. *See also Ex Parte Royall*, 117 U.S. 241 (1886). Nonetheless, the history of these cases recognized federal habeas review ""is an invocation of federal authority growing out of the supremacy of the Federal Constitution and the necessity of

giving effect to that supremacy if the state processes have failed to do so.'" Duker at 205, quoting *Wade v. Mayo,* 334 U.S. 672, 680 (1947).

2. If Applied to Mr. Allen's Case, Section 2254(d)(1) Violates Separation of Powers by Permitting Congress to Remove Essential Elements of the Judicial Branch's Judicial Power Vested in it by Article III

As outlined above, the Supremacy Clause vests an Article III court with a set of necessary components of its Judicial Power. Through section 2254(d)(1),[21] Congress has unconstitutionally attempted to divest the Judicial Branch of at least two of the necessary elements of Judicial Power that Article III vests in those courts: the power to grant a remedy and the power to independently decide what the constitution requires. Here, the district court erred in ruling that its independence was limited to examining solely "clearly established" Supreme Court authority and by deference to the state decision.

Marbury recognized, however, that when a statute and the Constitution conflict, but both apply to a particular case, "the court must either decide that case conformably to the law, disregarding the constitution;

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[21] The relevant portion of section 2254(d) reads: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the

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or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty." *Marbury,* 5 U.S. at 178. Thus, Congress may constitutionally diminish the judicial duty it gives the federal courts to decide state prisoner cases. *See e.g., Miller v. French,* 530 U.S. 327, 342, 120 S. Ct. 2246, 147 L. Ed. 2d 326 (2000); *Plaut,* 514 U.S. at 218-219; *Imprisoned Citizens Union v. Ridge,* 169 F.3d 178, 188 (3d Cir. 1999) (rejecting separation of powers challenge to PRLA because Congress "has left the judicial function of interpreting the law and applying the law to the facts entirely in the hands of the courts.") (internal quotations and citations omitted). Congress by divesting the Judicial Branch of an essential judicial power, that is, the power to effectuate its decision by giving some form of remedy, violates Separation of Powers principles.

The Supreme Court's reading of section 2254(d)(1) in *Williams v. Taylor,* 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000), disposes of the argument that there has been no "choice of law" restriction imposed by Congress on Article III courts. *Williams* held that

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judgment of a State court shall not be granted ..." if certain conditions are not met.

Section 2254(d)(1)'s phrase "clearly established Federal law as determined by the Supreme Court of the United States" "refers to the holdings, as opposed to the dicta, of [the] Court's decisions as of the time of the relevant state-court decision." *Williams,* 529 U.S. at 412. *Williams* took pains to distinguish this phrase from its historical predecessor, "clearly established federal law," used in the retroactivity context by *Teague.* The distinction drawn highlights Congress's effort to restrict the source of law. Congress, in adopting Section 2254(d)(1), "restrict[ed] the source of clearly established law to [the Supreme] Court's jurisprudence." *Williams,* 529 U.S. at 412.

Before the AEDPA and even after the *Teague* decision, Article III courts independently determined what the federal constitutional law was that applied to the particular case and controversy before them. Such courts regularly relied upon and cited circuit precedent in such judicial decisionmaking. *Cf. United States v. Lanier,* 520 U.S. 259, 268-269, 117 S.Ct. 1219 (1997) (in context of assessing whether fair warning about the scope of criminal liability existed, court rejected argument that only Supreme Court precedent was relevant); *Elder v. Holloway,* 510 U.S. 510, 516, 127 L. Ed. 2d 344, 114 S. Ct. 1019 (1994) (treating appellate court decisions as relevant authority that must be considered as part of qualified

immunity enquiry because of court's duty to use its "full knowledge of its own [and other relevant] precedents.").

Post-AEDPA, in contrast, the Judicial Branch, including the Supreme Court itself, may rely *only* on the Supreme Court's clearly established holdings to determine whether the state court's adjudication was unreasonable.[22] FN15 As summed up in *Andrade,*

> A state court decision is "contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [the United States Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [that] precedent." *Williams*, at 405-406; *see also Bell v. Cone, supra,* at 694.

538 U.S. at 73.

Thus, section 2254(d)(1) again violates Separation of Powers by imposing a restriction on an essential element of the Judicial Branch's

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[22] As this Court explained this limitation, an Article III court's "own independent consideration of the constitutional issue is neither relevant, nor necessary to dispose of the question presented. *See Bell v. Jarvis,* 236 F.3d 149,162 (4th Cir. 2000) (en banc) ('[A]ny independent opinions we offer on the merits of the constitutional claims *will* have no determinative effect in the case before us, nor any precedential effect for state courts in future cases.')." *Clark v. Murphy,* 331 F.3d 1062, 1069 (9th Cir. 2003). District or circuit law is merely persuasive (i.e., advisory) authority for purposes of

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Judicial Power to determine what the Constitution means.

Section 2254(d)(1)'s restriction is both temporal (by limiting it to what it is clearly established Supreme Court precedent at the time that the case is before the court), and in a sense, spatial (by restricting the authorities only to the Supreme Court). Because Congress cannot prevent Article III judges from exercising their independent judgment by prescribing a rule of decision, *United States v. Klein,* 80 U.S. (1 Wall.) 128 (1872), it cannot do so by passing a law that prevents the Judicial Branch from applying the entire body of supreme federal law to cases before them Congress has contravened the holding in *Marbury by* removing the independence of the federal judiciary by directing it to ignore the *stare decisis* effect from constitutional rulings by Article III courts. This violates the Separation of Powers between Congress and the Judicial Branch. *See City of Boerne,* 521 U.S. at 536.

B. Section 2254(d)(1) Violates the Supremacy Clause of Article VI

Section 2254(d)(1) requires the Judicial Branch to stand by idly while a prisoner is executed when the state court's rejection of the prisoner's claim that his execution will impose cruel and unusual punishment is wrong,

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determining whether a state court decision is an unreasonable application of Supreme Court law. *Id.*

but deferring to the state court under an "'objectively reasonable' lens of *Williams*." (Memorandum and Order at 10:12.) The Supremacy Clause and its reliance on the Judicial Branch's "Judicial Power," however, will not tolerate such a state of affair.

1. The Meaning of the "Unreasonable" Application Standard of Section 2254(d)(1)

The Supreme Court in *Williams* held that, under 2254(d)(1)'s "unreasonable application" clause, an Article III court may grant a writ of habeas corpus if a state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of a prisoner's case. *Williams*, 529 U.S. at 413. The "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous. To grant relief, the state court decision must be "objectively unreasonable." *Id.*, at 409, 410, 412. Explicitly using deference language, the Court explained that "The gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness." *Andrade,* 538 U.S. at 75.

2. If Applied to this Case, Section 2254(d)(1) Violates the Supremacy Clause by Permitting a State Court's "Objectively Reasonable" Yet Incorrect Federal Constitutional Ruling Bar a Federal Court's Constitutional Decision

Any argument that, under Section 2254(d)(1), the Judicial Branch, including the United States Supreme Court, simply lacks the power to give a remedy to a constitutional violation whenever the state court's adjudication of the federal constitutional claim was an "objectively reasonable" application of clearly established Supreme Court precedent simply ignores that the Supremacy Clause vests the Article III court with a set of necessary components of Judicial Power. One of those necessary elements is the power to grant a remedy. Without such power, the Judicial Branch is rendered a subservient and advisory court in violation of the Supremacy Clause.

3. Congress's Enforcement Power Under Clause 5 of the Fourteenth Amendment Does Not Permit it to Limit the Judicial Branch's Independent Judicial Power to Enforce the Constitution as the Supreme Law of the Land

Congress does possess enforcement power under the Fourteenth Amendment. Const., 14th Amend, § 5. This enforcement clause is a "positive grant of legislative power to Congress." *City of Boerne,* 521 U.S. at 517. But such enforcement power is not unlimited as "Congress does not

enforce a constitutional right by changing what the right is. *It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." City of Boerne,* 521 U.S. at 519 (emphasis added). As the Court explicitly concluded in *City of Boerne,* "The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States." 521 U.S. at 527.

The Supreme Court in *City of Boerne* allowed that Congress retained the right and authority to enact "preventive rules" as a form of remedial measure authorized to guarantee the Fourteenth Amendment's guarantees of Due Process and Equal Protection. *Id.* at 530. Such measures, however, must possess "a congruence between the means used and the ends to be achieved." *Id.* at 530.

There is no language in the AEDPA to suggest that Congress fashioned section 2254(d)(1) to prevent or remedy Due Process or Equal Protection violations that were committed under the Judicial Branch's habeas case law. It is quite apparent that section 2254(d)(1) "appears, instead, to attempt a substantive change in constitutional protections." *See City of Boerne,* 521 U.S. at 532. That is something Congress cannot do without destruction of the supremacy of the Constitution. *Id.* at 529;

Marbury, 5 U.S. at 177. *See Nixon v. Administrator of General Service,* 433 U.S. 425,443 (1977) (recognizing violation of separation of powers if the law "prevents the [one] branch from accomplishing its constitutionally assigned function" unless that "impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.")

C. If Section 2254(d)(1) Attempts to Give the Judicial Branch Quasi-Appellate Jurisdiction over State Prisoner Habeas Cases to Give Advisory Opinions, the Provision Unconstitutionally Violates the "Case or Controversy" Prerequisite to the Exercise of Judicial Power Imposed by Article III

Under section 2254(d), a state court's adjudication of the state prisoner's constitutional claim for relief becomes a primary focus of federal court review. *See e.g., Andrade v. Lockyer,* 538 U.S. 63, 70, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003)("AEDPA circumscribes a federal habeas court's review of a state-court decision.") Whether the constitutional question depends on the resolution of a disputed legal analysis, a disputed historical fact, or a mixed question, under section 2254(d), the state court's adjudication remains a main focus in federal habeas review.[23] But the

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[23] The circuits have arrived at different answers as to how a federal court is to deal with silent state court decisions. *See* Claudia Wilner, *"We Should Not Defer to that Which Does Not Exist": AEDPA Meets the Silent State Court* Opinion, 77 N.Y.U. L. Rev. 1442 (2002) (discussing and

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amendment does not give the Article III courts any true appellate power — it cannot remand or direct the state courts to take or refrain from taking any action in the petitioner's case.

Article III courts are granted habeas jurisdiction to review state prisoner cases, have full independent authority to consider whatever source of law it wishes to consider, and may come to a decision regarding the constitutionality of the state custody. Under section 2254(d)(1), such a court may simply not effectuate its constitutional decision in those close cases proscribed by the subsection. Such an application of section 2254(d)(1) would render the Article III courts ineffectual and advisory bodies. Article III courts cannot be made into such lesser functionaries.

The idea of accepting federal courts as essentially advisory bodies ignores the long standing prohibition on such creatures. Article III, sec. 2, cl. 1, provides that "[t]he judicial Power shall extend to all Cases, in :Law and Equity, arising under this Constitution, the Laws of the United States,

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critiquing different circuit approaches); *Delgado v. Lewis,* 223 F.3d 976, 982 (9th Cir. 2000) (where state courts have not provided a reasoned opinion in support of their decision on a petitioner's claims, a federal habeas court

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and Treaties made ...." The Supreme Court has long barred Article III courts from performing such a role. *See* Liebman & Ryan, *Some Effectual Power,* 98 Colum. L. Rev. at 796. In close cases involving mixed questions, the only manner in which the federal court will be able to determine whether the state court's decision rejecting the constitutional claim is to analyze whether the state court was correct, and if not correct, how wrong it was — that is whether it's decision was "objectively reasonable" or not. By requiring the federal court in such cases to determine the constitutional question but then to permit it to only hand out advice, violates Article III.

[Footnote continued from previous page.]
must independently review the record to determine whether the state court clearly erred in its application of federal law).

CONCLUSION

Based on the foregoing and the related records provided to the Court, Clarence Ray Allen respectfully requests this Court to issue a Certification of Appealability and to commute Mr. Allen's sentence to one of life in prison.

Dated: January 13, 2006

CHARLES PATTERSON
ANNETTE P. CARNEGIE
SOMNATH RAJ CHATTERJEE
MORRISON & FOERSTER LLP

By: _____
Somnath Raj Chatterjee
Attorneys for Plaintiff
CLARENCE RAY ALLEN