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OFFICE OF THE GOVERNOR FOR THE STATE OF CALIFORNIA

In the Matter of Clemency for

CLARENCE RAY ALLEN

CDC No. B-91240

Glenn County Superior Court
Case No. 18240

California Supreme Court
Case No. S004483 (Crim. 22879)

Execution Date: January 17, 2006

PETITION FOR CLEMENCY

Clarence Ray Allen (“Ray Allen”) petitions the Governor of the State of California, Arnold Schwarzenegger, to exercise his clemency power under the State Constitution. Ray Allen requests that the Governor, as an act of compassion and humanity, relieve him from the sentence of death that he has endured for nearly a quarter-century by commuting it to life imprisonment without possibility of parole. He prays for

that mercy because he is aged and infirm, suffering from chronic diseases that have been aggravated by the grossly inadequate medical treatment he has received at San Quentin and that have left him unable to walk, nearly blind, hard of hearing, and so physically incapacitated that his execution for the purpose of incapacitating him from the commission of further crime is manifestly unnecessary; because he has suffered the agonies and terrors of life and death on Death Row for more than two decades, a punishment that has already served the purposes of retribution and deterrence more profoundly than any summary execution of him could have accomplished; because his trial was flawed by fundamental unfairness that culminated in trial counsel's utter failure to present any of the wealth of evidence about Ray Allen that favored a life verdict, and deprived him of fair and reliable jury determinations on both guilt and penalty; and, finally, because of the lingering question of his innocence, since so much of the prosecution's evidence of guilt came from witnesses who testified out of self-interest and later changed their testimony or recanted.

This petition is supported by the accompanying Appendix of Exhibits, and the records on file in the Governor's office.¹ It is based on the limited preparation that Ray Allen has been able to undertake to date in light of his deteriorated medical condition and associated disruption of his access to his counsel, both of which have been exacerbated by the conduct of prison authorities. Ray Allen's physical debilitation and his curtailed accessibility to counsel have disabled him and his counsel from preparing a full petition for clemency that would provide further bases for the Governor to exercise his power of commutation in this case. Tragically, he has been disabled from presenting that evidence in this petition because he suffered a grave heart attack on September 2, 2005, which almost took his life and required extended hospitalization and treatment. His extensive

¹ References to exhibits and pages in this petition are to the tabbed exhibits in the Appendix, which are paginated consecutively.

health problems, and San Quentin's indifferent response to them as well as to his need for access to counsel to prepare this petition, have conspired to deprive him of the ability to establish fully the bases for exercise of the Governor's power of commutation.

For all of these reasons, Ray Allen prays that the Governor relieve him from the shadow of execution by acting decisively now to commute his sentence. But if this petition does not persuade the Governor to so act, Ray Allen prays that the Governor grant him a reprieve of 120 days in order to give him a full and fair opportunity to present all the evidence that supports mitigation of his punishment. Out of fairness not only to Ray Allen, but also to himself and the citizenry of the State of California, the Governor should so act to ensure that he is fully informed when he performs his solemn duty to determine whether Ray Allen should live or die.

* * * * *

GROUND FOR COMMUTATION OF SENTENCE

I. The Age and Infirmities of Ray Allen.

Ray Allen, the oldest prisoner on California's Death Row, is scheduled for execution the minute his 76th birthday on January 16, 2006, draws to a close.² California has never executed a person so old.³ No State in this country has executed a person so old in more than half a century, and only five people in this country's history were older than Ray Allen when they were executed; three of those were executed in the 1800s and the fourth in 1916.⁴ The uncivilized nature of execution of such an elderly person is

² Exh. 2, p. 3; see also Exh. 1, pp. 1-2, which depict Ray Allen.

³ Exh. 3, p. 4.

⁴ *Ibid.*

illustrated by the fact that Iraq, one of the minority of countries in the world that still retain capital punishment, bars the execution of anyone over 70.⁵ The age of Ray Allen alone provides a sound basis to grant clemency.

What makes clemency even more compelling for Ray Allen, however, are the infirmities he has acquired as he has aged on Death Row. He suffers from a number of chronic medical ailments that have been compounded by, or in some instances precipitated by, the shockingly substandard medical care system at San Quentin.⁶ Chief among those ailments are a heart condition and diabetes, each of which is serious and advanced.⁷ He has a long history of coronary artery disease with myocardial infarction, cardiac arrest and coronary artery stenting. He also has long suffered from Type-two diabetes, with end organ damage, including damage to his nervous system, heart, kidneys, and eyes. San Quentin's indifferent treatment of these conditions and others, including sporadic interruptions of his medication and failure to provide him with necessary care for his eyes, his heart and his diet, have accelerated his debilitation. The cumulative damage has left Ray Allen legally blind and unable to walk, confining him to a wheelchair when he is out of his cell and otherwise seriously diminishing his vitality.⁸

⁵ See transcript of "NewsHour with Jim Lehrer," October 19, 2005, interview of *Los Angeles Times* Baghdad correspondent Borzhou Daraghi, available at http://www.pbs.org/newshour/bb/middle_east/july-dec05/saddam_10-19.html.

⁶ In litigation designed to upgrade the Department of Corrections' medical care system to minimum constitutional standards, a federal district court recently found that at San Quentin "[e]ven the most simple and basic elements of a minimally adequate medical care system were obviously lacking." (*Plata v. Schwarzenegger*, No. C-01-1351 TEH, 2005 U.S. Dist. Lexis 8878, at *8 (N.D. Cal. May 10, 2005).)

⁷ Exh. 4, p. 6.

⁸ See generally Exh. 4, pp. 5-10 and 52-116.

Ray Allen's fragility was dramatically illustrated by the serious heart attack that he suffered on September 2, 2005, following recurrent chest pains.⁹ He was brought to Marin General Hospital, where he suffered cardiac arrest. Treating doctors were able to resuscitate him and performed angioplasty procedures. Doctors inserted an intra-aortic balloon and stented his left main coronary artery with a drug-eluting stent — a risky procedure undertaken only because he was desperately ill and at grave risk of immediate death. Those procedures proved successful and saved the life of Ray Allen.

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

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

⁹ Exh. 4, pp. 7 and 87.

¹⁰ See generally Exh. 4, pp. 7 and 80-82.

¹¹ *Id.*, at pp. 8-9, 83-106.

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

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

In sum, Ray Allen’s serious chronic diseases and age have left him enfeebled, incapacitated, near death, and a danger to no one. His execution under these circumstances would not measurably advance any of the interests that the State relied upon to impose his death judgment. Indeed, California has never executed a prisoner so physically decrepit, and this is hardly the time to inaugurate such a practice. The Governor should not sanction the bizarre spectacle of a blind, old, and crippled man being wheeled into the chamber at San Quentin for such an unprecedented and gratuitous execution.

¹² *Id.*, at pp. 8-9 and 95-106.

¹³ *Id.*, at p. 9.

¹⁴ *Ibid.*

¹⁵ *Id.*, at pp. 9, 25 and 50.

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

The physical and mental toll that confinement on Death Row takes on a condemned prisoner is commonly known as the “death row phenomenon.”¹⁶ This dehumanizing aspect of Ray Allen’s sentence has caused him unusual anguish and pain because of both the particularly long time that he has been exposed to it, including the fearsome approach of several dates for execution, and the particularly substandard conditions of San Quentin’s Death Row. That pain and anguish have intensified to intolerable mental and emotional torment with his escalating physical deterioration and the recent setting of January 17, 2006, for his execution.¹⁷ Because Ray Allen’s confinement for more than two decades under the physical deprivations of Death Row — all the while suffering the emotional and mental agony of his looming execution — has so fully served the State’s interests in retribution and deterrence relied upon to justify the imposition of his death judgment, his actual execution pursuant to that judgment is pointless and excessive. His execution would needlessly and gratuitously inflict pain and extinguish life, contrary to the core values of our democratic society reflected in our state and our federal constitutional bars to the imposition of cruel and unusual punishment. As Justice Stephens observed when considering the constitutionality of extended confinement on death row — confinement significantly shorter than Ray Allen has experienced: “[A]fter such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted,”¹⁸ and “the

¹⁶ See, e.g., *Soering v. United Kingdom*, 161 Eur. Ct. H.R (ser. A), at 34 (reprinted in 11 Eur. Hum. Rts. Rep. 439, 440).

¹⁷ See generally Exh. 12, pp. 278-284.

¹⁸ *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., respecting the denial of certiorari).

deterrent value of incarceration during that period of uncertainty may well be comparable to the consequences of the ultimate step itself.”¹⁹

Our state Supreme Court more than thirty years ago recognized that “[t]he cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out.”²⁰ It noted, “Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.”²¹

Time has only deepened that realization, for courts around the world since then have found that extended confinement awaiting execution on Death Row — again, for periods of time much shorter than Ray Allen’s — constituted “torture or ... inhuman or degrading punishment” in violation of the applicable constitutions or charters banning such punishment. For example, the Privy Council of the British House of Lords, the highest court in England, sitting en banc for the first time in 50 years, unanimously acted to commute the death sentences of two inmates who had been on death row for 14 years and who had been read execution warrants on three occasions because execution following that experience would constitute “torture or ... inhuman or degrading punishment” in violation of section 17(1) of the Jamaican Constitution.²² Likewise, the Supreme Court of Zimbabwe held that execution following the prolonged death row

¹⁹ *Coleman v. Balkcom* (1981) 451 U.S. 949, 952 [68 L.Ed.2d 334,101 S.Ct. 2031] (Stevens, J., respecting the denial of certiorari).

²⁰ *People v. Anderson* (1972) 6 Ca1.2d 628, 649.

²¹ *Ibid.*

²² *Pratt & Morgan v. Attorney General for Jamaica*, 3 SLR 995, 2 AC 1,4 A11 ER 769 (Privy Council 1993) (en banc).

incarceration suffered by four prisoners confined under death sentence for up to 6 years would constitute "inhuman or degrading punishment" in violation of its constitution, and commuted their sentences.²³ South Africa has taken a similar view of its constitution.²⁴ Likewise, the European Court of Human Rights found that that the protracted delays in carrying out death sentences in Virginia, which averaged six to eight years, constituted inhuman and degrading punishment in violation of Article 3 of the European Human Rights Convention for purposes of determining whether Great Britain should be permitted to extradite a German national to Virginia to face capital murder charges that risked exposure to the "death row phenomenon."²⁵

Since the California Supreme Court first spoke on the question, other state court judges have also concluded that the death penalty is cruel and unconstitutional under the pertinent state constitution, in part because "it will be carried out only after agonizing months and years of uncertainty."²⁶ Justices on our federal Supreme Court as well have questioned whether such lengthy confinement on Death Row may be cruel and unusual under our federal Constitution.²⁷

²³ *Catholic Comm'n for Justice & Peace in Zimbabwe v. Attorney General*, No. S.C. 73 (Zimb. June 24, 1993) (reported in 14 Hum. Rts. LJ. 323 (1993)).

²⁴ See *State v. Makwanyane & Mahuna*, Case No. CCT/3/94 (So. Afr. Const. Ct June 6, 1995).

²⁵ *Soering v. United Kingdom*, *supra*, 11 Eur. Hum. Rts. Rep. 439.

²⁶ *Suffolk County District Attorney v. Watson*, 381 Mass. 648, 673, 411 N.E.2d 1274, 1287 (1980) (Braucher, J., concurring); *id.*, at 675-686, 411 N.E.2d at 1289-1295, (Liacos, J., concurring.)

²⁷ See, e.g., *Lackey v. Texas*, *supra*, 514 U.S. 1045 (memorandum of Stephens, J., respecting the denial of certiorari); *Knight v. Florida*, 528 U.S. 990, 993 (1999) (Breyer, J., dissenting from denial of certiorari); *Foster v. Florida*, 537 U.S. 990, 991 (2002) (Breyer, J., dissenting from denial of certiorari).

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

To begin with, Ray Allen has spent an extraordinarily long time on Death Row. His death judgment was imposed on November 22, 1982, more than 23 years ago. As of this writing, California has never executed a person who has been on Death Row for so long.²⁸

Upon his commitment to San Quentin following imposition of his death judgment, Ray Allen was placed in North Seg, California's traditional Death Row that is sealed from the rest of a decrepit old cellblock. There sits the ghoulish gas chamber in which Ray Allen is scheduled to die — albeit now by lethal injection rather than asphyxiation. Conditions were so intolerable on Death Row there that in October 1980 they had produced a consent decree in a civil rights action brought to upgrade those conditions to minimum constitutional acceptability.²⁹ Although the action is subject to dismissal once the terms of the decree have been implemented,³⁰ it remains before the court because prison authorities have yet to implement all of the terms of the decree necessary to correct the violation of the inmates' rights under the Eighth Amendment to be free from cruel and unusual punishment and their rights under the Fourteenth Amendment to due process of

²⁸ Exh. 9, p. 249A.

²⁹ See *Thompson v. Enomoto* (9th Cir. 1990) 915 F.2d 1383, 1384-1385.

³⁰ *Id.*, at p. 1385, incl. fn. 1.

law.³¹ The conditions on Death Row at San Quentin include all the ones that typically contribute to the death row phenomenon: sequestration from the prison's mainline or general population; constant supervision by guards and gunmen; a small cell; little daylight; in-cell feeding; limited exercise out of the cell; limited property; restricted visitation; and restraints under escort. On top of those incidents of confinement is a range of substandard conditions peculiar to San Quentin that aggravates the phenomenon.

While Ray Allen's confinement on North Seg was painful in itself, the expansion of Death Row and Ray Allen's deteriorated physical condition led to his transfer four years ago to East Block to house him closer to the prison hospital, where conditions were even worse.³² As described by one federal court in the course of finding conditions there unconstitutional before it became part of Death Row:

South Block, East Block, and North Block at San Quentin ... are five-tier cell blocks. That is, they contain five rows, or "tiers," of cells stacked vertically atop one another. Outside the barred fronts of the cells runs a walkway, also enclosed by bars, and outside the walkway, approximately 20 to 30 feet of open space extends unbroken from the bottom of the first tier to above the top of the fifth tier. On the wall behind the open space, opposite the cell fronts, other walking platforms called "gunwalks" are mounted. This wall also contains windows. For most of the cells in these cell blocks, the windows across the open space and behind the gunwalks are the sole source of natural light.³³

The court found the physical conditions in these cellblocks were appallingly unconstitutional in a number of basic ways dangerous to health and life, including lack of heat; "a 'chilly mist' that dampens everything in the cell blocks, particularly at night";

³¹ See, e.g., *Gilmore v. State of California* (9th Cir. 2000) 220 F.3d 987; see also Exh. 8, pp. 204-248, particularly p. 211.

³² See, e.g., *Thompson v. Enomoto, supra*, 915 F.2d at pp. 1384-1385; see also Exh. 12, p. 281.

³³ *Toussaint v. McCarthy* (N.D. Cal.)1984) 597 F.Supp. 1388, 1394.

“putrid odor”; “plumbing and sewage disposal systems [that] are antiquated, deteriorated, and in need of replacement”; “[i]n-cell plumbing [that] is hardly better”; inadequate light; an “unrelenting, nerve-racking din that fills the ... units” and creates “bedlam”; “antiquated” electrical wiring and “fire hazards [that] abound”; “deplorable filth” in the cells; “serious deficiencies” in food service; generally inadequate services in clothing, bedding, laundry, and personal hygiene; “confinement ...locked inside a cell less than 50 square feet in dimension [that] allows very little meaningful exercise and is physically debilitating” in light of the “irregular” and “insufficient” opportunity of exercise out of the cell; “prolonged idleness” and “extreme boredom” that causes “psychological pain and loneliness” and that “adversely affects the mental health of a number of inmates.”³⁴ The court found that these conditions “are inconsistent with human decency, and violate the Eighth Amendment.”³⁵ The substandard conditions in the facilities at San Quentin that house condemned prisoners are chronic and endemic to the age of the physical plant, as revealed by the report of an inspection of San Quentin earlier this year, which noted:

Sewer lines in one of the condemned housing units leak, and has [sic] leaked for years. Waste water therefore continually drips down from the overhanging walkways of the tiers above onto the floor below creating pools of waste water³⁶

Prison officials recognize that the current facilities are totally unsuitable for housing condemned prisoners, and are proceeding with plans to build a new Death Row on the premises.³⁷

While adequate medical and psychological services that address the physical debilitation and psychological suffering resulting from long confinement under these

³⁴ *Id.*, at pp. 1396-1403.

³⁵ *Id.*, at p. 1409.

³⁶ Exh. 6, p. 138.

³⁷ Exh. 8, p. 204.

conditions might somewhat mitigate those effects, in fact these services at San Quentin are themselves shockingly deficient. In still other litigation, those conditions have themselves been found or implicitly acknowledged to impose cruel and unusual punishment.³⁸ Medical care at San Quentin is chronically and notoriously sub-standard, as encapsulated in the Executive Summary of the Medical Experts' Report on San Quentin in *Plata v. Schwarzenegger*, N.D. Cal. C-01-1351 TEH, dated April 8, 2005:

San Quentin is a facility that only in the last decade satisfactorily terminated a Federal settlement agreement designed to improve medical conditions. Also, San Quentin is a 2004 roll out facility so that at the time of our visits Defendants have had over a full year to initiate and establish the infrastructure and operational procedures required in the original Plata Stipulation in a facility that less than 10 years ago was found constitutionally adequate. Given that in the past decade care had improved sufficiently to satisfy the Federal Court and that it had a full year to prepare, we were extremely disappointed with existing conditions. [The previous two sentences of this quote still read funny to me, but if you've checked it, so be it.] We found overall compliance with the Stipulated Order and subsequent Court Orders was non-existent. In fact, it was clear that for most areas we reviewed there has been indifference to beginning the process required in the Stipulated Order. The system of organizational structure within the CDC that permitted this facility to deteriorate over the past 10 years to the state described in this report must be addressed as well. These problems have not occurred overnight.

We found a facility so old, antiquated, dirty, poorly staffed, poorly maintained, with inadequate medical space and equipment and overcrowded that it is our opinion that it is dangerous to house people there with certain medical conditions and is also dangerous to use this facility as an intake facility. In addition, the overcrowding and facility life-safety and hygiene conditions create a public health and life-safety risk to inmates who are housed there. We therefore strongly recommend as a life-safety issue that a census cap be initiated, that the

³⁸ See *Plata v. Schwarzenegger*, N.D. Cal., No. Civ-01-1351 (medical care) and *Coleman v. Davis*, E.D. Cal., No. CIV S-90-0520 LKK JF (psychiatric care); see also Exhs. 6 and 7, pp. 135-203.

existing Outpatient Housing Unit be closed or used for a different purpose, and that the mission of reception be re-directed to a different facility.

In summary, San Quentin should be viewed as needing to start from the beginning. Its mission should be re-evaluated. In determining that mission, its physical structure and staffing must be evaluated before deciding what types of medical patients should be housed there and what types of custody functions (e.g. reception screening) should be engaged in. (*Italics added.*)³⁹

Ray Allen not only has endured extraordinarily cruel and unusual physical conditions of confinement on Death Row, but he also has also endured them for an extraordinarily long time — during all of which he suffered “the anguish and mounting tension of living in the ever-present shadow of death” awaiting execution.⁴⁰ Ray Allen has suffered the diverse excruciations of Death Row for almost a quarter-century. He has experienced more than a half-score of times the loss by execution of a fellow condemned inmate that brings with it not also its own pain but also the terrible reminder of an approaching similar fate.⁴¹ To protect his almost sightless eyes from the light, he wears to this day the sunglasses inscribed with “S.W.A.” that condemned inmate Stephen Ray Anderson bequeathed to him upon execution.⁴² Ray Allen more than once has experienced the enormous grief and terror of the execution of still other fellow inmates to whom he had grown close.⁴³ Ray Allen had been a particularly close friend of Danny Williams and members of his family before he was executed.⁴⁴ Ray Allen suffered paroxysms of tears when he said his final goodbye to Manny Babbitt on the latter’s way

³⁹ Exh. 6, pp. 135-136.

⁴⁰ *Soering v. United Kingdom*, *supra*, 11 Eur. Hum. Rts. Rep. at p. 476.

⁴¹ See, e.g., Exh. 9, p. 249; Exh. 12, p. 282.

⁴² Exh. 12, p. 282; see also Exh. 10, p. 255.

⁴³ Exh. 12, p. 282.

⁴⁴ *Ibid.*

to the execution chamber, having become particularly close to him and his family over the years.⁴⁵ Ray Allen also has watched those around him die from “natural” causes after years on Death Row, as well as by their own hand when life on the Row awaiting execution had become more than a man could bear.⁴⁶

Adding to Ray Allen’s agony has been the terror of his own execution bearing down on him.⁴⁷ He has repeatedly experienced the approach of dates for which his execution was scheduled. On April 3, 1987, Ray Allen was served with his first execution warrant, for May 22, 1987.⁴⁸ He endured that date until he heard on May 4, 1987, that it had been stayed.⁴⁹ On November 18, 1987, the trial court designated 10:00 a.m. on January 8, 1988 for his execution.⁵⁰ Ray Allen gave away all his property in anticipation of that date,⁵² and prison psychiatrists examining him on December 7, 1987, found him suffering from anxiety as his scheduled execution approached.⁵³ He suffered that anguish until December 24, 1987, when he learned that the California Supreme Court had stayed that execution date the day before.⁵⁴ On July 26, 1988, the trial court issued

⁴⁵ *Ibid*; see also Exh. 10, p. 254.

⁴⁶ Even considering those who have volunteered for execution to end their misery, more prisoners on California’s Death Row have committed suicide than been executed since modern reinstatement of the death penalty. See Exh. 8, pp. 249-253.

⁴⁷ Exh. 12, p. 282.

⁴⁸ Exh. 11, p. 261A.

⁴⁹ *Id.*, at p. 261B.

⁵⁰ *Id.*, at pp. 262-266.

⁵¹ *Id.*, at p. 267.

⁵² *Id.*, at p. 267.

⁵³ *Id.*, at p. 268.

⁵⁴ *Id.*, at pp. 269-271.

yet another warrant for his execution — this time for September 9, 1988.⁵⁵ Ray Allen endured the approach of that execution until it was stayed by a federal court on September 1, 1988.⁵⁶ Conflicting reports from his keepers about the stay, however, caused him to suffer up to the very day scheduled for his execution, so that when he dressed at the command of guards to “get ready,” he thought it was for his execution until the guards later laughingly clarified that it was for yard.⁵⁷

January 17, 2006, is Ray Allen’s fourth execution date, a date that from the cumulative stress of facing execution becomes more horrifying for him every day that it draws nearer.⁵⁸ As the Privy Council observed in the case where it found that execution following incarceration on death row for 14 years for two inmates who had been read execution warrants on three occasions would constitute "torture or ... inhuman or degrading punishment" in violation of section 17(1) of the Jamaican Constitution:

There is an instinctive revulsion against the prospect of [executing] a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over an extended period of time.⁵⁹

Likewise, our community’s sense of humanity, its moral sense of decency, rebels against the prospect of the execution of Ray Allen after he has been held under sentence of death for so many years under the circumstances that have attended that sentence. This is especially so because during all the suffering of his confinement on Death Row, Ray Allen has been a conforming prisoner who has been virtually disciplinary- and trouble-

⁵⁵ *Id.*, at pp. 272-275.

⁵⁶ *Id.*, at p. 276-277.

⁵⁷ Exh. 12, p. 282.

⁵⁸ *Id.*, at p. 283.

⁵⁹ *Pratt & Morgan v. Attorney General for Jamaica, supra*, 3 WLR 995, 2 AC 1, 4 All ER 769, 142 NLJ 1639.

free during his long tenure there.⁶⁰ As attested to by those who have known him best on Death Row, including Manny Babbitt and Steven Anderson, Ray Allen has been a positive, peaceful, and steady force on Death Row.⁶¹

When the trial court set the upcoming date for Ray Allen's execution, it found that the considerations discussed thus far in this petition "are not matters that affect the propriety of this judgment[, but] are matters which should be addressed properly to the Governor of the State of California by way of [his powers of] clemency, if the Governor sees fit to exercise them."⁶² The Governor should see fit to exercise them, as part of the shared sense of humanity that recoils from the execution of Ray Allen under all the attendant circumstances. The Governor should spare Ray Allen the torture of execution as the capstone to the awful punishment that has already so diminished him, and commute his sentence to life imprisonment without possibility of parole.

III. The Fundamental Flaws in the Criminal Justice Process That Led to Ray Allen's Death Judgment.

Judicial reviews in both state court and federal court of Ray Allen's death judgment revealed that numerous errors occurred at his trial. While each court affirmed the judgment on the basis that the errors at issue were not prejudicial, the serious nature of those errors and their cumulative effect should cause the Governor to doubt the reliability of the death judgment and commute it on that basis.

The California Supreme Court found, and the federal courts agreed, that the special circumstance findings were grossly inflated: The jury was erroneously allowed to consider eleven special circumstances as aggravating factors when only three should have

⁶⁰ Exh. 12, p. 281.

⁶¹ Exh. 10, pp. 254-261.

⁶² *People v. Allen*, Case No. 18240, Glenn County Superior Court, Court Reporter's Transcript of Proceedings November 18, 2005, Setting of Execution Date, p. 15, ll. 22-26.

been considered.⁶³ The federal courts additionally found a “double- and triple-counting error” in the jury’s consideration of Ray Allen’s prior criminality.⁶⁴ These errors skewed the careful balancing of aggravation against mitigation that a jury must make when weighing the question of life or death.

There was also great controversy in the California Supreme Court on the most basic question of whether the jury utilized the fundamental normative standard that California law requires to impose a death penalty. That court divided 4-3 on the question whether the court’s instructions and the prosecutor’s argument worked together to mislead the jurors into believing that a death sentence was required as long as the aggravating evidence outweighed the mitigation evidence, when in fact each juror was required to make the much more profound and personal decision whether death was the appropriate verdict.⁶⁵ The proper standard gave each juror the discretion to return a life sentence even if he or she found that the aggravation evidence outweighed the mitigation evidence. Protection against a miscarriage of justice, especially in light of the closeness of and controversy over the fundamental issue of whether the jury utilized the proper standard for its life-or-death determination, is another sound basis for the Governor to grant clemency in this case.

Moreover, federal review revealed further error, with the Ninth Circuit finding a range of “errors committed by the trial court, prosecutor, and defense counsel in both the guilt and penalty phase proceedings.”⁶⁶ For example, the Ninth Circuit found that the

⁶³ *People v. Allen* (1986) 42 Cal.3d 1222, 1273-1274; *Allen v. Woodford* (9th Cir. 2005) 395 F.3d 979, 1011.

⁶⁴ *Allen v. Woodford*, *supra*, 395 F.3d at p. 1012.

⁶⁵ Compare *People v. Allen*, *supra*, 42 Cal.3d at p. 1277, with *id.* at p. 1289 (Broussard, J., concurring and dissenting).

⁶⁶ *Allen v. Woodford*, *supra*, 395 F.3d at p. 1019.

trial court “likely erred” when it precluded evidence about Ray Allen’s conforming conduct while in the county jail awaiting trial, and that the prosecutor committed misconduct in closing argument, particularly in the promulgation of baseless accusations at both the guilt and penalty phases that Allen and his counsel were conspiring to retaliate against witnesses at the capital trial.⁶⁷

Overshadowing all these errors was one that affected every aspect of the trial, and that is the wholly substandard representation that trial counsel provided. The inadequacy of counsel irremediably tainted the proceedings throughout, culminating in a complete breakdown of the adversarial system at the penalty trial. As the Ninth Circuit reported, Ray Allen’s “[t]rial counsel admits he did nothing to prepare for the penalty phase until after the guilty verdicts were rendered, and even then, in what little time [eight days] was available, he failed sufficiently to investigate and adequately present available mitigating evidence.”⁶⁸ Consequently, counsel produced only a single witness who addressed the life and character of Ray Allen. The Ninth Circuit found “overwhelmingly plain ... that Allen’s representation at the penalty phase of his trial fell below an objective standard of reasonableness.”⁶⁹ The Governor should not permit Ray Allen to be executed pursuant to a jury determination that was made in a vacuum of information about him that favored life, especially when there was abundant evidence that could have been produced for the jury to show his redeeming qualities.

The federal district court found that counsel could have presented evidence from about twenty-five witnesses that “revealed a human side to petitioner not previously presented.”⁷⁰ The court detailed this evidence in findings that covered approximately 23

⁶⁷ *Allen v. Woodford*, *supra*, 395 F.3d at pp. 998, 1013, 1015-1016.

⁶⁸ *Id.* at p. 984.

⁶⁹ *Ibid.*

⁷⁰ Exh. 13, p. 401.

pages, starting with the fact that Ray Allen was a Native American born at home on January 16, 1930, in Blair, Oklahoma, the youngest of five children, one of whom died very young.⁷¹ As the court encapsulated in its most succinct form the evidence of the full dimensions of Ray Allen's character:

... There was evidence of petitioner's impoverished childhood, close relationship with his dying sister, and religious background. In particular, testimony of petitioner's teen years through early adulthood showed that he had the capacity to work very hard to support his family. During his marriage to Helen, both worked hard, but had a close, caring family. Testimony also showed that even after the marriage ended, petitioner was close to many members of Helen's family.

A good deal of testimony showed that petitioner was unusually generous with his friends, considerate of his employees and their families, and loved spending time with children, particularly his grandchildren. Petitioner's fatherly relationship with Tammy Sevier was especially valuable mitigation.⁷²

The court found the evidence regarding Tammy Sevier "especially valuable,"⁷³ summarizing it as follows:

Helen Sevier testified that after her divorce from petitioner, she began drinking "from daylight to dark" and remarried. In 1964 ... Helen gave birth to a girl, Tammy, who is mildly retarded. By that time Helen's husband was out of the picture, but ... petitioner "and the boys both was [sic] thrilled" by the birth. They came to the hospital during the delivery and were the ones who named her. Petitioner "brought the boys nearly every week down to see" Helen and Tammy, and treated Tammy like a daughter. Petitioner brought Tammy presents and food during their visits because Helen was not able to provide for herself and Tammy at the time.

⁷¹ *Id.*, at pp. 357-379.

⁷² *Id.*, at p. 363.

⁷³ *Id.*, at p. 401.

For Tammy, petitioner was “more of a dad to me than ... my own dad was.” Tammy called petitioner “Uncle Fudge.” Tammy Sevier testified that each September petitioner would come down with the boys for Tammy’s birthday, and Tammy and petitioner would go into town and buy her a lot of clothes. He also bought her bicycles, a swimming pool, and other presents.⁷⁴

The court found other mitigation evidence valuable as well, characterizing the testimony from Allen’s granddaughter Paula as “very touching.”⁷⁵ In addition, it summarized the psychological evidence that could have been presented in mitigation as follows:

Psychological testing showed petitioner to be a passive, dependent personality who was free of mental illness at times relevant to this proceeding. Dr. White found petitioner to be “a passive, dependent individual with limited coping abilities. He is quite self-centered and may easily misunderstand other people, especially when their needs are at odds with his own His outlook toward the world is sentimental and he is uncomfortable dealing with genuine feeling.” [Citation]. Dr. Morgenthaler’s tests showed that petitioner suffered a dependent personality disorder. [Citation.] Dr. Morgenthaler noted that his data “consistently projected Mr. Allen as a passive, dependent, submissive and compliant individual who is ill-equipped psychologically to assume mature and independent leadership roles.” [Citation.]⁷⁶

In sum, the breadth of the evidence that could have been presented at Ray Allen’s trial to show the positive aspects of his character and the goodness that resided in him was considerable. The witnesses came from all walks of life and the evidence addressed all phases of Allen’s life, including “an act of bravery and heroism on the job at the olive plant where at great risk to himself [Ray Allen] rescued a co-worker stranded in the air on

⁷⁴ *Id.*, at p. 363.

⁷⁵ *Id.*, at p. 388.

⁷⁶ *Id.*, at pp. 379-380.

a conveyer belt,” and his longstanding model behavior in prison.⁷⁷ The parade of witnesses illustrated in a host of different ways their experience of Ray Allen as good-hearted, kind, spiritual, thoughtful, upright, lovable, loving, supportive, and full of positive human qualities. Dr. Craig Haney, who “has been studying juror responses to penalty phase evidence for the last ten years,”⁷⁸ explained the worth of this evidence:

[A]ll of this ... evidence and testimony ... conveyed [Allen’s] incredible capacity for and dedication to hard work; his religiosity and prior commitment to the church, both as a minister and person who lived and represented the ideals of the church; his positive outlook, uplifting attitude, and its effect on others; his care, concern, and generosity towards others (including his willingness to risk his own well-being for another); his dedication as a family man, father and grandparent, and father figure to young people; his loyalty and caringness as a friend; his excellent qualities as a supervisor and boss; and his continued contact with and significance to many persons who, despite his incarceration, continue to be positively influenced and affected by him and who would be diminished by his execution. In addition, evidence of his excellent institutional adjustment could have ... been presented to [Allen’s] jury to remind them of the contribution to prison that would be sacrificed by his execution and also to buttress a potential lingering doubt defense by showing an institutional history inconsistent with commission of the crimes for which he had been convicted.

Taken as a whole, this is extraordinarily powerful mitigation of the sort that one rarely encounters in capital litigation.⁷⁹

The district court admittedly found the “prejudice determination a difficult one” here.⁸⁰ As it explained: “Any attempt to second-guess what the penalty phase jury might

⁷⁷ See, e.g., *id.*, at pp. 373-374 and 377-378.

⁷⁸ *Id.*, at p. 380.

⁷⁹ Exh. 14, pp. 481-482; see also Exh. 13, p. 380.

⁸⁰ Exh. 13, p. 393.

have done had it the additional mitigating evidence is problematic.”⁸¹ Ultimately, however, both it and the Ninth Circuit found that trial counsel’s abominable lack of diligence did not prejudice Ray Allen. The stark fact, and the one that should control the Governor’s determination here, however, is that Ray Allen never got a fair opportunity of meeting with his own countervailing evidence the aggravating evidence that the jury considered. The power of the evidence supportive of the penalty of life without parole rather than death, none of which was ever considered by the jury because of the unconscionably substandard performance of counsel, provides another sound basis for commutation of Ray Allen’s sentence.

IV. The Lingering Question of Ray Allen’s Innocence.

The question of Ray Allen’s innocence of the three homicides at Fran’s Market perpetrated by Billy Ray Hamilton casts a troubling shadow over the propriety of his execution. Ray Allen has always maintained his innocence, and the question of his innocence lingers because so much of the evidence of guilt was based on witnesses whose testimony was procured by promises from the prosecution that exploited their self-interest and motivation to escape punishment for their involvement in these homicides or other crimes. Of those witnesses, the two most prominent were Gary Brady and Kenneth Allen, Ray Allen’s son.

Hamilton and Barbo’s invasion of Fran’s Market on September 5, 1980, was fueled by heavy methamphetamine use at the household of Kenneth Allen during the preceding few days.⁸² The homicides may well have been incident to a botched robbery attempt planned at the household then, as Kenneth Allen asserted in recanting his testimony after trial,⁸³ or the product of Kenneth Allen’s own desire to avenge his father’s

⁸¹ *Ibid.*

⁸² See, e.g., Exh. 16, pp. 523-524; Exh. 17, pp. 531-536.

⁸³ Exh. 13, p. 307.

prior conviction, as evidence admitted at trial indicated.⁸⁴ Kenneth Allen was arrested on drug charges on September 9, 1980.⁸⁵ He soon confessed involvement in the homicides and traded his cooperation with authorities for his release on his own recognizance on the drug charges and, eventually, a promise that he would serve no more than three years imprisonment (two years with good time) in connection with those charges and any charges arising out of the homicides.⁸⁶ After Kenneth Allen had testified against Ray Allen at the latter's preliminary hearing, Kenneth Allen advised Ray Allen in a letter: "I'm going to tell them the real truth the next time we go to court, and that should clear you."⁸⁷ Authorities intercepted that letter and confronted Kenneth Allen with it.⁸⁸ When he confessed that he had lied at Ray Allen's preliminary hearing, and followed up that confession with information that exonerated Ray Allen, authorities promptly turned around and filed capital charges against Kenneth Allen for the homicides, asserting that his exoneration of Ray Allen breached their agreement with him.⁸⁹ Consequently, in an attempt to obligate authorities to carry out their promises in the plea agreement that had led to his release and the promise of no more than two years actual imprisonment for his admitted involvement in the homicides, Kenneth Allen turned state's evidence again at Ray Allen's trial.⁹⁰ As previously set forth, Kenneth Allen admitted once again after trial that his testimony implicating Ray Allen was untruthful and given in order to secure the favorable terms of the bargain he had struck with authorities.

⁸⁴ See *People v. Allen*, *supra*, 42 Cal.3d at p. 1245.

⁸⁵ *Id.*, at p. 1247.

⁸⁶ *Id.*, at pp. 1247-1248.

⁸⁷ *Id.*, at p. 1249.

⁸⁸ *Ibid.*

⁸⁹ *Id.*, at p. 1250.

⁹⁰ *Id.*, at pp. 1250-1251.

Gary Brady also turned state's evidence to resolve drug charges against himself and his wife and to avoid prosecution for the capital murders.⁹¹ He testified that while he, Billy Ray Hamilton, and Ray Allen were all serving time at Folsom, he was in on a plan for Hamilton upon his parole to kill witnesses who had testified against Ray Allen.⁹² After Brady and his wife were arrested on new charges when they resumed their criminal conduct while out on bail, Brady threatened to admit that he had lied at Ray Allen's preliminary hearing — until authorities included dismissal of these new charges and provided for his immediate release on his own recognizance as part of their deal.⁹³

In addition to these self-interests, there were in — the words of the district court — numerous “inconsistencies between Brady's direct testimony at trial and his preliminary hearing testimony.”⁹⁴ Moreover, the trial evidence showed that, again in the words of the district court, “Brady had been placed in the witness protection program; Brady had numerous prior convictions for car theft, escape, robbery, assault on a peace officer, burglary, [and] possession of a firearm; Brady was taking amphetamines and heroin, and smoking four to five marijuana joints a day around the time Hamilton came to his house in Modesto; Brady suffered blackouts in the past; [and] Brady feared returning to prison because he had been labeled a snitch.”⁹⁵

The district court further noted that “[t]he ... jury did not hear ... that Brady has brain damage, memory lapses, and low intellectual functioning and that Brady avoided a felony conviction based on a finding of insanity," because the prosecutor never disclosed

⁹¹ Exh. 13, pp. 298 and 311.

⁹² *People v. Allen, supra*, 42 Cal.3d at pp. 1240; Exh. 13, p. 311.

⁹³ Exh. 13, p. 311.

⁹⁴ *Id.*, at p. 312.

⁹⁵ *Ibid.*

that information and counsel never developed it for presentation.⁹⁶ Nor did the prosecutor disclose or trial counsel learn that at the same time that Brady “was conversing with the prosecutor in the Allen case” and signed his cooperation agreement, Brady implicated George Marshall, a fellow inmate then facing capital charges, in a plot to murder witnesses, just as Brady had accused Ray Allen of doing.⁹⁷ Brady was desperate not to be returned to prison at that time because he had offended his own prison gang, the Aryan Brotherhood, who had a contract out on his life.⁹⁸ Indeed, Brady since has admitted lying in his eventual testimony in Marshall’s case — testimony he gave as part of a bargain for a reduced sentence following a conviction for robbery.⁹⁹ After Ray Allen’s trial, Brady sought to extract further favors from authorities by threatening to admit that he had lied in Ray Allen’s trial as well.¹⁰⁰

The actual perpetrators of the market invasion and eventual homicides, Barbo and Hamilton, also made statements to authorities that cast doubt on Ray Allen’s guilt. Barbo testified at her trial, and subsequently made statements to authorities, that she did not know Ray Allen and that his name never came up during any of the planning of the market robbery; indeed, she did not even know he was in prison at the time.¹⁰¹ Ray Allen’s jury, however, never heard from Connie Barbo.

Likewise, after his trial Hamilton made statements to authorities that exonerated Ray Allen.¹⁰² According to those authorities, “Billy Ray Hamilton admitted that he knew

⁹⁶ *Id.*, at p. 312.

⁹⁷ *Id.*, at p. 311.

⁹⁸ Exh. 15, p. 501.

⁹⁹ *Id.*, at pp. 499 and 513-519.

¹⁰⁰ *Id.*, at pp. 513-514.

¹⁰¹ Exh. 17, pp. 530-543.

¹⁰² Exh. 16, pp. 520-529.

Clarence Ray Allen in Folsom Prison ... but he said there was no time they (he and Allen) got off to themselves and talked about doing any job in Fresno.”¹⁰³ As reported:

Hamilton stated that he did write this [alleged hit] list. He filled this out at Kenneth Allen’s direction. He stated that Kenneth told him what to write and he wrote those names down. Hamilton stated at one point that he did not come down to Fresno for the purpose of executing or killing anybody, but he came down to help collect some money for Kenneth and when he got here, that money had been collected. He then stated that Kenneth Allen had tricked him, had given him a lot of drugs, and gotten him high, and tricked him into going out there to Fran’s Market.

Hamilton told authorities “that he didn’t have any hard feelings towards anyone except Kenneth Allen.” He asserted that “Kenneth Allen was a liar and there were a lot of things that Kenneth Allen had lied about”¹⁰⁴

Ray Allen’s jury never heard about these statements either.

Hamilton continued his drug-fueled ways of violent robbery following his commission of these murders, for he was arrested not long afterward when he tried to rob at knifepoint a liquor store around the corner from Gary Brady’s residence in Modesto where he was then staying.¹⁰⁵ During the whole time that Hamilton rampaged on drugs with Kenneth Allen and Brady and others in the community, Ray Allen — always under the watchful eye of prison authorities — continued his sober, peaceful, conforming, and law-abiding ways. The contrast reinforces the lingering doubt of Ray Allen’s guilt, and the unreliability of the informants.

¹⁰³ *Id.*, at p. 525.

¹⁰⁴ *Ibid.*

¹⁰⁵ *People v. Allen, supra*, 42 Cal.3d at p. 1243.

In Pennsylvania on November 15, 2005, Harold Wilson became the 122nd person in recent times freed from Death Row after exoneration of capital charges.¹⁰⁶ Three of those earlier exonerations were of California Death Row prisoners.¹⁰⁷ Even more recently, the Houston Chronicle reported on its investigation of the 1993 Texas execution of Ruben Cantu, who had steadfastly maintained his innocence, that led to startling new evidence exonerating Cantu and causing both the prosecutor and the jury foreperson in that case to conclude that they had made a mistake.¹⁰⁸ The California Legislature is considering and may very soon vote on AB 1121, The California Moratorium on Executions Act, which calls for a moratorium on the death penalty because of developments like these and others that cause grave concern about the fairness and reliability of its administration in this State. Given that fact, as well as the fact that the main witnesses for the prosecution of Ray Allen demonstrably changed their testimony as dictated by their desire to curry favor with authorities, there is strong reason for the Governor to commute Ray Allen's death judgment at this time.

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¹⁰⁶ Exh. 18, p. 547.

¹⁰⁷ *Id.*, at p. 548.

¹⁰⁸ Exh. 19, pp. 549-550.

GROUNDNS FOR REPRIEVE

RAY ALLEN'S LACK OF A REASONABLE OPPORTUNITY TO DEVELOP AND PRESENT ALL OF THE EVIDENCE THAT FAVORS COMMUTATION OF HIS SENTENCE.

Because of the ill-timing of Ray Allen's serious heart attack on September 2, 2005, and a long history of delayed and substandard medical treatment for him up to and including the time of this writing, Ray Allen has been disabled from preparing his case for clemency. That disability was aggravated by the conduct and practices of prison authorities that made him inaccessible to his counsel during critical preparation times, and that caused counsel to devote their resources to efforts simply to gain access to him rather than to the substantive development of his case for commutation. Consequently, Ray Allen has not had a fair opportunity to present in this petition all the bases that support commutation of his sentence, and he requests that the Governor grant him a reprieve of 120 days to permit him to perfect his petition for clemency.

The investigation for clemency had just been undertaken, with Ray Allen scheduled for visits with more than one expert consultant, when he suffered his life-threatening heart attack.¹⁰⁹ His medical treatment and extended hospitalization following that heart attack deprived counsel of any access to him during that time because of prison regulations that forbade such access during confinement in a community hospital.¹¹⁰ That denial of access caused the cancellation of scheduled visits.¹¹¹ It was only through concerted effort and fortuity of timing that counsel's representative was able to see Ray Allen when he was briefly returned to San Quentin on September 20, 2005, and that Dr. Watson, one of the defense consultants, was able to conduct one day of his planned three-

¹⁰⁹ Exh. 4, p. 31.

¹¹⁰ Exh. 4, pp. 6, 31 and 119.

¹¹¹ *Ibid.*

day testing.¹¹² San Quentin's arbitrary transfer of Ray Allen to Corcoran State Prison immediately thereafter, rather than back to the hospital for the surgery that he then urgently required, rendered him again inaccessible to counsel.¹¹³ That inaccessibility became further prolonged as authorities continued to move him around without notice to counsel.¹¹⁴ As earlier recounted, the recommended surgery was never performed on Ray Allen, and he was returned to San Quentin with no further surgical treatment prescribed for his heart condition. Yet he remains at serious risk of suffering another heart attack or even sudden cardiac death due to his coronary artery disease, and prison authorities have ignored the treatment recommendations of the defense's medical consultant, who was finally able to examine Ray Allen on October 17, 2005.¹¹⁵ That doctor has further warned that the stress of Ray Allen's impending execution may itself trigger another heart attack with fatal consequences.¹¹⁶ Until the precariousness of Ray Allen's heart condition is fully assessed, the risk that pre-execution procedures will trigger a fatal heart attack is good cause by itself to grant a reprieve.

Administrative impediments to access to counsel continue to the time of this writing. For example, prison officials have barred any legal visits with Ray Allen from December 10-13, the four days up to and including the due date for this application. This bar is a product of prison policy that generally restricts the weekend to personal visits and for a condemned prisoner reportedly permits such weekend legal visits only when he is within thirty days of execution (December 10 & 11), and an administrative decision to preclude all visitation on Monday and Tuesday (December 12 & 13) due to the prison's

¹¹² *Id.*, at pp. 32 and 119.

¹¹³ *Id.*, at pp. 32-33.

¹¹⁴ *Id.*, at p. 33.

¹¹⁵ *Id.*, at p. 6.

¹¹⁶ *Id.*, at pp. 9-10.

plans to execute another prisoner that Tuesday. Counsel intended to schedule in that time an interview of Ray Allen by a consultant (as well as an attorney visit) to further develop the grounds for clemency, which now cannot be included in the application. Counsel had also attempted to schedule this consultant and others for earlier visits but had not received a timely response from the prison administration. Counsel was later advised that the responsible administrator had been busy with other matters, including cancellation of appointments already scheduled for that Monday and Tuesday because of the prison's decision to preclude legal visits on those days. Ray Allen should not be forced to make his case for clemency under such harried and constricting circumstances.

A reprieve is also necessary to permit completion of the clemency investigation to determine whether Ray Allen suffers from brain damage. The defense cannot complete that investigation, and its retained doctors cannot make that determination, because of Ray Allen's current physical condition, including weakness from his heart attack and loss of vision from his diabetes, and the need to conduct further tests on him.¹¹⁷ Prison authorities were supposed to address Ray Allen's vision problems with surgery that was recommended for him back in June 2005, but they have yet to provide that surgery.¹¹⁸ Moreover, the tests that defense doctors need performed to inform their determinations require facilitation by prison authorities that has been requested but has not yet been forthcoming.¹¹⁹ The Governor should grant a reprieve particularly because the conduct of prison authorities has contributed to the need for additional time for Ray Allen to marshal the evidence supporting his application for commutation.

¹¹⁷ Exh. 4, pp. 117-120; Exh. 20, pp. 551-554.

¹¹⁸ *Id.*, at p. 129.

¹¹⁹ Exh. 4, pp. 25, 50 and 120; Exh. 20, pp. 551-554.

There is reason to believe that Ray Allen suffers from brain damage, which makes completion of this investigation vital.¹²⁰ Though the district court found that the mitigation evidence available to counsel but never presented to the jury was overall “important,”¹²¹ and in particular respects “especially valuable,”¹²² the Ninth Circuit was not persuaded because that evidence was “bereft of explanatory or exculpatory attributes, which are at the core of our belief in the importance of mitigation evidence.”¹²³ As it further explained, quoting the Supreme Court: “Evidence regarding social background and mental health is significant, as there is a ‘belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems, may be less culpable than defendants who have no such excuse.’”¹²⁴

Evidence of brain damage or other mental condition would supply that core explanation for Ray Allen’s criminality that makes him less culpable, and would have special force in moving the Governor to commute his sentence. Indeed, the last commutation of a death sentence in California, extended by then-Governor Ronald Reagan, was to a victim of brain damage whose condition was not discovered until after his trial.¹²⁵ A reprieve is imperative to permit development and presentation of that evidence favorable to Ray Allen’s petition for clemency.

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¹²⁰ Exh. 4, p. 120; Exh. 20, pp. 552-553.

¹²¹ Exh. 13, p. 406.

¹²² *Id.*, at p. 401.

¹²³ *Allen v. Woodford*, *supra*, 395 F.3d at p. 1005.

¹²⁴ *Ibid.*

¹²⁵ Exh. 21, p. 576.

CONCLUSION

These several considerations demonstrate that the execution of Ray Allen on January 17, 2006, would diminish and dishonor the State of California. The prospect of state officials wheeling a blind, lame, and enfeebled 76-year-old man into the execution chamber would chill even grim supporters of capital punishment, and would subject California to embarrassment in the national and international communities. Such an execution would constitute purely gratuitous punishment that furthers only the base purpose of vengeance and not any legitimate state interest. It would also deprive Ray Allen of a reasonable opportunity to marshal the evidence that would further support the Governor's commutation of sentence that he here requests.

In the interests of fairness and decency, the State of California should not execute Ray Allen when it has failed to provide him with adequate medical care and adequate access to counsel in his particular time of need. No one more than the Governor appreciates that California's prison system is in disarray, particularly in the provision of medical care and particularly at San Quentin Prison. The disgraceful treatment of Ray Allen after his heart attack, including shuttling him from facility to facility, the summary cessation of his medications, and the prison's failure still to adequately attend to his blindness and heart condition, is emblematic of the abrogation of basic medical norms that were excoriated in the decision in *Plata v. Schwarzenegger*. Ray Allen asks for no more than the maintenance of the health he would naturally have in his remaining days, and a fair chance to make the best case he can for commutation of his sentence. Both justice and mercy entitle him to no less.

For all of these reasons, we urge the Governor to use his broad powers of clemency, including commutation and reprieve, to spare Ray Allen from execution on January 17, 2005.

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