IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARMENIA LEVI CUDJO, JR., Petitioner-Appellant, v. VINCENT CULLEN, Warden, Respondent-Appellee.	CA No. 08-99028 D.C. No. CV-99-08089-JFW

APPELLANT'S REPLY BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE JOHN F. WALTER
United States District Judge

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Petitioner-Appellant Armenia Cudjo submits this reply brief pursuant to the Court's order of September 15, 2010.

INTRODUCTION

Cudjo requests that the Court expand the certificate of appealability ("COA") to include the uncertified claims he addressed in his opening brief. Appellant's Brief at 37. The Court can and should grant relief on those claims, and need not resolve the lethal injection claim, the only claim for which the district court granted a COA. In the alternative, the Court should remand the matter to the district court for further proceedings on the lethal injection claim, since California has recently issued new lethal injection regulations and the district court wrongly denied Cudjo's claim without first giving him an opportunity to develop a factual record through an evidentiary hearing. *Id*.

ARGUMENT

I. THE DISTRICT COURT WRONGLY DENIED THE LETHAL INJECTION CLAIM

Claim XXXVIII of Cudjo's federal habeas corpus petition alleges that "Petitioner's sentence of death is illegal and unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution . . . because execution by lethal injection, the method by which the State plans to execute him, violates

the prohibition against cruel and unusual punishment." Appellant's Supplemental Excerpts of Record, filed concurrently herewith ("ASER"), 60. The claim further alleges that "[t]he punishment is cruel and unusual because: (1) There is great risk that lethal injection will subject Petitioner to prolonged and extraordinary pain; and, (2) death by lethal injection is contrary to evolving standards of decency." *Id*. The State describes the claim as "alleg[ing] that lethal injection generally, and California's lethal injection procedures specifically, violate the Eight [sic] Amendment ban on cruel and unusual punishment." Appellee's Brief at 20.

The State agrees that Cudjo "presented essentially the same Eighth Amendment claim to the California Supreme Court." Appellee's Brief at 20; *see also* ASER 46-57 (containing the lethal injection claim (Claim XL) raised in Cudjo's 2000 state habeas corpus petition). The California Supreme Court summarily denied the claim on the merits. Appellant's Excerps of Record filed with Appellant's Brief ("ER") 197. The court also denied the claim as untimely except "insofar as [it] allege[s] that California's death penalty law is unconstitutional." *Id*.

In district court, Cudjo moved for an evidentiary hearing on his lethal injection claim. ASER 42-43. The State objected to a hearing on the grounds that the claim had been defaulted and that "[e]ven if Petitioner were able to overcome

his procedural default, he still would not be entitled to an evidentiary hearing because he cannot establish that the California Supreme Court's denial of this claim was unreasonable under 28 U.S.C. § 2254(d)." ASER 40. The State also said that, "[w]ithout conceding the merits under the AEDPA," it agreed that "it may be prudent for the Court to defer resolution of this claim until the outcome of the proceedings involving Michael Morales. . . . *See Morales v. Tilton*, 465 F. Supp. 2d 972 (N.D. Cal. 2006); *Morales v. Hickman*, 415 F. Supp. 2d 1037 (N.D. Cal. 2006)." *Id*. The district court rejected the State's procedural default argument but denied an evidentiary hearing on the claim. ASER 17-20, 31-32. The State has not challenged the procedural default ruling in this Court, and any such challenge is now waived.

The district court denied the lethal injection claim in the order denying the rest of Cudjo's petition. The Court explained:

> California's lethal injection protocol is the subject of litigation since a district court recently found it raises serious questions under the Eighth Amendment. *See Morales v. Tilton*, 465 F. Supp. 2d 972, 973 (N.D. Cal. 2006) (internal citations omitted) (finding serious but correctable deficiencies in the implementation of California's lethal injection protocol and urging California's executive branch to address the implementation problems.)

> In light of the fact that the issue is not thoroughly settled, and the identical claim is already being litigated in the Northern District of California, the Court denies relief on this claim, but grants a certificate of appealability. This will allow Armenia's claim to be reviewed by the Ninth Circuit Court of Appeals after the litigation before the district court in *Morales v. Tilton*, on the issue of the constitutionality of the lethal injection method of execution, is completed.

ER 191.

After Appellee's Brief was filed, the State of California issued new regulations governing the execution of death sentences by lethal injection. ASER 1-3.[1] These regulations are currently the subject of a state lawsuit, and the Marin County Superior Court has enjoined the State from executing any inmate pursuant to the new regulations. ASER 1-3. The federal lethal injection litigation before Judge Fogel in the Northern District of California is ongoing. *Id*. There appear to have been no evidentiary hearings on the new regulations, and the challenges to the regulations remain pending.

The State argues that this Court should affirm the denial of the lethal injection claim even though (1) California issued revised lethal injection

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[1]This paragraph cites orders issued in *Morales v. Cate*, N.D. Cal. case nos. 5-6-cv-219-JF-HRL, 5-6-cv-926-JF-HRL. These orders appear at ASER 1-3. Cudjo has filed a separate request that the Court take judicial notice of these orders.

regulations after this case was on appeal; and (2) the district court denied Cudjo's request to develop a record on the claim via an evidentiary hearing, or to await the resolution of lethal injection litigation in other courts. The State's argument makes no sense. Cudjo was denied the opportunity to develop a factual record on the claim below, and he cannot now create such a record on appeal. Even assuming that this Court could, as the district court surmised, review the claim after the *Morales* litigation is concluded (1) that litigation has not concluded and (2) Cudjo should have the opportunity to present his own evidence on his claim.[2] Cudjo met the requirements for an evidentiary hearing, and the district court abused its discretion in denying a hearing. *Earp v. Ornoski*, 431 F.3d 1158, 1167 (9th Cir. 2005) (district court abuses its discretion when it denies an evidentiary hearing "where the petitioner establishes a colorable claim for relief and has never been afforded a state or federal hearing on th[e] claim") (footnote omitted).

The main problem with the State's approach is that the district court evidently based its denial on its belief that the merits of Cudjo's Eighth Amendment claim would eventually be reached by *some* court. The State thus invites this Court to leave the merits of Cudjo's claim unreviewed by *any* court.

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[2] Principles of res judicata and collateral estoppel would prevent Cudjo from being bound by a judgment denying a lethal injection claim litigated by another California death row inmate in a separate proceeding.

This invitation fails to comport with the purposes of the writ of habeas corpus, "[t]he very nature of [which] demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 291 (1969). Conversely, this demand would be met simply, fairly and efficiently, by remanding the matter to the district court for further proceedings now that California has adopted new regulations for performing lethal injections. The State provides this Court with no good reason to do otherwise.

The State argues that in *Brown v. Ornoski*, 503 F.3d 1006 (9th Cir. 2006), "[t]his Court . . . already considered and rejected a substantially identical claim" to that raised by Cudjo. Appellee's Brief at 21. But "[i]n district court, Brown adduced no evidence to further this claim and opted not to brief the issue, essentially conceding it was foreclosed based on 'the current state of the law and record in the case.'" 503 F.3d at 1017. Cudjo has made no such concessions. Instead, he sought an evidentiary hearing on his claim.

The State contends that *Baze v. Rees*, 553 U.S. 35 (2008), forecloses relief on Cudjo's claim, arguing that "the Kentucky protocol considered by the Supreme Court in *Baze* uses the same three drugs that California uses," citing *Morales*, 465 F. Supp. at 975. Appellee's Brief at 21. However, as stated above, California

issued new lethal injection regulations after Appellee's Brief was filed. Further, the Supreme Court's denial of the lethal injection claim in *Baze* came after "[t]he trial court held extensive hearings and entered detailed Findings of Fact and Conclusions of Law." 553 U.S. at 41. This did not happen in the court below. Indeed, no court appears to have created such a record on the new regulations. Cudjo's claim should not have been denied without an opportunity to develop a record on his claim, and the denial should not be affirmed here without that same opportunity.

The State argues that "[t]o the extent that Petitioner did not intend the instant claim to be a collateral attack on his conviction and sentence, but rather intended it to be an as-applied challenge to California's death penalty protocol, such a challenge should be brought in an action arising under 42 U.S.C. § 1983, rather than in the instant habeas corpus action arising under 28 U.S.C. § 2241 et seq." Appellee's Brief at 23. Cudjo's claim is not so limited, and his claim is properly raised in habeas. Further, *Hill v. McDonough*, 547 U.S. 573 (2006), cited by the State in support of its proposition, held only that a challenge to a state's lethal injection procedure "may proceed as an action for relief under 42 U.S.C. § 1983," not that it could not proceed in a habeas petition. *Id*. at 576; *id*. ("The question before us is whether Hill's claim must be brought by an action for a writ

of habeas corpus under the statute authorizing that writ, 28 U.S.C. § 2254, or whether it may proceed as an action for relief under 42 U.S.C. § 1983."). *Brown*, 503 F.3d 1006, also cited by the State, merely provides that an "as applied" challenge need not be raised in habeas but can be brought later in a § 1983 action. 503 F.3d at 1017 n.5.

The State argues that 28 U.S.C. § 2254(d) prevents relief on the lethal injection claim. Appellee's Brief at 22. However, the State does not explain how § 2254(d) applies to the claim given that the State has changed its lethal injection regulations since the California Supreme Court denied Cudjo's claim, and in that sense there is no relevant state court adjudication on the merits of the claim. *See* 28 U.S.C. § 2254(d) ("An application for a writ of habeas corpus . . . shall not be granted with respect to any claim that was *adjudicated on the merits in State court proceedings* . . . .") (emphasis added); *Rompilla v. Beard*, 545 U.S. 374, 390 (2005).

Even if the state court decided the same claim as the one presented here, the fact that the claim was denied in a summary order without reasoning, an opinion, or citation to authority makes it difficult, if not impossible, to apply § 2254(d) to the decision. Although this Court's precedent treats summary state court denials as adjudications on the merits subject to § 2254(d), albeit under independent

review (*see* below), the courts have recognized the difficulty in applying § 2254(d) to such decisions. *See Smith v. Spisak*, 130 S. Ct. 676, 688 (2010) (declining to decide whether § 2254(d)(1) applies to summary denial of claim because claim failed even under de novo review); *Washington v. Schriver*, 255 F.3d 45 (2d Cir. 2001) (discussing circuit split regarding how to apply § 2254(d) to summary denial). At least one circuit has held that when the state court denied the petition without reasoning there is nothing to defer to, justifying application of *de novo* review. *Hameen v. Delaware*, 212 F.3d 226, 248 (3d Cir. 2000); *but see Chadwick v. Janecka*, 312 F.3d 597 (3d Cir. 2002) (§ 2254(d) standards apply when a state supreme court rejects a claim on the merits without explanation).

Other circuits have held that while § 2254(d) still applies to unreasoned summary denials, the federal court must perform an "independent review" of the record to assess the reasonableness of the state-court decision. *See, e.g., Delgado v. Lewis*, 223 F.3d 976, 981-82 (9th Cir. 2000), *overruled on other grounds by Lockyer v. Andrade*, 538 U.S. 63 (2003); *Harris v. Stuvall*, 212 F.3d 940, 943 (6th Cir. 2000); *Bell v. Jarvis*, 236 F.3d 149, 163 (4th Cir. 2000); *Aycox v. Lytle*, 196 F.3d 1174, 1178 (10th Cir. 1999). Cudjo believes that the better reasoned view is that § 2254(d) does not apply to summary denials.

II. THE COURT SHOULD GRANT CUDJO'S REQUEST TO EXPAND THE COA

The State has elected not to respond to the merits of Cudjo's arguments showing why the COA should be expanded to include additional claims, Appellee's Brief at 24, including the two ineffective assistance of counsel claims on which the district court held an evidentiary hearing, and a third-party culpability claim that two California Supreme Court justices concluded entitled Cudjo to relief. Appellant's Brief at 47-49. Rather than address the merits of Cudjo's claims, the State merely asserts that the Court "should decline to indulge Petitioner's wish to greatly expand" the COA, labeling "Petitioner's request [as] excessive." Appellee's Brief at 24.

Cudjo asked to expand the COA on claims that he believes meet the COA standard. *See* Appellant's Brief at 42-43 (describing the standard); Appellant's Unopposed Motion to Exceed the Page Limitation for His Opening Brief, filed November 20, 2009, docket no. 20, ¶ 3. Cudjo's habeas petition raises 39 claims. ER 191. Cudjo sought to expand the COA to include six of them. It would be no "indulgence" by this Court to expand the COA to include those claims. The fact of the matter is that capital habeas petitioners have been wrongly denied COAs by lower courts, and have ultimately won habeas relief under AEDPA once a COA

was granted. *See, e.g., Miller-El v. Cockrell*, 537 U.S. 322 (2003) (granting COA after COA denied by lower court); *Miller-El v. Dretke*, 545 U.S. 231 (2005) (granting relief under AEDPA after denial of relief by lower court).

The State further complains that "conspicuously absent from Petitioner's request to exceed the word limit [on Appellant's Brief] was any presentation of the principal reason why Petitioner found it necessary to exceed it: to present uncertified issues to this Court." Appellee's Brief at 24. If the State is claiming to be surprised or deceived that Cudjo's brief (or so much of his brief) addressed uncertified issues, or that Cudjo sought to expand the COA to include them, this claim rings hollow. In his requests for more time to file his opening brief, Cudjo explained that although the district court had certified only one claim, he intended to "seek to expand the COA in the opening brief to include the claims on which we had an evidentiary hearing in district court and probably on one or more record-based claims." *See* request filed at docket no. 10, ¶ 3; *see also* requests at docket no. 12, ¶ 3, docket no. 14, ¶ 3, docket no. 16, ¶ 3, docket no. 18, ¶ 3. These documents were served electronically on the State before the request to exceed the page limits was filed.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the opening brief, Cudjo requests that the Court reverse the judgment of the district court and grant habeas relief or, in the alternative, remand to the district court for further proceedings on his lethal injection claim.

Respectfully submitted,

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DATED: September 15, 2010

By */s/ Mark R. Drozdowski*
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B) and (C) and Circuit Rule 32-1, I certify that Appellant's Reply Brief has been prepared in a proportionately spaced typeface using WordPerfect X3, 14 point, Times New Roman and contains 2,569 words.

Dated: September 15, 2010

By */s/ Mark R. Drozdowski*
MARK R. DROZDOWSKI
Deputy Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By */s/ Mark R. Drozdowski*
MARK R. DROZDOWSKI
Deputy Federal Public Defender

APPENDIX TO ADDENDUM

ADDENDUM

U.S. Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Constitution, Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Constitution, Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254

(d) 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--

(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.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--