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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ERNEST DEWAYNE JONES,)	CASE NO. CV 09-02158 CJC
Petitioner,)	DEATH PENALTY CASE
v.)	ORDER RE: BRIEFING AND
KEVIN CAPPELL, Warden)	SETTLEMENT DISCUSSIONS
of California State)	
Prison at San Quentin,)	
Respondent.)	

This Court is extremely troubled by the long delays in execution of sentence in this and other California death penalty cases.

In claim 27, petitioner contends that his continuous confinement since 1995 under a death sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment under the principles which Justice Stevens articulated in his memorandum "respecting the denial of certiorari" in Lackey v. Texas, 514 U.S. 1045 (1995) (denying petition for writ of certiorari). (Pet., at 414-

1 18). While the death penalty can be justified by
2 "retribution and deterrence of capital crimes by
3 prospective offenders," an execution "cannot be so totally
4 without penological justification that it results in the
5 gratuitous infliction of suffering." Gregg v. Georgia,
6 428 U.S. 153, 183 (1976) (plurality opinion). Justice
7 White, concurring in Furman v. Georgia, 408 U.S. 238
8 (1972), opined that:

9 At the moment that [a proposed execution] ceases
10 realistically to further these purposes [of
11 deterrence and the coherent expression of moral
12 outrage], the emerging question is whether its
13 imposition in such circumstances would violate the
14 Eighth Amendment. It is my view that it would,
15 for its imposition would then be the pointless and
16 needless extinction of life with only marginal
17 contributions to any discernible social or public
18 purposes. A penalty with such negligible returns
19 to the State would be patently excessive and cruel
20 and unusual punishment violative of the Eighth
21 Amendment.

22 Furman, 408 U.S. at 312 April 10, 2014 (White, J.,
23 concurring).

24
25 In addition, the State has a strong interest in
26 expeditiously "exercising its sovereign power to enforce
27 the criminal law." In re Blodgett, 502 U.S. 236, 239
28 (1992). In this California capital case, this interest

1 has been utterly stymied for two reasons. First, in
2 California, the state and federal procedures for
3 litigating, post-conviction, a capital defendant's
4 Constitutional claims are especially protracted and
5 fraught with delay. See generally, Judge Arthur L.
6 Alarcón and Paula M. Mitchell, Executing the Will of the
7 Voters?: a Roadmap to Mend or End the California
8 Legislature's Multi-billion-dollar Death Penalty Debacle,
9 44 Loy. L. Rev. 41 (2011); Judge Arthur L. Alarcón,
10 Remedies for California's Death Row Deadlock, 80 S. Cal.
11 L. Rev. 697 (2007).

12
13 Second, all California executions have been
14 indefinitely stayed while the courts resolve the
15 Constitutionality of California's lethal injection
16 protocol. See, e.g., Morales v. Cate, 2012 WL 5878383, at
17 *1-*3 (N.D.Cal., Nov. 21, 2012) (summarizing the
18 protracted procedural history of litigation in the
19 Northern District of California, in which the plaintiffs
20 have challenged California's execution protocol as
21 unconstitutional, noting that, "California at this
22 juncture lacks a lethal-injection protocol that is valid
23 under state law.").

24
25 Thus, in addition to facing the uncertainty that, as
26 Justice Stevens and Justice Blackmun noted in their
27 opinions in Lackey and Furman, all capital defendants face
28 while they await execution, in this case, both petitioner

1 and the State must labor under the grave uncertainty of
2 not knowing whether petitioner's execution will ever, in
3 fact, be carried out.

4
5 The Court believes this state of affairs is
6 intolerable, for both petitioner and the State, and that
7 petitioner may have a claim that his death sentence is
8 arbitrarily inflicted and unusually cruel because of the
9 inordinate delay and unpredictability of the federal and
10 state appellate process.

11
12 The Court believes that briefing and oral argument are
13 necessary and appropriate on petitioner's potential claim.
14 Accordingly, the Court sets the following briefing and
15 hearing schedule:

16 1. The parties shall serve and file simultaneous opening
17 briefs which address the issues raised in this Order no
18 later than **June 9, 2014**.

19 2. The parties shall serve and file simultaneous
20 responsive briefs which address the issues raised in this
21 Order no later than 45 days after the opening briefs have
22 been served and filed.

23 3. The parties shall serve and file simultaneous reply
24 briefs which address the issues raised in this Order no
25 later than 30 days after the responsive briefs have been
26 served and filed.

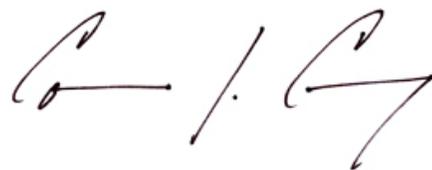
27 4. The Court will set a hearing date shortly after the
28 parties have filed their simultaneous replies.

1 The parties are encouraged to submit, and to address
2 in their briefing, the relevant statistics reported in the
3 two law review articles referenced above, as well as any
4 other reliable studies or public records addressing the
5 delay associated with the administration of California's
6 death penalty, the number of individuals on death row and
7 the likelihood that any of those individuals will ever be
8 executed or will instead die of natural causes or suicide.
9

10 In addition, the Court believes that, particularly in
11 light of the state of affairs described above, this case
12 may benefit from mediation or settlement discussions.
13 Therefore, the parties are ORDERED to meet and confer, and
14 to submit to the Court within 60 days of the filing date
15 of this order a joint statement discussing whether
16 mediation or settlement discussions would be appropriate
17 in this case, and, if so, what form the mediation or
18 discussions should take, including whether it would be
19 appropriate for the Court to appoint a mediation Judge.
20

21 IT IS SO ORDERED.

22
23 Dated: April 10, 2014.



Cormac J. Carney
UNITED STATES DISTRICT JUDGE