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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

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| **ERNEST DEWAYNE JONES,**<br>Petitioner,<br>**v.**<br>**KEVIN CHAPPELL, Warden of California State Prison at San Quentin,**<br>Respondent. | CV 09-2158-CJC<br>**CAPITAL CASE**<br>**RESPONDENT'S RESPONSIVE BRIEF ON CLAIM 27**<br>Hon. Cormac J. Carney<br>United States District Judge |

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Respondent hereby files the instant brief in response to Petitioner's Opening Brief on Claim 27 ("Opening Brief"). As discussed below, Claim 27 as presented in the Opening Brief is unexhausted because new factual allegations supporting the claim were never presented to the California Supreme Court. Even without the exhaustion problems, habeas corpus relief on Claim 27 is barred by 28 U.S.C. § 2254(d).

## MEMORANDUM OF POINTS AND AUTHORITIES

## ARGUMENT

### I. AMENDED CLAIM 27 IS UNEXHAUSTED BECAUSE IT WAS NEVER PRESENTED TO THE CALIFORNIA SUPREME COURT

Exhaustion of state remedies is a prerequisite to a federal court's consideration of claims sought to be presented by a state prisoner in federal habeas corpus. 28 U.S.C. § 2254(b); *Picard v. Connor*, 404 U.S. 270, 275, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971); *Wooten v. Kirkland*, 540 F.3d 1019, 1025 (9th Cir. 2008). To satisfy the state exhaustion requirement, the petitioner must fairly present his federal claims to the state's highest court. *Rose v. Lundy*, 455 U.S. 509, 515, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982). A claim has not been fairly presented unless the prisoner has described in the state court proceedings both the operative facts and the federal legal theory on which his contention is based. *See Gray v. Netherland*, 518 U.S. 152, 162-63, 116 S. Ct. 2074, 135 L. Ed. 2d 457 (1996); *Gatlin v. Madding*, 189 F.3d 882, 888 (9th Cir. 1999).

In the Opening Brief, Petitioner contends that the conditions of his confinement while he is awaiting execution violate the Eighth Amendment because they are physically and psychologically torturous. (Opening Brief at 25-41.) Petitioner describes the physical conditions on California's death row, arguing that such conditions are substandard and inhumane and that long periods of confinement

under such conditions constitutes physical and psychological torture.[1] (Opening Brief at 26-35.) Petitioner also contends that the uncertainties in California's death penalty scheme, including uncertainty about the method by which he will be executed and whether he will ever be executed, are psychologically tortuous. (Opening Brief at 35-41.) Petitioner, however, has never presented *any* of these allegations to the California Supreme Court. In his direct appeal in the California Supreme Court, Petitioner presented a *Lackey*[2] claim, arguing that his death sentence violated the Eighth Amendment only because of the long delay between sentencing and execution. (NOL B1 at 229-43.) Petitioner never argued in the California Supreme Court that the conditions of his confinement violate the Eighth Amendment. Thus, to the extent these new allegations focusing on the conditions of confinement place it in a fundamentally different light, Claim 27 is unexhausted.

Petitioner also contends in the Opening Brief that his execution would violate equal protection because he must endure lengthy and indefinite incarceration as a capital prisoner seeking post-conviction relief whereas non-capital inmates seeking post-conviction relief do not endure such lengthy and indefinite incarceration. (Opening Brief at 42-47.) Petitioner never presented such an equal protection claim to the California Supreme Court. Accordingly, this new legal theory renders Claim 27 unexhausted.

Further, in support of Claim 27, Petitioner presents three volumes of exhibits in the Opening Brief, totaling 644 pages. However, none of the exhibits was presented to the California Supreme Court. To the extent the exhibits, intended to further factually support the claim, fundamentally alter the legal claim that

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[1] Petitioner contends that the physical conditions on East Block where he is confined are deplorable, that he is isolated, and that medical and psychiatric treatment on death row is deficient. (Opening Brief at 26-31.)

[2] *See Lackey v. Texas*, 514 U.S. 1045, 115 S. Ct. 1421, 131 L. Ed. 2d 304 (1995) (Stevens, J., respecting denial of certiorari).

Petitioner actually presented to the California Supreme Court, they render the claim unexhausted.

This Court has no authority to grant relief on an unexhausted claim, absent Respondent's express waiver of the exhaustion requirement, which Respondent does not give. *See* 28 U.S.C. § 2254(b). Accordingly, because Petitioner's new allegations and legal theories are so drastically different from those actually presented to the California Supreme Court in support of his lengthy incarceration claim, Claim 27 is unexhausted.

## II. HABEAS CORPUS RELIEF ON CLAIM 27 IS BARRED BY 28 U.S.C. § 2254(d)

Even assuming that Claim 27 is exhausted, it is barred by 28 U.S.C. § 2254(d) because the Supreme Court has never clearly held that the pre-execution duration on a state's death row could violate the Eighth Amendment, or any other provision of the Constitution for that matter. Absent utter disregard for § 2254(d), and the vast catalogue of Supreme Court decisions interpreting it, relief cannot be granted on this claim.

### A. The Standard of Review

As amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d) constitutes a "threshold restriction," *Renico v. Lett*, 559 U.S. 766, 773 n.1, 130 S. Ct. 1855, 176 L. Ed. 2d 678 (2010), on federal habeas corpus relief that "bars relitigation of any claim 'adjudicated on the merits' in state court" subject to two narrow exceptions. *Harrington v. Richter*, 131 S. Ct. 770, 784, 178 L. Ed. 2d 624 (2011) ("*Richter*"). These exceptions require a petitioner to show that the state court's previous adjudication of the claim either (1) 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) was "'based on an unreasonable determination of the facts in light of the evidence presented at the State Court proceeding.'" *Id*. at 783-84 (quoting 28 U.S.C.

§ 2254(d)). Only if a petitioner can survive this threshold review as to claims previously rejected on their merits by a state court is a federal court permitted to reach the merits of a petitioner's claims, reviewing them "de novo." *See Panetti v. Quarterman*, 551 U.S. 930, 953, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007) ("When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied. A federal court must then resolve the claim without the deference AEDPA otherwise requires."); *see also Howard v. Clark*, 608 F.3d 563, 569 (9th Cir. 2010); *Frantz v. Hazey*, 533 F.3d 724, 735-36 (9th Cir. 2008) (en banc).

The inquiry under 28 U.S.C. § 2254(d)(1) is sharply circumscribed. First, "clearly established federal law" is limited to Supreme Court authority that "squarely addresses" the claim at issue and provides a "clear answer." *Wright v. Van Patten*, 552 U.S. 120, 125-26, 128 S. Ct. 743, 169 L. Ed. 2d 583 (2008); *see also Premo v. Moore*, 131 S. Ct. 733, 743, 178 L. Ed. 2d 649 (2011); *Knowles v. Mirzayance*, 556 U.S. 111, 121-22, 129 S. Ct. 1411, 173 L. Ed. 2d 1411 (2009); *Carey v. Musladin*, 549 U.S. 70, 77, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); *see also Marshall v. Rodgers*, 133 S. Ct. 1446, 1450-51, 185 L. Ed. 2d 540 (2013) (federal habeas court may "look to circuit precedent to ascertain whether [a federal appellate court] has already held that the particular point in issue is clearly established by Supreme Court precedent," but may not use lower court authority "to refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule" or "to determine whether a particular rule of law is so widely accepted among the Federal Circuits that it would, if presented to [the Supreme] Court, be accepted as correct"). Second, newly proffered evidence is irrelevant; rather, review of the state court decision is strictly "limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398, 179 L. Ed. 2d 557 (2011). And third, in light of the record before the state court and the clearly established Supreme Court precedent, the state

court decision must have been "objectively unreasonable," and not merely incorrect in the view of the federal court. *Richter*, 131 S. Ct. at 785; *Renico v. Lett*, 559 U.S. at 773; *see also Felkner v. Jackson*, 131 S. Ct. 1305, 1307, 179 L. Ed. 2d 374 (2011) (per curiam). To satisfy this standard, the state court is not required to "cite or even be aware of [the Supreme Court's] cases under § 2254(d)." *Richter*, 131 S. Ct. at 784. "Even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id*. at 786.

The inquiry under § 2254(d)(2) is likewise sharply circumscribed, as it calls for federal courts to be "particularly deferential" to the state courts. *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004). The Ninth Circuit has said that an unreasonable factual determination under § 2254(d)(2) may be shown where the state court failed to make a finding necessary to support its decision, it relied on an incorrect standard in making a necessary factual finding, or the factfinding process supporting the decision was itself defective. *Id*. at 1000-01. Again, it is insufficient that the state court's factual determination was merely erroneous; to satisfy § 2254(d)(2) it instead must be shown that "any appellate court" would have been *unreasonable* in approving the finding of fact. *Id*. at 1000; *see also Rice v. Collins*, 546 U.S. 333, 338-39, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006). "This is a daunting standard—one that will be satisfied in relatively few cases." *Taylor v. Maddox*, 366 F.3d at 1000.

The standard set forth in § 2254(d) is "difficult to meet . . . because it was meant to be." *Richter*, 131 S. Ct. at 786; *see also Burt v. Titlow*, 134 S. Ct. 10, 15-16, 187 L. Ed. 2d 348 (2013) ("Recognizing the duty and ability of our state-court colleagues to adjudicate claims of constitutional wrong, AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court."). It "reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Richter*, 131 S. Ct. at 786. To that

end, it precludes review of any claims previously rejected on their merits by a state court except in the narrow category of cases "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] precedents." *Id*. Accordingly, to overcome the bar of § 2254(d), a petitioner is required to show at the threshold that "the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id*.; *see also Burt v. Titlow*, 134 S. Ct. at 16 ("We will not lightly conclude that a State's criminal justice system has experienced the 'extreme malfunction' for which federal habeas relief is the remedy.") (quoting *Richter*, 131 S. Ct. at 786, alteration omitted); *Johnson v. Williams*, 133 S. Ct. 1088, 1091, 1094, 185 L. Ed. 2d 105 (2013) (standard of § 2254(d) is "difficult to meet" and "sharply limits the circumstances in which a federal court may issue a writ of habeas corpus to a state prisoner whose claim was 'adjudicated on the merits in State court proceedings'").

Just this term, in *White v. Woodall*, 134 S. Ct. 1697 (2014), the Supreme Court again explained just how narrow and limited the "clearly established" law requirement is. In discussing this aspect of § 2254(d)(1), the Court explained that the section "provides a remedy for instances in which a state court unreasonably applies this Court's precedent; it does not require state courts to *extend* this Court's precedent or license federal courts to treat the failure to do so as error." *Id*. at 1706 (italics in original). In other words, "if a habeas court must extend a rationale before it can apply to the facts at hand, then by definition the rationale was not clearly established at the time of the state court decision." *Id*. (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 666, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004)) (internal quotation marks omitted). Although "[t]he difference between applying a rule and extending it is not always clear," "[c]ertain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier

rule will be beyond doubt." *Id*., quoting *Yarborough*, 541 U.S. at 666. "The critical point is that relief is available under § 2254(d)(1)'s unreasonable-application clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question." *Id*. at 1706-07 (quoting *Richter*, 131 S. Ct. at 786).

**B. Section 2254(d) Bars Relief on Claim 27**

**1. *Lackey* Claim**

In the Opening Brief, Petitioner contends that execution following decades of incarceration under a sentence of death violates the Eighth Amendment because it would not satisfy the penological goals of retribution and deterrence that justify application of the death penalty. (Opening Brief at 16-25.) This claim fails under § 2254(d) because the Supreme Court has never held that execution following a lengthy term of incarceration violates the Eighth Amendment. In fact, the Supreme Court has thus far refused to even consider the issue, denying every certiorari petition for which review of the issue has been sought. *See, e.g., Johnson v. Bredesen*, 558 U.S. 1067, 130 S. Ct. 541, 175 L. Ed. 2d 552 (2009); *Thompson v. McNeil*, 556 U.S. 1114, 129 S. Ct. 1299 (2009); *Foster v. Florida*, 537 U.S. 990, 123 S. Ct. 470, 154 L. Ed. 2d 359 (2002); *Knight v. Florida*, 528 U.S. 990, 120 S. Ct. 459, 145 L. Ed. 2d 370 (1999); *Elledge v. Florida*, 525 U.S. 944, 119 S. Ct. 366, 142 L. Ed. 2d 303 (1998); *Lackey v. Texas*, 514 U.S. 1045, 115 S. Ct. 1421, 131 L. Ed. 2d 304 (1995). Although fair-minded jurists might disagree whether execution after decades of incarceration advances the goals of retribution and deterrence, this does not justify relief under § 2254(d). Rather, to obtain relief, there must be Supreme Court authority that "squarely addresses" the claim at issue and provides a "clear answer." *Wright v. Van Patten*, 552 U.S. at 125-26. No Supreme Court decision has held that execution following a certain term of incarceration violates the Eighth Amendment. Therefore, Petitioner's *Lackey* claim fails under § 2254(d). *See Allen v. Ornoski*, 435 F.3d 946, 958 (9th Cir. 2006)

(denial of habeas relief proper because Supreme Court has never held that execution after long tenure on death row constitutes cruel and unusual punishment).

In its Order Amending Briefing Schedule and Setting Hearing on Claim 27 (Docket No. 110), this Court has encouraged the parties to address the chart that is attached to the Order that documents the case status of 496 individuals who are currently on California's death row. The chart unquestionably shows that there are long delays in the execution of death sentences in California and that an extremely small number of capital inmates have been executed to date.[3] Delay in this regard can be attributed to various factors, including but not limited to the state court's heavy capital caseload, inconsistent adjudication speeds in the lower federal courts, repetitive litigation in state court conducted by capital inmates, and stay and abeyance requests by the inmates themselves. Of course, there are many other contributing factors as well.

But this state of affairs with respect to the post-conviction review process – in state and federal court – for California condemned inmates does not entitle Petitioner to habeas corpus relief under § 2254(d). This Court has stated that "the chart strongly suggests that executing those essentially random few who outlive the dysfunctional post-conviction review process serves no penological purpose and is arbitrary in violation of well-established constitutional principles." (Docket No. 110 at 2.) Respondent respectfully disagrees.

As Justice Thomas has explained, since the time Justice Stevens first wrote on the issue after certiorari was denied in *Lackey*, to date, "[t]here is simply no authority 'in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed.'" *Johnson v. Bredesen*, 558 U.S. 1067, 130 S. Ct. 541, 544-45, 175 L. Ed. 2d 552 (2009)

[3] In Petitioner's case, it has been nearly twenty years since he was sentenced to death.

(Thomas, J., concurring in denial of certiorari), quoting *Thompson v. McNeil*, 556 U.S. 1114, 129 S. Ct. 1299, 1301 (2009) (Thomas, J., concurring in denial of certiorari). The sole source of the delay in execution of sentence in this case is the condemned inmate pursuing post-conviction relief. Not once has Jones expressed disappointment with the speed, or lack thereof, with which the process is operating.[4] And of course, Jones has never agreed to forego post-conviction review and simply submit to execution. "It makes 'a mockery of our system of justice . . . for a convicted murderer, who, through his own interminable efforts of delay . . . has secured the almost-indefinite postponement of his sentence, to then claim that the almost-indefinite postponement renders his sentence unconstitutional." *Thompson v. McNeil*, 556 U.S. 1114, 129 S. Ct. 1299, 1301 (2009) (Thomas, J., concurring in denial of certiorari) quoting *Turner v. Jabe*, 58 F.3d 924, 933 (4th Cir. 1995) (Luttig, J., concurring in judgment). To find a basis upon which relief could be granted for an inmate's delayed execution resulting from pursuit of post-conviction remedies, the Supreme Court (and this Court) would have to "invent a new Eighth Amendment right." *Thompson v. McNeil*, 129 S. Ct. at 1301.

It is beyond any reasonable debate that the Supreme Court has never held that the execution of a small number of individuals who outlive a lengthy post-conviction review process - even if it is dysfunctional - violates the Eighth Amendment, or some other constitutional provision, or some combination of well-established constitutional principles. The Ninth Circuit has expressly recognized this fact. *Smith v. Mahoney*, 569 F.3d 1133, 1153 (9th Cir. 2010) ("We have rejected *Lackey* claims in the past. In *Allen v. Ornoski*, 435 F.3d 946 (9th Cir.2006), we determined, in the context of AEDPA, that '[t]he Supreme Court has

[4] Arguing that it would be unconstitutional to execute Petitioner after such a long time on death row is not the same as arguing the review process and his execution should happen faster.

never held that execution after a long tenure on death row is cruel and unusual punishment.' *Id*. at 958"). Therefore, relief is barred by § 2254(d).

**2. Conditions of Confinement**

Petitioner also contends that the conditions of his confinement while he is awaiting execution violate the Eighth Amendment because they are physically and psychologically torturous. (Opening Brief at 25-41.) He argues that the physical conditions on California's death row death row are substandard and inhumane. (Opening Brief at 26-35.) He also argues that the uncertainty concerning the method by which he will be executed, and whether he will ever be executed, is psychologically tortuous. (Opening Brief at 35-41.) These claims are barred under § 2254(d) because they concern challenges to the conditions of confinement.

Traditionally, challenges to prison conditions are cognizable only under 42 U.S.C. § 1983, while challenges implicating the fact or duration of confinement are brought through a habeas action. *Docken v. Chase*, 393 F.3d 1024, 1026 (9th Cir. 2004). "'Federal law opens two main avenues to relief on complaints related to imprisonment: a petition for habeas corpus, 28 U.S.C. § 2254, and a complaint under the Civil Rights Act of 1871, Rev. Stat. § 1979, as amended, 42 U.S.C. § 1983. Challenges to the lawfulness of confinement or to particulars affecting its duration are the province of habeas corpus.'" *Hill v. McDonough*, 547 U.S. 573, 579, 126 S. Ct. 2096, 165 L. Ed. 2d 44 (2006) (quoting *Muhammad v. Close*, 540 U.S. 749, 750, 124 S. Ct. 1303, 158 L. Ed. 2d 32 (2004)). "An inmate's challenge to the circumstances of his confinement, however, may be brought under § 1983." *Id*.; *see Skinner v. Switzer*, 131 S. Ct. 1289, 1299 n.13, 179 L. Ed. 2d 233 (2011) ("when a prisoner's claim would not 'necessarily spell speedier release,' that claim does not lie at 'the core of habeas corpus,' and may be brought, if at all, under § 1983"); *Ramirez v. Galaza*, 334 F.3d 850, 856 (9th Cir. 2003) ("Suits challenging the validity of the prisoner's continued incarceration lie within 'the heart of habeas corpus,' whereas 'a § 1983 action is a proper remedy for a state prisoner who is

making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody'"). Here, Petitioner's challenge to the conditions of his confinement (unhealthy living conditions, isolation, inadequate medical treatment, etc.) and his claim that such conditions are physically and psychologically torturous are not challenges to the fact or duration of his custody. Therefore, the claim is not cognizable in these habeas proceedings. And even if the allegations of psychic pain are somehow an attack on the duration of Petitioner's pre-execution custody, the Supreme Court has never held that such allegations support a basis for habeas corpus relief. The claim must be rejected.

**3. Equal Protection**

Petitioner further contends that his execution would violate equal protection because he must endure lengthy and indefinite incarceration as a capital petitioner seeking post-conviction relief whereas non-capital petitioners seeking post-conviction relief do not endure such lengthy and indefinite incarceration. (Opening Brief at 42-47.) But the Supreme Court has never held that execution following lengthy and indefinite incarceration while a capital petitioner seeks post-conviction relief violates equal protection. Indeed, the reason is self-evidence. Capital and non-capital prisoners are not similarly situated. *Massie v. Hennessey*, 875 F.2d 1386, 1389 (9th Cir. 1989). Thus, relief on this claim is barred by § 2254(d).

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## CONCLUSION

For the reason stated above, granting relief on Claim 27 would be impermissible.

Dated: June 30, 2014

Respectfully submitted,

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