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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

ERNEST DEWAYNE JONES,
Petitioner,

V.

KEVIN CHAPPELL, Warden of California State Prison at San Quentin,
Respondent.

Case No. CV-09-2158-CJC

DEATH PENALTY CASE

RESPONSE TO RESPONDENT'S OPENING BRIEF ON CLAIM 27

Date: August 4, 2014
Time: 11:00 a.m.
Courtroom: 9B

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I. INTRODUCTION

Pursuant to this Court's June 11, 2014 Order, Mr. Jones submits this response to respondent's brief on Claim 27. Order Amending Briefing Schedule and Setting Hearing on Claim 27, June 11, 2014, ECF No. 110. In its "Opening Brief on Claim 27 that Lengthy Confinement of Petitioner Under Sentence of Death Violates [the] Eighth Amendment," respondent asserts that (1) Mr. Jones failed to comply with the exhaustion doctrine; (2) a portion of the claim is not ripe for review; and (3) relief is bared by 28 U.S.C. section 2254(d). Opening Brief on Claim 27 that Lengthy Confinement of Petitioner Under Sentence of Death Violates Eighth Amendment (Resp. Opening Br.) at 2-7, June 9, 2014, ECF No. 107. Respondent's arguments, however, reflect a fundamental misunderstanding of the nature of the claims presented in the state court and this Court, the California Supreme Court's limited resolution of the claim on direct appeal, and the effect of respondent's express waiver of the exhaustion requirement after Mr. Jones filed his federal Petition for Writ of Habeas Corpus in 2010.

Mr. Jones presented a portion of Claim 27 to the state court on direct appeal. Appellant's Opening Br. at 229-43, Notice of Lodging, Apr. 6, 2010, ECF No. 29 ("NOL") at B1; Appellant's Reply Br. at 100, NOL at B3. Specifically, Mr. Jones presented to the state court a "twofold" claim: "first, that delay in itself constitutes cruel and unusual punishment; and second, that the actual carrying out of the execution would serve no legitimate penological ends." Appellant's Opening Br. at 240-41. Mr. Jones supported his claim with citations to legal authorities noting that the physical conditions and emotional and mental anguish that death row inmates face while awaiting execution – described in the Appellant's Opening Brief as "death row phenomenon" – constitute cruel and unusual punishment. Appellant's Opening Br. at 229-43; *see also* Appellant's Opening Br. at 237 (arguing that Mr. Jones's ten-year appellate process and additional habeas corpus proceedings exceed the "length of stay" considerations in *Soering v. United*

Kingdom, App. No. 14038/88, 11 Eur. H. R. Rep. 439 (1989)).

> The state court's adjudication of the claim consisted of the following: Defendant's argument that "one under judgment of death suffers cruel and unusual punishment by the inherent delays in resolving his appeal is untenable. If the appeal results in reversal of the death judgment, he has suffered no conceivable prejudice, while if the judgment is affirmed, the delay has prolonged his life."

People v. Jones, 29 Cal. 4th 1229, 1267, 131 Cal. Rptr. 2d 468 (2003) (citing and quoting *People v. Anderson*, 25 Cal. 4th 543, 606, 106 Cal. Rptr. 2d 575 (2001)).

In the Petition for Writ of Habeas Corpus filed in this Court, Mr. Jones significantly expanded on the legal and/or factual bases for Claim 27. Citing to several constitutional provisions, Mr. Jones alleged entitlement to relief because (1) California failed to provide "a constitutionally full, fair, and timely review of his conviction and sentence"; (2) California's excessive "delay in" the "final resolution" of cases "far exceeds that of any other state with capital punishment" and was not attributable to Mr. Jones's actions; (3) the deplorable conditions at San Quentin are "psychologically torturous, degrading; brutalizing, and dehumanizing"; (4) there are a significant number of deaths by suicide or other causes at San Quentin compared to the few executions that have occurred; and (5) several of the executions that have occurred have been botched. Petition for Writ of Habeas Corpus By a Prisoner in State Custody (28 U.S.C. § 2254) (Petition), Mar. 10, 2010, at 414-18, ECF No. 26. Mr. Jones also supplemented the appellate claim with additional factual allegations his claims that: (1) the uncertainty of execution inflicts unconstitutional "psychological suffering"; (2) execution after such an excessive delay negates any legitimate purpose – including retribution and deterrence – to be served by capital punishment; and (3) based on the forgoing, executing Mr. Jones after the excessive delay (fifteen years since the death judgment) that already has occurred and the "several more years likely" to pass and

under the conditions at San Quentin "would involve the needless infliction of avoidable mental anguish and psychological pain and suffering were it to occur." Petition at 414-18.

Mr. Jones presented the California Supreme Court with this enhanced claim in the state petition filed contemporaneously with the federal petition, but Mr. Jones withdrew that petition and the California Supreme Court did not review the claim because respondent expressly waived the exhaustion defense as to all claims in the federal petition. *See* Answer to Petition for Writ of Habeas Corpus, filed April 6, 2010, at 2 n.3, ECF No. 28 (noting that "Respondent is not asserting that any claims in the instant federal Petition are unexhausted"); Response to Application to Defer Informal Briefing on Petition for Writ of Habeas Corpus, Mar. 25, 2010, *In re Jones*, California Supreme Court Case No. S180926 at 1, Supplemental Notice of Lodging of Documents, filed May 13, 2010, ECF No. 42 at F8 (stating "respondent has examined the federal petition and has determined that all claims therein appear to be exhausted....Respondent will therefore be filing an answer to the federal petition and will not be asserting that any claims are unexhausted."); *see also* 28 U.S.C. § 2254(b)(3) (excusing exhaustion requirement when "the State, through counsel, expressly waives the requirement").

Thus, respondent's exhaustion and section 2254(d) arguments must account for the limited review that the state court conducted with respect to the claim raised in Appellant's Opening Brief and respondent's decision to waive any exhaustion objections to the claim pled in the Petition filed in this Court in 2010. Rejection of respondent's arguments is thus mandated.

II. THE EXHAUSTION DOCTRINE DOES NOT PRECLUDE THIS COURT FROM GRANTING RELIEF ON CLAIM 27.

Respondent asserts that a portion of Mr. Jones's Claim 27 – the portion alleging an Eighth Amendment violation based on delay caused by the current lack of an execution protocol in California – is unexhausted. Resp. Opening Brief at 2.

Respondent is incorrect. This portion of Claim 27 is in fact exhausted because it is sufficiently related and intertwined with the claim that was raised on appeal and the claim to which respondent expressly waived any exhaustion objections. Even if this Court finds otherwise, this portion of Claim 27 is properly before this Court because: (1) it would be otherwise futile for Mr. Jones to return to the California Supreme Court; and (2) the exhaustion requirement must be excused because the circumstances of this case render the California corrective process ineffective to protect Mr. Jones's rights.

Federal habeas relief is generally available to state prisoners only after they have exhausted their claims in state court. 28 U.S.C. § 2254(b); *see also O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999); *Vasquez v. Hillery*, 474 U.S. 254, 257, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986) (purpose of exhaustion doctrine is "to afford the state courts a meaningful opportunity to consider allegations of legal error without interference from the federal judiciary"). The exhaustion doctrine, however, is a matter of federalism and comity, not of jurisdiction. *See, e.g.*, *Granberry v. Greer*, 481 U.S. 129, 134, 107 S. Ct. 1671, 95 L. Ed. 2d 119 (1987); *see also Coleman v. Thompson*, 501 U.S. 722, 731, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). A claim is exhausted for purposes of legal and factual exhaustion if it has been "fairly present[ed]" to the state courts, so that the state court has an "'opportunity to pass upon and correct' alleged violations" of petitioner's federal rights. *Duncan v. Henry*, 513 U.S. 364, 365, 115 S. Ct. 887, 130 L. Ed. 2d 865 (1995) (quoting *Picard v. Connor*, 404 U.S. 270, 275, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971)).

A. Claim 27 is Exhausted in its Entirety.

Mr. Jones provided the state court the opportunity to "pass upon" his claim that the uncertainly of whether he will be executed following an extraordinarily lengthy delay in execution of his sentence renders his death sentence unconstitutional. Appellant's Opening Br. at 230 (quoting *In re Medley*, 134 U.S.

160, 172, 10 S. Ct. 384, 33 L. Ed. 835 (1890)); *see also* Petition at 417 (alleging "psychological suffering" caused by uncertainty of execution and quoting *In re Medley*); Petition at 418 (alleging "needless inflection of avoidable mental anguish and psychological pain and suffering"). In the Amended Petition for Writ of Habeas Corpus, Mr. Jones listed the lack of a valid lethal injection protocol as a more specific reason why the unconscionable delay in the final resolution of his case violates the Constitution. First Amended Petition for Writ of Habeas By A Prisoner in State Custody (28 U.S.C. § 2254) (First Amended Petition) at 421-22, Apr. 28, 2014, ECF No. 105. Nonetheless, the nature of the claim – that the uncertainty of whether Mr. Jones will be executed after an extraordinarily lengthy delay is unconstitutional – was unaffected by the amendment.

Thus, Mr. Jones's argument that California's lack of a valid execution protocol further violates the Eighth Amendment is sufficiently related and intertwined with the claim that was presented to the state court (and the claim to which respondent waived exhaustion) to satisfy the exhaustion requirement. *See Lounsbury v. Thompson*, 374 F.3d 785, 788 (9th Cir. 2004) (holding that by exhausting his procedural due process challenge in his state court petition, petitioner had fairly presented his substantive due process claim that he was tried while mentally incompetent because "the clear implication of his claim was that by following a constitutionally defective procedure, the state court erred in finding him competent."). Claims are "sufficiently related" or "intertwined" for exhaustion purposes when, by raising one claim, the petition clearly implies another error. *Id.* at 788. Here, Mr. Jones's state claim that the extraordinary delay in the execution of sentence clearly encompassed any additional delays attributable to the state, such as the current lack of an execution protocol. This augmented allegation to Claim 27 only provided further factual support for the claim; it relies on the same federal legal theory as well as the same operative facts. *Gray v. Netherland*, 518 U.S. 152, 162-63, 116 S. Ct. 2074, 135 L. Ed. 2d 457 (1996);

Gaitlin v. Madding, 189 F.3d 882, 888 (9th Cir. 1999). Accordingly, Claim 27 is exhausted in its entirety.

B. The Portion of Claim 27 Regarding California's Lack of an Execution Protocol Must be Deemed Exhausted Because California Does Not Provide A Viable Forum for Mr. Jones to Present it.

Even if this Court finds that Claim 27 is partially unexhausted, this Court should nevertheless consider that portion of Claim 27 because it would be futile for Mr. Jones to return to state court. The exhaustion requirement applies only when state remedies are available. *See, e.g.*, *Engle v. Isaac*, 456 U.S. 107, 125-26 n.28, 102 S. Ct. 1558, 71 L.Ed.2d 783 (1982). "'[I]n determining whether a remedy for a particular constitutional claim is 'available,' the federal courts are authorized, indeed required, to assess the likelihood that a state court will accord the habeas petitioner a hearing on the merits of his claim.'" *Phillips v. Woodford*, 267 F.3d 966, 974 (9th Cir. 2001) (quoting *Harris v. Reed*, 489 U.S. 255, 268, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989) (O'Connor, J., concurring)). "'[F]ederal courts should defer action only if there is some reasonable probability that (state) relief . . . will actually be available.'" *Matias v. Oshiro*, 683 F.2d 318, 320 (9th Cir. 1982) (quoting *Powell v. Wyrick*, 657 F.2d 222, 224 (8th Cir. 1981)); *see also Sweet v. Cupp*, 640 F.2d 233, 236 (9th Cir. 1981) (holding petitioner need not exhaust state remedies which would clearly be futile).

Here, Mr. Jones has insufficient state remedies available to him because of the inevitable inordinate state court delay in resolving habeas corpus petitions and the extreme unlikelihood that the state court would consider the claim on its merits. As Mr. Jones detailed in his First Amended Petition and Opening Brief on Claim 27, the California Supreme Court summarily denies the overwhelming majority of capital habeas corpus petitions without any explication of its reasoning and it is the very rare circumstance in which it issues orders to show cause (eight percent of habeas corpus proceedings) and the rarer circumstances that it holds an evidentiary

hearing (less than five percent of habeas corpus proceedings). *See* First Amended Petition at 418, Petitioner's Opening Br. on Claim 27 at 13-1, June 9, 2014, ECF No. 109.[1] Moreover, the California Supreme Court has denied claims similar or identical to Claim 27 on the merits in forty-one decisions on direct appeal and ninety-five orders in state habeas corpus proceedings, and has never found that a petitioner has stated a prima facie case requiring the issuance of an order to show cause, let alone granted relief on the claim. Far from demonstrating "a reasonable probability that [state] relief will actually be available," *Matias*, 683 F.2d at 320, this dysfunctional system guarantees that the California Supreme Court will conclude that he has not stated a prima facie case for relief. *Phillips*, 267 F.3d at 974.

C. California's Dysfunctional Death Penalty System Exempts Claim 27 From the Exhaustion Requirement.

Finally, regardless whether Claim 27 has been exhausted in its entirety, this Court must consider it because the ineffectiveness of California's corrective process require that any unexhausted portion of the claim be excused from the exhaustion requirement pursuant to 28 U.S.C. section 2254(b)(1)(B)(ii).[2] As a

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[1] In this case specifically, the California Supreme Court took six and a half years to summarily deny Mr. Jones's habeas petition and it did not provide him a hearing or resolve any factual disputes.

[2] 28 U.S.C. section 2254(b) provides:

> (1) 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 unless it appears that–
> (A) the applicant has exhausted the remedies available in the courts of the State; or
> (B) (i) there is an absence of available State corrective process; or
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

result of the extraordinary delay in this case, primarily due to the dysfunction of California's death penalty system, Mr. Jones's rights to merits review outweigh the jurisprudential concerns that underlie the exhaustion requirement. Mr. Jones has been waiting for final review of his conviction and sentence for nineteen years, and he will inevitably wait many more. More than four years passed before the California Supreme Court appointed counsel to represent Mr. Jones in his automatic appeal, over eight years passed between Mr. Jones's sentencing and the California Supreme Court's affirmance of his sentence, and over six and a half additional years passed before the Court ruled on Mr. Jones's state habeas petition. First Amended Petition at 415-17. There is simply no reasonable justification for this delay, and there is "no end in sight" to the delay. *See Phillips*, 56 F.3d at 1035. The delay is attributable only to the California state authorities' failure to adequately fund the system and decide cases in a prompt manner.

Federalism and comity must give way in this case given the extreme delay. "Although the requirement of exhaustion and its underlying principles form a threshold test for habeas relief, they are designed as an 'accommodation' rather than an 'insuperable barrier.'" *Hankins v. Fulcomer*, 941 F.2d 246, 249 (3d Cir. 1991) (quoting *Wilwording v. Swenson*, 404 U.S. 249, 250, 92 S. Ct. 407, 30 L. Ed. 2d 418 (1971)); *see also Lee v. Stickman*, 357 F.3d 338 (3d Cir. 2004) (exhaustion excused because of eight-year delay in state post-conviction collateral proceedings). The circumstances in this case render the California corrective process ineffective to protect Mr. Jones's rights. Accordingly, the requirement of exhaustion should be excused as to the execution protocol portion of Claim 27. *See, e.g., Coe v. Thurman*, 922 F.2d 528. 531 (9th Cir. 1990) (delay of three-years and eight months from time of filing of notice of appeal in California direct appeal excused exhaustion); *Harris v. Champion*, 15 F.3d 1538, 1556 (10th Cir. 1994) (delay of more than two years from notice of appeal in direct appeal process gives rise to a presumption that the process is ineffective); *Wojtczak v. Fulcomer*, 800

F.2d 353 (3d Cir. 1986) (three and one-half year delay inordinate); *Lowe v. Duckworth*, 663 F.2d 42 (7th Cir. 1981) (three and one-half year delay inordinate); *Dozie v. Cady*, 430 F.2d 637 (7th Cir. 1970) (seventeen-month delay inordinate); *compare Hamilton v. Calderon*, 134 F.3d 938 (9th Cir. 1998) (less than two-year delay in review by California Supreme Court not extreme).[3]

Application of this exception to the exhaustion requirement is particularly applicable to Claim 27, which is premised upon the lengthy delays inherent in California system. As detailed in Mr. Jones's Opening Brief, the Attorney General's insistence on requiring habeas corpus petitioners to return to the California Supreme Court to exhaust state remedies has been a substantial reason for the delay in the resolution of capital cases. Petitioner's Opening Br. on Claim 27 at 12. Requiring Mr. Jones to return to the state courts to exhaust a small portion of Claim 27 will result in years of additional litigation. Petitioner's Opening Br. on Claim 27 at 12-13 (noting historical data that the California Supreme Court takes over three years to resolve exhaustion petitions). Moreover, the unconscionable delay that forms the basis of Claim 27 would only increase, exacerbating the constitutional violation that Mr. Jones seeks to remedy. As one court noted, "[i]t is the legal issues that are to be exhausted, not the petitioner." *Burkett v. Cunningham*, 826 F.2d 1208, 1218 (3d Cir. 1987) (citations omitted).

[3] "Inordinate delay" is different from and something less than "extraordinary delay." *See Coe*, 922 F.2d at 531 ("four years is an alarming amount of time"); *Phillips*, 56 F.3d at 1034 n.3 (finding fifteen-year delay in guilt phase review allows federal court to review guilt phase claims prior to state penalty phase retrial). The decision to excuse exhaustion is affected by the nature of the proceeding. To excuse a portion of an already exhausted claim excused from the requirement due to inordinate delay requires a much less significant showing of delay than to deem the entire penalty phase trial, appeal, and post-conviction excessively delayed as in *Phillips*, 56 F.3d at 1035.

III. THE RIPENESS DOCTRINE DOES NOT PRECLUDE THE GRANTING RELIEF ON CLAIM 27.

Respondent asserts that resolution of Claim 27 is not ripe for review insofar as it relies upon the lack of a lethal injection protocol. Resp. Opening Br. at 4-5. Respondent's argument relies upon the assertion that "[a]ny delay in the execution of Petitioner's death sentence has not been attributable to the lack of an execution protocol." Resp. Opening Br. at 4 (emphasis omitted).

Respondent's misconstrues this portion of Claim 27. To be sure, the absence of a valid lethal injection protocol presents another reason why California's death penalty mechanism is dysfunctional and will give rise to significant litigation that will delay or entirely preclude executions. As detailed in Mr. Jones's Opening Brief, however, the crux of his claim is that lack of a valid protocol and uncertainty of the methods that California will adopt for carrying out executions "significantly increase the psychological torture imposed on Mr. Jones by California's death penalty scheme." Petitioner's Opening Br. on Claim 27 at 37-40. Mr. Jones has suffered these constitutional injuries for several years and will continue to suffer them unless this Court resolves Claim 27 immediately. Under such circumstance, the ripeness doctrine is inapplicable. *See, e.g.*, *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 732-33, 118 S. Ct. 1665, 140 L. Ed. 2d 921 (1998) (evaluating "whether the courts would benefit from further factual development of the issues presented" to determine whether ripeness doctrine applies); *Duke Power Co. v. Carolina Envt'l Study Group, Inc*., 438 U.S. 59, 74-75, 98 S. Ct. 2620, 57 L. Ed. 2d 595 (1978) (holding ripe constitutional challenges to a statute because "delayed resolution of these issues would foreclose any relief from the present injury suffered by appellees").

IV. THE LIMITATIONS CONTAINED IN 28 U.S.C. § 2254(D) DO NOT PRECLUDE THE GRANTING RELIEF ON CLAIM 27.

Respondent argues that Mr. Jones's claim is barred by 28 U.S.C. § 2254(d)

"because there is no clearly established law from the United States Supreme Court endorsing a claim of cruel and unusual punishment for a lengthy delay between conviction and execution of a capital sentence." Resp. Opening Br. at 5. Respondent's argument fails for several reasons.

First, respondent rests its argument entirely on applying section 2254(d) and asserting that there is no clearly established federal law supporting Mr. Jones's claim. Resp. Opening Br. on Claim 27 at 5-7. Citing a 2006 Ninth Circuit case that so held, respondent argues that federal habeas relief is barred. Resp. Opening Br. at 7 (citing *Allen v. Ornoski*, 435 F.3d 946, 958 (9th Cir. 2006)). But the petitioner in *Allen*, unlike Mr. Jones, based his claim solely on Eighth Amendment grounds. *Compare Allen*, 435 F.3d at 955 (noting that petitioner's claim is that twenty-three years under horrific conditions of confinement violate the Eighth Amendment), *with* Petitioner's Opening Br. on Claim 27 at 2-16, 25, 42-47 & n.17 (raising Equal Protection and due process grounds for relief). *Allen* is further distinguishable because the uncertainty that exists about the final resolution in Mr. Jones's case, as set forth in Petitioner's Opening Brief on Claim 27 at pages 37 through 41, has drastically increased since 2006, particularly in light of the California Department of Corrections and Rehabilitation's failure to lawfully promulgate an execution protocol that comports with constitutional requirements. These additional facts bring Mr. Jones' claim in line with the clearly established law set forth in his Opening Brief on Claim 27. *See* Petitioner's Opening Br. at 25-41 (citing the supporting clearly established federal law, including *Rhodes v. Chapman*, 452 U.S. 337, 347, 101 S. Ct. 2392, 69 L. Ed. 2d 59 (1981); *Hutto v. Finney*, 437 U.S. 678, 98 S. Ct. 2565, 57 L. Ed. 2d 522 (1978); *Estelle v. Gamble*, 429 U.S. 97, 103, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976); *Trop v. Dulles*, 356 U.S. 86, 101-02, 78 S. Ct. 590, 598, 2 L. Ed. 2d 630 (1958) (plurality opinion); *In re Medley*, 134 U.S. 160, 172, 10 S. Ct. 384, 33 L. Ed. 835 (1890); and *In re Kemmler,* 136 U.S. 436, 447, 10 S. Ct. 930, 34 L. Ed. 519 (1890)). Similarly, since

2006, California's death penalty system's dysfunction has steadily increased such that the California death penalty fails to further the penological goals of retribution and deterrence. Petitioner's Opening Br. at 2-25; *see also* section IV.D., *infra*. Accordingly, Mr. Jones's claim is distinguishable from *Allen* and squarely governed by the clearly established federal law set forth in the Opening Brief on Claim 27 and herein.

Second, and more fundamentally, respondent's Opening Brief on Claim 27 entirely fails to address the threshold question a court must answer before it can apply AEDPA deference: whether section 2254(d) is applicable. Instead, respondent assumes, without any support, that the state court's adjudication of the claim was an adjudication on the merits and that it resolved the identical claim presented to this Court. Resp. Opening Br. on Claim 27 at 5-6. Section 2254(d), however, applies only to claims that have been "adjudicated on the merits" in state-court proceedings. 28 U.S.C. § 2254(d).

Third, respondent's argument fails because respondent ignores the fact that there are two ways in which a claim that has been adjudicated on the merits by the state court may satisfy section 2254(d). The first, as noted by respondent, is if the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). For the reasons set forth below, Mr. Jones satisfies section 2254(d)(1). Mr. Jones may additionally satisfy section 2254(d) if the state court's adjudicated of his claim "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." 28 U.S.C. § 2254(d)(2).

Finally, respondent fails entirely to address the applicability of § 2254(d)(2). Mr. Jones also satisfies § 2254(d)(2) for the reasons described below. Accordingly, he is entitled to de novo review of his claim.

A. Mr. Jones is Entitled to De Novo Review Because the State Court Did Not Adjudicate His Claim on the Merits.

Where the state court "did not reach the merits of [the petitioner's constitutional] claim[,] federal habeas review is not subject to the deferential standard that applies under AEDPA to 'any claim that was adjudicated on the merits in State court proceedings.'"; "[i]nstead, the claim is reviewed *de novo*." *Cone v. Bell*, 556 U.S. 449, 472, 129 S. Ct. 1769, 1784, 173 L. Ed. 2d 701 (2009) (quoting 28 U.S.C. § 2254(d)); *see also Rompilla v. Beard*, 545 U.S. 374, 390, 25 S. Ct. 2456, 2467, 162 L. Ed. 2d 360 (2005) (reviewing the prejudice prong of the *Strickland* inquiry de novo because the state court did not reach prejudice).

1. The California Supreme Court never adjudicated Claim 27 as presented to this Court.

In its opinion in *Cullen v. Pinholster*, the Supreme Court explicitly held that "not all federal habeas claims by state prisoners fall within the scope of § 2254(d), which applies only to claims 'adjudicated on the merits in State court proceedings.'" *Cullen v. Pinholster*, __ U.S. __, 131 S. Ct. 1388, 1401, 179 L. Ed. 2d 557 (2011) (holding the restrictions of section 2254(e)(2) applicable when "federal habeas courts … decid[e] claims that were not adjudicated on the merits in state court"). The Court further recognized that claims outside the scope of section 2254(d) may include instances where evidence developed after the conclusion of state court proceedings produces a "new claim" for 2254(d) purposes, although related in some way to a claim adjudicated on the merits in state court. *Pinholster*, 131 S. Ct. at 1401 n.10 (declining to "draw the line between new claims and claims adjudicated on the merits" but noting that a hypothetical situation in which new evidence arises after the state court has adjudicated a claim on the merits may well give rise to a new claim). Though the Supreme Court did not "draw the line" between new claims and previously adjudicated claims in *Pinholster*, it previously has held that a claim involving evidence that "fundamentally alter[s] the legal

claim already considered by the state courts" is a claim that requires exhaustion. *Hillery*, 474 U.S. at 260.

The Ninth Circuit, therefore, long has held that that a federal habeas claim is sufficiently distinct from a claim previously presented to the state court "if new factual allegations either fundamentally alter the legal claim already considered by the state courts, or place the case in a significantly different and stronger evidentiary posture than it was when the state courts considered it." *Dickens v. Ryan*, 740 F.3d 1302, 1318 (9th Cir. 2014) (internal quotations omitted). Following the Supreme Court decision in *Pinholster*, the Ninth Circuit held that a claim that has not been fairly presented to a state court according to these guidelines has not been "adjudicated on the merits" for purposes of section 2254(d). *Id*. at 1320 (rejecting "any argument that *Pinholster* bars the federal district court's ability to consider Dickens's 'new' IAC claim" a claim that added "extensive factual allegations" to the original ineffective assistance of counsel claim presented in the state court); *see also, e.g., Green v. Thaler*, 699 F.3d 404, 420 (5th Cir. 2012); *Roybal v. Chappell*, No. 99CV2152-JM KSC, 2013 WL 6589381 (S.D. Cal. Dec. 16, 2013).

These well-established principles preclude any application of section 2254(d) to Claim 27. As detailed in the section I, *supra*, Claim 27 presents substantially different factual and legal bases than the claim presented in the direct appeal. In particular, Mr. Jones alleged facts regarding the state's dysfunctional system that fails to provide full, fair, and timely review of capital judgments and which produces excessive delay that is unique among states with capital punishment; the deplorable conditions at San Quentin that are psychologically torturous, degrading, brutalizing, and dehumanizing; the high rate of deaths by suicide or other causes at San Quentin compared to the few executions that have occurred; the uncertainty of execution or even resolution of his case that results in unconstitutional psychological trauma; and the excessive delay (fifteen years since

the imposition of the death judgment) that already has occurred and the "several more years likely" to pass and under the conditions at San Quentin "would involve the needless infliction of avoidable mental anguish and psychological pain and suffering were it to occur." Petition at 414-18.

Although respondent waived exhaustion of Claim 27,[4] these facts substantially altered the claim that was presented in the direct appeal and thus Claim 27 is distinct from the claim that California Supreme Court resolved. *See e.g.*, *Green*, 699 F.3d at 420 (holding that where the state court rejected a competency-to-be-executed claim in 2010, subsequent competency-to-be-executed claim in the federal petition based on updated mental health evidence was a "new claim"); *Roybal*, 2013 WL 6589381 (S.D. Cal. Dec. 16, 2013) (granting leave to amend federal petition with new claims and rejecting state argument that 2254(d) would foreclose consideration of them). Thus, the limitation contained in section 2254(d) are inapplicable and this Court must review the merits of the claim de novo. *See, e.g.*, *Dickens*, 740 F.3d at 1320.

2. The California Supreme Court did not adjudicate the appellate claim on the merits.

Similarly, section 2254(d) is inapplicable to the portion of the claim that was presented in the direct appeal. The state court's adjudication of Mr. Jones's claim contains no citation to federal law; rather, it simply deems Mr. Jones' claim "untenable" and concludes that Mr. Jones cannot demonstrate prejudice because any delay will have prolonged his life if the judgment is affirmed and he will not have been prejudiced – in other words, he will not be executed – if the judgment is reversed. *Jones*, 29 Cal. 4th at 1267. The state court thus did not reach the question of whether the physical conditions under which Mr. Jones has suffered

[4] As noted above, respondent's express waiver of exhaustion estops respondent from reliance on the exhaustion requirement. 28 U.S.C. § 2254(b)(3).

and continues to suffer, as well as the mental anguish his circumstances have engendered while awaiting execution, constitute cruel and unusual punishment.

Although the Supreme Court has held that there is a presumption that such a state court denial of a claim constitutes an adjudication on the merits, even when the state court does not address a petitioner's claim, this presumption is rebuttable: "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits *in the absence of any indication or state-law procedural principles to the contrary*." *Harrington v. Richter*, 562 U.S. ___, 131 S. Ct. 770, 784-85 (2011) (emphasis added). Here, state-law procedural principles defeat the presumption that the state court adjudicated Mr. Jones' claim on the merits.

State law procedural principles dictate that the state court decide Mr. Jones's based solely on the appellate record and ignore the additional facts Mr. Jones cited in support of his claim.[5] *See, e.g.*, *People v. Barnett*, 17 Cal. 4th 1044, 1183, 74 Cal. Rptr. 2d 121 (1998) (declining to consider a capital defendant's claim that

[5] The state court's precedent in other cases is relevant to assessing its adjudication of Mr. Jones's claim because "[c]ourts are as a general matter in the business of applying settled principles and precedents of law to the disputes that come to bar." *Beam Distilling Co. v. Georgia*, 510 U.S. 529, 534 (1991). The state court is presumed to have applied already decided legal principles and precedents when those principles and precedents predate the events on which the dispute turns. *Id.* That the state court applied these principles in Mr. Jones's case is further supported by the fact that the California Supreme Court continued to apply this precedent to similar claims in the years following its adjudication of Mr. Jones's claim. *See, e.g.*, *People v. Ledesma*, 39 Cal. 4th 641, 745, 47 Cal. Rptr. 3d 326, 417 (2006) (holding that defendant's claim that execution after more than twenty-five years of imprisonment constitutes cruel and unusual punishment could not be resolved based on the appellate record and citing *Barnett* in support); *People v. Carter*, 36 Cal. 4th 1114, 1213, 32 Cal. Rptr. 3d 759 (2005) (declining to resolve a claim that execution following lengthy and torturous confinement constitutes cruel and unusual punishment and citing *Barnett* in support).

execution after inordinate delay violated the Eighth Amendment's Cruel and Unusual Punishment Clause because it relied on "evidence and matters not reflected in the record on appeal," and the state court's review on direct appeal is limited to the appellate record) (citing *People v. Sanchez*, 12 Cal. 4th 1, 59, 47 Cal. Rptr. 2d 843 (1995), *disapproved of other ground by People v. Doolin*, 45 Cal. 4th 390, 87 Cal. Rptr. 3d 209 (2009); *People v. Szeto*, 29 Cal. 3d 20, 35, 171 Cal. Rptr. 652 (1981)). This precedent makes clear that state-law procedural principles foreclosed the state court's use of the facts that petitioner placed before the court in support of his argument that the conditions he endured (and endures) while awaiting execution constitute cruel and unusual punishment; they similarly foreclosed the state court's use of the facts petitioner set forth in support of the argument that his execution after a lengthy delay is unconstitutional. *See Barnett*, 17 Cal. 4th at 1183; *Sanchez*, 12 Cal. 4th at 59; *Szeto*, 29 Cal. 3d at 35. Taken together with the state court's failure to address the portion of Mr. Jones' claim related to the physical conditions under which Mr. Jones has suffered and continues to suffer, as well as the mental anguish his circumstances have engendered while awaiting execution, this rebuts the presumption that the state court adjudicated Mr. Jones' claim on the merits. Accordingly, section 2254(d) does not apply and Mr. Jones is entitled to de novo review. *See, e.g.*, *Winston v. Kelly*, 592 F.3d 555-56 (4th Cir. 2010) ("If the record ultimately proves to be incomplete, deference to the state court's judgment would be inappropriate because judgment on a materially incomplete record is not an adjudication on the merits for purposes of § 2254(d)."), *aff'd* 683 F.3d 489, 498-99 (4th Cir. 2012).

B. Mr. Jones Satisfies Section 2254(d) Because the State Court Had Before It, But Ignored, the Facts Supporting His Claim, and Because the State Court Based Its Ruling on Incorrect Factual Assumptions.

Even if the state court adjudicated Mr. Jones's claim on the merits, Mr. Jones nevertheless surmounts section 2254(d) because the state court had before it, but

ignored, the facts supporting his claim, and because the state court based its ruling on incorrect factual assumptions. As set forth above, in reaching its conclusion that Mr. Jones did not suffer (and will not suffer) any prejudice, the state court undoubtedly failed to consider the facts and authorities establishing the existence of psychological harm from uncertain, but lengthy, pre-execution delays in support of Mr. Jones's claim. In addition, the state court made several factual assumptions rooted in either incomplete evidence or no evidence, and, as a consequence, made erroneous factual findings.

First, the state court appears to have assumed that any delay was attributable to Mr. Jones and a function of Mr. Jones availing himself of his rights to review. In adjudicating Mr. Jones' claim, the state court quoted and cited *People v. Anderson*, which rejected the appellant's claim in part because "the automatic appeal process following judgments of death is a constitutional safeguard, not a constitutional defect . . . because it assures careful review of the defendant's conviction and sentence." *Anderson*, 25 Cal. 4th at 605 (internal citations omitted).

Anderson, in turn, relied on two previous California Supreme Court opinions. *People v. Hill*, 3 Cal. 4th 959, 1015-16, 13 Cal. Rptr. 2d 475 (1992), *overruled on other grounds by Price v. Superior Court*, 25 Cal. 4th 1046, 108 Cal. Rptr. 2d 409 (2001); *People v. Frye*, 18 Cal. 4th 894, 1030, 77 Cal. Rptr. 2d 25 (1998), *disapproved of on other grounds by People v. Doolin*, 45 Cal. 4th 390, 87 Cal. Rptr. 3d 209 (2009). In both *Hill* and *Frye*, the California Supreme Court held that pre-execution delays did not violate the Eighth Amendment because the delay was a function of the time it took the capital defendant to avail himself of his rights to review. *Hill*, 3 Cal. 4th at 1015-16; *Frye*, 18 Cal. 4th at 1030-31. These cases are consistent with subsequent state court jurisprudence attributing any pre-execution delay to the petitioner because he wishes to appeal his sentence. *See, e.g.*, *People v. Ochoa*, 26 Cal. 4th 398, 463, 110 Cal. Rptr. 2d 324 (2001) (issuing direct appeal opinion in capital defendant's case nine years after final judgment and

describing defendant as "delaying his execution for these past nine years"), *abrogated on other grounds as stated in People v. Coombs*, 34 Cal. 4th 821, 860 (1995).[6] The state court so concluded despite Mr. Jones's assertion on direct appeal that the delay in his case is "the result of the nature of the [appellate and post-conviction] process and no fault of his own," Appellant's Opening Br. at 240, and the existence of significant evidence in the state court's possession of its own dysfunctional system supporting Mr. Jones' assertion, *see* Petitioner's Opening Br. on Claim 27 at 2-16.

Second, the state court concluded in *Anderson* that the defendant had "no conceivable complaint" of prejudice from the pre-execution delay because "life without possibility of parole was the minimum sentence he faced." 25 Cal. 4th at 606. In so concluding, the state court made a factual determination in Mr. Jones's case that inmates on death row endure conditions comparable to those experienced by inmates sentenced to life without the possibility of parole. The state court made this factual determination based on an assumption; if it considered any evidence in support of this conclusion, such evidence was incomplete, as the state court's factual determination was incorrect. *See* Petitioner's Opening Br. on Claim 27 at 25-41.

Each of these factual errors render the state court's adjudication of Mr. Jones' claim an unreasonable application of clearly established federal law under section 2254(d)(1). *Porter v. McCollum*, 558 U.S. 30, 42, 123 S. Ct. 2527, 156 L.

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[6] This reasoning also contravenes Supreme Court precedent holding that the idea that a petitioner should be forced to forfeit one set of fundamental constitutional rights in order to vindicate a second set of constitutional rights is "intolerable." *Simmons v. United States*, 390 U.S. 377, 394, 88 S. Ct. 967, 976, 19 L. Ed. 2d 1247 (1968). "Obviously, where the state court's legal error infects the fact-finding process, the resulting factual determination will be unreasonable and no presumption of correctness can attach to it." *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004).

Ed. 2d 471 (2009) (concluding that the state court unreasonably applied clearly established federal law because it "did not consider or unreasonably discounted" facts in the record before it); *Wiggins v. Smith*, 539 U.S. 510, 528, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (finding that the state court made incorrect assumptions about the facts and "based its conclusion, in part, on a clear factual error" and "[t]his partial reliance on an erroneous factual finding . . . highlights the unreasonableness of the state court's decision"). The state court's refusal to consider relevant facts further constitutes an unreasonable determination of the facts, and Mr. Jones thus satisfies section 2254(d)(2). *Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003) (holding that § 2254(d)(2) is satisfied where state court "had before it, and apparently ignored," relevant factual information); *Ali v. Hickman*, 571 F.3d 902, 921 (9th Cir. 2009) (holding that § 2254(d)(2) was satisfied where state court ignored comparative juror analysis information in the record, when adjudicating *Batson* claim); *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004) (ruling that the state court fact-finding process is undermined, and § 2254(d)(2) is satisfied, "where the state has before it, yet apparently ignores, evidence that supports petitioner's claim").

C. The State Court's Holding That Mr. Jones Suffered No Conceivable Prejudice is Contrary To Clearly Established Federal Law.

On direct appeal, the state court held that Mr. Jones' argument was "untenable" because, "If the appeal results in reversal of the death judgment, he has suffered no conceivable prejudice, while if the judgment is affirmed, the delay has prolonged his life." *Jones*, 29 Cal. 4th at 1267. The state court's conclusion that Mr. Jones suffered no conceivable prejudice thus necessarily rested on the assumption articulated by the state court in *Hill* and *Frye* that the Eighth Amendment cannot not be violated if an inmate's conviction and sentence are obtained without error. *See Hill*, 3 Cal. 4th at 1015 (holding "the inherent-delay argument is untenable in a capital case, like this one, in which the judgment as to

the defendant's guilt and death-eligibility, *i.e.*, a statutory special circumstance, are affirmed on appeal."); *Frye*, 18 Cal. 4th at 1031 (endorsing the position that it would be a "mockery of justice" if appellant had his sentence reversed because of the time it took for him to pursue unmeritorious claims). The state court thus essentially declined to consider Mr. Jones' claim that the Constitution prohibits his execution based on its conclusion that his conviction and sentence were obtained without error.[7]

This conclusion is contrary to well-established Supreme Court jurisprudence for two reasons. First, it is contrary to established federal law acknowledging that the Eighth Amendment may be violated by the execution of an inmate, even if his conviction and sentence were obtained without error, based on conditions and facts that have emerged since the time that his sentence was imposed. *Ford v. Wainwright*, 477 U.S. 399, 417-18, 105 S. Ct. 2595, 91 L. Ed. 2d 335 (1986); *see also Hall v. Florida*, ___ U.S. ___, 134 S. Ct. 1986, 2001 (May 27, 2014) ("The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution."). Second, the court's conclusion rests on the assumption that Mr. Jones' claim of cruel and unusual punishment is limited to the act of execution. This is not so; as Mr. Jones made clear, the conditions under which he has been forced to live and the mental anguish he has endured during this period of delay, while awaiting execution, constitute cruel and unusual punishment. The state court's dismissal of this claim runs contrary to federal law that has clearly established that conditions of confinement and uncertainties surrounding execution

[7] As Mr. Jones has demonstrated in prior briefing, the state court's conclusion that Mr. Jones' conviction and sentence were obtained without error was also incorrect.

may violate the Eighth Amendment.[8] *See* Petitioner's Opening Br. at 25-41 (citing clearly established federal law in support of petitioner's position).

D. Mr. Jones Satisfies Section 2254(d) Because the State Court Standard is Contrary to Clearly Established Federal Law Regarding the Penological Purposes of the Death Penalty.

The state court's jurisprudence – which it is presumed to have followed in Mr. Jones's case, *see* n.5, *supra* – is also contrary to clearly established federal law regarding principles of retribution and deterrence. In *People v. Ochoa*, the state court first addressed a capital defendant's claim that execution after lengthy delay cannot serve any legitimate penological ends.[9] *Ochoa*, 26 Cal. 4th at 462-64. The court rejected the defendant's claim, concluding "that execution notwithstanding the delay associated with defendant's appeals furthers both the deterrent and retributive functions; shielding defendant from execution solely on this basis would frustrate these two penological purposes." *Id.* at 464. More specifically, the state court concluded—without any citation or factual support—that the conditions of confinement on death row would only serve to enhance the deterrent effect of the death penalty and that "an announcement by this court that any defendant whose automatic appeal has been pending for many years is exempt from subsequent execution would eviscerate any possible deterrent effect of a death sentence." *Id*. at 463. The state court's conclusions regarding deterrence are contrary to clearly established federal law. Established federal law makes clear that "it is fanciful to believe" that a prospective capital defendant in a particular

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[8] As noted above, Mr. Jones satisfies section 2254(d) because the state court failed entirely to adjudicate this portion of Mr. Jones' claim.

[9] Mr. Jones, like the defendant in *Ochoa*, claimed that his execution after lengthy delay serves no legitimate penological purpose. Appellant's Opening Brief at 229-43.

category of offenders would be deterred by the knowledge that a small number of persons within this category of offenders have been executed. *Thompson v. Oklahoma*, 487 U.S. 815, 838, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988); *see also Enmund v. Florida*, 458 U.S. 782, 800, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982) (concluding that rare imposition of the death penalty upon a class of offenders "further attenuates its possible utility as an effective deterrence").

Similarly, the state court's conclusion that "the passage of time and alteration of circumstances have no bearing on" the analysis of whether a particular punishment serves a retributive purpose, *Ochoa*, 26 Cal. 4th at 463, is contrary to well-established legal principles. Federal law is clear that the passage of time and alteration of circumstances are relevant factors in assessing the retributive value of the death penalty, particularly when these factors result in the execution of a random few. *Furman v. Georgia*, 408 U.S. 238, 304-05, 92 S. Ct. 2726 33 L. Ed. 2d 346 (1972) (Brennan, J., concurring) ("The asserted public belief that murderers . . . deserve to die is flatly inconsistent with the execution of a random few."); *id.* at 311 (White, J., concurring) ("When imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied."). Moreover, retribution has been defined by the Supreme Court as "an expression of community outrage." *Spaziano v. Florida*, 468 U.S. 447, 461, 104 S. Ct. 3154 82 L. Ed. 2d 340 (1984). That the passage of time and alteration of circumstances have no bearing on the expression of community outrage squarely contradicts the Supreme Court's longstanding recognition that the Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 598, 2 L. Ed. 2d 630 (1958) (plurality opinion); *see also Enmund v. Florida*, 458 U.S. at 788; *Coker v. Georgia*, 433 U.S. 584, 593-95, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977) (plurality opinion); *Weems v. United States*, 217 U.S. 349, 373-78, 30 S. Ct. 433, 54 L. Ed. 793 (1910).

V. THIS COURT'S ANALYSIS OF THE STATUS OF THE DEATH SENTENCES IMPOSED BETWEEN 1978 AND 1997 FULLY SUPPORTS GRANTING OF RELIEF ON CLAIM 27.

In its June 10, 2014 Order, this Court attached a chart of the individuals sentenced to death in California between 1979 and 1997 and the status of their cases. The Court invited the parties "to address the chart and the troubling issues it raises." Order Amending Briefing Schedule and Setting Hearing on Claim 27 at 3, ECF No. 110.[10]

This Court's chart – which analyzes the cases of the 507 people sentenced between 1978 and 1997 – fully supports the conclusion 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." Order at 2. Almost forty percent (39.6) of those cases are still pending before the California courts, for direct appeal or collateral review, or for the purposes of federal exhaustion. In short, 201 of those individuals have been waiting more seventeen years – in some cases up to thirty-five years – for federal review and adjudication of their claims. Seventy-nine individuals – 15.6 percent of those sentenced in that 20-year period – have died from causes other than execution. Nearly three times the number of those executed have had their death sentenced vacated by the federal courts. Other studies have demonstrated that sixty percent of California death sentences are reversed by the

[10] Counsel for Mr. Jones conducted a review of the cases and identified some additional or different information for a few of the cases. The suggested modifications to the chart are indicated in track changes in the attachment to this brief. Among these suggestions are the addition of fifteen cases not currently reflected in the chart that are pending in state court proceedings and the removal of duplicate entries. The numbers used in this brief correspond with those on the attached chart.

federal courts, Ex. 14 to Petitioner's Opening Brief on Claim 27 at 632, ECF No. 109-3, while 1.7 percent of death sentences in California have actually resulted in execution.[11] Meanwhile, the more recent statistics included in Mr. Jones's Opening Brief demonstrate that the delay inherent in the California's dysfunctional state court system has increased dramatically for those sentenced since 1997. Petitioner's Opening Br. at 8.

VI. CONCLUSION

For the foregoing reasons, Mr. Jones is entitled to relief on Claim 27.

Dated: July 3, 2014

Respectfully submitted,

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[11] This figure is calculated by dividing the total number of executions since 1978 (thirteen in California), *see* Ex. 13 to Petitioner's Opening Br. on Claim 27 at 630, ECF. No. 109-3, by the total number of inmates sentenced to death since 1978 (746), *see* Div. of Adult Ops., Cal. Dep't of Corr. and Rehab., *Condemned Inmate Summary List* (July 3, 2014), http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateSummary.pdf.