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9 **UNITED STATES DISTRICT COURT**  
 10 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

11 ERNEST DEWAYNE JONES,  
 12 Petitioner,

13 v.

14  
 15 KEVIN CHAPPELL, Acting  
 16 Warden of California State Prison at  
 San Quentin,  
 17 Respondent.

Case No. CV-09-2158-CJC

**DEATH PENALTY CASE**

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 REPLY IN SUPPORT OF  
 PETITIONER’S EX PARTE  
 APPLICATION FOR AN EXTENSION  
 OF TIME TO FILE AN OPENING  
 BRIEF ON THE APPLICATION OF 28  
 U.S.C. § 2254(d)

20 On September 4, 2012, Petitioner Ernest Dewayne Jones requested a 180-  
 21 day extension of time to file his opening brief on the application of 28 U.S.C. §  
 22 2254(d) to his claims. Petitioner’s Ex Parte Application for a 180-Day Extension  
 23 of Time to File an Opening Brief on the Application of 28 U.S.C. 2254(d) (“Ex  
 24 Parte Application”), filed Sep. 4, 2012, ECF No. 90. The requested extension of  
 25 time is necessary based on Petitioner’s counsel’s unprecedented workload in the  
 26 months since the briefing order was filed, as set forth in detail in the Declaration of  
 27 Michael Laurence filed in support of the Ex Parte Application. As explained in the  
 28 Ex Parte Application and below, each of counsel’s competing case commitments

1 had deadlines scheduled prior to this Court’s April 16, 2012 Order, setting forth the  
2 schedule for the 28 U.S.C. section 2254(d) briefing. Counsel’s already-  
3 extraordinary workload has become unsustainable following the unanticipated  
4 departure of two staff attorneys; family leave taken by a third staff attorney; and  
5 the unanticipated litigation in which the Los Angeles County District Attorney is  
6 seeking an immediate execution date for Habeas Corpus Resource Center (HCRC)  
7 clients Mr. Mitchell Sims and Mr. Tiequon Cox despite the existence of a federal  
8 stay of execution and a state court injunction prohibiting executions.

9 Respondent opposes Petitioner’s request on three grounds. First,  
10 Respondent contends that Petitioner has not demonstrated good cause for the  
11 extension and has not explained why other cases take precedence over Petitioner’s  
12 case. Second, Respondent contends that the extension of time will frustrate the  
13 state’s interests in obtaining finality of the state court judgment and in punishing a  
14 convicted offender. Third, Respondent asserts—without any support—that *Cullen*  
15 *v. Pinholster*, 563 U.S. \_\_\_, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011), and  
16 *Harrington v. Richter*, 562 U.S. \_\_\_, 131 S. Ct. 770, 780, 178 L. Ed. 2d 624 (2011)  
17 have simplified the issues to be briefed. Each of Respondent’s contentions is  
18 erroneous.

19 **1. Petitioner Has Demonstrated Good Cause For The Extension.**

20 Counsel for Petitioner accepted the appointment in this case, in part, in light  
21 of the universal recognition that “[c]ontinuity of representation by the same lawyer  
22 in both state and federal habeas corpus proceedings helps to reduce many of the  
23 delays that now occur in state and federal habeas proceedings, especially where  
24 exhaustion of claims in state court is a problem.” California Commission on the  
25 Fair Administration of Justice, *Final Report* 58 (2008), *available at*  
26 <http://www.ccfaj.org/rr-dp-official.html>. Unquestionably, counsel for Petitioner  
27 have fulfilled those expectations in their representation before this Court, despite  
28

1 the departure from the HCRC of the senior staff attorney assigned to the case since  
2 the initial state court appointment.

3 In allocating their time between Petitioner's case and their other cases, since  
4 this Court's appointment, counsel proceeded on the understanding that 28 U.S.C.  
5 section 2254(d) briefing on Petitioner's claims would occur after an evidentiary  
6 hearing, the routine practice in federal capital habeas cases in California prior to  
7 the decision in *Pinholster*. See, e.g., Petitioner's Supplemental Brief on the Effect  
8 of *Cullen v. Pinholster* on the Court's Power to Grant an Evidentiary Hearing, July  
9 18, 2011, ECF No. 68, at 17-19. Thus, following the filing of the Motion for an  
10 Evidentiary Hearing and the requested post-*Pinholster* briefing, counsel reasonably  
11 did not anticipate the need to research and draft extensive briefing on each claim  
12 raised in the Petition for Writ of Habeas Corpus.

13 Following this Court's March 26, 2012 Order, counsel, therefore, provided  
14 the Court with a good faith estimate that they could file Petitioner's initial brief in  
15 December 2012, given their competing case commitments, each of which were  
16 scheduled before this Court ordered 28 U.S.C. section 2254(d) briefing.  
17 Nonetheless, this Court set September 10, 2012, as the date for the filing of the  
18 opening brief. Order Re: Schedule for Merits Briefing under 28 U.S.C. §  
19 2254(d)(1) and 2254(d)(2), Apr. 16, 2011, ECF No. 77.

20 Although counsel for Petitioner have diligently attempted to meet that  
21 deadline, their pre-existing commitments prevented them from doing so. In the  
22 months since this Court's April Order, lead counsel Michael Laurence was required  
23 to prioritize the filing of briefing in two federal cases—filed before this case—in  
24 compliance with scheduling orders entered prior to this Court's April 2012 Order.  
25 Declaration of Michael Laurence in Support of Petitioner's Ex Parte Application, ¶  
26 3. Mr. Laurence further was obligated to devote extensive time on the two state  
27 habeas corpus petitions with unmovable presumptive timeliness dates in August  
28 2012. *Id.* The failure to file those petitions within the presumptive timeliness

1 dates would have risked the California Supreme Court rejecting potentially  
2 meritorious claims because they were untimely presented and thus potentially  
3 foreclosing any federal judicial review of those claims.<sup>1</sup>

4 Cliona Plunkett had to prioritize filing the Denial to the Return in San Mateo  
5 County Superior Case No. SC31145, in which an Order to Show Cause was issued  
6 by the California Supreme Court on December 15, 2010. The timing of that case  
7 was dictated by the state's requests for protracted continuances totaling 390 days to  
8 file its return to the Order to Show Cause. The resulting delays forced Ms.  
9 Plunkett to prioritize filing the denial to the return before turning to Petitioner's  
10 case.

11 In addition to the above cases, the demands placed on Petitioner's counsel  
12 by the unexpected resignation of two HCRC staff attorneys, the departure of a third  
13 staff attorney on family leave, and the unanticipated litigation commenced by the  
14 state to execute HCRC clients have made counsel's initial estimate of a December  
15 2012 completion date untenable. Counsel have two other cases with immediate—  
16 and fixed—deadlines, *Maury v. Chappell*, No. 2:12-cv-1043 (E.D. Cal.) (with the  
17 federal statute of limitations expiring on October 24, 2012), and *In re Beck on*  
18 *Habeas Corpus*, California Supreme Court Case No. S029843 (with a  
19 presumptively timely due date of November 28, 2012), a complicated case  
20 involving multiple codefendants and multiple victims and in which one of the staff  
21 attorneys announced her resignation in summer 2012, after this Court had set the  
22 briefing schedule in this case. Due to the procedural postures of *Maury* and *Beck*,  
23 counsel cannot seek continuances or extensions of time in either case. Counsel can  
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25 <sup>1</sup> In addition to case responsibilities, Mr. Laurence is the Executive Director  
26 of the HCRC and is responsible for the administration of the office. Since this  
27 Court's April Order, those responsibilities have included addressing the \$1.1  
28 million reduction in the HCRC state budget for fiscal year 2012-2013.

1 prioritize their preparation of briefing in Petitioner’s case only if they file  
2 inadequate or untimely petitions in *Maury* and *Beck*, placing counsel in an  
3 untenable and legally conflicted position. Similarly, Mr. Laurence reasonably has  
4 devoted and, must continue to devote, substantial time to responding to the state’s  
5 motion to force the California Department of Corrections to execute his client,  
6 Mitchell Sims, by use of an undefined single-drug lethal injection protocol.

7 Respondent’s assertions that counsel have misprioritized their workload  
8 simply ignores the reasonable expectations of counsel, the competing demands of  
9 cases with deadlines established before this Court’s April Order, and the  
10 extraordinary unanticipated developments of staff departures and the state’s efforts  
11 to execute HCRC clients.

12 **2. Granting Petitioner A Single Extension Of Time Does Not Frustrate The**  
13 **State’s Interests In Finality Of Convictions And Punishment Of**  
14 **Offenders.**

15 The state’s interest in the finality of criminal convictions is not absolute.  
16 Where, as here, Petitioner has shown good cause for his delay, this Court may  
17 conclude that his “interest in obtaining federal review of his claims outweighs the  
18 competing interests in finality and speedy resolution of federal petitions.” *Rhines*  
19 *v. Weber*, 544 U.S. 269, 278, 125 S. Ct. 1528, 161 L. Ed. 2d 440 (2005) (stating  
20 that a district court would likely abuse its discretion in denying a petitioner a stay  
21 to exhaust potentially meritorious claims where the petitioner had not engaged in  
22 intentionally dilatory litigation tactics and had shown good cause for non-  
23 exhaustion).

24 Moreover, by continuing to represent Petitioner after the close of his state  
25 proceedings, the HCRC has significantly facilitated the state’s desire for a timely  
26 conclusion to this litigation. The record on appeal in Petitioner’s case consists of  
27 thirty-two volumes of reporter’s transcripts and twenty-eight volumes of clerk’s  
28 transcripts. The state appellate pleadings and briefs total 503 pages, and the state

1 post-conviction record comprises 4,116 pages. Because counsel had represented  
2 Petitioner in the state proceeding, counsel already had assembled the record and  
3 the client file and were familiar with the issues raised in state court. Had the  
4 HCRC not continued to represent Petitioner, the Court would have had to appoint  
5 private counsel. New counsel would have had to expend significant time to  
6 familiarize themselves with the voluminous record, injecting delay into the  
7 proceedings beyond the single extension of time that HCRC currently seeks and  
8 generating additional costs for which they would have sought reimbursement from  
9 this Court.

10 **3. The Decisions in *Pinholster* and *Richter* Have Substantially Complicated**  
11 **the Issues to be Briefed.**

12 As set forth in the Declaration of Michael Laurence in Support of  
13 Petitioner’s Ex Parte Application, the *Pinholster* and *Richter* decisions have  
14 significantly complicated the issues that Petitioner must brief. Such briefing  
15 necessarily includes a complete discussion of the merits of the claim *and* the  
16 reasons why 28 U.S.C. section 2254(d) does not bar relief. Moreover, the  
17 discussion concerning section 2254(d) alone is a complicated and time-consuming  
18 endeavor. As one example, following *Richter*, Petitioner must expend substantial  
19 time to research the California Supreme Court’s published decisions on claims  
20 similar to his to determine the court’s legal rationale for rejecting his claims  
21 without an explanation or an evidentiary hearing. Respondent’s unexplained  
22 contention that *Pinholster* and *Richter* have simplified section 2254(d) briefing is  
23 incorrect. The federal courts continue to wrestle with—and reasonable jurists are  
24 divided on—the effects of *Pinholster* and *Richter* on section 2254(d)-governed  
25 cases. *See, e.g., Ayala v. Wong*, No. 09-99005, 2012 WL 3711689, \*13 n. 15, \*29-  
26 30 (9th Cir. Aug. 29, 2012) (majority and dissent disagree vigorously on whether  
27 *Richter* altered AEDPA prejudice analysis).

1 Consistent with Respondent’s request for a firm deadline, Petitioner amends  
2 the Ex Parte Application and requests that this Court extend the time for filing of  
3 the Opening Brief to and including February 11, 2013, rather than the requested  
4 date of March 11, 2013.<sup>2</sup> In addition to arguments specific to each claim,  
5 Petitioner intends to present global arguments applicable to all of his claims. He is  
6 therefore opposed to Respondent’s proposal for interim due dates, which—in  
7 addition to creating unworkable conflicts with counsel’s preexisting  
8 commitments—would result in piecemeal, inefficient briefing. A single brief will  
9 also avoid repetitive arguments.

10 Therefore, for the reasons set forth in the application and above, counsel for  
11 Petitioner respectfully requests an extension to file the Opening Brief until and  
12 including February 11, 2013.

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15 Dated: September 6, 2012

Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

17  
18 By: /s/ Michael Laurence

Michael Laurence

19 Attorney for Petitioner Ernest Dewayne Jones  
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25 <sup>2</sup> To comply with this deadline, counsel for Petitioner will request additional  
26 time from the California Supreme Court to file three replies to informal responses  
27 to state habeas corpus petitions. As with each of the cases identified above, these  
28 deadlines were established before the Court issued its April 2012 Order.