

No. 06-99001

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLARENCE RAY ALLEN,

Plaintiff-Appellant,

vs.

STEVEN ORNOSKI, WARDEN OF THE CALIFORNIA STATE
PRISON AT SAN QUENTIN, AND THE ATTORNEY GENERAL
OF THE STATE OF CALIFORNIA

Defendants-Appellees.

On Appeal From the United States District Court
for the Eastern District of California
The Honorable Frank C. Damrell, Jr.
(Case No. 2:06-CV-00064-FCD-DAD)

**EMERGENCY MOTION UNDER CIRCUIT RULE 27-3
FOR STAY OF EXECUTION**

EXECUTION IMMINENT

Jan. 17, 2006, at 12:01 A.M.

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CIRCUIT RULE 27-3 CERTIFICATE OF COUNSEL

I, Annette P. Carnegie, declare as follows:

1. I am an attorney licensed to practice in the State of California and admitted to practice in this Court. I am a member of the law firm of Morrison & Foerster LLP, one of counsel for Clarence Ray Allen.
2. Mr. Allen will suffer the most grievous form of irreparable injury imaginable without a stay: he will be executed on January 17, 2006.
3. On December 23, 2005, Petitioner filed a Petition for Writ of Habeas Corpus with the California Supreme Court that prayed for a stay and relief from the judgment of death. On January 10, 2006, the California Supreme Court denied the petition. Later that day, the court denied Petitioner's motion that it stay the execution.
4. On January 12, 2006, Petitioner filed a Motion for Stay of Execution in the United States District Court, Eastern District. The grounds advanced in support of this motion were advanced in the District Court. The Court denied the motion on January 12, 2006. On January 13, counsel notified Ward Campbell, Supervising Deputy Attorney General that we would be filing this motion seeking emergency relief from this Court.
5. Filed simultaneously with this Certificate and Motion to Stay is a Motion for Issuance of a Certificate of Appealability.

6. As set forth in the motion, the issues on appeal, whether procedural or substantive, are substantial. The date set for Mr. Allen's execution, however, will not provide sufficient time for this Court, or if necessary, the United States Supreme Court, to consider those issues. Therefore, Petitioner seeks an immediate order staying his execution, set for January 17, 2006, pending final disposition of the matter, including review by the United States Supreme Court of any order by this Court that would otherwise permit the execution of Mr. Allen.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct.

Executed this 13th day of January, 2006 at San Francisco, California.



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I. INTRODUCTION

Pursuant to Cir. Rules 22-2 and 27-3, Petitioner Clarence Ray Allen, through his attorneys, moves this Court for an immediate order staying his execution, set for January 17, 2006, pending final disposition of the matter, including review by the United States Supreme Court of any order by this Court that would otherwise permit the execution of Mr. Allen. This motion is based on this pleading, the Certificate of Counsel, the Motion for Issuance of a Certificate of Appealability filed simultaneously with this motion, and the record of the district court proceedings that have already been lodged with the court as part of the records on file in this proceeding.

As set forth in the accompanying Motion for Certificate of Appealability, Mr. Allen raises substantial federal questions that this Court should resolve on appeal. He has been on Death Row for 23 years. During that time, his health has deteriorated dramatically. Mr. Allen will be 76 on the day before he will be executed. He suffers from numerous physical infirmities including chronic heart disease, diabetes and blindness. He is confined to a wheelchair. Carrying out the execution under these circumstances would constitute cruel and unusual punishment. No legitimate societal interest would be advanced by executing Mr. Allen after all he has suffered while under judgment of death, including the deterioration of his condition to the point where he is an incapacitated invalid.

II. PETITIONER IS ENTITLED TO A STAY OF EXECUTION

Mr. Allen will suffer the most grievous form of irreparable injury imaginable without a stay: he will be executed on January 17, 2006. Mr. Allen's appeal raises a substantial federal question: whether executing an elderly and infirm inmate who has spent over 23 years on Death Row, where substandard

conditions of confinement, particularly in medical treatment, have directly contributed to his physical deterioration, violates the Eighth Amendment's prohibition against cruel and unusual punishment. Accordingly, the Court should stay Mr. Allen's execution so that the district court's denial of his claim can be considered on appeal and, if necessary, considered on petition for writ of certiorari.

As already stated, Mr. Allen will be 76 the day before the date set for his execution. He is blind, hard of hearing, confined to a wheelchair, frail, and recently suffered a serious heart attack that nearly killed him and further enfeebled him. He is a threat to no one.

Mr. Allen's physical deterioration is not simply a consequence of old age and the passage of time, but rather, has been exacerbated by the unconstitutional conditions which he has endured while at San Quentin, which have been the subject of multiple federal court decrees. Perhaps most deplorable is its medical care system. Independent experts appointed by a federal court concluded that medical care at San Quentin constitutes an intolerable danger to the health and safety of its inmates. (Office of the Medical Experts, *Plata v. Schwarzenegger*, N.D. Cal. C 01-1351 T.E.H., Medical Experts' Report on San Quentin, April 8, 2005.) The experts described the medical care system at San Quentin as one of "medical meltdown" and "dysfunction." (*Id.* at 12, 13) and concluded that "all this dysfunction has its effect on medical care of inmates. Medical record reviews demonstrate multiple instances of incompetence, indifference, cruelty, and neglect." (*Id.* at 13.) These are the conditions which Mr. Allen has suffered for the past 23 years.

Moreover, Daniel Vasquez, the former Warden at San Quentin, has stated that these substandard conditions of Mr. Allen's confinement on Death Row have exacerbated his physical decline:

There is no question in my mind that the long term confinement of Mr. Allen under the outmoded and substandard conditions of San Quentin's Death Row has hastened the decline of his health.

(Declaration of Daniel B. Vasquez in Support of Clarence Ray Allen's Petition for Clemency and Petition For Writ of Habeas Corpus, Ex. O at 0759.) Similarly, after examining Mr. Allen, Dr. Peter Pompei, a specialist in internal medicine and geriatrics, concluded:

From the medical experts' reports in *Plata* and from Mr. Allen's report of his experience there, it would be an understatement to say that the conditions of his confinement at [San Quentin's Outpatient Housing Unit] were not conducive to his good health; rather they could only have contributed to his ills.

(Declaration of Dr. Peter Pompei In Support of Plaintiff's Application For A Temporary Restraining Order and Order to Show Cause, Ex. A-4, at HP0045, ¶ 9.)

The death penalty is constitutionally permissible only if it does not inflict cruel and unusual punishment. In turn, execution imposes cruel and unusual punishment unless it measurably advances some societal interest in retribution and deterrence. There is a substantial question whether the execution of Mr. Allen in his present condition violates these standards. For over 23 years, Mr. Allen has suffered the mental anguish and degradation associated with living on Death Row. Year after year he has declined physically. He cannot walk, cannot see, is hard of hearing, and is at risk for another heart attack.

No legitimate purpose would be served by executing Mr. Allen. His physical deterioration and suffering while confined for 23 years on Death Row under conditions that have themselves imposed cruel and unusual punishment, all the while under a sword of Damocles, satisfies any interest society may have in retribution or in deterrence. The spectacle of Mr. Allen being wheeled into the death chamber, unable to walk and unable to see those who have come to witness his execution, violates all standards of decency and would amount to nothing more

than the “purposeless and needless imposition of pain and suffering” prohibited by the Eighth Amendment. *Enmund v. Florida*, 458 U.S. 782, 798 (1982).

Members of the Supreme Court already have indicated a serious interest in an issue that is related to, but considerably less compelling. In *Lackey v. Texas*, 514 U.S. 1045 (1995) Justice Stevens noted that the question whether executing an inmate who had spent 17 years on Death Row violated the Eighth Amendment was a question whose importance and novelty were “sufficient to warrant review.” *Id.* Justice Breyer concurred. *Id.* There is thus a reasonable probability that absent relief from this Court, the Supreme Court would grant certiorari and a significant possibility that the Supreme Court would reverse the lower court decisions that rejected Mr. Allen’s claims. See *Barefoot v. Estelle*, 463 U.S. 880 (1983) (where a condemned prisoner seeks a stay of execution in connection with a petition for writ of certiorari, “it is well-established that there must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction [and] there must be a significant possibility of reversal of the lower court’s decision.”).

Mr. Allen’s circumstances present a far more compelling case, both in degree and in kind, than in *Lackey*. His aged and decrepit physical condition alone establishes the inhumanity of his execution. The dehumanizing and substandard conditions of San Quentin’s Death Row that Mr. Allen has suffered for more than two decades, including treatment by a medical system where, according to a federal court “[e]ven the most simple and basic elements of a minimally adequate medical care system were obviously lacking”, (*Plata v. Schwarzenegger*, No. C-01-1351 TEH, 2005 U.S. Dist. LEXIS 8878, at *8 (N.D. Cal. May 10, 2005)), add greatly to his claim, because they undeniably contributed to his physical deterioration. The district court, however, unaccountably took this factor out of the calculus by construing his petition as “present[ing] two distinct claims – one

concerning his “physical condition” and the other concerning “his extended tenure on death row, ... along with the ‘horrific’ conditions of his confinement”

Thus, it is beyond question that Mr. Allen’s appeal raises substantial constitutional issues.

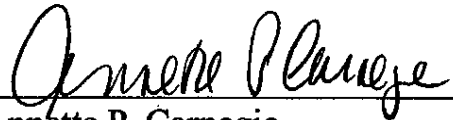
It would not be just, nor would it appear just, to execute Mr. Allen before he has been given a reasonable opportunity to pursue his legal remedies concerning the fundamental constitutional questions raised in his appeal. In this case that opportunity includes the right to pursue review by this Court and by the United States Supreme Court of the district court judgment. As stated by one court: “[T]his Court, as the voice of justice in an orderly and humane society, concludes that there would be a miscarriage of justice if the irremediable act of execution is taken” while substantial constitutional issues remain unresolved.” *Modesto v. Nelson*, 296 F. Supp. 1375, 76-1377 (N.D. Cal. 1969); *see also Hill v. Nelson*, 272 F. Supp. 790, 795 (N.D. Cal. 1967) (“Justice requires that no condemned man who has standing to raise any federal constitutional issue should be executed until such question is finally adjudicated”; *Fouquette v. Bernard*, 193 F.2d 96, 97 (9th Cir. 1952) “Obviously, it would be a mockery of federal justice to execute [a condemned inmate]...pending consideration [of post-conviction proceedings raising substantial issues]”).

III. CONCLUSION

For all of the foregoing reasons, Petitioner requests a stay of execution. In the event this Court denies a certificate of appealability or affirms the district court judgment, it should stay Mr. Allen's execution until final determination of his claims in the United States Supreme Court.

Dated: January 13, 2006

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