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OFFICE OF THE GOVERNOR FOR THE STATE OF CALIFORNIA

In the Matter of Clemency for

CLARENCE RAY ALLEN

CDC No. B-91240

Glenn County Superior Court
Case No. 18240

California Supreme Court
Case No. S004483 (Crim. 22879)

Execution Date: January 17, 2006

REPLY TO OPPOSITION TO PETITION FOR CLEMENCY

I.

THE GOVERNOR SHOULD COMMUTE RAY ALLEN'S
DEATH JUDGMENT TO A SENTENCE OF LIFE
IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE.

Ray Allen has petitioned the Governor to commute his death sentence as a
compassionate act of clemency. His principal justification for seeking that act of

grace resides in the fact that “his serious chronic diseases and age have left him enfeebled, incapacitated, near death, and a danger to no one,” so that [“h]is execution ... would not measurably advance any of the interests that the State relied upon to impose his death judgment.”¹ In that Petition he showed that the substandard physical conditions on Death Row had been deleterious to his health and that the chronically deficient health care system at San Quentin had accelerated his physical decline. He pointed out that his conforming and positive behavior on Death Row for more than two decades, coupled with his debilitated physical condition and incapacitation, guaranteed that he posed no danger to either institutional or public safety. He demonstrated that he had already suffered greatly from the privations of Death Row during the many years he had endured them, with the peril of execution like the sword of Damocles over his head the entire while. He showed that the punishment the State excruciatingly imposed upon him in the long twilight before his execution satisfied its interests in deterrence and retribution as fully as his summary execution would have, so that his execution now would be gratuitous and beyond the bounds of civilized conduct.

Ray Allen detailed in his petition how he had become a physical wreck in his old age. He is legally and functionally blind. He is hard of hearing. He has no feeling in his lower extremities. He cannot stand up on his own, and needs a walker to move about the tiny confines of his cell and a wheelchair when he is taken out of his cell. He suffers from the effects of a stroke, advanced diabetes, and an advanced heart condition that led to a massive heart attack and nearly killed him less than three months ago. He asked that the Governor act out of a “shared sense of humanity ... [to] spare [him] the torture of execution as the capstone to

¹ Petition for Clemency (“Petition”), p. 6.

the awful punishment that has already so diminished him”² He added that the appropriateness of compassionate relief from the death judgment was reinforced by the fact that there were fundamental flaws in the process leading to it, and that there remained a lingering doubt as to his guilt.

The State has filed an Opposition to Ray Allen’s petition for clemency that distracts attention from and avoids Ray Allen’s worthy bases for clemency. Instead, it provides an extensive and rhetorical exposition of the facts of the crime, augmented by photographs and video, to establish that he committed a grievous offense that justified the judgment of death, and that the judgment has withstood review by the courts. Those premises, however, are the starting point, not the end, of the Governor’s consideration of clemency. No question of clemency ever arises unless and until the individual has been found guilty of an offense so grievous that it qualifies for a death judgment, a jury has concluded that the individual deserves death, and the judgment has been found lawful after conscientious review at every court level. The State’s Opposition misses the point of clemency and instead confounds the discretionary nature of a grant of executive clemency with the more legally circumscribed nature of the judicial process.

As pointed out in a letter dated December 23, 2005, to the Governor from the Honorable Joseph R. Grodin, retired Associate Justice of the California Supreme Court, the question whether Ray Allen should be favored with clemency is a moral one that goes beyond issues of guilt and lawfulness of the judgment, to embrace compassionate consideration of all the facts – up to the present moment – that bear on the justice of his execution:

Now, twenty years later, the issue is no longer whether Mr. Allen was guilty or whether the procedures leading to his death

² Petition, p. 17.

sentence conformed to law.... [T]he issue now -- for you as Governor ... -- is whether the execution of Mr. Allen would serve any legitimate societal interest in either retribution or deterrence.³

On that issue, Justice Grodin's view is clear:

My own judgment, considering the time that has elapsed, the physical suffering that Mr. Allen has endured, and the state's likely involvement in that suffering, is that it would not. On the contrary, to execute Mr. Allen now, under these conditions, for a crime which he committed more than a quarter century ago, would itself violate societal standards of decency. I hope you share this judgment and that you will grant Mr. Allen's petition for clemency.⁴

The State's Opposition relies not only on the majority opinion affirming the judgment on appeal, authored by Justice Grodin, but also on other observations Justice Grodin has made regarding the homicides.⁵ But it is Justice Grodin's views on clemency, which are based on all the facts and speak to the very issue at hand, that best inform the Governor's clemency determination. Indeed, California's Governors historically have given great weight to the request of a California Supreme Court Justice to grant clemency, particularly when it was the very Justice who authored the opinion affirming the death judgment.⁶

³ See Supplement to Appendix in Support of Petition for Clemency (Supp. App.), Exh. 22, p. 577.

⁴ *Ibid.*

⁵ See Opposition ("Opp."), pp. 11-12 & 15.

⁶ See, e.g., Commutation of Sentence of Ernest Leroy Johnson by Governor Edmund G. Brown, December 5, 1966, p. 3 ("I have also been influenced in my decision by a letter I have received from an Associate Justice of the Supreme Court of California, indicating that he feels the circumstances of this case are such that a commutation of the sentence would be appropriate."); Commutation of Sentence of Clarence Edward Ashley by Governor Edmund G. Brown, June 17, 1963, p. 5 ("There is one other important factor which has strongly influenced my decision in this case. The Honorable Raymond E. Peters, Associate Justice of the

Significantly, the State does not dispute the factual premises of Ray Allen's central bases for clemency: his old age and advanced infirmities. Rather, the State argues that "Mr. Allen's age and health complaints are ... completely irrelevant to whether he now deserves to die" (Opposition, p. 6.) But since the question truly is whether Ray Allen "*now* deserves to die for his crimes," his current condition is, in fact, of surpassing importance. In arguing otherwise, the State callously asserts that "Mr. Allen's age and health complaints are the product of his own choices." (*Ibid.*) The State does not favor us with an explanation of the choices the State has ascribed to him. The only choice Ray Allen has made concerning his age and infirmities was his choice to live as best he could under the horrific conditions the State had forced upon him. Surely that does not disqualify him from clemency. Nor does his choice to utilize what the State calls "the deliberative and precise nature of our criminal justice system"⁷ to test the lawfulness and reliability of his death judgment disqualify him from compassionate relief. "It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure."⁸ It was the State that established the conditions leading to Ray

California Supreme Court, who wrote the opinion of that Court which affirmed the judgments and sentence imposed against Ashley, has recently written a letter to me... [in which] he has recommended to me that I grant executive clemency to Ashley. This is a highly significant recommendation from such a distinguished jurist.").

⁷ Opp., p. 6.

⁸ *Pratt & Morgan v. Attorney General for Jamaica*, 3 SLR 995, 2 AC 1, 20, All ER 769 (Privy Council 1993) (en banc) (slip. opn. at p. 20).

Allen's implacable physical decline, and his only choice was "the Hobson's choice of prolonged torture by incarceration or swift torture by execution."⁹

According to the State, "[t]he disparity between Allen's seniority and the ages of his young victims should constitute reason enough to deny his request for clemency" because "Allen has been able to live his life" while they have not.¹⁰ There is no logic to this argument, only rhetorical flourish that adds nothing to the clemency analysis, for anyone who has killed another continues to live his life while the decedent does not. Clemency is appropriate for Ray Allen because his advanced age and infirmities after so many years on Death Row have reduced him to a decrepit old man already near death who manifestly poses no danger to anyone, so that no legitimate state purpose is served by his execution now. As the State elsewhere acknowledges, "[A]nything is pertinent that may move the mind to doubt or the heart to charity.... It is enough that compassion be stirred."¹¹

Ray Allen's condition presents several considerations that invite compassion in those who are not prepared to reject it out of hand. As found by Daniel Vasquez, the former Warden of San Quentin who executed the first two men in California's modern administration of the death penalty and served Ray Allen with his first death warrant when he was in far better health:

[Ray Allen] now presents absolutely no risk to institutional safety or to public safety....[H]e has physically declined so dramatically since his reception on Death Row that he is physically incapacitated from promoting any violence.... [H]e is verifiably blind and disabled. He is also significantly hard of

⁹ G. Richard Strafer, *Symposium on Current Death Penalty Issues: Volunteering For Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, NW School of Law. 74 J. Crim. L. 860, 864.

¹⁰ Opp., p. 6.

¹¹ *Id.*, at p. 4, quoting *Andrews v. Gardiner* (N.Y. 1918) 121 N.E. 341, 343.

hearing and of frail voice. He cannot even stand up by himself. He needs a walker to move around even within the confines of his cell, and a wheelchair for any movement out of his cell. Even daily activities such as showering require assistance and are fraught with risk of injury for him. He is an old man who has fallen apart in almost every respect. When I observed him on December 20, 2005, ...he was a pathetic sight: aged, downcast, dejected, isolated, oblivious to his surroundings, cuffed to his wheelchair, and utterly defeated.¹²

Former Warden Vasquez found a dramatic change in Ray Allen not only physically, but also attitudinally:

I find ...that [Mr. Allen's] crimes bear little on the assessment of the threat that he currently poses, for his conduct then occurred long ago under very different circumstances that bear no reasonable likelihood of recurring. Most obviously, there has been the change that time and age typically have on the attitudes of even a hardened offender. These factors have wrought unusual change in Mr. Allen, for reasons that no doubt relate to Mr. Allen himself but also are due to the length of that time and his advanced years.... In my experience, prisoners his age pose virtually no threat to institutional security or public safety.... [A]s often happens as a prisoner grows old and approaches his last years, particularly after the kinds of brushes with death that Mr. Allen has experienced both due to his failing health and his condemned status, he has tended toward passive acceptance and reconciliation rather than active rebellion and conflict. The risk that Mr. Allen would engage in dangerous or violent behavior in the future is nil. Everything that I have seen in Mr. Allen's record at San Quentin and witnessed in his attitude during our visit this week reflects a very different person than the prisoner at Folsom who plotted murder for revenge or freedom. It is unthinkable to me that Mr. Allen would engage in conduct remotely resembling the conduct reflected in his convictions.¹³

¹² Supp. App., Exh. 23, p. 580.

¹³ *Id.*, at pp. 581-582.).

Assessment of the present dangerousness of a condemned inmate is an essential guide to the clemency determination. The State's repeated quote of the Ninth Circuit's conclusion that "Allen continues to pose a threat to society," and the State's insistence that "execution is the only way to eliminate his extreme threat to society,"¹⁴ reflect the centrality of this consideration to the State. The State's insistence that Ray Allen's execution is justified by the threat he supposedly presents is flawed and misplaced, however, because it is based on a record frozen in time more than two decades ago. It does not take into account developments since then that indisputably demonstrate that Ray Allen poses no danger to anyone:

Mr. Allen's long record while on Death Row shows that he has been virtually a model prisoner during his confinement there for nearly a quarter-century. He has suffered a single disciplinary report in that time, for a nonviolent offense that was minor if not innocuous in context, and insignificant when assessing his dangerousness. His record of longstanding and consistent conduct in conformance with institutional goals of safety and order is an exceptional one for a Death Row inmate. Mr. Allen unquestionably has been a constructive force during his time on Death Row... [and] used [his time] to promote harmony and peace for the general welfare of all. [¶]... The longevity of his conforming conduct is especially impressive, for no inmate can fake such good behavior for so many years.¹⁵

The remoteness of Ray Allen's criminal conduct undermines the State's contention that permitting him to die a natural death would endanger the lives of others. Consideration of the record that Ray Allen has maintained for almost a quarter century since, together with his inexorable debilitation, is dispositive on

¹⁴ Opp., p. 7.

¹⁵ Supp. App., Exh. 23, pp. 580-581.

the question of any present danger, and conclusively establishes that he poses no risk to anyone. The view of former Warden Vasquez is most apposite:

I have every confidence he will continue his positive conduct as long as he lives. Moreover, I would have that same confidence if he were relieved of his death sentence and taken off the Row for placement in regular prison housing. Pursuant to established prison policy, he would be required to spend at least the following five years – considerably longer than he is likely to live – in close custody in a Level IV maximum security prison, which would not only provide more than enough security to house him safely, but which also has the modern resources for attending to his needs as an ailing and disabled prisoner of advanced age.¹⁶

The State asserts that the spectacle of wheeling a blind, crippled, weak-hearted, frail, and aged Ray Allen into the execution chamber “could not possibly overshadow the horror of ‘execution by sawed off shotgun’” that Billy Ray Hamilton perpetrated upon the three victims in this case.¹⁷ In fact, Ray Allen’s execution promises to present an even more ludicrous scene than rolling him into the execution chamber in his wheelchair, for prison authorities have announced their “plan ... to have him walk the final 15 feet to the execution chamber”¹⁸ The spectacle of Ray Allen slouching toward execution, stumbling and faltering dangerously while his executioners prop him up and lift him over the lip of the execution chamber, would only further invite worldwide condemnation and ridicule of California for such barbarous treatment of its citizenry – treatment that also would violate both the Constitution and the American With Disabilities Act.¹⁹

¹⁶ *Id.*, at p. 584.

¹⁷ *Opp.*, p. 8.

¹⁸ See report by an ABC affiliate, quoting San Quentin spokesman Vernell Crittendon, at <http://abclocal.go.com/ksfn/story?section=local&id=3719334>.

¹⁹ See, e.g., *Supp. App.*, Exh.22, pp. 584-585; Exh. 25, p. 595.

In a similar vein, the State argues that “Allen’s agony on Death Row must also be contrasted with the horrors faced by his victims” at the time of their deaths.²⁰ The Governor should reject the State’s rhetoric as an emotional pitch designed to deflect him from acting pursuant to the ideals and values of his high office.

The statements of the family members of the victims in the papers and videotape submitted with the Opposition are poignant and heartfelt in describing their loss, and their desire to see Ray Allen suffer extreme punishment for his conduct is understandable. It is also understandable that in their pain they have not dwelled upon the fact that Ray Allen has already suffered extreme punishment awaiting his execution in a process that has drawn the life out of him in a manner more agonizing, exacting, and excruciating than any efficient execution of him would have. His has literally been a fate worse than death.

The State seeks to downplay the unhealthy and destructive effects of Death Row described in the Petition, but we invite the Governor to inspect San Quentin’s Death Row first hand to see for himself the reality of what Ray Allen has endured. The State dismisses Ray Allen’s emotional and psychological suffering with the assertion “that Allen is a depressed person by nature.”²¹ But any personal vulnerability to depression would only magnify the effects of the depressive features of the death row phenomenon. Moreover, the State’s assertion is based on the testing by Dr. Gretchen White after Ray Allen had already spent well more than a decade on Death Row.²² That testing revealed his “dejection and discouragement about his current life situation and ... view of his future.”²³ The

²⁰ Opp., p. 10.

²¹ *Ibid.*, at p. 9.

²² See Appendix to Opp., Exh. T, p. 216.

²³ *Ibid.*

testing also found that his “[p]reoccupations with personal inadequacy and feelings of worthlessness or guilt are also notable.”²⁴ Finally, the testing showed that he “feels apprehensive and restless and may complain of tension, recurrent fears, or anxieties relating to his current life state.”²⁵ Thus, the testing confirms the destructive effects of Ray Allen’s incarceration on his spirit as well as his body. That confinement on San Quentin’s Death Row is more likely than confinement on other death rows to destroy a person is reflected by the statement of former Warden Daniel Vasquez, who toured a number of death rows around the country when he was Warden of San Quentin. As he reported: “Those inspections convinced me that in order to meet contemporary standards of decency for the confinement of condemned prisoners, San Quentin would need to build a bigger and better Death Row”²⁶ Former Warden Vasquez found “no question ...that the long term confinement of Mr. Allen under the outmoded and substandard conditions of San Quentin’s existing Death Row has hastened the decline of his health.”²⁷ As he explained:

Mr. Allen is obviously worn out and tired. I have observed that the weight and pressure of living as a condemned man on Death Row is extremely debilitating and wears a prisoner out both physically and emotionally. Every court petition brings a ray of hope and rescue to the condemned prisoner, every court reprieve promises more and every court denial dashes that hope and engenders despair. The condemned prisoner must constantly adjust to these extremities of emotion, which grinds at his spirit. The process can be especially debilitating for prisoners who must contend with death warrants. No doubt

²⁴ *Id.*, at p. 217.

²⁵ *Ibid.*

²⁶ Supp. App., Exh.23, p. 583.

²⁷ *Ibid.*

these weights and pressures during Mr. Allen's long tenure on the Row also have contributed to his decline.²⁸

The State asserts that "Allen's affection for his family rings hollow," since he led his sons Roger and Kenneth into crime, resulting in both of them serving prison time.²⁹ But the extensive evidence from family and friends of Ray Allen presented in the federal habeas corpus proceedings exhibited broad concurrence about the care and love that he had for the members of his family, as well as for his wife Helen's family.³⁰ For example, Roger testified that Ray Allen showed Kenny and him tremendous unconditional love.³¹ As the federal district court recounted the evidence:

[Ray Allen] provided critical support to Roger upon his parole, counseling him to avoid returning to crime and to remain diligent and patient and truthful in his efforts to secure employment. Roger secured stable employment, resulting in successful parole and eventual ownership of his own air-conditioning business. He ascribes much of his success to qualities [Ray Allen] instilled in him and the interest [Ray Allen] has taken in his efforts.³²

The State's attempt to use the testimonials of Ray Allen's fellow Death Row inmates to deflate the agonies of his death row existence as reported by Dr. Good similarly fail. The fact that Ray Allen was "friendly and engaging" with them and otherwise participated in life on the Row³³ does not detract from the findings of Dr. Good, who never reported otherwise. Moreover, those testimonials

²⁸ *Id.*, at pp. 583-584.

²⁹ *Opp.*, p. 10.

³⁰ See generally Appendix to Petition, Exh. 13, pp. 358-379.)

³¹ *Id.*, at p. 365.

³² *Id.*, at p. 374 (citations to record omitted).

³³ *Opp.*, p. 10.

were almost fifteen years ago, before Ray Allen's stroke, heart attacks, diabetes, and other ailments had so disabled him and reduced his circumstances.

Although the State concludes that Ray Allen's "claim of 'Death Row Phenomenon' is unworthy of consideration,"³⁴ it cannot deny that the conditions of confinement on Death Row at San Quentin are scandalously and chronically unhealthy and dangerous to life, as the courts have repeatedly observed and prison officials have candidly conceded, and that Ray Allen's health and spirits have declined dramatically during the course of his exposure to them. Nor can the State credibly dismiss the sound basis for clemency predicated on the punishing effects of that exposure for almost a quarter-century. As Dr. Good noted about Ray Allen, "Losing his health and vitality to heart attacks and diabetes has made him less resilient to Death Row's grinding assault on his humanity," and more vulnerable than other condemned inmates to the inherently devastating effects of the death row phenomenon.³⁵ Thus, the vicious cycle of Ray Allen's exposure to that phenomenon and the State's continuing neglect of his medical condition have accelerated his deterioration.

In sum, the punishment that Ray Allen has experienced since the judgment of death was imposed has fully served the State's interests in retribution and deterrence, and the State's interest in his incapacitation has been fully satisfied by his enfeebled condition. His execution now would be purposeless and barbarous, a step back in our State's administration of the Death Penalty at a time when public support for the death penalty is waning and the Legislature is on the brink

³⁴ Opp., p. 11.

³⁵ Appendix in Support of Petition, Exh. 12, p. 284.

of imposing a moratorium on its use.³⁶ Under these circumstances, the execution of Ray Allen would bring the State into shameful disrepute, and would be contrary to its own best interests.

II.

THE GOVERNOR SHOULD GRANT A REPRIEVE FROM EXECUTION TO PERMIT RAY ALLEN TO DEVELOP FULLY THE BASES FOR COMMUTATION OF HIS DEATH JUDGMENT.

Ray Allen also petitioned the Governor for a reprieve of 120 days to permit him to set forth fully all of the bases that support his application for commutation of his sentence. As he recounted in his Petition, the massive heart attack that he suffered at the outset of the investigation for and preparation of his Petition, together with various impediments to his access to counsel erected by prison authorities, deprived him of a reasonable opportunity to develop and present all of the evidence that favors commutation of his sentence. Most importantly, he showed that the reprieve was “necessary to permit completion of the clemency investigation to determine whether [he] suffers from brain damage.”³⁷ His claim

³⁶ See, e.g., Editorial, *Shut Down Death Row*, L.A. Times, Oct. 27, 2005, at <http://www.latimes.com/news/opinion/editorials/la-ed-tookie27oct27,0,1865279.story?coll=la-news-comment-editorials> (“California ... should give up on capital punishment altogether”); Editorial, *To Hear Victims’ Voices*, S. F. Chronicle, Dec. 8, 2005, p. B-8 (“Executions in California are rare enough ... that they are more spectacle than deterrent. As we have advocated in the past, this state should join others in imposing a moratorium on the death penalty, especially with the wave of exonerations across the nation that has exposed a disturbing margin of error in our justice system.”); Ryan, *Suspend Executions – For Now*, S. F. Chronicle, Dec. 8, 2005, p. B-1 (“Schwarzenegger should announce a moratorium on all executions in California”).

³⁷ Petition for Clemency, p. 31.

that "completion of this investigation [was] vital" to his application³⁸ is borne out even by the Opposition to that application, which quotes the Ninth Circuit's observation that "[n]one of the testimony portrays a person whose moral sense was warped by abuse, drugs, *mental incapacity or disease* or who acted out of passion, anger or other motive unlikely to reoccur."³⁹ That is precisely why the testing Ray Allen has sought is so essential.

The State asserts that Ray Allen "provides no concrete information about what additional material could be produced that could possibly aid his appeal for mercy."⁴⁰ This is not correct. If the new technology of the MRI and SPECT tests reveal previously undiscovered brain damage, that would be a powerful aid in support of his appeal for mercy.⁴¹ Ray Allen should thus be given a fair opportunity to investigate and develop this basis for clemency through the necessary testing recommended by mental health professionals. The State does not dispute that to this day prison authorities have precluded the investigation of such brain damage by refusing to provide Ray Allen with the surgery that has been prescribed for him to improve his eyesight, which is necessary for his experts to conduct neuropsychological testing, and also refusing to transfer him to a facility where the necessary MRI and SPECT tests can be conducted.⁴²

As Ray Allen's clemency petition indicated, he filed a civil rights action in federal court seeking postponement of his execution as a matter of constitutional imperative in order to secure more time to prepare his clemency petition. Part of

³⁸ *Ibid.*

³⁹ Opp., p. 14.

⁴⁰ *Id.*, at pp. 32-33.

⁴¹ See Petition, p. 31.

⁴² See, e.g., Supp. App., Exh. 24, pp. 592-594.

the court's reasoning in finding no constitutional basis to involve itself in the clemency process as requested was that "[Governor] Schwarzenegger may decide that he requires the evidence proffered by [Allen] before making a determination about commutation, in which case he will grant [the] reprieve."⁴³ Ray Allen requests that the Governor so find, and so act.

⁴³ *Allen v. Hickman* (N.D.Cal.) No. C 05 501 JSW, order filed Dec. 15, 2005, p. 13.

CONCLUSION

Without meeting Ray Allen's substantial grounds for clemency, the State instead seeks to shift the focus almost entirely to the facts of the capital crimes themselves. In doing so, the State either ignores or summarily denigrates the worthiness of his clemency petition, which is based largely on developments in the quarter-century since those crimes. Thus, the State's Opposition provides very little help to the Governor in addressing the injustice of executing Ray Allen now. To further aid the Governor in his decision, we request that in addition to conducting a first hand inspection of the Death Row facilities at San Quentin, the Governor grant the parties a private hearing before he acts. We again urge the Governor to exemplify the ideals and decency of our State by sparing Ray Allen from execution on January 17, 2005.

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