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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA

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11 CLARENCE RAY ALLEN,
12 Petitioner,

NO. CIV. S-06-64 FCD/DAD

13 v.

MEMORANDUM AND ORDER

14 STEVEN ORNOSKI, Warden of
15 the California State Prison at
16 San Quentin, and THE ATTORNEY
17 GENERAL OF THE STATE OF
18 CALIFORNIA,

Respondents.

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20 This morning, petitioner Clarence Ray Allen filed a petition
21 for writ of habeas seeking relief from his sentence of death
22 under 28 U.S.C. § 2254 and a motion for a stay of his January 17,
23 2006 execution date.¹ This is petitioner's second proceeding in

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25 ¹ In a December 23, 2005 habeas corpus petition, petitioner
26 raised these claims before the California Supreme Court. At
27 12:30 p.m. on January 10, 2006, that court denied the petition in
28 a one-sentence order: "Petitioner's third petition for a writ of
habeas corpus and request for stay of execution, filed December
23, 2005, is denied on the merits." In re Clarence Ray Allen,
No. S139857 (Cal. Supreme Ct.).

1 this court. In 1988, petitioner filed a petition for a writ of
2 habeas corpus. Allen v. Calderon, CIV S 88-1123 F.D. JFM (E.D.
3 Cal.). After exhaustion of his state remedies, amendment of the
4 petition, and an evidentiary hearing, on March 9, 1999 Magistrate
5 Judge Moulds recommended denial of the amended petition. By
6 order dated May 11, 2001, the undersigned adopted those findings
7 and recommendations, denied the amended petition, and dismissed
8 the case. The Court of Appeals affirmed. Allen v. Woodford, 395
9 F.3d 979 (9th Cir.), cert. denied, 126 S. Ct. 134 (2005).

10 Petitioner concedes that he did not raise in his prior petition
11 the Eighth Amendment claims now raised in the pending petition.
12 Early this afternoon, the state filed a response.²

13 The facts underlying petitioner's conviction and sentence
14 were set out in the March 1999 Findings and Recommendations.
15 They need not be repeated here.

16 Petitioner presents two distinct claims. First, because he
17 is elderly and "woefully infirm," petitioner argues his execution
18 would violate the Eighth Amendment. He describes "evolving
19 standards of decency" based on state laws and practices and
20 "international norms" which demonstrate that his execution would
21 constitute cruel and unusual punishment banned by the Eighth
22 Amendment. Given his poor health, his argument continues, his
23 execution would serve neither the retributive nor the deterrent
24 purposes of the death penalty. The essence of this claim is
25 petitioner's physical condition. Second, petitioner argues that

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27 ² Due to the extreme exigencies of time and the adequacy
28 of the prior briefing, the court finds a reply brief and oral
argument unnecessary.

1 executing him after his extended tenure on death row, now more
2 than 23 years, along with the "horrific" conditions of his
3 confinement, would also violate his Eighth Amendment rights.

4 I.

5 Because this is not petitioner's first proceeding in this
6 court, the initial issue is whether he must seek permission from
7 the Court of Appeals to file his current petition. For a "second
8 or successive" ("SOS") petition, 28 U.S.C. section 2244 provides
9 the following "gatekeeping" requirements:

10 (b) (3) (A) Before a second or successive
11 application permitted by this section is
12 filed in the district court, the applicant
13 shall move in the appropriate court of
14 appeals for an order authorizing the district
15 court to consider the application.

14 The court of appeals may authorize a filing where "the
15 application makes a prima facie showing that the application
16 satisfies the requirements of this subsection." Subsection
17 (b) (3) (C). Those requirements of subsection (b) include the
18 following:

19 (1) A claim presented in a second or
20 successive habeas corpus application under
21 section 2254 that was presented in a prior
22 application shall be dismissed.

22 (2) A claim presented in a second or
23 successive habeas corpus application under
24 section 2254 that was not presented in a
25 prior application shall be dismissed unless -

24 (A) the applicant shows that the claim relies
25 on a new rule of constitutional law, made
26 retroactive to cases on collateral review by
27 the Supreme Court, that was previously
28 unavailable; or

27 (B) (I) the factual predicate for the claim
28 could not have been discovered previously
through the exercise of due diligence; and

1 (ii) the facts underlying the claim, if
2 proven and viewed in light of the evidence as
3 a whole, would be sufficient to establish by
4 clear and convincing evidence that, but for
5 constitutional error, no reasonable
6 factfinder would have found the applicant
7 guilty of the underlying offense.

8 Petitioner argues his application is filed properly in this
9 court because it is not a "second or successive habeas corpus
10 application" within the meaning of section 2244. The statute
11 does not define an SOS application. "Courts have uniformly
12 rejected a literal reading of Section 2244, concluding that a
13 numerically second petition does not necessarily constitute a
14 'second' petition for the purposes of AEDPA." James v. Walsh,
15 308 F.3d 162, 167 (2nd Cir. 2002) (collecting cases). The
16 standard consistently applied is the abuse of the writ standard
17 used prior to the 1996 amendments (the "AEDPA") to the habeas
18 statute. The Court of Appeals for the Ninth Circuit has applied
19 this abuse of the writ standard: "The Supreme Court, the Ninth
20 Circuit, and our sister circuits have interpreted the concept
21 incorporated in this term of art ["second or successive"] as
22 derivative of the 'abuse-of-the-writ' doctrine developed in pre-
23 AEDPA cases." Hill v. Alaska, 297 F.3d 895, 897-98 (9th Cir.
24 2002). Pre-AEDPA law in this circuit established that an
25 "'abuse-of-the-writ' occurs when a petitioner raises a habeas
26 claim that could have been raised in an earlier petition were it
27 not for inexcusable neglect." Id. at 898 (citing McCleskey v.
28 Zant, 499 U.S. 467, 493 (1991)).

Arguing that his is not an SOS application, petitioner
relies primarily on the Supreme Court's decision in Stewart v.

1 Martinez-Villareal, 523 U.S. 637 (1998). There, the Court
2 considered whether a claim that the petitioner was incompetent to
3 be executed, a Ford claim,³ which the federal court dismissed as
4 premature in a prior petition, was SOS. The Court held it was
5 not, finding that because the district court originally refused
6 to rule on petitioner's Ford claim, the later assertion of the
7 claim did not amount to an SOS application subject to section
8 2244(b). 523 U.S. at 644-45. The Court pointed out that
9 identifying any assertion of a claim as SOS whenever the
10 petitioner had previously been to federal court would have
11 implications for habeas practice which would be "far reaching and
12 seemingly perverse." Id. at 644. This was true because the Ford
13 claim was not ripe until the petitioner's execution "was
14 imminent." Id. at 644-45. Indeed, as the Court recognized,
15 applying section 2244(b) to Martinez-Villareal's Ford claim would
16 render it unreviewable on the merits by a federal habeas court.
17 Id. at 645. If considered SOS, the claim would have been barred
18 since the claim did not rely on new law and was not an assertion
19 of innocence of the underlying crime. 28 U.S.C. § 2244(b)(2).
20 It is possible this complete denial of federal review would
21 amount to an unconstitutional suspension of the writ. See James,
22 308 F.3d at 168 (a denial of permission for [the petitioner] to
23 bring the present claim as a first habeas petition might
24 implicate the Suspension Clause, which provides that "[t]he
25 Privilege of the Writ of Habeas Corpus shall not be suspended,

27 ³ In Ford v. Wainwright, the Court held that the Eighth
28 Amendment prohibits the execution of person who is insane. 477
U.S. 399, 410 (1986).

1 unless when in Cases of Rebellion or Invasion the public Safety
2 may require it." U.S. Const. art. I, § 9, cl. 2).`

3 The situation in Martinez-Villareal differs from that
4 presented here in one important respect. Petitioner has not
5 previously raised his current claims in federal court. The
6 Supreme Court specifically declined to address this situation:

7 This case does not present the situation
8 where a prisoner raises a Ford claim for the
9 first time in a petition filed after the
10 federal courts have already rejected the
11 prisoner's initial habeas application.
Therefore, we have no occasion to decide
whether such a filing would be a "second or
successive habeas corpus application" within
the meaning of AEDPA.

12 523 U.S. at 645 n.1. However, since Martinez-Villareal, several
13 courts have examined the issue and held that, such a claim not
14 raised previously and not ripe until an execution was imminent,
15 is not an SOS claim subject to section 2244(b). See Singleton v.
16 Norris, 319 F.3d 1018, 1023 (8th Cir. 2003) (involuntary
17 medication of prisoner after execution date set); Coe v. Bell,
18 209 F.3d 815, 823 (6th Cir. 2000) (Ford claim); Poland v.
19 Stewart, 41 F. Supp. 2d 1037, 1039 (D. Ariz. 1999) (Ford claim).
20 Respondent points to no authority to the contrary.⁴

21 Petitioner argues that both of his claims fall within the
22 ambit of Martinez-Villareal. He is only partly correct.
23 Petitioner's claim that the standards of decency underlying the
24 Eighth Amendment dictate that a man of his age and condition
25 should be spared is essentially a claim of physical incompetency
26

27 ⁴ While the court's independent research has identified
28 some cases suggesting to the contrary, each of those decisions
pre-dated Martinez-Villareal and are, therefore, inapplicable.

1 to be executed. The focus of this claim is petitioner's age and
2 condition at the time his execution date looms.⁵ This is not a
3 claim petitioner could have raised in 1991 when he filed his
4 amended petition in his prior proceeding or even in 2001 when
5 this court denied that petition. Like a petitioner's mental
6 competence, petitioner's physical condition is changeable. The
7 fact that he may have been physically infirm in 1991, 1997, or
8 2001 would not have amounted to a ripe claim that he was too
9 infirm to be executed since his physical condition, like his
10 mental competence, could very well change.

11 Petitioner's duration of confinement claim is entirely
12 different. The claim arises from Justice Stevens' memorandum
13 respecting the denial of certiorari in Lackey v. Texas, 514 U.S.
14 1045 (1995). There, Justice Stevens commented upon the
15 importance and novelty of the petitioner's claim that his
16 seventeen years on death row amounted to cruel and unusual
17 punishment in violation of the Eighth Amendment. It is quite
18 clear that in this circuit a Lackey claim falls within the ambit
19 of section 2244(b). Gerlaugh v. Stewart, 167 F.3d 1222, 1223-24
20 (9th Cir. 1999); Ortiz v. Stewart, 149 F.3d 923, 944 (9th Cir.
21 1998); Gretzler v. Stewart, 146 F.3d 675, 676 (9th Cir. 1998);
22 Ceja v. Stewart, 134 F.3d 1368, 1369 (9th Cir. 1998).

25 ⁵ The fact that petitioner includes the length of his
26 confinement as a factor contributing to his physical condition
27 does not turn this into a different claim. Certainly, a claim of
28 incompetence would include a discussion of all the factors,
including possibly tenure on death row and treatment in prison,
which contributed to the petitioner's mental state. The basis of
petitioner's first claim is that his age and physical infirmity
render his execution a violation of the Eighth Amendment.

1 An application for a writ of habeas corpus on
2 behalf of a person in custody pursuant to the
3 judgment of a State court shall not be granted
4 with respect to any claim that was adjudicated on
5 the merits in State court proceedings unless the
6 adjudication of the claim-

7 (1) resulted in a decision that was contrary to,
8 or involved an unreasonable application of,
9 clearly established Federal law, as determined by
10 the Supreme Court of the United States; or
11 (2) resulted in a decision that was based on an
12 unreasonable determination of the facts in light
13 of the evidence presented in the State court
14 proceedings.

15 28 U.S.C. § 2254(d). Only the former requirement is relevant
16 here.

17 In Williams v. Taylor, 529 U.S. 362, 409-10 (2000), the
18 Supreme Court clarified the meaning of "contrary to" and
19 "unreasonable application of" clearly established Federal law, as
20 determined by the Supreme Court, holding that a federal court
21 must *objectively* determine whether the state court's decision of
22 federal law was erroneous or incorrect. The Court reiterated the
23 views expressed in Williams in Bell v. Cone, 535 U.S. 685, 694
24 (2002) and held that (1) under the "contrary to" clause of
25 Section 2254(d)(1), a federal habeas court may issue the writ if
26 the state court applies a rule different from the governing law
27 set forth in Supreme Court cases or if it decides a case
28 differently than the Supreme Court has done on a set of
materially indistinguishable facts; and (2) under the
"unreasonable application" clause of Section 2254(d)(1), the
court may grant relief if the state court correctly identifies
the governing legal principle from Supreme Court decisions but
unreasonably applies it to the facts of the case. The court held
that under this latter clause the application must be objectively

1 unreasonable, which is different from incorrect.

2 In this case, the above standard is modified because the
3 "state court reach[ed] a decision on the merits but provide[d] no
4 reasoning to support its conclusion." Pirtle v. Morgan, 313 F.3d
5 1160, 1167 (9th Cir. 2002). In that situation, the court
6 "independently review[s] the record to determine whether the
7 state court clearly erred in its application of Supreme Court law
8 . . . [but] still defer[s] to the state court's ultimate
9 decision." Id.; see also, Delgado v. Lewis, 223 F.3d 976, 982
10 (9th Cir. 2000) (stating that independent review is not the
11 equivalent of *de novo* review, rather review is undertaken through
12 the "'objectively reasonable' lens" of Williams).

13 Applying these standards, petitioner cannot prevail because
14 there is no "clearly established" United States Supreme Court law
15 which renders petitioner's execution, at his advanced age and
16 with his current physical infirmities, a violation of the cruel
17 and unusual punishment clause of the Eighth Amendment. Indeed,
18 to the extent the Supreme Court has found that the Eighth
19 Amendment limits the death penalty, those limitations have
20 related to reduced mental culpability or capacity. Specifically,
21 in holding that the Eighth Amendment prohibited the execution of
22 juveniles, the Supreme Court enumerated three differences between
23 juveniles and adults: juveniles are (1) immature, with impulsive
24 judgment; (2) they have a greater vulnerability to negative
25 influences; and (3) they have relatively more transitory
26 personality traits. Roper v. Simmons, 125 S.Ct. 1183, 1195
27 (2005). Clearly, none of these differences apply to a mature
28 adult like petitioner who committed multiple murders with cold-

1 blooded calculation at age fifty.

2 Similar to Roper, in holding that the Eighth Amendment
3 precluded execution of the mentally retarded, the Court
4 emphasized the disparity of the "relative culpability of mentally
5 retarded offenders, and the relationship between mental
6 retardation and the penological purposes served by the death
7 penalty." Atkins v. Virginia, 536 U.S. 304, 319 (2002).
8 Likewise, in Ford v. Wainwright, 477 U.S. 399, 421 (1986)
9 (Powell, J., conc.), finding the execution of the mentally
10 incompetent unconstitutional under the Eighth Amendment, the
11 Court held "that the Eighth Amendment forbids the execution only
12 of those who are unaware of the punishment they are about to
13 suffer and why they are to suffer it." Also, in Enmund v.
14 Florida, 458 U.S. 782, 801 (1982), the Court based its decision,
15 finding the execution of those who aided a felony but did not
16 kill or intend to kill unconstitutional under the Eighth
17 Amendment, on the personal culpability of the accomplice:
18 "criminal culpability must be limited to his participation in the
19 robbery, and his punishment must be tailored to his personal
20 responsibility and moral guilt."

21 To the contrary, petitioner's argument, here, that it is a
22 violation of the Eighth Amendment to execute a seventy-six year
23 old man suffering from serious physical infirmities, does not
24 involve culpability. Nothing about his advanced age or his
25 physical infirmities (chronic heart disease, diabetes, legal
26 blindness, and inability to ambulate), affected his culpability
27 at the time he committed the capital offenses. There is no
28 evidence now that he does not understand the gravity and meaning

1 of his imminent execution. Furthermore, petitioner's argument
2 that his execution serves none of the penological purposes of
3 capital punishment is without merit. Petitioner's current
4 condition is irrelevant to the fulfillment of those purposes.
5 Indeed, sparing his life, according to the Ninth Circuit, would
6 undermine the primary penological purpose:

7 [The] evidence of Allen's guilt is overwhelming.
8 Given the nature of his crimes, sentencing him to
9 another life term would achieve none of the traditional
10 purposes underlying punishment. Allen continues to
11 pose a threat to society, indeed to those very persons
12 who testified against him in the Fran's Market triple-
13 murder trial here at issue, and has proven that he is
14 beyond rehabilitation. He has shown himself more than
15 capable of arranging murders from behind bars. If the
16 death penalty is to serve any purpose at all, it is to
17 prevent the very sort of murderous conduct for which
18 Allen was convicted.

19 Allen v. Woodford, 395 F.3d 979, 1019 (9th Cir. 2005.)

20 This court is bound by Supreme Court precedent. At bottom,
21 what petitioner requests herein is that this court find Supreme
22 Court precedent where there is none, by holding that "evolving
23 standards of decency" call for a revision of the constitutional
24 standards to recognize the inhumanity of executing the elderly
25 and infirm. See Trop v. Dulles, 356 U.S. 86, 101 (1958) (the
26 Eighth Amendment "must draw its meaning from the evolving
27 standards of decency that the mark the progress of a maturing
28 society"). The debilitating infirmities of an old man who
murdered remorselessly in his middle age is sobering and pitiable
and, perhaps, deserving of executive mercy. This court, however,
under the AEDPA, is not at liberty to redefine the constitutional
standards unless articulated by the Supreme Court. As such, the
court likewise cannot find that the state court's refusal to do

1 so was unreasonable or contrary to law.

2 For the foregoing reasons, IT IS HEREBY ORDERED as follows:

3 1. Good cause appearing, petitioner's January 12, 2006
4 motion for leave to proceed inform a pauperis is granted.

5 2. Good cause appearing, petitioner's January 12, 2006
6 application for appointment of counsel is granted. Michael
7 Satris, SBN 67413, P.O. Box 337, Bolinas, California 94924, shall
8 represent petitioner pursuant to 21 U.S.C. § 848(q).

9 3. Petitioner's January 12, 2006 application for a writ of
10 habeas corpus is denied on the merits with respect to
11 petitioner's claim that his age and physical infirmity render his
12 execution a violation of the Eighth Amendment. This court lacks
13 jurisdiction to consider petitioner's other claim that his
14 execution after his tenure on death row amounts to an Eighth
15 Amendment violation because he has not sought permission from the
16 Court of Appeals to file that claim here. 28 U.S.C. §
17 2244(b)(3)(A).

18 4. Because this court finds no merit to petitioner's claim
19 that his age and physical infirmity render his execution a
20 violation of the Eighth Amendment, petitioner's request for a
21 stay of execution is denied. Vargas v. Lambert, 159 F.3d 1161,
22 1165-66 (9th Cir. 1998) (quoting Barefoot v. Estelle, 463 U.S.
23 880, 895 (1963) ("The granting of a stay should reflect the
24 presence of substantial grounds upon which relief might be
25 granted.")). For the same reasons, the court finds petitioner
26 has not made a "substantial showing of the denial of a
27 constitutional right" for the issuance of a certificate of
28

1 appealability. 28 U.S.C. § 2253(c).

2 DATED: January 12, 2006

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/s/ Frank C. Damrell Jr.
FRANK C. DAMRELL, Jr.
UNITED STATES DISTRICT JUDGE

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