

FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUL 08 2005

FOR THE NINTH CIRCUIT

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

JUAN H.,

Petitioner - Appellant,

v.

WALTER ALLEN, III,

Respondent - Appellee.

No. 04-15562

D.C. No. CV-02-02018-CW
Northern District of California,
Oakland

ORDER

Before: D.W. NELSON, KLEINFELD, and GOULD, Circuit Judges.

The opinion filed on June 2, 2005, and published at 408 F.3d 1262, is
AMENDED as follows:

The content of footnote 8 states:

Aside from determining whether a state court has unreasonably applied a provision of federal law or the Constitution, under § 2254(d)(2), a federal court may also grant a writ of habeas corpus if a material factual finding of the state court reflects “an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(2). In making this inquiry, we must presume that any state court factual finding is correct, and the petitioner has the burden of proving

otherwise by clear and convincing evidence. *Id.* at § 2254(e)(1); *Wiggins v. Smith*, 539 U.S. 510, 528 (2003).

The content of footnote 8 is deleted in its entirety and replaced with the following language:

Aside from determining whether a state court has unreasonably applied a provision of federal law or the Constitution, under § 2254(d)(2), a federal court may also grant a writ of habeas corpus if a material factual finding of the state court reflects “an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(2); *Wiggins v. Smith*, 539 U.S. 510, 528 (2003).

The second citation following the third sentence in section V.A. states: *Torres v. Mullin*, 317 F.3d 1145, 1163 (10th Cir. 2003) (Henry, J., concurring in part and dissenting in part);

This citation to *Torres v. Mullin*, 317 F.3d 1145, 1163 (10th Cir. 2003) (Henry, J., concurring in part and dissenting in part) is deleted in its entirety.

IT IS SO ORDERED.