14-56373

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERNEST DEWAYNE JONES,

Petitioner-Appellee,

v.

KEVIN CHAPPELL, Warden,

Respondent-Appellant.

On Appeal from the United States District Court
for the Central District of California No. 09-CV-02158-CJC
The Honorable Cormac J. Carney, Judge

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

Page

Introduction 1
Statement of Jurisdiction.....3
Statement of the Issues.....4
Statement of the Case.....5
A. Trial and Conviction 5
B. Direct Appeal.....6
C. State Habeas Proceeding.....7
D. Federal Habeas Proceeding.....8
E. The District Court's Order and Judgment 11
Summary of the Argument.....14
Standard of Review.....19
Argument.....19
I. AEDPA Bars Relief on the Eighth Amendment Claim Presented in Jones's Habeas Petition, Which the California Supreme Court Reasonably Rejected on the Merits 19
II. The District Court Erred in Granting Habeas Relief Based on a New Theory That Has Not Been Exhausted.....24
A. Jones Never Exhausted the "Arbitrariness" Theory.....24
B. Exhaustion Is Not Excused under § 2254(b)(1)(B)(ii).....26
C. The District Court's Exhaustion Holding Sidesteps the Basic Structure of Federal Habeas Jurisdiction.....31
III. The Anti-Retroactivity Doctrine of *Teague v. Lane* Also Bars Relief.....33
A. The Arbitrariness Theory Is a "New Rule" under *Teague* 34

TABLE OF CONTENTS
(continued)

Page

B. The Arbitrariness Theory Is Not a "Substantive" or "Watershed" Rule 36

IV. California's System for Reviewing Death Judgments Is Consistent with the Eighth Amendment 38

A. The District Court's Holding Is at Odds with Settled Eighth Amendment Jurisprudence.....38

B. The System for Reviewing Capital Sentences in California Is Lengthy Because It Is Designed to Avoid Arbitrary Results, Not to Produce Them 43

Conclusion.....58

Statement of Related Cases.....59

TABLE OF AUTHORITIES

Page

CASES

Allen v. Ornoski
435 F.3d 946 (9th Cir. 2006)..... 15, 21, 22, 23, 38

Arrendondo v. Neven
763 F.3d 1122 (9th Cir. 2014).....25

Beard v. Banks
542 U.S. 406 (2004).....17, 36

Bell v. State
938 S.W.2d 35 (Tex. Crim. App. 1996) 39

Bieghler v. State
839 N.E.2d 691 (Ind. 2005) 39, 42, 57

California v. Brown
479 U.S. 538 (1987).....40

Carey v. Saffold
536 U.S. 214 (2002).....31

Carroll v. State
114 So. 3d 883, 889-890 (Fla. 2013).....39

Chambers v. Bowersox
157 F.3d 560 (8th Cir. 1998).....38, 39

Clark v. United States
289 U.S. 1 (1933).....35

Coleman v. Thompson
501 U.S. 722 (1991).....32

Cullen v. Pinholster
131 S. Ct. 1388 (2011).....23, 26

TABLE OF AUTHORITIES
(continued)

Page

Duckworth v. Serrano
454 U.S. 1 (1981).....28

Dyer v. Calderon
151 F.3d 970 (9th Cir. 1998).....35

Engle v. Isaac
456 U.S. 107 (1982).....28

Ex parte Bush
695 So. 2d 138 (Ala. 1997).....39

Fierro v. Gomez
77 F.3d 301 (9th Cir. 1996).....53

Foster v. Florida
123 S. Ct. 470 (2002).....22

Furman v. Georgia
408 U.S. 238 (1972).....12, 40, 41

Graham v. Collins
506 U.S. 461 (1993).....17, 34, 35

Gray v. Netherland
518 U.S. 152 (1996).....25, 28

Greene v. Fisher
132 S. Ct. 38 (2011).....21

Gregg v. Georgia
428 U.S. 153 (1976).....35, 40, 41, 42

Harrington v. Richter
131 S. Ct. 770 (2011).....32, 47, 55

TABLE OF AUTHORITIES
(continued)

Page

Hill v. State
962 S.W.2d 762 (Ark. 1998) 39

In re Clark
5 Cal. 4th 750 (1993) 27

In re Reno
55 Cal. 4th 428 (2012) 45, 46, 48, 49

Johnson v. Bredesen
130 S. Ct. 541 (2009) 22

Jones v. Tubman
360 F. Supp. 1298 (S.D.N.Y. 1973) 29, 30

Kennedy v. Louisiana
554 U.S. 407 (2008) 40

Knight v. Florida
528 U.S. 990 (1999) 22, 39

Lackey v. Johnson
83 F.3d 116 (5th Cir. 1996) 39

Lackey v. Texas
514 U.S. 1045 (1995) ..... *passim*

Lambert v. Blodgett
393 F.3d 943 (9th Cir. 2004) 19

Lee v. Stickman
357 F.3d 338 (3d Cir. 2004) 29

Livaditis v. Martel
No. CV 96-2833-SVW (C.D. Cal. Sept. 23, 2014) 26, 39

TABLE OF AUTHORITIES
(continued)

Page

McKenzie v. Day
57 F.3d 1461 (9th Cir. 1995)..... 22, 23, 38, 41

McKinney v. State
992 P.2d 144 (Idaho 1999).....39

Morales v. Cal. Dep't of Corr. & Rehab.
168 Cal. App. 4th 729 (2008).....53

Morales v. Tilton
465 F. Supp. 2d 972 (N.D. Cal. 2006).....53

Noel v. Hall
568 F.3d 743 (9th Cir. 2009).....4

Noltie v. Peterson
9 F.3d 802 (9th Cir. 1993).....28

People v. Anderson
25 Cal. 4th 543 (2001) 20, 39

People v. Bryant
60 Cal. 4th 335 (2014) 47

People v. Emerson
727 N.E.2d 302 (Ill. 2000) 39

People v. Jones
29 Cal. 4th 1229 (2003) 5, 6, 7, 20

People v. Lucas
60 Cal. 4th 153 (2014) 47

People v. Ochoa
26 Cal. 4th 398 (2001) 21, 43

TABLE OF AUTHORITIES
(continued)

Page

Phillips v. Vasquez
56 F.3d 1030 (9th Cir. 1995).....30

Rohan v. Woodford
334 F.3d 803 (9th Cir. 2003).....51

Rose v. Lundy
455 U.S. 509 (1982).....15, 25, 31

Russell v. State
849 So. 2d 95 (Miss. 2003).....39

Ryan v. Gonzales
133 S. Ct. 696 (2013).....51

Saffle v. Parks
494 U.S. 484 (1990).....37

Sawyer v. Smith
497 U.S. 227 (1990).....17, 36

Schriro v. Summerlin
542 U.S. 348 (2004).....36, 37

Sims v. Dep't of Corr. & Rehab.
216 Cal. App. 4th 1059 (2013).....53

Smith v. Mahoney
611 F.3d 978 (9th Cir. 2010).....34, 38

State v. Austin
87 S.W. 3d 447 (Tenn. 2002).....39

State v. Moore
591 N.W.2d 86 (Neb. 1999).....39

TABLE OF AUTHORITIES
(continued)

Page

State v. Smith
931 P.2d 1272 (Mont. 1996) 39, 42, 57

State v. Sparks
68 So. 3d 435 (La. 2011).....39

Sweet v. Cupp
640 F.2d 233 (9th Cir. 1981).....28

Tamalani v. Stewart
249 F.3d 895 (9th Cir. 2001).....27

Teague v. Lane
489 U.S. 288 (1989).....*passim*

Thompson v. McDonough
517 F.3d 1279 (11th Cir. 2008).....38

Turney v. Ohio
273 U.S. 510 (1927).....35

Whorton v. Bockting
549 U.S. 406 (2007)..... 17, 33, 37

Wooten v. Kirkland
540 F.3d 1019 (9th Cir. 2008).....25

Wright v. Van Patten
552 U.S. 120 (2008).....21

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

28 U.S.C.
§ 1291 4
§ 2253(a) 4
§ 2254(a) 3
§ 2254(b) 30
§ 2254(b)(1) 24, 25
§ 2254(b)(1)(A) 15, 24
§ 2254(b)(1)(B)(i) 27
§ 2254(b)(1)(B)(ii) 16, 26, 28, 29
§ 2254(d) ..... *passim*
§ 2254(d)(1) ..... *passim*

Cal. Gov. Code
§ 68660 46
§ 68662 7

Cal. Penal Code
§ 1473 27
§ 1983 53

Fla. Stat.
§ 27.711 45

Tex. Code Crim. P. art. 11.071
§ 2A 45
§ 4 46

CONSTITUTIONAL PROVISIONS

Cal. Const. art. VI
§ 11 49
§ 12 49

U.S. Const. amend. VIII ..... *passim*

TABLE OF AUTHORITIES
(continued)

Page

COURT RULES

Cal. R. Ct. 8.630(b)(1)(A) 45

Fed. R. App. P. 43(c)(2) 4

Fed. R. Civ. P. 54(b) 3

Fla. R. App. P. 9.210(a)(5) 45

Fla. R. Crim. Proc. § 3.851(e)(1), (2) 45

OTHER AUTHORITIES

Cal. Commission on the Fair Administration of Justice,
Final Report 53, 54, 57

Cal. Supreme Court Policies Regarding Cases Arising from
Judgments of Death, Policy 3, § 2-1 7

INTRODUCTION

Ernest Jones was sentenced to death for the rape and murder of his girlfriend's mother. The California Supreme Court affirmed his conviction and sentence and denied a state habeas petition. At trial, Jones admitted stabbing the victim. No court has identified any error in either the guilt or the penalty phase of Jones's trial.

On federal habeas review, the district court entered a partial final judgment vacating Jones's capital sentence, on the ground that California's system of post-conviction review in capital cases violates the federal Constitution. The court based its ruling on a novel Eighth Amendment theory that Jones himself never advanced, either in the state courts or in his federal habeas petition: that system-wide "dysfunction" in California's post-conviction process would render an execution in this case unconstitutionally "arbitrary" and strip it of any penological purpose. The court's order is improper for several threshold procedural reasons. In any event, its "arbitrariness" theory lacks any legal support.

In framing its ruling, the district court relied largely on policy studies, law review articles, and statistics that it found or created on its own. It reasoned that California's review process for capital cases had become "inordinately and unnecessarily delayed"; that different cases took different amounts of time to reach final resolution; that the passage of time and the intervention of other factors, such

as death in prison, led to some sentences never being carried out; and that, when all these factors were combined, the State in the end would likely execute "only an arbitrarily selected few of those sentenced to death." ER 26-27. The court concluded that long-delayed, "unpredictable," and "arbitrary" executions would not serve the deterrent or retributive purposes necessary to make capital punishment permissible under the Constitution. Holding California constitutionally responsible for all these perceived flaws, the court ruled that it would violate the Eighth Amendment for the State to execute Jones.

That ruling is fundamentally misguided. California provides capital defendants with substantial opportunities to challenge their convictions—and resources for doing so—for the precise purpose of ensuring that the death penalty will *not* be "arbitrarily" imposed. Providing that sort of careful, individualized review through direct appeal and state habeas proceedings takes time. The exact course of each case depends on its particular circumstances, and no Eighth Amendment precedent requires the State to force every case to conform to some schedule designed to ensure greater speed. Presumably California could make its review system faster and more uniform on average by, for example, imposing severe time limits, page limits, or resource constraints of the sort faced by capital defendants in some other States. The State can scarcely be faulted under the Eighth Amendment, however, for having instead made procedural choices

designed to provide more protection for the profound personal and governmental interests at stake in capital cases.

There has long been healthy public debate over whether to impose the death penalty at all—and, if it is to be imposed, over how best to balance important interests in accuracy, finality, and timeliness in a way that is fiscally manageable and fair to capital defendants, to the public, and to the victims of terrible crimes and their families. In 2012, California voters considered and rejected Proposition 34, which would have ended capital punishment in the State. Policymakers have enacted and will continue to consider proposals for reforming the litigation process. There is, however, no legal basis for the district court's conclusion that the time often required to work through California's current system of thorough review, combined with the fact that some cases move faster than others, creates a "dysfunctional" system under which those executions that do take place are "arbitrary" and lack penological purpose. The court mistook its policy critique as a proper basis for legal judgment. Its decision should be reversed.

STATEMENT OF JURISDICTION

The district court had jurisdiction over Jones's habeas petition under 28 U.S.C. § 2254(a). On July 25, 2014, the district court entered final judgment on Claim 27 of Jones's first amended petition pursuant to Federal Rule of Civil Procedure 54(b), after finding that there was "no just reason for delay in the entry

of this judgment until final determination on the remaining claims in this matter." ER 1. Respondent-Appellant Warden Kevin Chappell (California or the State) filed a notice of appeal on August 21, 2014. ER 94.[1] This Court has jurisdiction over the State's appeal under 28 U.S.C. §§ 1291 and 2253(a), so long as the district court properly entered a partial final judgment. *See Noel v. Hall*, 568 F.3d 743, 747 (9th Cir. 2009). Under the particular circumstances of this case, the district court permissibly determined that it was appropriate to enter a partial judgment so as to permit an immediate appeal.

STATEMENT OF THE ISSUES

1. Whether relief on the Eighth Amendment delay claim that Jones presented to the state courts and in his federal habeas petition is barred under 28 U.S.C. § 2254(d).

2. Whether the district court erred in granting relief based on a novel Eighth Amendment theory that Jones never exhausted in the state courts.

3. Whether the theory on which the district court granted relief is a "new rule" that may not be applied retroactively on federal collateral review under *Teague v. Lane*, 489 U.S. 288 (1989).

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[1] Acting Warden Kelly Mitchell has succeeded Warden Chappell as Jones's custodian at San Quentin State Prison. She should be substituted as the named respondent-appellant. *See* Fed. R. App. P. 43(c)(2).

4. Whether California's system of post-conviction judicial review in capital cases renders those executions that are ultimately carried out arbitrary or devoid of penological purpose in violation of the Eighth Amendment.

STATEMENT OF THE CASE

A. Trial and Conviction

In 1995, Jones was tried for the rape and murder of Julia Miller, the mother of his girlfriend. *See People v. Jones*, 29 Cal. 4th 1229, 1238-1242 (2003); ER 15. Miller was found dead in her house, bound and gagged, with two kitchen knives sticking out of her neck and pieces of three other knives on or around her body. *Jones*, 29 Cal. 4th at 1238. In addition to the wounds in her neck, she had fourteen stab wounds in her abdomen, one in her vagina, and one in the middle of her chest that penetrated to her spine. *Id.* at 1239. Early the next morning, Jones led police on a chase in the victim's station wagon. *Id.* When the pursuit ended after forty minutes, Jones shot himself in the chest with a rifle. *Id.* Jones's DNA matched that of ejaculate found in Miller's body. *Id.* at 1239-1240. Jones testified at his trial, admitting that he had repeatedly stabbed the victim. *Id.* at 1242.

The jury convicted Jones of first degree murder and rape, while acquitting on charges of burglary and robbery. *Id.* at 1237. The jury found true the special circumstance allegation that the murder was committed in the commission of the rape. *Id.* It also found true the allegations that Jones personally used a deadly

weapon to commit the crimes and that Jones had served a prior prison term. *Id.* After hearing aggravating and mitigating evidence, the jury set Jones's penalty at death. *See id.* at 1237, 1242-1244.

B. Direct Appeal

Jones pursued an automatic direct appeal to the California Supreme Court. He filed his opening brief, which presented 20 separate claims for relief, on June 19, 2001. *See* Cal. S. Ct. Docket (No. S046117).[2] In his eighteenth claim, Jones argued that "the extraordinary delay between sentence and execution" that he anticipated would "render[] the imposition of the death penalty cruel and unusual." ER 144-145. This is generally known as a "*Lackey*" claim. *See Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (Stevens, J., respecting denial of certiorari). As Jones described the claim, it had two components: first, "that delay in itself," and accompanying "uncertainty" about the execution, would subject him to "physical conditions" and "emotional and mental anguish" amounting to cruel and unusual punishment (ER 145, 154-155); and second that, as a result of the delay, "the actual carrying out of his execution" would violate the Eighth Amendment because it "would serve no legitimate penological ends" (ER 155-156).

[2] The California Supreme Court docket can be searched by visiting http://appellatecases.courtinfo.ca.gov/search.cfm?dist=0.

Briefing was completed on February 26, 2002. *See* Cal. S. Ct. Docket (No. S046117). On March 17, 2003, the California Supreme Court unanimously affirmed Jones's conviction and sentence. *See* 29 Cal. 4th at 1238.[3] In particular, the Court held that Jones's *Lackey* claim was "untenable": "If the appeal results in reversal of the death judgment, he has suffered no conceivable prejudice, while if the judgment is affirmed, the delay has prolonged his life." *Id.* at 1267 (internal quotation marks omitted).

C. State Habeas Proceeding

Pursuant to a state statutory requirement and the Court's internal policies, the California Supreme Court appointed habeas counsel for Jones on October 20, 2000, while his direct appeal was still pending. *See* Cal. Gov. Code § 68662; California Supreme Court Policies Regarding Cases Arising from Judgments of Death, Policy 3, § 2-1. Jones filed his initial state habeas petition in the California Supreme Court on October 21, 2002. ER 15. The petition presented 27 separate grounds for relief. Briefing was completed on December 8, 2003, and the California Supreme Court issued a summary order denying the petition on March

[3] Justice Kennard concurred, disagreeing with the Court's analysis of one issue related to Jones's conviction, but agreeing that the conviction and sentence should be affirmed. *See* 29 Cal. 4th at 1268-1269.

16, 2009. ER 81. The order stated that each of the 27 claims was denied on the merits, and noted that certain claims were also procedurally barred. *Id.*[4]

D. Federal Habeas Proceeding

On March 10, 2010, Jones filed a federal petition for a writ of habeas corpus. ER 137. In Claim 27, Jones alleged that his "execution following a long period of confinement under a sentence of death" would violate the Eighth Amendment. ER 138. He argued, as he had in state court, both that the period of delay in his case "would constitute cruel and unusual punishment because of the physical and psychological suffering inflicted on petitioner" during that period and that, because of that delay, "the state has no legitimate penological interest (deterrent or retributive) in executing petitioner." ER 141-142.

Jones's federal habeas petition was fully briefed by January 27, 2014. ER 170. On April 10, 2014, the district court *sua sponte* issued a five-page order noting that it was "extremely troubled by the long delays in execution of sentence in this and other California death penalty cases." ER 132. The court asserted that the State's "strong interest in expeditiously exercising its sovereign power to enforce the criminal law" had "been utterly stymied for two reasons." ER 133-134 (internal quotation marks omitted). "First, in California, the state and federal

[4] The California Supreme Court also issued an order denying a second habeas petition that Jones had filed on October 16, 2007. *See* Cal. S. Ct. Docket (No. S159235).

procedures for litigating, post-conviction, a capital defendant's Constitutional claims are especially protracted and fraught with delay." ER 134. "Second, all California executions have been indefinitely stayed while the courts resolve the Constitutionality of California's lethal injection protocol." *Id.* As a result, "both petitioner and the State must labor under the grave uncertainty of not knowing whether petitioner's execution will ever, in fact, be carried out." ER 134-135. The court expressed a belief that "this state of affairs is intolerable, for both petitioner and the State, and that petitioner may have a claim that his death sentence is arbitrarily inflicted and unusually cruel because of the inordinate delay and unpredictability of the federal and state appellate process." ER 135.

The district court set a briefing schedule under which the parties were given until June 9, 2014, to file simultaneous briefs discussing the court's concerns, with responsive briefs due 45 days later and reply briefs due 30 days after that. *Id.* On April 14, 2014, the district court issued a further order that reaffirmed the briefing schedule and required Jones to

> serve and file an amendment to his operative petition for writ of habeas corpus alleging [a] claim that the long delay in execution of sentence in his case, coupled with the grave uncertainty of not knowing whether his execution will ever, in fact, be carried out, renders his death sentence unconstitutional.

ER 131.

Shortly thereafter, Jones amended Claim 27 of his petition to address, for the first time, California's lack of an execution protocol as a consequence of ongoing legal challenges. ER 123-124. He alleged that the lack of a protocol "renders it gravely uncertain when or whether" his execution will take place. ER 116. He continued to argue that "[c]arrying out [his] sentence after this extraordinary delay violates the Eighth Amendment," because of his physical and psychological suffering during the delay and because the delay "drastically diminished" the deterrent and retributive effect of the punishment. ER 125-126.

On June 9, 2014, the parties filed simultaneous opening briefs. ER 171. On June 11, the court advanced the schedule, making responsive briefs due on July 3 and reply briefs due on July 18. ER 96. The court set a hearing for August 4, 2014. *Id.* Attached to the June 11 order was a chart, which purported to describe "the case status of 496 individuals sentenced to death in California between 1978 and 1997." ER 97. The court encouraged the parties to "address the chart and the troubling issues it raises . . . ." *Id.* Shortly after the parties filed their responsive briefs, the district court again amended the briefing schedule, eliminating reply briefs and advancing the hearing date to July 16. ER 95.

When counsel arrived for that hearing, court staff distributed copies of a final, signed order "declaring California's death penalty system unconstitutional and vacating petitioner's death sentence." *See* ER 2. The court then took the bench

and invited comments. *See* ER 51. During the hearing, the court summarized its rationale for issuing the order:

> The way I'm looking at it is it's a huge problem. It's been a problem for a while. And they haven't fixed it and they're not going to fix it. And I just feel I have—not trying to preach, that's the last thing I'm trying to do—but I have a solemn obligation to defend and protect the Constitution. And when I look at the statistics, I have at least convinced myself that there is a constitutional problem right now. And it's not going to be fixed and no one is fixing it, and I can't be passive or silent.

ER 54. The hearing concluded at 10:10 a.m., and the district court entered its order fifteen minutes later. ER 34, 172.

E. The District Court's Order and Judgment

The district court's order purports to grant relief on Claim 27, as amended at the direction of the court. The order distinguishes between two different types of constitutional challenges regarding delay preceding execution. It notes that, "in previous instances where federal courts have been presented claims of unconstitutional delay preceding execution, they have generally appeared in the context of claims brought by inmates in whose *individual* cases the delay was extraordinary. *See, e.g.*, *Lackey v. Texas*, 514 U.S. 1045 . . . ." ER 24 n.19. The court then construes amended Claim 27 as raising a different claim: "that [Jones's] execution would be arbitrary and serve no penological purpose because of *system-wide* dysfunction in the post-conviction review process." *Id.* (emphasis added).

In analyzing this distinct claim based on "system-wide dysfunction," the district court first discusses the "delay" at "each stage of the post-conviction review process," based on information gleaned from policy studies, law review articles, and statistics compiled by the court itself. ER 8; *see* ER 3-15. Its order concludes that this "delay" is "[i]nordinate and unpredictable," and that "the State itself is to blame." ER 18, 23. As a result, the order reasons, "a sentence of death in California is a sentence of life imprisonment with the remote possibility of death," a possibility that will be realized "for an arbitrarily selected few of the 748 inmates currently on Death Row." ER 18. For such an inmate, the court concludes, "selection for execution . . . will depend upon a factor largely outside [his] control, and wholly divorced from the penological purposes the State sought to achieve by sentencing him to death in the first instance: how quickly [he] proceeds through the State's dysfunctional post-conviction review process." ER 18-19.

Next, the court's order holds that this "arbitrariness" violates the Eighth Amendment. "For Mr. Jones to be executed in such a system . . . would offend the most fundamental of constitutional protections—that the government shall not be permitted to arbitrarily inflict the ultimate punishment of death." ER 20 (citing *Furman v. Georgia*, 408 U.S. 238, 293 (1972) (Brennan, J., concurring)). The court also concludes that "[t]he systemic delay and dysfunction that result in the

arbitrary execution of California's Death Row inmates give rise to a further constitutional problem," in that "the execution of a death sentence is so infrequent, and the delays preceding it so extraordinary, that the death penalty is deprived of any deterrent or retributive effect it might once have had." ER 20-21.

Finally, the order rejects the State's threshold arguments against granting relief based on this new "arbitrariness" theory. First, it holds that Jones is excused from the normal requirement that a federal habeas petitioner must exhaust his claims in state court. ER 27-28. The court reasons that "[s]pecial circumstances clearly exist such that Mr. Jones need not return to the California Supreme Court to exhaust his claim," because exhaustion "would require Mr. Jones to have his claim resolved by the very system he has established is dysfunctional and incapable of protecting his constitutional rights." ER 28. Second, the order holds that relief is not barred by the anti-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), because the arbitrariness theory on which it is granting relief is "not [a] new" rule. ER 28-29.

At the conclusion of the July 16, 2014, hearing, the district court discussed its belief that its Eighth Amendment holding should be appealed immediately. "I feel strongly I should certify this and it should go to the circuit as quickly as possible. I don't want to hold this up for me to resolve the other claims." ER 77. The court told the parties that it

> would appreciate if you could submit a proposed partial judgment with the certification. And it sounds to me like you can agree on what the wording of that should be so you can get to the circuit quicker rather than later. . . . So if you could submit a partial judgment granting petitioner's claim 27 and vacating his death sentence. And then the certification, that there is no just reason for the delay. Resolving the constitutionality of California's administration of the death penalty system is of paramount importance to the state, to petitioner, to jurors, taxpayers, and the families of the victims. And I don't believe waiting is in anybody's interest, especially given my view that the constitutional problem is only going to get worse. [¶] And if you could run it by the attorney general and make sure that they are comfortable with it and then submit it, and I'll sign it.

ER 78-79.

On July 25, 2014, as requested, the parties submitted a stipulated form of partial final judgment on Jones's Claim 27, granting the claim and vacating Jones's death sentence. *See* D. Ct. Dkt. No. 123. The court entered the judgment the same day. ER 1.[5] On August 21, 2014, the State filed a timely notice of appeal. ER 94.

SUMMARY OF THE ARGUMENT

I. Jones never presented any court with a claim that system-wide "dysfunction" would render his execution "arbitrary," the theory on which the district court granted relief. He did present a claim alleging that anticipated delay in his case following the pronouncement of his death sentence would create an

[5] The remaining claims in the first amended petition have not yet been adjudicated. The district court indicated that a decision on the remaining issues "could be rendered by the end of the year." ER 19.

Eighth Amendment violation. But that claim, which the California Supreme Court rejected, cannot provide Jones with a basis for federal habeas relief. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) bars federal habeas relief for any claim adjudicated on the merits in state court, except where the state court's decision was contrary to, or involved an unreasonable application of, clearly established Federal law. 28 U.S.C. § 2254(d)(1). The Supreme Court "has never held that execution after a long tenure on death row is cruel and unusual punishment," and the California Supreme Court's ruling here was not contrary to clearly established federal law. *Allen v. Ornoski*, 435 F.3d 946, 959 (9th Cir. 2006).

II. The district court's arbitrariness theory cannot support federal habeas relief because no claim raising it has ever been presented to the state courts.

A. Exhaustion of state remedies is a prerequisite to any claim advanced by a state prisoner in a federal habeas petition. 28 U.S.C. § 2254(b)(1)(A); *Rose v. Lundy*, 455 U.S. 509, 515 (1982). Here, the arbitrariness theory was first injected into this case by the district court, more than four years after Jones filed his federal habeas petition. Jones could seek to present this new claim by filing a habeas petition in the California Supreme Court, but he has not yet done so.

B. The district court erred when it excused Jones from exhausting a claim based on the arbitrariness theory under 28 U.S.C. § 2254(b)(1)(B)(ii), which addresses situations where the state process is "ineffective to protect the rights of the applicant." This exception applies only in extraordinary circumstances, where presentation of a claim to the state courts would be "futile," or the claim has already been presented to the state courts and they have failed to resolve it despite inordinate delay. Jones's case does not fall into either category. The California Supreme Court provides effective state collateral review, and Jones never presented that court with any claim that system-wide dysfunction made executions arbitrary or eliminated their penological purpose.

C. By granting relief based on this novel theory before the state courts had any opportunity to address it, the district court improperly ignored the principles of federal-state comity that animate the exhaustion requirement, and allowed Jones to circumvent the deferential standard of review that Congress has prescribed for federal habeas cases.

III. In any event, the anti-retroactivity doctrine announced in *Teague v. Lane*, 489 U.S. 288 (1989), bars the district court from granting relief on its arbitrariness theory. That doctrine forbids federal courts from applying new rules retroactively on collateral review unless the rule is substantive or qualifies as a "watershed" rule of criminal procedure.

A. The arbitrariness theory is a "new rule" for *Teague* purposes because it was not dictated by precedent existing at the time Jones's conviction became final in 2003. *See Graham v. Collins*, 506 U.S. 461, 467 (1993). So far as the State is aware, the district court's order in this case was the first time that *any* court adopted this theory. There is no merit to the district court's holding that the arbitrariness theory is an old rule because it is rooted in "basic notions of due process and fair punishment." ER 28. The Supreme Court has repeatedly warned against treating a specific, novel application of a general principle as an old rule. *See, e.g.*, *Beard v. Banks*, 542 U.S. 406, 414 (2004); *Sawyer v. Smith*, 497 U.S. 227, 236 (1990).

B. Nor does the arbitrariness theory satisfy either of the *Teague* exceptions. It is procedural in nature, not substantive. And it is not a "watershed" rule, because it has nothing to do with the accuracy of the underlying conviction and does not alter any existing "bedrock procedural elements" that exist to protect the fairness of criminal proceedings. *See Whorton v. Bockting*, 549 U.S. 406, 418 (2007).

IV. Even putting aside the district court's error in analyzing these threshold issues, the court's arbitrariness theory lacks merit.

A. The district court's holding is at odds with settled law. Courts routinely reject claims that delay between the date on which a particular capital

defendant is sentenced and the date of his execution violates the Eighth Amendment. The argument that variations in the length of the post-conviction review process for different capital defendants make the entire system unconstitutional is weaker still. Post-conviction review is designed to *avoid* arbitrariness and error in capital cases. Requiring it to proceed in some lockstep fashion, rather than based on the unique circumstances of each case, could itself raise arbitrariness concerns. Nor does the fact that a rational review process takes time make a constitutionally significant difference in the deterrent or retributive effects of a death sentence when it is ultimately carried out.

B. The factual premise of the district court's holding is also deeply flawed. California's system for post-conviction review in capital cases is lengthy because it is designed to avoid arbitrary results. In light of the profound importance of ensuring that the ultimate criminal sanction is imposed only on individuals who have been convicted and sentenced in full accordance with the law, California provides capital defendants with substantial opportunities to challenge their convictions and sentences, and resources for doing so, and the California Supreme Court carefully reviews every capital case. Indeed, a significant number of capital defendants obtain some form of relief. This process is necessarily time-intensive, and the length of the process varies as a result of the nature of each case and choices made by each defendant. Variation in the length of each review

process does not, however, render executions in California unconstitutionally arbitrary or purposeless, as the district court concluded. Although there is surely room for policy debate over the death penalty and how best to review capital sentences, the district court erred when it found a constitutional violation based on its own policy critique of California's system.

STANDARD OF REVIEW

This Court reviews de novo a district court's decision to grant or deny habeas relief to a state prisoner. *Lambert v. Blodgett*, 393 F.3d 943, 964 (9th Cir. 2004). Factual findings and credibility determinations made by the district court in the context of granting or denying the petition are reviewed for clear error. *Id.*

ARGUMENT

I. AEDPA BARS RELIEF ON THE EIGHTH AMENDMENT CLAIM PRESENTED IN JONES'S HABEAS PETITION, WHICH THE CALIFORNIA SUPREME COURT REASONABLY REJECTED ON THE MERITS

The district court's analysis of Claim 27 in Jones's first amended petition should have been straightforward. Amended Claim 27 presented the same underlying Eighth Amendment claim that Jones previously advanced on direct appeal in state court, and that the California Supreme Court rejected. Because the state court's decision was not contrary to, or an unreasonable application of, any United States Supreme Court precedent, a federal court may not grant relief on the claim. *See* 28 U.S.C. § 2254(d)(1).

Amended Claim 27 alleged that it would violate the Eighth Amendment for the State to execute Jones following a lengthy period of confinement, because long delay and accompanying uncertainty about the date of execution would cause "physical and psychological suffering" amounting to cruel and unusual punishment, and because execution after such delay would serve no legitimate penological purpose. ER 125-127. That claim has become known as a *Lackey* claim, after the case in which Justice Stevens identified it as a "novel" theory "which would benefit from . . . further study." *Lackey*, 514 U.S. at 1045 (Stevens, J., respecting the denial of certiorari).

The *Lackey* claim described in amended Claim 27 largely mirrors the claim that the California Supreme Court squarely rejected when Jones's case was on direct appeal. *Jones*, 29 Cal. 4th at 1267. The state Supreme Court held that the "argument that 'one under judgment of death suffers cruel and unusual punishment by the inherent delays in resolving his appeal is untenable. If the appeal results in reversal of the death judgment, he has suffered no conceivable prejudice, while if the judgment is affirmed, the delay has prolonged his life.'" *Jones*, 29 Cal. 4th at 1267 (quoting *People v. Anderson*, 25 Cal. 4th 543, 606 (2001)) (alteration omitted).[6]

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[6] The California Supreme Court has also expressly rejected the related argument that delay in an individual case might prevent an execution from serving (continued…)

Jones may not obtain federal habeas relief based on his *Lackey* claim in light of the California Supreme Court's decision rejecting it on the merits. As relevant here, 28 U.S.C. § 2254(d) bars relitigation of any claim adjudicated on the merits in state court unless the state court's ruling "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Section 2254(d)(1) "requires federal courts to focus on what a state court knew and did, and to measure state-court decisions against [the Supreme] Court's precedents as of the time the state court renders its decision." *Greene v. Fisher*, 132 S. Ct. 38, 44 (2011) (internal quotation marks and alterations omitted). "Clearly established federal law" is limited to holdings of the United States Supreme Court that provided a "clear answer." *Wright v. Van Patten*, 552 U.S. 120, 126 (2008).

The United States Supreme Court has never addressed a claim that delay between capital sentencing and execution violates the Eighth Amendment—either on the theory that the defendant suffers as he awaits execution or on the theory that delay eliminates the penological purpose of the death penalty. *See generally Allen*

(…continued)
any deterrent or retributive purpose. *See People v. Ochoa*, 26 Cal. 4th 398, 463 (2001).

v. Ornoski, 435 F.3d 946, 958 (9th Cir. 2006) ("The Supreme Court has never held that execution after a long tenure on death row is cruel and unusual punishment."). Accordingly, a habeas petitioner cannot "credibly claim that there is any clearly established law, as determined by the Supreme Court, which would support" such a claim. *Id.* at 959.[7] Although Justice Breyer and Justice Stevens have occasionally authored opinions respecting the denial of certiorari urging the Court to consider a *Lackey* claim, those opinions only underscore that the full Court has never addressed the issue.[8]

The lack of United States Supreme Court precedent supporting Jones's *Lackey* claim is dispositive under § 2254(d)(1), but it bears mentioning that other federal and state courts have consistently reached the same result as the California Supreme Court. In *McKenzie v. Day*, 57 F.3d 1461 (9th Cir. 1995), this Court held that a *Lackey* claim was unlikely to succeed on the merits. *See id.* at 1467, *opinion aff'd and adopted*, 57 F.3d 1493, 1494 (9th Cir. 1995) (*en banc*). The Court noted

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[7] *Allen* involved a request for permission to present a *Lackey* claim in a second or successive habeas petition. This Court denied the request, but then noted that even were it "to reach the merits of [the] claim," it would deny relief because the Supreme Court had never addressed the issue. 435 F.3d at 958.

[8] *See, e.g.*, *Johnson v. Bredesen*, 130 S. Ct. 541, 542-544 (2009) (Stevens, J., respecting the denial of certiorari); *Foster v. Florida*, 123 S. Ct. 470, 471-472 (2002) (Breyer, J., dissenting from the denial of certiorari). *But see, e.g.*, *Knight v. Florida*, 528 U.S. 990, 990 (1999) (Thomas, J., concurring in denial of certiorari) (review not necessary because no legal support for *Lackey* claim).

that "[t]he delay has been caused by the fact that McKenzie has availed himself of procedures our law provides to ensure that executions are carried out only in appropriate circumstances," and the Court refused to "conclude that delays caused by satisfying the Eighth Amendment themselves violate it." *Id.* at 1466-1467. "Numerous other federal and state courts have rejected *Lackey* claims." *Allen*, 435 F.3d at 959 (collecting cases from four federal courts of appeals and seven state courts of last resort). The State is not aware of a single case where a court in the United States has granted relief based on a *Lackey* claim.

Finally, as Jones has acknowledged, his amended Claim 27 introduced new factual allegations in support of the *Lackey* claim, including allegations that California's lack of a lethal injection protocol exacerbated the uncertainty surrounding his execution.[9] But those new factual allegations do not alter the inquiry under § 2254(d). The deferential standard of § 2254(d)(1) must be applied based on "the record that was before the state court." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011). The federal courts "are precluded from considering" additional facts alleged for the first time in federal court. *Id.* at 1402 n.11.[10]

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[9] *See* ER 116, 123-124; *see also* D. Ct. Dkt. No. 113 at 2 (Jones's reply brief) (acknowledging that amended Claim 27 "significantly expanded" the "factual bases" for the *Lackey* claim).

[10] The State construes amended Claim 27 as presenting only a standard *Lackey* claim. Jones himself described the claim as contending that "the

(continued…)

II. THE DISTRICT COURT ERRED IN GRANTING HABEAS RELIEF BASED ON A NEW THEORY THAT HAS NOT BEEN EXHAUSTED

Rather than concluding its analysis by recognizing that the claim Jones actually asserted had been permissibly rejected by the state courts, the district court granted relief based on a novel "arbitrariness" theory that is analytically distinct from the *Lackey* claim that Jones himself presented. Because Jones never advanced an arbitrariness theory in state court, it was inappropriate for the district court to reach the issue. Jones must "exhaust[] the remedies available in the courts of the State" before he may obtain federal habeas relief on this theory. 28 U.S.C. § 2254(b)(1)(A). No exception relieves Jones of that obligation.

A. Jones Never Exhausted the "Arbitrariness" Theory

Section 2254(b)(1) provides that:

> [a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or

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(…continued)
extraordinarily leng[th]y delay in execution of sentence *in Mr. Jones's case*, coupled with the grave uncertainty of not knowing whether *his execution* will ever be carried out, renders *his death sentence* unconstitutional." ER 116 (emphasis added). Should this Court conclude, to the contrary, that amended Claim 27 raised a new and distinct Eighth Amendment theory along the lines on which the district court granted relief, that claim still fails for reasons discussed in Parts II through IV below.

> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). To satisfy the exhaustion requirement, a petitioner must "'fairly present' his federal claims to each appropriate state court." *Wooten v. Kirkland*, 540 F.3d 1019, 1025 (9th Cir. 2008); *see Lundy*, 455 U.S. at 515. A claim has been "fairly present[ed]" only if the petitioner presented "to the state courts both the operative facts and the federal legal theories that animate the claim." *Arrendondo v. Neven*, 763 F.3d 1122, 1138 (9th Cir. 2014); *see Gray v. Netherland*, 518 U.S. 152, 162-163 (1996).

Here, Jones raised a *Lackey* claim in the state courts, but he never presented those courts with the separate Eighth Amendment claim on which the district court ultimately granted relief. As the district court itself recognized, the two claims involve different legal theories. A *Lackey* claim contends that the Eighth Amendment has been violated because "the delay was extraordinary" in an inmate's "*individual* case[]." ER 24 n.19. In contrast, the claim on which the district court granted relief is that Jones's "execution would be arbitrary and serve no penological purpose because of *system-wide* dysfunction in the post-conviction review process." *Id.* (emphasis added).[11]

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[11] If this Court concludes that the theory on which the district court granted relief is the equivalent of a *Lackey* delay claim, then relief on that theory is barred by § 2254(d)(1) for the reasons identified above: the state court's decision

(continued…)

Jones never presented to the state courts a claim that California's system of post-conviction review in death penalty cases violates the Eighth Amendment because only an "arbitrarily" selected few of those on Death Row are actually executed, or because "system-wide dysfunction" eliminates any penological purpose of the death penalty. Nor did he present to the state court operative facts that would animate such a claim. Jones presented only a typical *Lackey* claim, citing Justice Stevens's opinion in *Lackey* and focusing on the delay that Jones expected to face in his individual case. *See* ER 144, 152, 155. As the district court correctly acknowledged, Jones has never exhausted an "arbitrariness" claim. *See* ER 27-28, 55.[12]

B. Exhaustion Is Not Excused under § 2254(b)(1)(B)(ii)

The district court held that Jones was excused from exhausting the arbitrariness claim under 28 U.S.C. § 2254(b)(1)(B)(ii), which addresses situations

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(…continued)
rejecting the claim was not contrary to clearly established federal law, and federal courts may not consider additional evidence in support of the claim that was not before the state court. *See Pinholster*, 131 S. Ct. at 1402 n.11; *cf. Livaditis v. Martel*, No. CV 96-2833-SVW, at 4 (C.D. Cal. Sept. 23, 2014) (holding that the systemic theory adopted by the district court in this case is "the equivalent of" a *Lackey* claim).

[12] Although the district court attributed the arbitrariness theory to Claim 27 of Jones's amended petition (*see* ER 15-16, 24 n.19), even as amended, Claim 27 does not describe any theory of a constitutional violation based on system-wide dysfunction leading to "arbitrariness" in executions (*see* ER 116-129).

where the state corrective process is "ineffective to protect the rights of the applicant." *See* ER 27-28.[13] That was error. California maintains an effective system for collateral review of convictions and sentences, and there is no indication that system would not be effective in Jones's individual case.

Jones may exhaust his state court remedies by filing a habeas petition in the California Supreme Court seeking to raise a claim based on the arbitrariness theory. *See* Cal. Penal Code § 1473; *In re Clark*, 5 Cal. 4th 750, 774-775, 797-799 (1993) (successive habeas petition permissible if petitioner establishes that delay was justified or that a fundamental miscarriage of justice would otherwise occur). The State might well oppose any such petition by arguing, for example, that it is procedurally barred in the circumstances of Jones's case. But "[t]he fact that a procedural bar may preclude" Jones from presenting this new Eighth Amendment theory to the California Supreme Court "in no way nullifies the fact that he had an adequate state remedy that has not been exhausted." *Tamalani v. Stewart*, 249 F.3d 895, 899 n.2 (9th Cir. 2001).[14]

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[13] Neither Jones nor the district court took the position that this case qualified for the other exception to the exhaustion requirement, for cases where "there is an absence of available State corrective process," which is plainly inapplicable here. 28 U.S.C. § 2254(b)(1)(B)(i).

[14] Exhaustion is excused only where, unlike here, "it is *clear* that the habeas petitioner's claims are now procedurally barred under state law"—in which case the federal court would consider whether there is a basis for excusing the

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The relief available in California is not "ineffective" within the meaning of § 2254(b)(1)(B)(ii). Courts have applied that exception only in extraordinary circumstances, generally falling into two categories. *First*, the exception may apply if the state "corrective process is so clearly deficient as to render futile any effort to obtain relief." *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981). The Supreme Court has never itself identified any circumstance that warranted a finding of futility. Some courts of appeals have found futility where the state's highest court recently addressed the same legal issue and resolved it adversely to the petitioner, *see, e.g.*, *Sweet v. Cupp*, 640 F.2d 233, 236 (9th Cir. 1981) (collecting cases), but it is debatable whether those cases remain good law.[15] Even if they do, they would not excuse the exhaustion requirement here. The California Supreme Court has

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(…continued)
procedural default. *Gray*, 518 U.S. at 161-162 (emphasis added) (internal quotation marks and alterations omitted).

[15] The year after *Sweet*, the United States Supreme Court, while addressing a related issue in the context of procedural default, stated that "[i]f a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim." *Engle v. Isaac*, 456 U.S. 107, 130 (1982). In light of *Engle*, this Court has questioned whether the rule adopted in *Sweet* remains good law. *See, e.g.*, *Noltie v. Peterson*, 9 F.3d 802, 805 (9th Cir. 1993).

never addressed the novel Eighth Amendment theory adopted by the district court.[16]

Second, some federal courts of appeals have applied § 2254(b)(1)(B)(ii) in cases involving inordinate delay *after* prisoners presented their legal claims to the state courts. In *Lee v. Stickman*, 357 F.3d 338, 342 (3d Cir. 2004), for example, the Third Circuit excused the exhaustion requirement because the prisoner's state habeas petition had been pending for almost eight years without the state court reaching the merits of his claims. The prisoners in those cases properly presented their legal claims first to the state courts, which at least had an opportunity to act. This case is on an entirely different footing. Jones never presented a claim based on the arbitrariness theory to the California courts.

The two cases cited by the district court in support of its exhaustion holding (*see* ER 28) actually illustrate why exhaustion is required here. In *Jones v. Tubman*, 360 F. Supp. 1298, 1300 (S.D.N.Y. 1973), the court noted the general rule that "exhaustion is not mandated [either] where the state consideration would be . . . futile or where state procedures do not provide swift review of the petitioner's claims." But it then denied the habeas petition because, as here, the

[16] In *People v. Seumanu*, Cal. S. Ct. No. S093803, the parties recently filed supplemental briefs addressing the "arbitrariness" theory. The California Supreme Court has not yet scheduled argument in that case.

record did not "warrant a finding that the exhaustion doctrine is inapplicable" under either exception. *Id.*

In *Phillips v. Vasquez*, 56 F.3d 1030 (9th Cir. 1995), this Court allowed a prisoner to challenge the constitutionality of his conviction in a federal habeas petition a decade after the state supreme court upheld the conviction but reversed the prisoner's death sentence. The prisoner was later resentenced to death, and his state appeal as to that sentence was still pending ten years after the conviction was affirmed. *Id.* at 1032. The prisoner filed a federal habeas petition that challenged only the constitutionality of his *conviction*. *Id.* This Court rejected the argument that the petition could not proceed until the state supreme court had resolved the pending appeal as to his *sentence*, noting that "[c]omity concerns in this case are practically nonexistent since the state has had a full and fair opportunity to review the validity of Phillips' conviction and its decision regarding that conviction is final." *Id.* at 1036. In this context, the Court stated that "extraordinary delay in the state courts can render state corrective processes 'ineffective' within the meaning of section 2254(b)." *Id.* at 1035. The district court quoted this statement (ER 28), but ignored that *Phillips* underscores the requirement for a prisoner to present each claim to the state courts before seeking federal habeas relief on that claim.

Finally, the district court's assertion that exhaustion may be excused because California's post-conviction review system is "dysfunctional and incapable"

(ER 28) cannot be squared with the facts of this case. Every legal claim that Jones has presented to the California Supreme Court—a total of 20 on direct appeal and 27 on state habeas—has been adjudicated after careful consideration. To date, the district court has found no substantive fault with the state court's resolution of any claim. The time consumed by the process is not surprising given the number and scope of Jones's claims; the particular importance of careful review in capital cases; and the fact that neither the parties nor the courts have unlimited resources.

C. The District Court's Exhaustion Holding Sidesteps the Basic Structure of Federal Habeas Jurisdiction

The exhaustion doctrine protects the interests of state sovereigns in our federal system. Exhaustion "serves AEDPA's goal of promoting comity, finality, and federalism, by giving state courts the first opportunity to review the claim, and to correct any constitutional violation in the first instance." *Carey v. Saffold*, 536 U.S. 214, 220 (2002) (internal quotation marks, alterations, and citations omitted). Federal courts apply the exhaustion doctrine "[b]ecause it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." *Lundy*, 455 U.S. at 518 (internal quotation marks omitted). That concern is surely at its apex where, as here, the asserted violation rests on a novel theory attacking the structure and performance of the state system itself.

By framing and then granting relief on a novel Eighth Amendment theory, the district court deprived the California courts of "the first opportunity to address and correct alleged violations of [Jones's] federal rights." *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). It also circumvented the deferential standard of review that Congress created for federal habeas actions under AEDPA. That standard, the exhaustion requirement, and the procedural bar doctrine, all "complement[]" each other "to ensure that state proceedings are the *central* process." *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011) (emphasis added). A state prisoner must satisfy AEDPA's deferential standard by showing "that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 786-787. But by excusing exhaustion, the district court sidestepped this "basic structure of federal habeas jurisdiction." *Id.* at 787; *see* ER 28 n.23 ("Because there is no underlying state court ruling on the merits of Mr. Jones's claim of arbitrariness in California's death penalty system, the Court does not consider the claim under AEDPA's deferential standard of review. *See* 28 U.S.C. § 2254(d).").

A decision from this Court sustaining the district court's rationale for excusing exhaustion would severely undermine the exhaustion requirement for all California capital defendants. The district court excused Jones from exhausting the

arbitrariness theory because exhaustion "would require Mr. Jones to have his claim resolved" by a California system of post-conviction review in capital cases that the district court viewed as "dysfunctional and incapable of protecting [Jones's] constitutional rights." ER 28. This rationale would apparently apply to any new constitutional theory raised by *any* California inmate who has been sentenced to death. No capital defendant would need to present any federal claim before the California Supreme Court before raising it on federal habeas review. There is no basis for any such result.

III. THE ANTI-RETROACTIVITY DOCTRINE OF *TEAGUE v. LANE* ALSO BARS RELIEF

Even if this Court were to overlook Jones's failure to exhaust the "arbitrariness" theory, the anti-retroactivity doctrine announced in *Teague v. Lane*, 489 U.S. 288 (1989), would bar him from obtaining relief based on that theory. Under *Teague*, a "new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Whorton v. Bockting*, 549 U.S. 406, 416 (2007) (internal quotation marks and alteration omitted). Because the district court's arbitrariness theory is a new procedural rule that does not qualify for "watershed" status, the court could not announce or apply it in this federal habeas proceeding.

A. The Arbitrariness Theory Is a "New Rule" under *Teague*

"A holding constitutes a 'new rule' within the meaning of *Teague* if it breaks new ground, imposes a new obligation on the States or the Federal Government, or was not dictated by precedent existing at the time the defendant's conviction became final." *Graham v. Collins*, 506 U.S. 461, 467 (1993) (internal quotation marks and alteration omitted). Put differently, a claim in a habeas petition seeks to invoke a "new rule" unless "all reasonable jurists would have deemed themselves compelled to accept [the] claim" at the time the petitioner's conviction became final. *Id.* at 477. Under these standards, the district court's arbitrariness theory is a new rule. The court's order in this case is the first time *any* court has held that perceived delay or arbitrariness in the absolute or relative pace of a State's post-conviction review process for capital defendants violates the Eighth Amendment. *Cf.* ER 24 n.19 (noting that courts addressing claims of unconstitutional delay have typically focused on the delay in individual cases). Certainly no reasonable jurist would have felt compelled by precedent to accept such a theory when Jones's conviction became final in 2003.[17]

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[17] *Cf. Smith v. Mahoney*, 611 F.3d 978, 998-999 (9th Cir. 2010) (*Lackey* claim sought a "new rule" because "a state court considering Smith's Eighth Amendment claim at the time his conviction became final would not have felt compelled by existing precedent to conclude that the rule sought was required by the Constitution.").

The district court reasoned that its theory was "inherent in the most basic notions of due process and fair punishment embedded in the core of the Eighth Amendment." ER 28. It cited, however, only concurring and plurality opinions that stand at most for the general proposition that States may not use "sentencing procedures that create[] a substantial risk that" the death penalty will be imposed "in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion). Those opinions say nothing about the problem perceived by the district court here—alleged arbitrariness in the pace at which California conducts post-conviction review. Nothing in them would have "compelled" "all reasonable jurists" to accept the district court's theory when Jones's conviction became final in 2003. *Graham*, 506 U.S. at 477. Nor would any other precedent that existed at that time, or any case that has been decided since.[18]

[18] The district court also cited *Dyer v. Calderon*, 151 F.3d 970, 984 (9th Cir. 1998) (*en banc*). *Dyer* involved the rule that juror bias may be inferred based on the circumstances in extraordinary cases. The Court noted that this rule had been accepted in the common law as far back as 1610, and that the Supreme Court had taken it for granted in *Clark v. United States*, 289 U.S. 1 (1933), and *Turney v. Ohio*, 273 U.S. 510 (1927). *See Dyer*, 151 F.3d at 984. This extensive "pedigree" doomed the argument that implied bias was a "new rule" under *Teague*. *Id.* The novel Eighth Amendment theory embraced by the district court here has no such heritage.

The Supreme Court has repeatedly warned against the mode of analysis employed by the district court here: treating cases that articulate general legal principles as established precedent for a narrow rule never actually adopted by the Court. Even where an earlier rule, "conceived of at a high level of generality," might "be thought to support" a later, narrow rule, the later rule is "new" unless the earlier one "mandate[s]" its adoption. *Beard v. Banks*, 542 U.S. 406, 414, 416 (2004). Indeed, *Teague* "would be meaningless if applied at this level of generality." *Sawyer v. Smith*, 497 U.S. 227, 236 (1990).

B. The Arbitrariness Theory Is Not a "Substantive" or "Watershed" Rule

The arbitrariness theory does not satisfy either exception to *Teague*'s bar on the retroactive application of new rules on collateral review. *First*, the theory is not a "substantive" rule. "Substantive" rules include "decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Schriro v. Summerlin*, 542 U.S. 348, 351-352 (2004) (internal citations omitted) (collecting cases). Such rules are applied retroactively "because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Id.* at 352 (internal quotation marks omitted). The arbitrariness theory does not narrow the scope of criminal

liability. Nor does it create any risk that Jones is innocent of murder, or suggest that California is without power to impose the death penalty. This theory turns entirely on criticism of the *procedures* by which California offers post-conviction review to Jones and other prisoners who have been sentenced to death. *Cf. id.* at 353-355 (rule regarding the permissible methods for imposing a death sentence is procedural, not substantive).

Second, while the district court's arbitrariness theory would of course have radical consequences and involve a dramatic change in the law, for *Teague* purposes it would not qualify as a "'watershed rule[] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle v. Parks*, 494 U.S. 484, 495 (1990). The Supreme Court has recognized that "[t]his exception is extremely narrow," and has "rejected every claim that a new rule satisfied the requirements for watershed status." *Bockting*, 549 U.S. at 417-418 (internal quotation marks omitted) (collecting cases). A new "watershed" rule would have to (1) "be necessary to prevent an impermissibly large risk of an inaccurate conviction" and (2) "alter our understanding of the bedrock procedural elements essential to the fairness of the proceeding." *Id.* at 418 (internal quotation marks omitted). The arbitrariness theory does not satisfy either requirement. It focuses only on the pace at which the State carries out post-conviction review in different cases.

IV. CALIFORNIA'S SYSTEM FOR REVIEWING DEATH JUDGMENTS IS CONSISTENT WITH THE EIGHTH AMENDMENT

Even putting aside procedural doctrines that barred the district court from granting relief to Jones based on the court's arbitrariness theory, the theory itself lacks merit. The court's constitutional holding is incorrect as a matter of Eighth Amendment doctrine, and in any event its factual premise is deeply flawed.

A. The District Court's Holding Is at Odds with Settled Eighth Amendment Jurisprudence

The district court's holding lacks any legal support. Courts have routinely and emphatically rejected claims made in particular cases that delays in post-conviction review violated the Eighth Amendment. The district court's novel theory, based on differences in the pace of review in different cases, has no greater merit.

1. As discussed in Part I above, federal and state courts have consistently rejected claims that delay in the review of an individual capital defendant's conviction or sentence violates the Eighth Amendment. This Court has repeatedly cast doubt on *Lackey* claims or rejected them outright. *See Smith v. Mahoney*, 611 F.3d 978, 998 (9th Cir. 2010); *Allen*, 435 F.3d at 958; *McKenzie*, 57 F.3d at 1470. So far as the State is aware, every other federal court of appeals and state court of last resort to address the issue has also rejected this type of claim. *See, e.g.*, *Thompson v. McDonough*, 517 F.3d 1279, 1283-1284 (11th Cir. 2008); *Chambers*

v. Bowersox, 157 F.3d 560, 568-570 (8th Cir. 1998); *Lackey v. Johnson*, 83 F.3d 116, 117 (5th Cir. 1996); *Carroll v. State*, 114 So. 3d 883, 889-890 (Fla. 2013); *State v. Sparks*, 68 So. 3d 435, 492-493 (La. 2011); *Bieghler v. State*, 839 N.E.2d 691, 696-698 (Ind. 2005); *Russell v. State*, 849 So. 2d 95, 144-145 (Miss. 2003); *State v. Austin*, 87 S.W. 3d 447, 485-486 (Tenn. 2002); *People v. Anderson*, 25 Cal. 4th at 606; *People v. Emerson*, 727 N.E.2d 302, 345 (Ill. 2000); *State v. Moore*, 591 N.W.2d 86, 93-95 (Neb. 1999); *McKinney v. State*, 992 P.2d 144, 151-152 (Idaho 1999); *Hill v. State*, 962 S.W.2d 762, 767 (Ark. 1998); *Ex parte Bush*, 695 So. 2d 138, 139-140 (Ala. 1997); *State v. Smith*, 931 P.2d 1272, 1288 (Mont. 1996); *Bell v. State*, 938 S.W.2d 35, 52-53 (Tex. Crim. App. 1996).[19]

To the extent one conceives of the theory on which the district court granted relief as the functional equivalent of a *Lackey* claim, the theory cannot be squared with this uniform body of Eighth Amendment precedent. *Cf. Livaditis v. Martel*, No. CV 96-2833-SVW, at 4 (C.D. Cal. Sept. 23, 2014) ("Habeas petitioners have been raising the equivalent of a '*Jones*' claim for many years, when they were commonly known as '*Lackey* claims.'").

[19] *See also Knight*, 528 U.S. 990 (Thomas, J., concurring in denial of certiorari) ("I am unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed.").

2. The district court sought to avoid this conclusion by describing its theory as one of unconstitutional "arbitrariness" across cases, based on "system-wide dysfunction in the post-conviction review process." ER 24 n.19. That new theory lacks legal support.

The district court cited concurring opinions in *Furman v. Georgia*, 408 U.S. 238 (1972), a case that produced no majority opinion. *Furman*, however, addressed a fundamentally different issue: arbitrariness in the selection of who is sentenced to death. The Supreme Court has subsequently described *Furman* as holding that the death penalty may "not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg*, 428 U.S. at 188 (plurality opinion); *see also Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008); *California v. Brown*, 479 U.S. 538, 541 (1987).

Thus, the various concurring opinions cited by the district court all focus on perceived arbitrariness in imposing the death penalty at the sentencing stage in capital cases. Justice White voiced concern that there was "no meaningful basis for distinguishing the few cases in which" a death sentence "is imposed from the many cases in which it is not." *Furman*, 408 U.S. at 313 (White, J., concurring). Justice Stewart stated that the Eighth Amendment does not permit the "sentence of death [to be] imposed" in a "wanton[] and . . . freakish[]" manner. *Id.* at 310

(Stewart, J., concurring). Justice Brennan focused on the death penalty being "inflicted arbitrarily" among the cases where it is a "legally available" sentence. *Id.* at 293 (Brennan, J., concurring). And Justice Douglas traced the history of the Eighth Amendment and found that it was aimed at forbidding the imposition of "arbitrary and discriminatory penalties." *Id.* at 242 (Douglas, J. concurring).

None of these opinions in *Furman*, nor any opinion of the Supreme Court since then, suggests that individual death sentences imposed in a proper, non-arbitrary fashion, can become collectively unconstitutional on the theory that post-conviction judicial review takes longer in some cases than in others. That is for good reason. Once a sentence of death has been imposed, post-conviction review is designed to ensure that the sentence was *not* imposed in an arbitrary fashion. At common law, "executions could be carried out on the dawn following the pronouncement of sentence." *McKenzie*, 57 F.3d at 1467. Evolving standards, however, have led to systems that "provide death row inmates with ample opportunities to contest their convictions and sentences . . . in recognition of the fact that the common law practice of imposing swift and certain executions could result in arbitrariness and error." *Id.* (citing *Furman* and *Gregg*). Each case is unique, and the length of this post-conviction review process necessarily varies. A lockstep post-conviction review process resulting in "swift and certain" executions

would *undermine*, not advance, the interest in avoiding arbitrary imposition of the death penalty. *See id.*

3. The district court was also incorrect when it identified, as "a further constitutional problem with the State's administration of its death penalty system," that "the death penalty is deprived of any deterrent or retributive effect it might have once had." ER 20-21.

There has long been active debate over the deterrent value of the death penalty. But the Supreme Court has observed that "[t]he value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts." *Gregg*, 428 U.S. at 186. Once a State has concluded that capital punishment is justified in some cases, the argument that "the passage of time renders the death sentence an ineffective deterrent . . . is a matter for the legislature." *Bieghler*, 839 N.E.2d at 698; *see Smith*, 931 P.2d at 1288 (argument that delay reduced deterrent effect "should be presented to the Montana Legislature, not to this Court"). And there is no basis for a court to conclude that even a lengthy judicial review process eliminates *all* deterrent effect. As capital defendants would no doubt agree, the prospect of execution, even if deferred, makes a capital sentence significantly more severe than any other.

The district court's conclusion that delay in California's post-conviction review process eliminates any retributive effect is similarly unpersuasive. An individual who is put to death by the State suffers a form of retribution qualitatively different from, and more severe than, any other. That fact does not change with the passage of time. Indeed, there is a sense in which the degree of deliberation that precedes an execution underscores the point that the basis for the State's action is a thoroughly considered social decision to impose the ultimate penalty in collective retribution for especially heinous crimes. *Cf. Ochoa*, 26 Cal. 4th at 463 ("Nazi war criminals and church bombers motivated by racial hatred have been prosecuted for murders committed decades earlier."). Retribution is in large part about imposing a particular punishment that is deemed appropriate for a particular bad act. That calculus does not change merely because of the passage of time.

B. The System for Reviewing Capital Sentences in California Is Lengthy Because It Is Designed to Avoid Arbitrary Results, Not to Produce Them

California's system for carefully reviewing capital convictions and sentences takes time. It might be hastened if the State had no resource constraints, or less interest in ensuring the accuracy and legality of its judgments in capital cases. Neither observation, however, makes the State's system "dysfunctional" or "incapable," or renders executions "arbitrary." ER 2-3, 28. The time it takes to

review and implement a capital sentence in California results from the interaction of legal rules, procedural protections, and practical accommodations that are designed to protect individual and government interests of surpassing importance. There is nothing "arbitrary" about a system that takes whatever time is necessary to protect those interests. Rather, California's system recognizes the profound importance of providing careful judicial review before carrying out a capital sentence.

1. As the district court observed, "the execution of an individual carries with it the solemn obligation of the government to ensure that the punishment is not arbitrarily imposed and that it furthers the interests of society." ER 16. California's system of post-conviction review in capital cases is designed to ensure that the ultimate criminal sanction is imposed only on individuals who have been convicted and sentenced in full accordance with the law, and that the sanction is carried out through a method that complies with legal and constitutional guarantees. The State properly provides capital defendants with opportunities and resources for challenging their convictions. And the California Supreme Court carefully reviews those challenges in every capital case.

The State's strong interest in ensuring accurate and just outcomes in capital cases is reflected in the fact that its post-conviction review process is, in important

respects, more robust and more generous to defendants than the process in some other States that impose the death penalty. For example:

- *Payment for appointed counsel*. Counsel appointed in state habeas proceedings in California frequently earn more than $130,000 from the State for their work on a single case, and sometimes earn more than $200,000. *See In re Reno*, 55 Cal. 4th 428, 456 n.9 (2012). In contrast, habeas counsel in Texas are entitled to no more than $25,000 from the State in compensation and expenses combined; more may be available from local government. Tex. Code Crim. P. art. 11.071, § 2A(a). In Florida, habeas counsel are entitled to capped fees that total only $84,000, including for the time spent filing a petition for certiorari in the U.S. Supreme Court. Fla. Stat. § 27.711(4)(a)-(h).

- *Length of filings*. The California Rules of Court allow capital defendants to file opening briefs on direct appeal that include up to 102,000 words, or approximately 408 pages at 250 words per page. *See* Cal. R. Ct. 8.630(b)(1)(A). In Florida, the rules impose a 50-page limit. Fla. R. App. P. 9.210(a)(5).[20] There is no page limit on initial habeas petitions in California, nor any limit on the number of claims a capital defendant may raise. *See In re Reno*, 55 Cal. 4th at 457 n.11. Second or subsequent petitions in California may be 50 pages. *Id.* at 516. In Florida, the rules limit capital defendants to 75 pages for a first petition and 25 pages for successive petitions. Fla. R. Crim. P. § 3.851(e)(1), (2).

- *Resources for investigation on habeas*. California currently pre-authorizes habeas counsel to spend up to $50,000 investigating a habeas petition. Habeas attorneys in Florida are allotted no more than $15,000 for the purpose of "paying for investigative services" and another $15,000 for "miscellaneous expenses"; those allotments are only available with the court's approval. *See In re Reno*, 55 Cal. 4th at 457 n.10; Fla. Stat. § 27.711(5)-(6).

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[20] In practice, some briefs filed by capital defendants in Florida exceed the stated page limits. *See, e.g.*, Initial Br. of Appellant, *Smith v. Florida*, No. SC11-1076, *available at* http://www.law.fsu.edu/library/flsupct/SC11-1076/11-1076_ini.pdf (62 pages).

- *Time for filing habeas petition*. California currently permits capital defendants to file a habeas petition within 36 months of the date when habeas counsel is appointed. Texas generally requires a petition to be filed within 180 days after counsel is appointed. *See In re Reno*, 55 Cal. 4th at 457 n.12; Tex. Code Crim. P. art. 11.071, § 4(a).

Capital defendants typically take full advantage of these protections, as of course they are entitled to do. This case is no exception. Jones is represented by the Habeas Corpus Resource Center, an entity created and funded by the State. *See* Cal. Gov. Code § 68660 *et seq*. On direct appeal, Jones filed a 255-page brief in the California Supreme Court, presenting 20 separate grounds for relief. In his state habeas proceeding, Jones filed a petition totaling 427 pages and presenting 27 claims for relief, followed by a 370-page reply to the State's informal response.

As a result of this robust system of post-conviction review, and the vigorous challenges mounted by capital defendants through state-funded counsel, a significant number of capital defendants obtain some relief from the California Supreme Court. Since California reinstated the death penalty in 1977, its highest court has granted relief in more than 110 different decisions in capital cases—including more than 30 decisions granting relief from a conviction on direct appeal, more than 60 decisions granting relief from a death sentence on direct appeal, and at least 18 decisions granting relief from a conviction or sentence in a state habeas

proceeding.[21] The district court discounted the relevance of decisions issued between 1979 and 1986 (*see* ER 4 n.5), but even if those decisions are ignored, the California Supreme Court has granted relief to capital defendants in more than 60 different decisions since 1987.

This process for reviewing capital cases is not quick or casual—nor should it be. The California Supreme Court carefully reviews every capital case on direct appeal. Its opinions often exceed 100 pages, identifying errors where they exist and assessing whether they were prejudicial. *See, e.g.*, *People v. Bryant*, 60 Cal. 4th 335 (2014); *People v. Lucas*, 60 Cal. 4th 153 (2014). The court gives similar attention to habeas petitions in capital cases. It typically rules on the merits of every claim presented in a capital habeas petition, and also reviews whether any claims are procedurally barred. Although the district court criticized the fact that many of these rulings are made without discussion in summary dispositions, the United States Supreme Court has endorsed this sensible practice. *See Richter*, 131 S. Ct. at 784 ("The issuance of summary dispositions in many collateral attack cases can enable a state judiciary to concentrate its resources on the cases where opinions are most needed.").

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[21] There was never an evidentiary hearing that led to presentation or adversarial testing of these data—or, for that matter, the district court's data. The State can lodge citations for the referenced decisions with the Court upon request.

The conclusions drawn by the district court from its review of this system are unsupported. That California's post-conviction review process is lengthy does not mean that the process serves no purpose. That the length of time involved varies across individual cases does not mean that this variance is arbitrary. No two cases are the same. The pace of post-conviction review for any particular capital defendant will depend on myriad case-specific factors, including the factual and legal complexity of the case; the number and nature of the claims presented by the defendant on direct appeal and state habeas; the number of extensions requested and received by the parties; the availability of qualified counsel; whether the defendant exercises his right to obtain new counsel on state habeas; intervening factual and legal developments; and so forth. Each of these factors can prolong the review process in a particular capital case, as compared with another, different capital case. In every case, however, the delay occasioned by these factors serves purposes of great importance: affording capital defendants a fair chance to frame and present challenges to their convictions and sentences, and then ensuring careful review of every legal challenge to a capital defendant's conviction or sentence. *See, e.g.*, *In re Reno*, 55 Cal. 4th at 456 (California's post-conviction review process is designed to ensure that the capital defendant "has had ample opportunity to raise all meritorious claims, the adversarial process has operated correctly, and both this court and society can be confident that, before a person is

put to death, the judgment that he or she is guilty of the crimes and deserves the ultimate punishment is valid and supportable.”).

2. The district court found fault with several California laws and policies that it described as prolonging the State’s system for post-conviction review for capital defendants. As with any public program, there is certainly room for debate over how best to structure this system, and, in doing so, how to balance competing state priorities. But the district court failed to recognize that the policies it assailed *do* serve important interests and, in all events, do not render California executions either purposeless or arbitrary.

For example, the district court faulted the State for failing to alter the requirement that death penalty appeals must be heard by the California Supreme Court rather than the state’s intermediate courts of appeal. *See* ER 26. This issue has been raised, as a policy matter, by the California Supreme Court itself.[22] To date, however, California has decided as a matter of state constitutional law that such appeals must proceed directly to its highest court. *See* Cal. Const. art. VI, §§ 11(a), 12(d). The voters reaffirmed that constitutional judgment in 1984, when they approved a proposition that enabled the Supreme Court to transfer cases to the

[22] *See* News Release, Supreme Court Proposes Amendments to Constitution in Death Penalty Appeals, Nov. 19, 2007, *available at* http://www.courts.ca.gov/documents/NR76-07.PDF.

courts of appeal, but expressly withheld transfer authority for capital cases. Ballot Pamphlet, General Election 28-29 (Nov. 6, 1998).[23] Although that proposition was intended to "establish greater court efficiency" at a time when "the business transacted by the California Supreme Court ha[d] nearly doubled" during the preceding decade, its proponents emphasized that "[t]his proposition does *nothing* to change the Supreme Court's mandate to hear death penalty cases." *Id.* at 31; *see id.* at 29. There is room to debate the policy merits of that decision, but there is no basis for finding it to be constitutionally unreasonable.

The district court also criticized the State for delays related to the appointment of counsel at the direct appeal and habeas stages. ER 8-12. Perhaps California could reduce those delays by relaxing its requirements for the qualifications of appointed counsel. Any such reduction, however, could be in tension with the interests of indigent defendants in obtaining experienced counsel who will vigorously represent them, or of society in ensuring that the defendants' convictions and death sentences are reviewed through an effective adversarial process. Similarly, while California already compensates capital counsel at higher rates than many other States, *see supra* p. 45, perhaps it could speed the appointment process by substantially increasing compensation. But that sort of

[23] *Available at* http://librarysource.uchastings.edu/ballot_pdf/1984g.pdf.

policy decision is not made in a vacuum—the State cannot devote unlimited resources to death penalty representation, any more than to other public responsibilities. The State's current level of support for post-conviction representation is sufficient under the Constitution.[24]

As the district court noted, critics of the policy choices made by California in structuring its post-conviction review process have included members of the California Supreme Court. For example, then-Chief Justice Ronald George argued in 2008 that "[t]he existing system for handling capital appeals in California is dysfunctional and needs reform." Ronald M. George, *Reform Death Penalty Appeals*, L.A. Times, Jan. 7, 2008. Such statements are evidence of an active policy debate, not of a constitutional violation. Chief Justice George's statement, for example, was made in the context of a newspaper essay urging the legislature and voters to authorize the California Supreme Court to transfer capital cases to courts of appeal.

In short, there are certainly policy options that might be suggested to quicken the pace of California's post-conviction review process. The balance the State has struck in providing ample scope for review, subject to existing resource constraints,

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[24] Indeed, the Constitution does not require the State to provide counsel for collateral review proceedings at all. *See, e.g.*, *Rohan v. Woodford*, 334 F.3d 803, 810 (9th Cir. 2003) (collecting cases), *abrogated on other grounds*, *Ryan v. Gonzales*, 133 S. Ct. 696 (2013).

makes its review process lengthier than some possible alternatives, but more robust than others in seeking to protect both defendants' rights and the public interest in the careful and fair administration of capital punishment. Nothing about the particular choices made by the State renders its process arbitrary or purposeless, as the district court held.

3. Nor was the district court correct when it suggested that the State bears sole responsibility for the duration of post-conviction review for capital defendants. ER 23.

First, much of the delay results from choices made by capital defendants and their counsel. Counsel, of course, owe their clients a duty of zealous representation. As a practical matter, counsel often request numerous extensions, file briefs and petitions on the last possible day, and present dozens of claims to the California Supreme Court. For example, on direct appeal, Jones obtained seven separate extensions of time for his opening brief, totaling over 400 days. *See* Cal. S. Ct. Docket (No. S046117). In his habeas proceeding, Jones filed his petition on the last day permitted, and then obtained seven separate extensions for his reply brief, totaling over 200 days. *See* Cal. S. Ct. Docket (No. S110791). Defendants may also engage a new attorney for habeas proceedings, requiring time for new counsel to master a complex case. The State does not question the right of capital defendants and their counsel to make these decisions, but they can significantly

prolong the process of review. The State cannot be held constitutionally responsible for the resulting delay.

Capital defendants and their counsel have also succeeded in suspending all executions in California by challenging the State's methods of execution.[25] It is their right to bring such challenges, and California is committed to ensuring that executions are carried out only in accordance with the Eighth Amendment and other applicable law. But these challenges, too, have contributed to the "unpredictable period of delay preceding . . . actual execution" described and criticized by the district court. ER 2.

Second, much of the time consumed by post-conviction review occurs in the federal court system. The state commission report relied on by the district court, for example, found an average time of 22 months between the filing of a state habeas petition and the decision of the California Supreme Court on that petition. *See* California Commission on the Fair Administration of Justice, Final Report 123

[25] *See, e.g.*, *Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996), *cert. granted and judgment vacated*, 519 U.S. 918 (1996) (§ 1983 challenge to California's use of the gas chamber); *Morales v. Tilton*, 465 F. Supp. 2d 972 (N.D. Cal. 2006) (§ 1983 challenge to California's lethal injection protocol); *Morales v. Cal. Dep't of Corr. & Rehab.*, 168 Cal. App. 4th 729 (2008) (challenge to amended lethal injection protocol under California's Administrative Procedures Act); *Sims v. Dep't of Corr. & Rehab.*, 216 Cal. App. 4th 1059 (2013) (Administrative Procedures Act challenge to lethal injection protocol promulgated in 2010).

("Commission Report").[26] In contrast, it found an average time of 74 months between the filing of a federal habeas petition and the grant or denial of relief by a federal district court, and noted that another 50 months, on average, are consumed by federal appellate review (including a petition for en banc review and a petition for certiorari). *See id.* at 123, 137. Even the data set relied on by the district court confirms this point.[27] For example, in several of the capital cases identified by the district court, the defendants have awaited a decision in federal court for a period three times longer than their entire state adjudicative process.[28]

This case further illustrates the point. As of this writing, Jones's federal habeas petition has been pending before the federal district court for more than four and one-half years. The district court has now prolonged the process by first ordering Jones to amend his petition, and then granting relief based on a novel

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[26] *Available at* http://www.ccfaj.org/documents/CCFAJFinalReport.pdf.

[27] Some of the data cited by the court are open to question. For example, the court expressly declined to include cases for the years 1979 to 1986, notwithstanding that many death penalty cases were adjudicated to finality by the California Supreme Court during that period. ER 4-5 n.5. The court also decided not to include data related to death sentences handed down since 1997 (*see id.*), although dozens of those cases were litigated to conclusion in state court in a relatively expeditious manner. Finally, the court excluded from its consideration the numerous capital cases in which the California Supreme Court granted relief as to either conviction or sentence: well over 100 cases from 1979 through mid-2014.

[28] This is true for at least the following capital defendants listed in the appendix to the district court's order: Oscar Gates, John Brown, Patrick Gordon, Andre Burton, Denny Mickle, Horace Kelly, Curtis Price, Troy Ashmus, David Breaux, George Wharton, Kenneth Clair, and Michael Hill. *See* ER 32-33, 35-37.

theory originated by the court itself. The court has yet to rule on the remaining claims raised by Jones. *See* ER 19.

The district court suggested that the State is responsible for delays in the federal courts, in part because the California Supreme Court often denies state habeas relief without explaining its rationale. ER 13 n.14. That assertion is puzzling. Requiring lengthy published opinions for each habeas petition brought by a capital defendant would add still more time to the state review process, which the district court otherwise criticized as too lengthy. That is one reason the United States Supreme Court has expressly approved of state courts using summary dispositions. *See Richter*, 131 S. Ct. at 784. In any event, when a claim is summarily denied on the merits in state court, AEDPA authorizes a federal court to grant habeas relief only if there is no argument or theory that *could have* supported the state court's decision. *See id.* With state counsel present to explain why there is at least one theory under which a state decision cannot be said to be factually unreasonable or to contravene some specific holding of the United States Supreme Court, *see* 28 U.S.C. § 2254(d), it should not be inordinately time-consuming for the federal courts to discharge this important but limited responsibility under AEDPA.

Similarly, the district court held the State constitutionally responsible for delays in federal court because of the time sometimes required for a capital

defendant to file an exhaustion petition with the California Supreme Court. ER 14. The exhaustion doctrine is a matter of federal law, based on comity and federalism, and applies only if a capital defendant wishes to seek federal review of a claim not previously presented to the state courts. The time necessary to allow the state courts to consider such claims is not a period of "delay" that should be charged to the State's account for purposes of the Eighth Amendment.

The federal courts have an important role in providing final, collateral review of state convictions and sentences. If it takes time for them to perform that review properly, then that is time well spent—especially in capital cases. The personal and government interests at stake in any such case warrant whatever amount of time it takes to do the job right. But the fact that careful judicial review takes time is no basis for concluding that executions conducted after review in individual cases has run its course would be "arbitrary" in violation of the Eighth Amendment.

4. At bottom, the district court's order amounts to a policy critique of California's post-conviction review system. That system, and the desirability of capital punishment generally, have long been topics of public debate, in California and elsewhere. Members of the California Supreme Court have suggested modifications to the post-conviction review process. *See supra* n.22. The state Senate created a commission to study the death penalty and suggest improvements, *see* Cal. Sen. Res. No. 44 (2004), and its report suggested revisions to the post-

conviction review process, including some revisions that are discussed in the district court's order. *See, e.g.*, Commission Report at 147-149. In 2012, State voters considered, but rejected, a proposal to eliminate the death penalty altogether.[29] Many of the policy considerations discussed by the district court were presented in ballot materials considered by voters.[30]

But this policy debate is far beyond the proper scope of federal collateral review of an individual state capital sentence. As courts in other jurisdictions have routinely held, the sort of policy arguments advanced in the district court's order "should be presented to the . . . Legislature." *Smith*, 931 P.2d at 1288; *see Bieghler*, 839 N.E.2d at 698. For the time being, the judgment of California voters remains that capital punishment should be imposed in appropriate cases. The State's system for implementing that judgment does not become unconstitutional because the process of careful post-conviction review, designed to ensure that each case in which the penalty is imposed is indeed an appropriate one, takes time.

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[29] *See* California Secretary of State, Statewide Summary by County for State Ballot Measures, at 102, *available at* http://www.sos.ca.gov/elections/sov/2012-general/ssov/ballot-measures-summary-by-county.pdf.

[30] *See* Arguments in Favor of Proposition 34, *available at* http://vig.cdn.sos.ca.gov/2012/general/pdf/34-arg-rebuttals.pdf.

CONCLUSION

The judgment of the district court should be reversed.

Dated: December 1, 2014

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6(c), Appellant notes that in *Andrews v. Chappell*, Nos. 09-99012, 09-99013, the petitioner-appellant recently moved for permission to file a supplemental brief presenting an argument based on the district court's decision in this case, and the Court requested a response. The State believes that the issue is not properly presented in *Andrews*, but is filing a response noting the pendency of this case and setting out an abbreviated version of the arguments advanced in this brief.

CERTIFICATE OF COMPLIANCE

I certify that: (check (x) appropriate option(s))

[X] 1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **opening** brief is

[X] Proportionately spaced, has a typeface of 14 points or more and contains **13,941** words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words)

or is

[ ] Monospaced, has 10.5 or fewer characters per inch and contains ____ words or ___ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

[ ] 2. The attached brief is **not** subject to the type-volume limitations of Fed.R.App.P. 32(a(7)(B) because

[ ] This brief complies with Fed.R.App.P 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages.

or

[ ] This brief complies with a page or size-volume limitation established by separate court order dated _____ and is

[ ] Proportionately spaced, has a typeface of 14 points or more and contains _____ words,

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[ ] 3. Briefs in **Capital Cases**.
This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 and is

[ ] Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 21,000 words; reply briefs must not exceed 9,800 words).

or is

[ ] Monospaced, has 10.5 or fewer characters per inch and contains __ words or __ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 75 pages or 1,950 lines of text; reply briefs must not exceed 35 pages or 910 lines of text).

☐ 4. **Amicus Briefs**.

☐ Pursuant to Fed.R.App.P 29(d) and 9th Cir.R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less,

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or is

☐ Not subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed.R.App.P. 32 (a)(1)(5).

December 1, 2014
Dated

S/ James William Bilderback II
James William Bilderback II
Supervising Deputy Attorney General

CERTIFICATE OF SERVICE

Case Name: **Ernest Dewayne Jones v. Kevin Chappell, Warden** No. **14-56373**

I hereby certify that on December 1, 2014, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

APPELLANT'S OPENING BRIEF

EXCERPTS OF RECORD VOLUME I OF II

EXCERPTS OF RECORD VOLUME II OF II

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 1, 2014, at Los Angeles, California.

Sandra Fan	*s/ Sandra Fan*
Declarant	Signature

14-56373

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EARNEST DEWAYNE JONES,

Petitioner-Appellee,

v.

KEVIN CHAPPELL, Warden,

Respondent-Appellant.

On Appeal from the United States District Court
for the Central District of California, No. 09-CV-02158-CJC
The Honorable Cormac J. Carney, Judge

EXCERPTS OF RECORD VOLUME I OF II

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INDEX – VOLUME I

Document	Page No.
7/25/2014 - Final Judgment On Claim 27 (Docket no. 127)	1
7/16/2014 - Order Declaring California's Death Penalty System Unconstitutional And Vacating Petitioners Death Sentence (Docket no. 117)	2-48
7/16/2014 - Hearing Transcript (Docket no. 121)	49-80
3/16/2009 - California Supreme Order Denying Habeas Relief in case S110791 (Docket no. 29, lodgement C.7)	81
3/17/2003 - California Supreme Court Opinion in case S04611 —Excerpt (pp. 1-10, 40-41) (Docket no. 29, lodgment B.4)	82-93

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ERNEST DEWAYNE JONES,

Petitioner,

v.

KEVIN CHAPPELL, Warden of California State Prison at San Quentin,

Respondent.

Case No. CV-09-2158-CJC

DEATH PENALTY CASE

FINAL JUDGMENT ON CLAIM 27 (FRCP 54(b))

Pursuant to the Court's Order Declaring California's Death Penalty System Unconstitutional and Vacating Petitioner's Death Sentence, July 16, 2014, ECF No. 117, Petitioner's Claim 27 is GRANTED and his death sentence is VACATED. The clerk is directed to enter final judgment on Claim 27 immediately. Pursuant to Federal Rule of Civil Procedure 54(b), the Court determines that there is no just reason for delay in the entry of this judgment until final determination on the remaining claims in this matter.

Dated: July 25, 2014

CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ERNEST DEWAYNE JONES, **Petitioner,** **vs.** **KEVIN CHAPPELL, Warden of California State Prison at San Quentin,** **Respondent.**	**Case No.: CV 09-02158-CJC** **ORDER DECLARING CALIFORNIA'S DEATH PENALTY SYSTEM UNCONSTITUTIONAL AND VACATING PETITIONER'S DEATH SENTENCE**

On April 7, 1995, Petitioner Ernest Dewayne Jones was condemned to death by the State of California. Nearly two decades later, Mr. Jones remains on California's Death Row, awaiting his execution, but with complete uncertainty as to when, or even whether, it will ever come. Mr. Jones is not alone. Since 1978, when the current death penalty system was adopted by California voters, over 900 people have been sentenced to death for their crimes. Of them, only 13 have been executed. For the rest, the dysfunctional administration of California's death penalty system has resulted, and will continue to result, in an inordinate and unpredictable period of delay preceding their actual execution. Indeed, for most, systemic delay has made their execution so unlikely that the death

sentence carefully and deliberately imposed by the jury has been quietly transformed into one no rational jury or legislature could ever impose: *life in prison, with the remote possibility of death*. As for the random few for whom execution does become a reality, they will have languished for so long on Death Row that their execution will serve no retributive or deterrent purpose and will be arbitrary.

That is the reality of the death penalty in California today and the system that has been created to administer it to Mr. Jones and the hundreds of other individuals currently on Death Row. Allowing this system to continue to threaten Mr. Jones with the slight possibility of death, almost a generation after he was first sentenced, violates the Eighth Amendment's prohibition against cruel and unusual punishment.

BACKGROUND

A. Delay in California's Death Penalty System

California juries have imposed the death sentence on more than 900 individuals since 1978.[1] Yet only 13 of those 900 have been executed by the State. Of the remainder, 94 have died of causes other than execution by the State, 39 were granted relief from their death sentence by the federal courts and have not been resentenced to

[1] In 1977, five years after the California Supreme Court first invalidated the State's death penalty statute, *see People v. Anderson*, 6 Cal. 3d 628 (1972), the California Legislature acted to reinstate the punishment. One year later, the current death penalty system took form, when voters passed Proposition 7, known as the Briggs Initiative, amending the death penalty statute and significantly expanding the circumstances under which prosecutors could seek the death penalty. *See* California Commission on the Fair Administration of Justice, Final Report 120 (Gerald Uelmen ed., 2008) ["Commission Report"], *available at* http://www.ccfaj.org/documents/CCFAJFinalReport.pdf ("Under the death penalty statute now in effect, 87% of California's first degree murders are 'death eligible' . . . .").

death, and 748 are currently on Death Row, having their death sentence evaluated by the courts or awaiting their execution.[2]

The simplest explanation for the size of California's Death Row is that in each year since 1978, more individuals have been sentenced to death than have been removed from Death Row. *See* Commission Report at 121 (showing historical growth in the size of California's Death Row). As the size of California's Death Row grows larger and larger, so too do the delays associated with it. Of the 748 inmates currently on California's Death Row, more than 40 percent, including Mr. Jones, have been there longer than 19 years.[3] Nearly all of them are still litigating the merits of their death sentence, either before the California Supreme Court or the federal courts.[4] *See* Appendix A.[5]

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[2] *See* Cal. Dep't of Corr. & Rehab., Condemned Inmate List (July 2014), *available at* http://www.cdcr.ca.gov/capital_punishment/docs/condemnedinmatelistsecure.pdf. Despite having been granted relief by the federal courts, 10 of the 39 individuals are listed by the CDCR as being among the 748 inmates currently on Death Row. *See id*. In at least some of these cases, this may be explained by the State's intention to again seek the death penalty against these inmates in a new trial.

[3] *See* Cal. Dep't of Corr. & Rehab., Condemned Inmate Summary List at 2 (June 2014) ["CDCR Summary"], *available at* http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateSummary.pdf.

[4] Those sentenced to death in California proceed through a post-conviction review process that begins with a mandatory automatic appeal to the California Supreme Court. If that appeal is denied, an inmate may seek collateral review of the death sentence, again from the California Supreme Court. If state habeas relief is denied, an inmate may then pursue collateral review of the death sentence from the federal courts. If relief is denied at each of these levels, then the inmate may be executed.

[5] Between 1978 and 1997, 591 new death judgments were issued in California. *See* Cal. Dep't of Justice, Criminal Justice Statistics Center, Homicide in California, 2011 at tbl. 35, *available at* http://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/homicide/hm11/hm11.pdf. Appendix A describes the current case status of 511 individuals sentenced in that time period. It does not include individuals whose death sentences were overturned by the California Supreme Court, unless subsequently reinstated. Because most of the death sentences overturned by the California Supreme Court were overturned in the period between 1979 and 1986, inclusion of those sentences in Appendix A would not accurately reflect the current state of affairs in the California death penalty system. *See* Commission Report at 120 n.21 (noting that between 1979 and 1986, the California Supreme Court reversed 59 of 64 death judgments it reviewed, but that

For those whose challenge to the State's death sentence is ultimately denied at each level of review, the process will likely take 25 years or more. *See* Gerald Uelmen, *Death Penalty Appeals and Habeas Proceedings: The California Experience*, 93 Marq. L. Rev. 495, 496 (2009) ("Typically, the lapse of time between sentence and execution is twenty-five years, twice the national average, and is growing wider each year."). The majority of that time will likely be spent litigating before the California Supreme Court. *See* Dkt. No. 109-3, Exh. 15 ["Laurence Decl."] ¶ 15 (noting that for inmates who had their state habeas petitions decided between 2008 and 2014, the average delay between sentencing and disposition of the petition was 17.2 years). There is no evidence to suggest that the trend is reversing.

Of course, the vast majority of those sentenced to death in California will not actually be executed by the State. Indeed, the most common way out of California's Death Row is not death by State execution, but death by other means. Of the 511 individuals sentenced to death between 1978 and 1997, 79 died of natural causes, suicide, or causes other than execution by the State of California. *See* Appendix A. Another 15 sentenced after 1997—or two more than the total number of inmates that have been executed by California since the current death penalty system took form—have died of non-execution causes.[6] As California's Death Row population gets older, that number is sure to rise. *See* CDCR Summary at 1 (showing that nearly 20 percent of California's current Death Row population is over 60 years old).

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since that time, it has reversed death judgments less than 10 percent of the time). Appendix A also does not include individuals whose post-conviction proceedings have been stayed based on their lack of mental competency to face the death penalty. Finally, Appendix A does not include individuals sentenced to death after 1997 because state proceedings are ongoing for all but a small handful, and none have completed the federal habeas process.

[6] *See* Cal. Dep't of Corr. & Rehab., Condemned Inmates Who Have Died Since 1978 (2014) (showing that since 1978, 63 inmates have died of natural causes, 22 have committed suicide, 8 have died of other causes, including drug overdose or violence on the exercise yard, and 1 has been executed by another state), *available at* http://www.cdcr.ca.gov/Capital_Punishment/docs/CONDEMNEDINMATESWHOHAVEDIEDSINCE1978.pdf.

For those that survive the extraordinary wait for their challenge to be both heard and decided by the federal courts, there is a substantial chance that their death sentence will be vacated. As of June 2014, only 81 of the 511 individuals sentenced to death between 1978 and 1997 had completed the post-conviction review process. Of them, 32 were denied relief by both the state and federal courts—13 were executed, 17 are currently awaiting execution, and two died of natural causes before the State acted to execute them.[7] *See* Appendix A. The other 49—or 60 percent of all inmates whose habeas claims have been finally evaluated by the federal courts—were each granted relief from the death sentence by the federal courts.[8] *See id.*

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[7] These 17 inmates are awaiting execution because since 2006, federal and state courts have enjoined executions by California. In 2006, the federal district court for the Northern District of California enjoined the State from executing Death Row inmate Michael Morales on grounds that, as administered, the State's lethal injection protocol "create[d] an undue and unnecessary risk that an inmate will suffer pain so extreme" that it violated the Eighth Amendment's prohibition against cruel and unusual punishment. *See Morales v. Tilton*, 465 F. Supp. 2d 972, 974, 976–77 (N.D. Cal. 2006). The State subsequently amended the protocol, but because those amendments were not promulgated in compliance with the State's Administrative Procedures Act (APA), the Marin County Superior Court enjoined executions under them. *See Morales v. Cal. Dep't of Corr. & Rehab.*, 168 Cal. App. 4th 729, 732 (2008). In response to the ruling, the State undertook to promulgate a lethal injection protocol through the APA's rulemaking process. After the regulations went into effect in August 2010, Death Row inmate Mitchell Sims sued to enjoin executions under the amended protocol, again for failure to comply with the APA. The state court agreed, invalidating the regulations for substantial failure to comply with the requirements of the APA, and permanently enjoining executions in California until the State is able to adopt an execution protocol that complies with its own procedural law. *See Sims v. Dep't of Corr. & Rehab.*, 216 Cal. App. 4th 1059 (2013). California is therefore without any execution protocol by which to execute the 17 Death Row inmates who have been finally denied relief by both the state and federal courts, or to execute any other inmates who may similarly be denied relief in the near future.

[8] The State resentenced 10 of these individuals to death, thus starting anew the post-sentencing appeal process on the renewed sentences, though two have since died while on post-conviction review for the second time. *See* Appendix A.

B. The Nature of Delay in California's System

The nature of the delay in California's administration of its death penalty system has been comprehensively studied, including by the State itself. In 2004, the California State Legislature established the California Commission on the Fair Administration of Justice (the "Commission"), and tasked it with conducting a comprehensive review of the State's justice system, including its administration of the death penalty. *See* Commission Report at 113–14. The Commission, a bipartisan panel which was composed of prosecutors, criminal defense attorneys, law enforcement officials, academics, representatives of victim's rights organizations, elected officials, and a judge, issued its Final Report in June 2008. Its conclusion was a stern indictment of the State's death penalty system:

> California's death penalty system is dysfunctional. The system is plagued with excessive delay in the appointments of counsel for direct appeals and habeas corpus petitions, and a severe backlog in the review of appeals and habeas petitions before the California Supreme Court.

Id. at 114–15.[9] The Commission is not alone in reaching this determination. In 2008, then-Chief Justice of the California Supreme Court Ronald M. George offered the same assessment. *See* Ronald M. George, *Reform Death Penalty Appeals*, L.A. Times, Jan. 7, 2008 ("The existing system for handling capital appeals in California is dysfunctional and needs reform. The state has more than 650 inmates on death row, and the backlog is growing.") (cited in Commission Report at 164–65 n.3). Ninth Circuit Court of Appeals Senior Judge Arthur L. Alarcón has suggested the same in his study of the issue. *See* Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to*

[9] Even the commissioners who dissented from the Commission Report agreed "wholeheartedly" that "delay on appeal and in habeas corpus in state and federal court is excessive and frustrates the effective administration of the death penalty." Commission Report at 164 (separate statement of Commissioners Totten, Boscovich, Cottingham, Dunbar, and Hill).

Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle, 44 Loy. L.A. L. Rev. S41, S61 (2011) (describing California's "broken" death penalty system).

In reaching these conclusions, the Commission and others have documented the source and nature of the delay in California's death penalty system. Their studies confirm that delay is evident at each stage of the post-conviction review process, including from the time the death sentence is issued.

1. Delay on Direct Appeal

In California's death penalty system, delay sets in at the first step of post-conviction review—direct appeal. California law mandates that after a death sentence is imposed, it must be automatically appealed to the California Supreme Court for review. *See* Cal. Penal Code § 1239. To pursue that appeal, indigent Death Row inmates are entitled to the assistance of court-appointed counsel.[10] *See* Cal. Penal Code § 1240. But inmates must wait years—on average, between three and five years—until counsel is appointed to represent them. *See* Commission Report at 122. Indeed, as of June 2014, there were 71 Death Row inmates awaiting appointment of counsel for their direct appeal. Dkt. No. 116 ["Laurence Supplemental Decl."] ¶ 3. Unsurprisingly, until such counsel is appointed, there is effectively no activity on the inmate's case.

This delay is likely due to the severe shortage of qualified attorneys available to accept appointment as counsel on direct appeal. To be appointed, attorneys must have at least four years of active law practice, experience in felony appeals, completion of

[10] That a Death Row inmate is indigent is essentially a foregone conclusion. Of the 670 inmates on California's Death Row in 2008, each was indigent and therefore entitled to the assistance of court-appointed counsel in the post-conviction review process. *See* Commission Report at 121.

training, and demonstrated proficiency in appellate skills. Commission Report at 132 (citing Cal. Rule of Court Rule 8.605(d)). Notably, however, the Commission did not find a general dearth of lawyers able to meet these qualifications or willing to take on the representation of Death Row inmates. Rather, the Commission found the State's underfunding of its death penalty system to be a key source of the problem. *Id.* For example, the Commission noted that despite the high volume of applicants willing to represent Death Row inmates from the security of an agency setting, the Office of the State Public Defender's budget has been cut and its staff reduced. *Id.* (recommending that "[t]he most direct and efficient way to reduce the backlog of death row inmates awaiting appointment of appellate counsel would be to again expand the Office of the State Public Defender"). Similarly, as to appointments of private counsel, the Commission found that the low rate at which private appointed counsel are paid by the State is "certainly a significant factor in the decline of the pool of attorneys available to handle death penalty appeals." *Id*; *see also* Arthur L. Alarcón, *Remedies for California's Death Row Deadlock*, 80 S. Cal. L. Rev. 697, 734 (2007) ["Alarcón Study"] ("Private practitioners who can bear the financial sacrifice of accepting court-appointment at the present hourly rates are scarce.").

Once counsel is eventually appointed, that counsel must learn the trial record, which often totals more than 9,000 pages, must research the law, and must file an opening brief with the California Supreme Court. *See* Commission Report at 131. Including the time spent by the State to file a responsive brief, and by counsel for the inmate to file a reply brief, the briefing process will typically consume under four years. *Id.* The parties must then wait for the case to be scheduled for argument before the California Supreme Court. On average, the California Supreme Court generally hears between 20 and 25 death penalty appeals per year, and so another two to three years will likely pass before arguments are scheduled and the case is subsequently decided. *Id.* Taken together then, from the sentence of death to the California Supreme Court's

disposition of the automatic appeal, between 11.7 and 13.7 years will have elapsed, *see id.*, with inmates spending much of that time waiting for counsel to be appointed and for oral argument to be scheduled.

2. Delay on State Collateral Review

Whereas on direct review the inmate challenges issues raised at the trial and sentencing, on collateral review the inmate may attack the legality of his confinement based on issues that normally cannot be determined in the direct appeal process, including claims of ineffective assistance of counsel at trial. As on direct appeal, indigent Death Row inmates are entitled to the assistance of state-appointed counsel to pursue their habeas petitions. *See* Cal. Gov't Code § 68662. Unless the inmate requests that the same counsel provide representation both on direct appeal and during collateral review, California law directs that different counsel be appointed at each stage. Cal. Gov't Code § 68663. The majority of counsel appointed in capital habeas cases are private attorneys, though a number of inmates receive the assistance of the Habeas Corpus Resource Center ("HCRC"), the entity created by the Legislature to provide habeas representation to Death Row inmates.[11] *See* Laurence Decl. ¶ 11 (in fiscal years 2005 to 2012, the HCRC was appointed, on average, in 43 percent of state habeas cases).

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[11] Whether an inmate receives the assistance of the HCRC or a private attorney may significantly affect the extent of delays in the inmate's post-conviction review proceedings. Whereas the HCRC may be able to provide continuous representation in both the inmate's state and federal habeas claims, the same is not true of private attorneys appointed to represent Death Row inmates in their state habeas proceedings, who generally do not continue to provide representation in federal proceedings as well. *See* Commission Report at 137. As the Commission found, "[c]ontinuity of representation by the same lawyer in both state and federal habeas corpus proceedings helps to reduce many of the delays that now occur in state and federal habeas proceedings." *Id.*

The California Supreme Court has noted that "[i]deally, the appointment of habeas corpus counsel should occur shortly after an indigent defendant's judgment of death" so as to "enable habeas corpus counsel to investigate potential claims for relief and to prepare a habeas corpus petition at roughly the same time that appellate counsel is preparing an opening brief on appeal." *In re Morgan*, 50 Cal. 4th 932, 937 (2010). An expeditious appointment "would ensure the filing of a habeas corpus petition soon after completion of the briefing on the appeal." *Id.* Yet as of June 2014, 352 inmates—nearly half of Death Row—were without habeas corpus counsel. *See* Laurence Decl. ¶ 7. And that number is up from 291 inmates awaiting appointment of habeas counsel in 2008. *See* Commission Report at 134; *see also* Laurence Decl. tbl. 1 (showing that in all but one year since 1999, the total number of Death Row inmates awaiting the appointment of habeas counsel has increased). The growing backlog of appointments can again be traced to underfunding issues similar to those on direct appeal. *See* Commission Report at 135 (describing the below-market rates at which appointed habeas counsel are paid, and the low cap on funds made available to conduct habeas investigations and retain necessary experts); Alarcón Study at 738 (same). And unless the State is able to reverse the current trend, the backlog of Death Row inmates awaiting habeas counsel will only continue to grow. *See* Laurence Supplemental Decl. ¶ 5 (noting that over the past five years, the State has issued an average of 22.8 death judgments per year compared with only 9.4 annual appointments of habeas counsel over the same period).

The Commission found in 2008 that, far from meeting the California Supreme Court's ideal, habeas counsel is generally not appointed until between eight and ten years after the imposition of the death sentence. *See* Commission Report at 134. And the length of delay is growing. Currently, of the 352 inmates without habeas counsel, 159 have been awaiting appointment of such counsel for more than ten years. *See* Laurence Supplemental Decl. ¶ 4; Laurence Decl. ¶ 8. Further, there are 76 inmates whose direct appeals have been fully denied by the California Supreme Court but still lack habeas

counsel. *See* Laurence Supplemental Decl. ¶ 4. They have already waited an average of 15.8 years after the imposition of their death sentence for habeas counsel to be appointed, and are still waiting. *Id.*

Once habeas counsel is appointed, that counsel must learn the trial record, investigate any potential constitutional or statutory claims, and file the habeas petition with the California Supreme Court.[12] To be presumed timely, the petition must be filed either within 180 days after the final due date for filing the appellant's reply brief on direct appeal or within 36 months after the appointment of habeas counsel, whichever is later.[13] Then, in most cases, the State will only file an informal reply to the petition before it is decided by the California Supreme Court. *See* Laurence Decl. ¶ 17 (noting that of the 729 habeas petitions resolved on the merits by the California Supreme Court since 1978, the court has issued orders to show cause, requiring the Attorney General to formally respond to the petition, in only 99 cases, and held evidentiary hearings only 45 times).

In 2008, the Commission estimated that after a habeas petition was filed, it would take the California Supreme Court 22 months on average to decide it. *See* Commission

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[12] Given that habeas petitions at both the state and federal level often include claims of ineffective assistance of counsel, the appointed habeas counsel is often required to reinvestigate the inmate's case to discover whether any additional mitigating evidence might have been presented to the jury, but was not for lack of adequate representation during the guilt and penalty phases of the inmate's trial. *See* Commission Report at 133–34. As noted above, however, such investigation may be hampered by underfunding, which may in turn further delay the federal habeas process. *See id.* at 135; Alarcón Study at 738.

[13] *See* Supreme Court Policies Regarding Cases Arising from Judgments of Death, Policy 3, Timeliness Standard 1-1.1 (as amended Nov. 30, 2005), *available at* http://www.courts.ca.gov/documents/PoliciesMar2012.pdf. At the time Mr. Jones filed his state habeas petition in 2002, the Policy required the petition to be filed within 90 days after the final due date for the filing of the appellant's reply brief on direct appeal or within 24 months after the appointment of habeas counsel, whichever is later.

Report at 134. But that delay has more than doubled since the Commission's report was issued. Of the 176 capital habeas petitions currently pending before the California Supreme Court, the average amount of time that has elapsed since each petition was filed is 49 months. Laurence Supplemental Decl. ¶ 6. Similarly, of the 68 capital habeas petitions the court has decided since 2008, it has taken an average of 47.8 months for the California Supreme Court to issue a decision once each petition was fully briefed. Laurence Decl. ¶ 14. In all, by the time the inmate's state habeas petition is decided, he will likely have spent a combined 17 years or more litigating his direct appeal and petition for state habeas review before the California Supreme Court.[14] *See id.* ¶ 15.

3. Delay on Federal Collateral Review

When an inmate's state habeas petition is denied, the inmate may seek relief in federal court by alleging that the State has violated his federal constitutional rights. Federal habeas proceedings are significantly affected by the habeas proceedings before the state court. Federal courts are generally limited in their review by the legal and factual determinations of the state court. 28 U.S.C. § 2254(d). Moreover, if an inmate discovers new facts in the federal proceeding that were not before the California Supreme Court when it decided the state habeas petition, that inmate must generally halt the federal proceeding and return to the California Supreme Court by way of an exhaustion

[14] When the California Supreme Court does rule on a capital habeas petition, it usually does so by way of a summary unpublished opinion. For example, the California Supreme Court denied Mr. Jones's habeas petition in a mere 202 words, excluding citations. *See* Jones (Ernest Dewayne) on H.C., No. S110791 (Cal. Mar. 11, 2009, amended Mar. 16, 2009), *available at* http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1842470&doc_no=S110791. The Commission noted that much of the delay in federal habeas proceedings "is attributable to the absence of a published opinion and/or an evidentiary hearing in the state courts" because "[o]ften, the federal courts cannot ascertain why state relief was denied." Commission Report at 123.

petition to present to it the new facts and exhaust the state remedy. *See* 28 U.S.C. § 2254(b).

As of 2008, the complete federal habeas review process, including initial review by the district court, appeal to the Ninth Circuit, and possible petitions for en banc and Supreme Court review, took an average of 10.4 years. *See* Commission Report at 123, 137. While certainly lengthy, "[m]uch of the delay in federal habeas corpus proceedings . . . is attributable to the need to exhaust state remedies and to conduct investigations." Alarcón Study at 750. For example, since 1978, Death Row inmates have filed 268 exhaustion petitions in the California Supreme Court after initiating federal habeas proceedings. Laurence Supplemental Decl. ¶ 7; *see also* Alarcón Study at 749 (noting that approximately 74 percent of federal habeas proceedings are stayed at some point during the proceeding for exhaustion of state remedies). The average time that elapses before that exhaustion petition is decided by the California Supreme Court is 3.2 years. Laurence Supplemental Decl. ¶ 7; *see also* Alarcón Study at 749 (finding that, as of 2007, "[t]he average delay for the exhaustion of state remedies before the California Supreme Court [was] 2.8 years").

Ultimately, since 1978 only 81 inmates—of the more than 900 individuals sentenced to death in California—have received a final determination on the merits of their federal habeas petitions.[15] Less than half of those 81 have been denied relief at all levels, and only 13 have actually been executed. *See* Appendix A. Of the 17 that are currently awaiting their execution, each has been on Death Row for more than 25 years, and eight have been there for more than 30 years. *Id.* More inmates will ultimately be

[15] This number includes two inmates who technically never had their petitions decided by the federal courts because they voluntarily withdrew their petitions, choosing to be executed immediately by the State rather than have their habeas petitions finally decided by the federal courts.

denied relief at each stage of review, but when or whether they will be executed is unclear. Indeed, not one inmate has been executed in California since 2006. *See id*.

C. Mr. Jones's Claim

After Mr. Jones was sentenced to death in April 1995, he waited approximately four years before the State appointed counsel to represent him in his direct appeal. Then, another four years later, on March 17, 2003, the California Supreme Court affirmed Mr. Jones's conviction. *People v. Jones*, 29 Cal. 4th 1229 (2003). After certiorari was denied by the United States Supreme Court, the judgment became final on October 21, 2003. *Jones v. California*, 540 U.S. 952 (2003). In total, Mr. Jones spent about eight years litigating his direct appeal before the California Supreme Court—considerably less time than the 12 to 14 years spent by most individuals on California's Death Row.

Mr. Jones's state habeas counsel was appointed on October 20, 2000, five years after he was sentenced to death and while he was still litigating his direct appeal. By October 21, 2002, Mr. Jones's counsel—the Habeas Corpus Resource Center, which continues to represent him in this federal habeas proceeding—filed his state habeas petition. Six and a half years later, and over five years after the petition was fully briefed, on March 11, 2009 the California Supreme Court denied Mr. Jones's petition in an unpublished order. No hearing was conducted, and no briefing was provided by the State beyond an informal reply.

Finally, on March 10, 2010, Mr. Jones filed his petition for federal habeas relief. *See* Dkt. No. 26. Briefing on the petition was completed in January 2014, and the Court is reviewing his claims. On April 28, 2014, Mr. Jones amended Claim 27 of his petition to broaden the nature of his claim of unconstitutional delay in California's administration of its death penalty system. *See* Dkt. No. 105 ["First Am. Pet."]. Mr. Jones's new claim

asserts that as a result of systemic and inordinate delay in California's post-conviction review process, only a random few of the hundreds of individuals sentenced to death will be executed, and for those that are, execution will serve no penological purpose. *Id.*

ANALYSIS

The Eighth Amendment prohibits the imposition of cruel and unusual punishment by the state. Although reasonable people may debate whether the death penalty offends that proscription, no rational person can question that the execution of an individual carries with it the solemn obligation of the government to ensure that the punishment is not arbitrarily imposed and that it furthers the interests of society. As the American tradition of law has long recognized, death is a punishment different in kind from any other. *See, e.g.*, *Harmelin v. Michigan*, 501 U.S. 957, 995 (1991) (noting the "qualitative difference between death and all other penalties"); *Coleman v. McCormick*, 874 F.2d 1280, 1288 (9th Cir. 1989) ("The finality and severity of a death sentence makes it qualitatively different from all other forms of punishment."). Indeed, in its finality, the punishment of death "differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

Recognizing that solemn obligation, in 1972 the United States Supreme Court invalidated the death sentences of the three petitioners appearing before it, and signaled that as it was then being imposed across much of the country, the death penalty violated the Eighth Amendment. *See Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). In *Furman*, the Court encountered state sentencing schemes by which judges and juries were afforded virtually untrammeled discretion to decide whether to impose the ultimate

sanction. The result was that the death penalty was being imposed in an at best random manner against some individuals, with "no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not." *See id.* at 313 (White, J., concurring). While no majority opinion controlled in *Furman*, the Supreme Court agreed that such an outcome was abhorrent to the Constitution, holding that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *See Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion) (describing *Furman*'s holding). Put another way, the Constitution quite simply "cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Furman*, 408 U.S. at 310 (Stewart, J., concurring). In the 40 years since *Furman*, the Supreme Court has never retreated from that fundamental principle.

The *Furman* decision was rooted in part in the Court's recognition that arbitrary imposition of the death penalty could not justly further the penological goals of society—deterrence and retribution. *See id.* at 312 (White, J., concurring) ("At the moment that [the death penalty] ceases realistically to further these purposes, . . . its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment."). Indeed, in *Gregg v. Georgia*, when the Supreme Court lifted what had become *Furman*'s de facto moratorium on the death penalty, it did so with the understanding that such punishment should serve these "two principal social purposes." 428 U.S. at 183. Since that time, the Supreme Court has harkened back to these twin purposes to guide its evaluation of challenges to the death penalty under the Eighth Amendment. *See, e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407, 441 (2008) ("[C]apital punishment is excessive when it is grossly out of proportion to the crime or it does not

fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes."). They are bedrock principles of the Constitution's promise to not permit the infliction of cruel and unusual punishment by the State.

A. Arbitrariness in California's Death Penalty System

California's death penalty system is so plagued by inordinate and unpredictable delay that the death sentence is actually carried out against only a trivial few of those sentenced to death. Of the more than 900 individuals that have been sentenced to death since 1978, only 13 have been executed. For every one inmate executed by California, seven have died on Death Row, most from natural causes. The review process takes an average of 25 years, and the delay is only getting longer. Indeed, no inmate has been executed since 2006, and there is no evidence to suggest that executions will resume in the reasonably near future. Even when executions do resume, the current population of Death Row is so enormous that, realistically, California will still be unable to execute the substantial majority of Death Row inmates. In fact, just to carry out the sentences of the 748 inmates currently on Death Row, the State would have to conduct more than one execution a week for the next 14 years. Such an outcome is obviously impossible for many reasons, not the least of which is that as a result of extraordinary delay in California's system, only 17 inmates currently on Death Row have even completed the post-conviction review process and are awaiting their execution. *See* Appendix A. For all practical purposes then, a sentence of death in California is a sentence of life imprisonment with the remote possibility of death—a sentence no rational legislature or jury could ever impose.

Of course, for an arbitrarily selected few of the 748 inmates currently on Death Row, that remote possibility may well be realized. Yet their selection for execution will not depend on whether their crime was one of passion or of premeditation, on whether

they killed one person or ten, or on any other proxy for the relative penological value that will be achieved by executing that inmate over any other. Nor will it even depend on the perhaps neutral criterion of executing inmates in the order in which they arrived on Death Row. Rather, it will depend upon a factor largely outside an inmate's control, and wholly divorced from the penological purposes the State sought to achieve by sentencing him to death in the first instance: how quickly the inmate proceeds through the State's dysfunctional post-conviction review process.

Mr. Jones's case is illustrative. Mr. Jones is now in his fifth year of federal review, and given that the final briefing on the merits of his claims was completed in January, a decision from this Court could be rendered by the end of the year. On average, review at the Ninth Circuit will take another 2.2 years. *See* Commission Report at 123. Accounting then for the time spent seeking en banc review from the Circuit and certiorari from the United States Supreme Court, and assuming relief is denied at every level, the federal stay on Mr. Jones's execution could be lifted and he could be ready for execution within three or four years—about 23 years after he was first sentenced to death.

By comparison, of the 380 inmates included in Appendix A who are currently on Death Row, 285 have been there longer than Mr. Jones. *See* Appendix A; *see also* CDCR Summary at 2 (showing that about 40 percent of all inmates have been on Death Row longer than Mr. Jones). Over a third of them are engaged in state court proceedings. *See* Appendix A (showing that 109 of the 285 inmates who have been on Death Row longer than Mr. Jones have state proceedings ongoing). In all likelihood, given the delays in the post-conviction review process, most of them will never face execution as a realistic possibility, unlike Mr. Jones. Similarly, of the 38 Death Row inmates who like Mr. Jones were sentenced to death in 1995, only 7, including Mr. Jones, have completed the state habeas review process. *See id.* Were his petition denied today, Mr. Jones would be one of three inmates sentenced in 1995 to have his federal habeas petition under

review by the Ninth Circuit, effectively the last available stage before execution. Again, because of the inordinate delays inherent in California's system, many of the rest will never be executed. They will instead live out their lives on Death Row. *See* Gerald Uelmen, *Death Penalty Appeals and Habeas Proceedings: The California Experience*, 93 Marq. L. Rev. 495, 496 (2009) ("For all practical purposes, a sentence of death in California is a sentence of life imprisonment without the possibility of parole.").

For Mr. Jones to be executed in such a system, where so many are sentenced to death but only a random few are actually executed, would offend the most fundamental of constitutional protections—that the government shall not be permitted to arbitrarily inflict the ultimate punishment of death. *See Furman*, 408 U.S. at 293 (Brennan, J., concurring) ("When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system."). To be sure, *Furman* specifically addressed arbitrariness in the selection of who gets sentenced to death. But the principles on which it relied apply here with equal force. The Eighth Amendment simply cannot be read to proscribe a state from randomly selecting which few members of its criminal population it will sentence to death, but to allow that same state to randomly select which trivial few of those condemned it will actually execute. Arbitrariness in execution is still arbitrary, regardless of when in the process the arbitrariness arises.

B. The Penological Purpose of California's Death Penalty System

The systemic delay and dysfunction that result in the arbitrary execution of California's Death Row inmates give rise to a further constitutional problem with the State's administration of its death penalty system. In California, the execution of a death sentence is so infrequent, and the delays preceding it so extraordinary, that the death

penalty is deprived of any deterrent or retributive effect it might once have had. Such an outcome is antithetical to any civilized notion of just punishment.

1. Deterrence

Whether the death penalty has any deterrent effect when administered in a functional system is a widely contested issue upon which no clear empirical consensus has been reached. But even when administered in a functional system, few could dispute that long delays preceding execution frustrate whatever deterrent effect the death penalty may have. Indeed, the law, and common sense itself, have long recognized that the deterrent effect of *any* punishment is contingent upon the certainty and timeliness of its imposition. *See, e.g.*, *Harmelin*, 501 U.S. at 989 ("[D]eterrent effect depends not only upon the amount of the penalty but upon its certainty . . . ."); *United States v. Panico*, 308 F.2d 125, 128 (2d Cir. 1962) ("There can be little doubt that the effectiveness of punishment as a deterrent is related not only to the quality of the possible punishment but to the certainty and promptness as well."), *vacated on other grounds*, 375 U.S. 29 (1963); *see also* Commission Report at 115 n.8 (agreeing that "[i]f there is a deterrent value [to the death penalty], . . . it is certainly dissipated by long intervals between judgment of death and its execution"). In the death penalty context, where finality of punishment is not achieved until the actual execution of the inmate, the case is no different.

In California, the system in which the death penalty is administered can only be described as completely dysfunctional. The delay inherent in California's system is so extraordinary that it alone seriously undermines the continued deterrent effect of the State's death penalty. *See Chief Justice Ronald George Reflects on Death Penalty, Prop. 8*, The California Report, Dec. 6–8, 2013 ("[O]ne of the rationales for the death penalty is a deterrent effect that it . . . has on a certain number of cases, . . . and when there's so much delay as there is now—25 years' worth is the average stay on death row—I think it

loses its justification.").[16] But delay is not the only problem. Executions by the State are so few and far between that since 1978, of the 900 individuals sentenced to death in California, only 13 have been executed. The reasonable expectation of an individual contemplating a capital crime in California then is that if he is caught, it does not matter whether he is sentenced to death—he realistically faces only life imprisonment. Under such a system, the death penalty is about as effective a deterrent to capital crime as the possibility of a lightning strike is to going outside in the rain.[17]

2. Retribution

Just as inordinate delay and unpredictability of executions eliminate any deterrent effect California's death penalty might have, so too do such delay and unpredictability defeat the death penalty's retributive objective. It is true that the Supreme Court has consistently affirmed the view that retribution, as "an expression of society's moral outrage at particularly offensive conduct," is a constitutionally permissible aim of capital sentencing schemes. *See Gregg*, 428 U.S. at 183. But no reasonable jurist could dispute that inordinate delay frustrates that aim. *See Coleman*, 451 U.S. at 960 (Rehnquist, J., dissenting from the denial of certiorari) ("There can be little doubt that delay in the enforcement of capital punishment frustrates the purpose of retribution."); *Ceja v. Stewart*, 134 F.3d 1368, 1374 (9th Cir. 1998) (Fletcher, J., dissenting) ("[T]he ability of

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[16] *Available at* http://www.californiareport.org/archive/R201312061630/c.

[17] In 1995, the same year Mr. Jones was sentenced to death, now-Chief Judge of the Ninth Circuit Court of Appeals Alex Kozinski commented that as it then existed in the United States, the "death penalty . . . has no deterrent value because it is imposed so infrequently and so freakishly." *See* Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, Lecture, 46 Case W. Res. L. Rev. 1, 25 (Fall 1995). In the nearly 20 years since, the evidence is clear that the problem has only gotten worse. California has made true then-Justice Rehnquist's remark—perhaps hyperbolic at the time—that "the existence of the death penalty in this country is virtually an illusion." *See Coleman v. Balkcom*, 451 U.S. 949, 957–58 (1981) (Rehnquist, J., dissenting from the denial of certiorari).

an execution to provide moral and emotional closure to a shocked community diminishe[s] as the connection between crime and punishment [becomes] more attenuated and more arbitrary."); Lewis Powell, *Capital Punishment*, Commentary, 102 Harv. L. Rev. 1035, 1041 (1989) ("The retributive value of the death penalty is diminished as imposition of sentence becomes ever farther removed from the time of the offense.").

In California, a Death Row inmate will likely wait at least 25 years before his execution becomes even a realistic possibility. Were such lengthy delay an isolated, or even necessary, circumstance of a system that otherwise acts purposefully to give meaning to society's moral outrage, the retributive purpose of the death penalty might continue to be served. Here, however, the delay is systemic, and the State itself is to blame. The State has allowed such dysfunction to creep into its death penalty system that the few executions it does carry out are arbitrary. Whereas few have been or will eventually be executed by California, the vast majority of individuals sentenced to death—each of whom, in the State's view, committed crimes sufficiently reprehensible to warrant death—will effectively serve out terms of life imprisonment. *See* Appendix A. This reality of delay and dysfunction created by the State simply cannot be reconciled with the asserted purpose of retribution. *See Furman*, 408 U.S. at 304–05 (Brennan, J., concurring) ("The asserted public belief that murderers . . . deserve to die is flatly inconsistent with the execution of a random few."); *id.* at 311 (White, J., concurring) ("[W]hen imposition of the [death] penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied.").

C. Petitioners' Fault in Creating Delay

As the State correctly notes, courts have thus far generally not accepted the theory that extraordinary delay between sentencing and execution violates the Eighth

Amendment. *See, e.g.*, *People v. Anderson*, 25 Cal. 4th 543, 606 (2001) ("[A]ppellate delay in a capital case is not cruel and unusual punishment."). When courts have rejected the theory, however, they have often not addressed whether any penological purpose of the death penalty continues to be served more than two decades after the death sentence was imposed. Rather, courts often rely on two justifications for rejecting the theory: first, that the delay is reasonably related to the state's effort to safeguard the inmate's constitutional rights by ensuring the accuracy of its death conviction and sentence, and second, that the delay is caused by the petitioner himself, and therefore cannot be constitutionally problematic.[18] The facts here, however, show that at least as to California's administration of its death penalty system, such assumptions are simply incorrect.

The Court pauses first to note the arguments that the State is not making in opposition to Mr. Jones's claim. The State is not arguing that the delay in Mr. Jones's execution is an isolated incident in a system that otherwise operates as expeditiously as possible to execute those sentenced to death.[19] Nor does the State argue that it is rational or necessary for it to take more than two decades to provide Death Row inmates with the

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[18] For example, in *Anderson*, the California Supreme Court found that "the automatic appeal process following judgments of death is a constitutional safeguard, not a constitutional defect." 25 Cal. 4th at 606. Similarly, Justice Clarence Thomas, concurring in the Supreme Court's denial of certiorari in *Thompson v. McNeil*, argued that "[i]t makes 'a mockery of our system of justice . . . for a convicted murderer, who, through his own interminable efforts of delay . . . has secured the almost-indefinite postponement of his sentence, to then claim that the almost-indefinite postponement renders his sentence unconstitutional.' " 556 U.S. 1114, 129 S. Ct. 1299, 1301 (2009) (Thomas, J., concurring in the denial of certiorari) (quoting *Turner v. Jabe*, 58 F.3d 924, 933 (4th Cir. 1995) (Luttig, J., concurring in judgment)).

[19] Unlike Mr. Jones's claim here, in previous instances where federal courts have been presented claims of unconstitutional delay preceding execution, they have generally appeared in the context of claims brought by inmates in whose *individual* cases the delay was extraordinary. *See, e.g.*, *Lackey v. Texas*, 514 U.S. 1045 (17 years of delay); *Smith v. Mahoney*, 611 F.3d 978 (9th Cir. 2010) (25 years of delay). In those cases, however, the petitioner did not argue, as does Mr. Jones here, that his execution would be arbitrary and serve no penological purpose because of system-wide dysfunction in the post-conviction review process.

process required to ensure that their death sentence comports with constitutional requirements. Indeed, the State cannot reasonably make these arguments.

On the record before it, the Court finds that much of the delay in California's post-conviction review process is created by the State itself, not by inmates' own interminable efforts to delay.[20] Most Death Row inmates wait between three and five years for counsel to be appointed for their direct appeal. After the issues are briefed on direct appeal, another two to three years are spent waiting for oral argument to be scheduled before the California Supreme Court. On state habeas review, far from meeting the ideal goal of appointing state habeas counsel shortly after the death verdict, at least eight to ten years elapse between the death verdict and appointment of habeas counsel. When that counsel is appointed by the State, investigation of potential claims is hampered by underfunding, which in turn slows down the federal habeas review process. Then, after state habeas briefs are submitted, another four years elapse before the California Supreme Court issues a generally conclusory denial of the inmate's claims. This lack of a reasoned opinion further slows adjudication of inmates' federal habeas claims. Finally, even after filing a petition for federal habeas review, many inmates, often because of deficiencies rooted in the State's process, must stay their federal cases to exhaust claims in state court.

These delays—exceeding 25 years on average—are inherent to California's dysfunctional death penalty system, not the result of individual inmates' delay tactics, except perhaps in isolated cases. *See generally* Appendix A (showing that very few of California's Death Row inmates have completed the state and federal post-conviction

[20] Indeed, in Mr. Jones's case, there is no evidence of frivolous filings or unreasonable delay caused by Mr. Jones. Rather, the unnecessary delay in his case—as in the cases of most other Death Row inmates—is attributable to structural problems inherent in California's death penalty system.

review process, even 20 years after being sentenced to death). That such delays are not reasonably necessary to the fair administration of justice is evident. In 2008, the Commission recommended a series of related reforms that, in its view, would help alleviate delay inherent in California's death penalty system. The Commission's recommendations included more adequately funding the system and removing the requirement that death penalty appeals must be automatically heard by the California Supreme Court rather than the state's intermediate courts of appeal. *See* Commission Report at 124. Through its proposed reforms, the Commission estimated that the delay between sentencing and execution of a Death Row inmate could be reduced to between 11 and 14 years.[21] *See id*. So reducing California's time to execution would bring California closer to, or even below, the national average, which between 2000 and 2012 was approximately 12.5 years, and in 2012 was 15.8 years.[22]

The Commission's proposal, and the experience of other states across the country—which, on average, take substantially less than 20 years, let alone 25 or 30 years, to adjudicate their post-conviction review process—demonstrate that the inordinate delay in California's death penalty system is not reasonably necessary to protect an inmate's rights. Moreover, there is no basis to conclude that inmates on California's Death Row are simply more dilatory, or have stronger incentives to needlessly delay the capital appeals process, than are those Death Row inmates in other states. Most of the delay in California's post-conviction process then is attributable to California's own system, not the inmates themselves.

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[21] Whether the State adopts the Commission's proposed reforms, or any others, is a policy question beyond the scope of this proceeding. But the proposals are relevant to supporting Mr. Jones's claim that the delay in California is of a structural and systemic nature, and are cited here for that purpose.

[22] United States Dep't of Justice, Bureau of Justice Statistics, NCJ 245789, Capital Punishment, 2012—Statistical Tables (May 2014) at 14, *available at* http://www.bjs.gov/content/pub/pdf/cp12st.pdf.

Of course, the Court's conclusion should not be understood to suggest that the post-conviction review process should be curtailed in favor of speed over accuracy. Indeed, it bears noting that in more than half of all cases in which the federal courts have reviewed a California inmate's death sentence on habeas review, the inmate has been granted relief from the death sentence. *See* Appendix A. The post-conviction review process is, therefore, vitally important. It serves both the inmate's interest in not being improperly executed, as well as the State's interest in ensuring that it does not improperly execute any individual. Nevertheless, the Court holds that where the State permits the post-conviction review process to become so inordinately and unnecessarily delayed that only an arbitrarily selected few of those sentenced to death are executed, the State's process violates the Eight Amendment. Fundamental principles of due process and just punishment demand that any punishment, let alone the ultimate one of execution, be timely and rationally carried out.

D. Procedural Bars to Federal Collateral Review

The State argues that Mr. Jones's claim is procedurally barred. Specifically, the State contends that Mr. Jones has not exhausted available state remedies as required under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(b). Federal courts generally may not grant habeas relief to an individual in state custody unless that individual has first exhausted the remedies available in state court. *See* 28 U.S.C. § 2254(b)(1)(A). However, where "circumstances exist that render [the state] process ineffective to protect the rights of the applicant," exhaustion is not required. 28 U.S.C. § 2254(b)(1)(B)(ii). The Court has determined that systemic delay caused by the dysfunctional state review process has resulted in the arbitrary selection of a small handful of individuals for execution, and has therefore rendered Mr. Jones's death sentence unconstitutional. Requiring Mr. Jones to return to the California Supreme Court to exhaust his claim would only compound the delay that has already plagued his post-

conviction review process. *See* Laurence Decl. ¶ 16 (noting that, on average, 3.19 years elapse before an exhaustion petition in a capital habeas case is decided by the California Supreme Court). More importantly, it would require Mr. Jones to have his claim resolved by the very system he has established is dysfunctional and incapable of protecting his constitutional rights. Special circumstances clearly exist such that Mr. Jones need not return to the California Supreme Court to exhaust his claim. *Cf. Phillips v. Vasquez*, 56 F.3d 1030, 1035 (9th Cir. 1995) ("[E]xtraordinary delay in the state courts can render state corrective processes 'ineffective' within the meaning of section 2254(b) [such] that exhaustion is not required . . . .") (citation omitted); *Jones v. Tubman*, 360 F. Supp. 1298, 1300 (S.D.N.Y. 1973) ("[E]xhaustion is not mandated where the state consideration would be either futile or where state procedures do not provide swift review of petitioner's claims.").

While not specifically addressed by the State, the Court considers a second procedural defense commonly raised to avoid federal habeas review: that the petitioner's claim seeks the announcement of a new rule on collateral review and is therefore barred under *Teague v. Lane*, 489 U.S. 288, 306 (1989).[23] The rule Mr. Jones seeks to have applied here—that a state may not arbitrarily inflict the death penalty—is not new. Rather, it is inherent in the most basic notions of due process and fair punishment embedded in the core of the Eighth Amendment. *See Furman*, 408 U.S. at 274–77 (Brennan, J., concurring) (describing the principle that "the State must not arbitrarily inflict a severe punishment" as "inherent in the [Cruel and Unusual Punishment] Clause" and tracing its application in Anglo–American jurisprudence); *see also id.* at 242 (Douglas, J., concurring) ("There is evidence that the provision of the English Bill of Rights of 1689, from which the language of the Eighth Amendment was taken, was

[23] Because there is no underlying state court ruling on the merits of Mr. Jones's claim of arbitrariness in California's death penalty system, the Court does not consider the claim under AEDPA's deferential standard of review. *See* 28 U.S.C. § 2254(d).

concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature."). This rule is certainly one "so deeply embedded in the fabric of due process that everyone takes it for granted." *Dyer v. Calderon*, 151 F.3d 970, 984 (9th Cir. 1998) (en banc). It is therefore not a new rule for *Teague* purposes. *See id.* ("[A] rule needs to be announced for purposes of *Teague* only if it's new.").

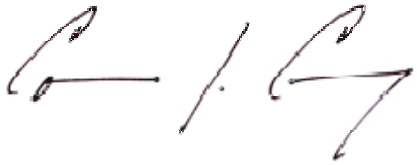
* * *

When an individual is condemned to death in California, the sentence carries with it an implicit promise from the State that it will actually be carried out. That promise is made to the citizens of the State, who are investing significant resources in furtherance of a punishment that they believe is necessary to achieving justice. It is made to jurors who, in exercise of their civic responsibility, are asked to hear about and see evidence of undeniably horrific crimes, and then participate in the agonizing deliberations over whether the perpetrators of those horrific crimes should be put to death. It is made to victims and their loved ones, for whom just punishment might provide some semblance of moral and emotional closure from an otherwise unimaginable loss. And it is made to the hundreds of individuals on Death Row, as a statement their crimes are so heinous they have forfeited their right to life.

But for too long now, the promise has been an empty one. Inordinate and unpredictable delay has resulted in a death penalty system in which very few of the hundreds of individuals sentenced to death have been, or even will be, executed by the State. It has resulted in a system in which arbitrary factors, rather than legitimate ones like the nature of the crime or the date of the death sentence, determine whether an individual will actually be executed. And it has resulted in a system that serves no

penological purpose. Such a system is unconstitutional. Accordingly, the Court hereby VACATES Mr. Jones's death sentence.

DATED: July 16, 2014



CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE

Appendix A: Death Sentences in California, 1978 – 1997[1]

Between 1978 and 1997, 591 new death judgments were imposed by the State of California. This chart describes the current case status of the 511 individuals sentenced in that time period whose death sentences have not been overturned by the California Supreme Court (unless subsequently reinstated) and whose post-conviction proceedings have not been stayed based on their lack of mental competency to face the death penalty.[2] Of these 511 individuals, 13 were executed by the State (Red), 17 had relief denied by the federal courts but have had their executions stayed (Pink), 39 were granted relief from their death sentences by the federal courts and have not been resentenced to death[3] (Blue), 79 died on Death Row from causes other than execution by the State of California (Orange), 169 are currently having their habeas petitions evaluated by federal district courts (Green) or the Ninth Circuit Court of Appeals (Purple), and 194 are still having their appeals reviewed by the California Supreme Court, either on direct or collateral review (Yellow). The chart is current to June 2014.[4]

Name	Date Sentenced[5]	Federal Case Number	Federal Judicial District	Date Federal Habeas Proceedings Initiated[6]	Current Case Status	Years Since Sentenced
Lavell Frierson	8/14/1978	92-06251 DDP	Central	10/19/1992	Relief Granted (2007)	--
Doug Stankewitz	10/12/1978	91-00616 AWI	Eastern	11/15/1991	Relief Granted (2012)	--
Ronald Bell	3/2/1979	99-20615 RMW	Northern	4/12/1991	CD Cal Petition Pending	35
Robert Harris	3/9/1979	90-00380 E	Southern	3/26/1990	Executed (1992)	--
Earl Jackson	3/19/1979	95-03286 ER	Central	5/17/1995	Relief Granted (2008) / Resentenced to Death (2010) / State Proceedings Pending	35
Keith Williams	4/13/1979	89-00160 REC	Eastern	2/22/1989	Executed (1996)	--
David Murtishaw	4/27/1979	91-00508 OWW	Eastern	9/10/1991	Relief Granted (2001) / Resentenced to Death / Deceased (2011)	--
Robert Massie	5/25/1979	99-02861 CAL	Northern	6/14/1999	Executed (2001)	--
Richard Chase	6/8/1979				Deceased (1980)	--
Stevie Fields	8/29/1979	92-00465 AHM	Central	1/23/1992	Relief Denied (2007) / Execution Stayed	35
David Ghent	10/30/1979	90-02763 RMW	Northern	9/26/1990	Relief Granted (2002)	--
Richard Montiel	11/20/1979	96-05412 LJO	Eastern	4/22/1996	ED Cal Petition Pending	35
James Anderson	11/30/1979	03-07948 JLS	Central	11/4/2003	CD Cal Petition Pending	35
Steven Ainsworth	1/30/1980	90-00329 LKK	Eastern	3/16/1990	Relief Granted (2001)	--
Richard Phillips	2/20/1980	92-05167 AWI	Eastern	3/4/1992	Relief Granted (2012)	--
Alejandro Ruiz	2/21/1980	89-04126 FMC	Central	7/11/1989	Deceased (2007)	--
Fermin Ledesma	3/14/1980	07-02130 PJH	Northern	4/17/2007	State Proceedings Pending	34

David Moore	4/30/1980				Deceased (1980)	--
Melvin Turner	8/20/1980	96-02844 DOC	Central	4/22/1996	State Proceedings Pending	34
Marvin Walker	9/8/1980	94-01997 PJH	Northern	6/7/1994	ND Cal Petition Pending	34
Donald Griffin	12/3/1980				State Proceedings Pending	34
Darrell Rich	1/23/1981	89-00823 EJG	Eastern	6/12/1989	Executed (2000)	--
Jerry Bunyard	2/2/1981				State Proceedings Pending	33
Bernard Hamilton	3/2/1981	92-00474 B	Southern	3/31/1992	Relief Granted (1994) / Resentenced to Death (1996) / State Proceedings Pending	33
Lawrence Bittaker	3/22/1981	91-01643 TJH	Central	3/27/1991	CD Cal Petition Pending	33
Harvey Heishman	3/30/1981	90-01815 VRW	Northern	6/26/1990	Relief Denied (2010) / Execution Stayed	33
Eric Kimble	4/6/1981	90-04826 SVW	Central	9/7/1990	CD Cal Petition Pending	33
Stanley Williams	4/15/1981	89-00327 SVW	Central	1/18/1989	Executed (2006)	--
Robert McLain	5/12/1981	89-03061 JGD	Central	5/18/1989	Relief Granted (1998)	--
Joe Johnson	5/28/1981				State Proceedings Pending	33
Anthony Bean	7/20/1981	90-00648 WBS	Eastern	5/18/1990	Relief Granted (1998)	--
Stephen Anderson	7/24/1981	92-00488 JGD	Central	1/24/1992	Executed (2002)	--
Oscar Gates	8/7/1981	88-02779 WHA	Northern	7/14/1988	ND Cal Petition Pending	33
Michael Burgener	9/4/1981	10-03399 GHK	Central	5/6/2010	State Proceedings Pending	33
Ronald Hawkins	9/20/1981				Deceased (1983)	--
Billy Ray Hamilton	10/16/1981	89-03758 THE	Northern	10/4/1989	Deceased (2007)	--
John Davenport	11/4/1981	96-06883 DSF	Central	9/30/1996	State Proceedings Pending	33
Russell Coleman	11/20/1981	89-01906 RMW	Northern	6/2/1989	Relief Granted (2000)	--
Edgar Hendricks	12/4/1981	89-02901 EFL	Northern	8/7/1989	Relief Granted (1995)	--
Gary Guzman	12/22/1981				Deceased (1991)	--
Fernando Caro	1/5/1982	93-04159 JW	Northern	11/23/1993	Relief Granted (2002)	--
Bluford Hayes Jr.	1/22/1982	92-00603 DFL	Eastern	4/14/1992	Relief Granted (2005)	--
Phillip Lucero	1/26/1982	01-02823 VAP	Central	3/27/2001	CD Cal Petition Pending	32
Richard Hovey	2/10/1982	89-01430 MHP	Northern	4/26/1989	Relief Granted (2006)	--
Carlos Avena	2/12/1982	96-08034 GHK	Central	11/15/1996	Circuit Appeal Pending	32
Albert Brown	2/22/1982	94-08150 ABC	Central	12/5/1994	Relief Denied (2008) / Execution Stayed	32
Willie Branner	2/26/1982	90-03219 DLJ	Northern	11/9/1990	ND Cal Petition Pending	32
Rondald Sanders	3/3/1982	92-05471 LJO	Eastern	7/13/1992	ED Cal Petition Pending	32
William Payton	3/5/1982	94-04779 R	Central	7/18/1994	Relief Denied (2011) / Execution Stayed	32

William Bonin	3/12/1982	91-00693 ER	Central	2/7/1991	Executed (1996)	--
Benjamin Silva	3/15/1982	90-03311 DT	Central	6/26/1990	Relief Granted (2005)	--
Darnell Lucky	4/7/1982	91-00583 TJH	Central	2/1/1991	CD Cal Petition Pending	32
Richard Boyde	4/20/1982	91-02522 GPS	Central	5/9/1991	Relief Granted (2008)	--
Melvin Wade	5/21/1982	89-00173 R	Central		Relief Granted (1994)	--
George Carpenter	5/21/1982				Deceased (1984)	--
Gary Howard	5/27/1982	88-07240 WJR	Central	12/8/1988	Relief Granted (1996)	--
Richard Grant	5/28/1982	90-00779 JAM	Eastern	6/18/1990	Relief Granted (2010)	--
John Brown	6/15/1982	90-02815 AHS	Central	6/1/1990	CD Cal Petition Pending	32
Manuel Babbitt	7/8/1982	89-01407 WBS	Eastern	8/1/1989	Executed (1999)	--
Mose Willis	7/26/1982				Deceased (1988)	--
Prentice Snow	8/31/1982				State Proceedings Pending	32
Adam Miranda	9/17/1982	89-07130 JLS	Central	12/11/1989	State Proceedings Pending	32
James Karis	9/17/1982	89-00527 LKK	Eastern	4/13/1989	Relief Granted (1998) / Resentenced to Death / Deceased (2013)	--
Brett Pensinger	9/20/1982	92-01928 DSF	Central	3/30/1992	Circuit Appeal Pending	32
Fernando Belmontes	10/6/1982	89-00736 JAM	Eastern	5/25/1989	Relief Denied (2010) / Execution Stayed	32
Bronte Wright	10/29/1982	92-06918 AHM	Central	11/20/1992	Deceased (2000)	--
Ronald Deere	11/10/1982	92-01684 CAS	Central	3/18/1992	Circuit Appeal Pending (Relief Denied / Certiorari Pending)	32
Joseph Poggi	11/12/1982				Deceased (1990)	--
Clarence Allen	11/22/1982	88-01123 FCD	Eastern	8/31/1988	Executed (2006)	--
Ricardo Sanders	12/3/1982	96-07429 JFW	Central	10/22/1996	Circuit Appeal Pending	32
Craig Ross	12/10/1982	96-02720 SVW	Central	4/16/1996	CD Cal Petition Pending	32
Steven Champion	12/10/1982	96-02845 SVW	Central	4/22/1996	State Proceedings Pending	32
Michael Hamilton	12/17/1982	90-00363 OWW	Eastern	6/12/1990	Relief Granted (2009)	--
Maurice Keenan	1/21/1983	89-02167 DLJ	Northern	6/22/1989	Relief Granted (2001)	--
Ronald Fuller	2/3/1983				Deceased (1989)	--
Douglas Clark	3/16/1983	92-06567 PA	Central	11/3/1992	CD Cal Petition Pending	31
James Melton	3/18/1983	89-04182 RMT	Central	7/13/1989	Relief Granted (2007)	--
Michael Williams	4/1/1983	90-01212 R	Southern	8/31/1990	Relief Granted (1993)	--
Jaturun Siripongs	4/22/1983	89-06530 WDK	Central	11/9/1989	Executed (1999)	--
Malcolm Robbins	5/12/1983	91-04748 TJH	Central	9/4/1991	CD Cal Petition Pending	31

Larry Roberts	5/27/1983	93-00254 TLN	Eastern	2/18/1993	ED Cal Petition Pending	31
Larry Webster	6/9/1983	93-00306 LKK	Eastern	2/25/1993	ED Cal Petition Pending	31
Michael Morales	6/14/1983	91-00682 DT	Central	2/6/1991	Relief Denied (2005) / Execution Stayed	31
Kevin Malone	6/14/1983	96-04040 WJR	Central	6/7/1996	Executed by Missouri (1999)	--
Gerald Gallego	6/21/1983	92-00653 SBA	Northern	2/4/1992	Deceased (2002)	--
William Proctor	6/28/1983	96-01401 JAM	Eastern	7/31/1996	ED Cal Petition Pending	31
George Marshall	6/28/1983	97-05493 AWI	Eastern	5/12/1997	Deceased (2001)	--
Martin Gonzalez	7/8/1983				Deceased (1990)	--
Keith Adcox	7/11/1983	92-05830 LJO	Eastern	12/1/1992	State Proceedings Pending	31
Francis Hernandez	7/12/1983	90-04638 RSWL	Central	8/28/1990	Circuit Appeal Pending	31
Albert Howard	8/3/1983	93-05726 LJO	Eastern	10/25/1993	Deceased (2009)	--
James Odle	8/12/1983	88-04280 MMC	Northern	10/25/1988	Relief Granted (2001)	--
Douglas Mickey	9/23/1983	93-00243 RMW	Northern	1/22/1993	Relief Denied (2010) / Execution Stayed	31
Alfred Dyer	9/26/1983	93-02823 VRW	Northern	7/29/1993	Relief Granted (1998)	--
Demetrie Mayfield	9/30/1983	94-06011 ER	Central	9/2/1994	Relief Granted (2001)	--
Constantino Carrera	10/7/1983	90-00478 AWI	Eastern	7/31/1990	Relief Granted (2008)	--
John Visciotti	10/21/1983	97-04591 R	Central	6/23/1997	Circuit Appeal Pending	31
Donald Miller	11/10/1983	91-02652 NM	Central	5/16/1991	Deceased (2005)	--
Robert Thompson	12/6/1983	90-06605 CBM	Central	12/5/1990	Deceased (2006)	--
David Mason	1/27/1984		Eastern		Executed (1993)	--
Jackson Daniels	1/31/1984	92-04683 JSL	Central	8/5/1992	Relief Granted (2006) / Resentenced to Death (2010) / State Proceedings Pending	30
Mark Reilly	2/1/1984	93-07055 JAK	Central	11/22/1993	CD Cal Petition Pending	30
Andrew Robertson	2/3/1984	90-04850 CBM	Central	9/10/1990	Deceased (1998)	--
Gerald Stanley	2/7/1984	95-01500 JAM	Eastern	8/17/1995	ED Cal Petition Pending	30
Donald Beardslee	3/13/1984	92-03990 SBA	Northern	10/1/1992	Executed (2005)	--
Michael Jennings	3/27/1984	89-01360 JW	Northern	3/19/1989	Relief Granted (2003)	--
Michael Hunter	3/28/1984	90-03275 JW	Northern	11/13/1990	Relief Granted (2001)	--
Charles Moore	5/16/1984	91-05976 KN	Central	11/1/1991	Relief Granted (1997) / Resentenced to Death (1998) / State Proceedings Pending	30
Michael Jackson	5/21/1984	91-04249 R	Central	8/8/1991	Relief Granted (2001) / Resentenced to Death (2002) / State Proceedings Pending	30

Scott Pinholster	6/4/1984	95-06240 GLT	Central	9/19/1995	Relief Denied (2011) / Execution Stayed	30
Jesse Andrews	6/8/1984	02-08969 R	Central	11/21/2002	Circuit Appeal Pending	30
Robert Diaz	6/15/1984	93-06309 TJH	Central	10/19/1993	Deceased (2010)	--
Stephan Mitcham	7/6/1984	97-03825 LHK	Northern	8/10/1994	ND Cal Petition Pending	30
Robert Bloom	7/23/1984	90-02581	Central	5/22/1990	Relief Granted (1997) / Resentenced to Death (2001) / State Proceedings Pending	30
Jay Kaurish	7/27/1984	92-01623 DT	Central	3/16/1992	Deceased (1992)	--
William Kirkpatrick	8/14/1984	96-00351 WDK	Central	1/18/1996	Circuit Appeal Pending	30
Thomas Thompson	8/17/1984	89-03630 DT	Central	6/15/1989	Executed (1998)	--
Watson Allison	10/2/1984	92-06404 CAS	Central	10/26/1992	Relief Granted (2010)	--
Charles McDowell	10/23/1984	90-04009 MRP	Central	7/30/1990	Relief Granted (1998) / Resentenced to Death (1999) / State Proceedings Pending	30
Robert Lewis	11/1/1984				State Proceedings Pending	30
David Carpenter	11/16/1984	98-02444 MMC	Northern	6/19/1998	ND Cal Petition Pending	30
Kenneth Lang	12/5/1984	91-04061 MMM	Central	7/29/1991	CD Cal Petition Pending	30
Richard Boyer	12/14/1984	06-07584 GAF	Central	11/29/2006	Circuit Appeal Pending	30
Thaddaeus Turner	12/21/1984	91-00153 LJO	Eastern	4/1/1991	Relief Granted (2009)	--
William Clark	2/1/1985	95-00334 DOC	Central	1/18/1995	Relief Granted (2006)	--
Earl Jones	2/22/1985	94-00816 TJH	Central	2/7/1994	Deceased (2006)	--
Ward Weaver	4/4/1985	02-05583 AWI	Eastern	5/17/2002	ED Cal Petition Pending	29
Fred Douglas	4/5/1985	91-03055 RSWL	Central	6/6/1991	Relief Granted (2003)	--
Patrick Gordon	5/3/1985	91-00882 LKK	Eastern	7/5/1991	ED Cal Petition Pending	29
Kevin Cooper	5/15/1985	92-00427 H	Southern	3/24/1992	Relief Denied (2009) / Execution Stayed	29
Charles Whitt	5/23/1985	94-07960 WJR	Central	11/23/1994	Deceased (2004)	--
Andre Burton	6/4/1985	91-01652 AHM	Central	3/27/1991	Circuit Appeal Pending	29
Brian Mincey	6/14/1985	93-02554 PSG	Central	5/3/1993	CD Cal Petition Pending	29
Randy Haskett	6/28/1985	92-06192 GAF	Central	10/15/1992	Relief Granted (2009)	--
Duane Holloway	7/8/1985	05-02089 KJM	Eastern	10/19/2005	ED Cal Petition Pending	29
Robert Stansbury	7/15/1985	95-08532 WMB	Central	12/11/1995	Deceased (2003)	--
Richard Ramierz	8/8/1985	91-03802 CBM	Central	7/15/1998	Relief Granted (2009)	--
Raynard Cummings	9/20/1985	95-07118 CBM	Central	10/20/1995	Circuit Appeal Pending	29
Kenneth Gay	9/20/1985	01-05368 GAF	Central	6/18/2001	State Proceedings Pending	29

Michael Cox	11/26/1985	04-00065 MCE	Eastern	1/5/2004	ED Cal Petition Pending	29
Jeffrey Sheldon	12/19/1985	96-05545 TJH	Central	8/13/1996	CD Cal Petition Pending	29
Stephen DeSantis	2/3/1986	93-01083 FCD	Eastern	7/1/1993	Deceased (2002)	--
Michael Mattson	2/7/1986	91-05453 FMC	Central	10/8/1991	Deceased (2009)	--
Anderson Hawthorne	2/18/1986	95-07709 CBM	Central	11/13/1995	State Proceedings Pending	28
Denny Mickle	4/17/1986	92-02951 THE	Northern	7/30/1992	ND Cal Petition Pending	28
Tiequon Cox	4/30/1986	92-03370 CBM	Central	6/4/1992	Relief Denied (2011) / Execution Stayed	28
Henry Duncan	5/5/1986	92-01403 AHS	Central	3/4/1992	Relief Granted (2008)	--
Ronald McPeters	5/7/1986	95-05108 LJO	Eastern	2/13/1995	ED Cal Petition Pending	28
Chay'im Ben-Sholom	5/9/1986	93-05531 AWI	Eastern	8/10/1993	Relief Granted (2012)	--
Freddie Taylor	5/30/1986	92-01627 EMC	Northern	4/30/1992	ND Cal Petition Pending	28
Ralph Thomas	6/4/1986	93-00616 MHP	Northern	2/18/1993	Relief Granted (2013)	--
Horace Kelly	6/25/1986	93-02951 TJH	Central	5/21/1993	CD Cal Petition Pending	28
Curtis Price	7/10/1986	93-00277 PJH	Northern	1/25/1993	ND Cal Petition Pending	28
Barry Williams	7/11/1986	00-10637 DOC	Central	10/4/2000	CD Cal Petition Pending	28
Anthony Sully	7/15/1986	92-00829 WHA	Northern	2/21/1992	Relief Denied (2013) / Execution Stayed	28
Troy Ashmus	7/25/1986	93-00594 THE	Northern	2/17/1993	ND Cal Petition Pending	28
Royal Hayes	8/8/1986	01-03926 MHP	Northern	10/18/2001	Relief Denied (2011) / Execution Stayed	28
Mauricio Silva	8/11/1986				State Proceedings Pending	28
Rodney Alcala	8/20/1986	94-1424 SVW	Central	3/4/1994	Relief Granted (2003) / Resentenced to Death (2010) / State Proceedings Pending	28
Antonio Espinoza	9/17/1986	94-01665 LKK	Eastern	10/13/1994	ED Cal Petition Pending	28
Wilbur Jennings	11/12/1986	91-00684 AWI	Eastern	12/16/1991	Deceased (2014)	--
Robert Danielson	11/13/1986	95-02378 SI	Northern	7/8/1994	Deceased (1995)	--
Thomas Edwards	12/11/1986	93-07151 CJC	Central	11/26/1993	Relief Denied (2009) / Deceased (2009)	--
Theodore Frank	2/23/1987	91-06287 AHS	Central	11/18/1991	Deceased (2001)	--
Teofilio Medina	2/25/1987	94-01892 RSWL	Central	3/25/1994	Circuit Appeal Pending	27
Christopher Day	3/3/1987				Deceased (1994)	--
David Breaux	3/12/1987	93-00570 JAM	Eastern	4/6/1993	ED Cal Petition Pending	27
Conrad Zapien	3/23/1987	94-01455 WDK	Central	3/7/1994	Circuit Appeal Pending	27
Richard Benson	4/30/1987	94-05363 AHM	Central	8/8/1994	Circuit Appeal Pending	27

Robert Nicolaus	6/23/1987	95-02335 MMC	Northern	9/17/1992	Deceased (2003)	--
Alfred Sandoval	6/30/1987	94-08206 R	Central	12/7/1994	Relief Granted (2001)	--
Steven Livaditis	7/8/1987	96-02833 SVW	Central	4/22/1996	CD Cal Petition Pending	27
Harold Memro (Reno)	7/17/1987	96-02768 CBM	Central	4/18/1996	CD Cal Petition Pending	27
George Wharton	7/22/1987	92-03469 CJC	Central	6/9/1992	Circuit Appeal Pending	27
Robert Garceau	7/30/1987	95-05363 OWW	Eastern	5/12/1995	Deceased (2004)	--
Willie Johnson	8/5/1987	98-04043 SI	Northern	10/21/1998	ND Cal Petition Pending	27
Timothy Pride	8/6/1987	93-00926 GEB	Eastern	6/9/1993	Deceased (1994)	--
Bruce Morris	8/27/1987	92-00483 EJH	Eastern	3/27/1992	Relief Granted (2007)	--
Jeffrey Wash	9/1/1987	95-01133 CAL	Northern	4/3/1995	Deceased (1996)	--
Donrell Thomas	9/10/1987				Deceased (1992)	--
Mitchell Sims	9/11/1987	95-05267 GHK	Central	8/8/1995	Relief Denied (2006) / Execution Stayed	27
Martin Kipp	9/18/1987	99-04973 ABC	Central	5/10/1999	CD Cal Petition Pending	27
Paul Tuilaepa	9/25/1987	95-04619 DDP	Central	7/13/1995	CD Cal Petition Pending	27
Fred Freeman	10/7/1987	99-20614 JW	Northern	9/22/1995	Deceased (2009)	--
Kenneth Clair	12/4/1987	93-01133 CAS	Central	2/26/1993	Circuit Appeal Pending	27
Keith Fudge	12/11/1987	95-05369 RGK	Central	8/11/1995	CD Cal Petition Pending	27
Richard Clark	12/18/1987	97-20618 WHA	Northern	8/5/1994	Circuit Appeal Pending	27
Michael Wader	1/5/1988	96-05482 HLH	Central	8/9/1996	Deceased (1997)	--
Michael Hill	1/21/1988	94-00641 CW	Northern	2/24/1994	ND Cal Petition Pending	26
William Noguera	1/29/1988	94-06417 CAS	Central	9/23/1994	CD Cal Petition Pending	26
Horace Kelly	3/24/1988	98-02722 TJH	Central	4/6/1998	CD Cal Petition Pending	26
Laverne Johnson	4/1/1988	95-00305 THE	Northern	1/26/1995	ND Cal Petition Pending	26
Lance Osband	4/8/1988	97-00152 KJM	Eastern	1/30/1997	ED Cal Petition Pending	26
Marcelino Ramos	4/27/1988	98-02037 AHS	Central	3/20/1988	Deceased (2007)	--
David Rogers	5/2/1988				State Proceedings Pending	26
Dennis Brewer (Mayfield)	5/4/1988	97-03742 FMO	Central	5/19/1997	CD Cal Petition Pending	26
Bill Bradford	5/11/1988	98-05799 RSWL	Central	7/20/1998	Deceased (2008)	--
Curtis Fauber	5/16/1988	95-06601 GW	Central	10/3/1995	CD Cal Petition Pending	26
David Raley	5/17/1988	93-02071 JW	Northern	6/1/1993	Relief Denied (2007) / Execution Stayed	26

Theodore Wrest	5/18/1988	95-00214 DDP	Central	1/11/1995	CD Cal Petition Pending	26
William Hart	5/27/1988	05-03633 MMM	Central	5/16/2005	CD Cal Petition Pending	26
Armenia Cudjo	5/31/1988	99-08089 JFW	Central	8/9/1999	Relief Granted (2013)	--
Joselito Cinco	6/10/1988				Deceased (1988)	--
David Carpenter	6/27/1988	00-03706 MMC	Northern	10/6/2000	ND Cal Petition Pending	26
Richard Samayoa	6/28/1988	00-02118 W	Southern	10/16/2000	Relief Denied (2012) / Execution Stayed	26
Guy Rowland	6/29/1988	94-03037 WHA	Northern	8/26/1994	Circuit Appeal Pending	26
Gary Hines	7/8/1988	98-00784 TLN	Eastern	5/1/1998	ED Cal Petition Pending	26
Tracy Cain	7/12/1988	96-2584 ABC	Central	4/11/1996	Circuit Appeal Pending	26
Dennis Webb	8/15/1988	97-00956 VAP	Central	2/13/1997	CD Cal Petition Pending	26
William Dennis	9/6/1988	98-021027	Northern	10/9/1998	ND Cal Petition Pending	26
Jerry Frye	9/12/1988	99-00628 LKK	Eastern	3/29/1999	ED Cal Petition Pending	26
Daniel Jenkins	10/6/1988	07-01918 JGB	Central	3/22/2007	State Proceedings Pending	26
Charles Riel	10/14/1988	01-00507 LKK	Eastern	3/14/2001	ED Cal Petition Pending	26
Richard Turner	10/19/1988	09-07449 BRO	Central	10/14/2009	State Proceedings Pending	26
Jose Rodrigues	10/21/1988	96-01831 CW	Northern	5/17/1996	ND Cal Petition Pending	26
Sammy Marshall	10/27/1988				Deceased (1997)	--
Teddy Sanchez	10/31/1988	97-06134 AWI	Eastern	11/20/1997	ED Cal Petition Pending	26
Aurthur Halvorsen	11/18/1988				State Proceedings Pending	26
Rodney Berryman	11/28/1988	95-05309 AWI	Eastern	4/27/1995	Circuit Appeal Pending	26
Max Barnett	11/30/1988	99-02416 JAM	Eastern	12/8/1999	State Proceedings Pending	26
Manuel Mendoza	1/6/1989	03-06194 SJO	Central	8/29/2003	CD Cal Petition Pending	25
Herbert Coddington	1/20/1989	01-01290 KJM	Eastern	7/3/2001	ED Cal Petition Pending	25
Reynaldo Ayala	2/9/1989	01-00741 BTM	Southern	4/27/2001	Circuit Appeal Pending	25
Lester Ochoa	3/20/1989	99-11129 DSF	Central	10/22/1999	CD Cal Petition Pending	25
Drax Quartermain	4/10/1989				Deceased (2005)	--
Rodney Beeler	5/5/1989	96-00606 GW	Central	1/29/1996	CD Cal Petition Pending	25
James Scott	5/18/1989	03-00978 ODW	Central	2/10/2003	CD Cal Petition Pending	25
Jeffrey Kolmetz	5/18/1989				Deceased (1996)	--
Noel Jackson	6/2/1989	97-03531 MWF	Central	5/9/1997	State Proceedings Pending	25
Steven Crittenden	6/12/1989	95-01957 KJM	Eastern	10/26/1995	Circuit Appeal Pending	25

Jack Farnam	6/15/1989	06-00917 SJO	Central	2/15/2006	State Proceedings Pending	25
Albert Cunningham	6/16/1989	02-07170 GHK	Central	9/13/2002	Relief Denied (2013) / Execution Stayed	25
Louis Craine	6/27/1989				Deceased (1989)	--
George Smithey	7/18/1989				Deceased (2010)	--
David Welch	7/25/1989	00-20242 RMW	Northern	2/28/2000	State Proceedings Pending	25
Ronald Seaton	7/27/1989	04-09339 FMO	Central	11/12/2004	CD Cal Petition Pending	25
Clarence Ray	7/28/1989	96-06252 LJO	Eastern	11/8/1996	State Proceedings Pending	25
James Blair	8/9/1989	06-04550 VAP	Central	7/20/2006	CD Cal Petition Pending	25
Cynthia Coffman	8/31/1989	06-07304 ABC	Central	11/15/2006	CD Cal Petition Pending	25
Robert Fairbank	9/5/1989	98-01027 CRB	Northern	3/16/1998	Relief Denied (2011) / Execution Stayed	25
Manuel Alvarez	9/14/1989	97-01895 GEB	Eastern	10/8/1997	ED Cal Petition Pending	25
David Lucas	9/19/1989				State Proceedings Pending	25
David Rundle	9/21/1989	08-01879 TLN	Eastern	8/13/2008	ED Cal Petition Pending	25
Robert Maury	10/27/1989	12-01043 WBS	Eastern	4/19/2012	ED Cal Petition Pending	25
Terry Bemore	11/2/1989	08-00311 LAB	Southern	2/15/2008	Circuit Appeal Pending	25
Richard Ramirez	11/7/1989	07-08310 BRO	Central	12/26/2007	Deceased (2013)	--
Stanley Davis	11/15/1989				State Proceedings Pending	25
Randy Kraft	11/29/1989	01-04623 AG	Central	5/23/2001	CD Cal Petition Pending	25
Hector Ayala	11/30/1989	01-01322 IEG	Southern	7/20/2001	Circuit Appeal Pending	25
Jeffrey Hawkins	1/31/1990	96-01155 TLN	Eastern	6/19/1996	ED Cal Petition Pending	24
Dean Carter	2/6/1990	06-04532 RGK	Central	7/20/2006	Circuit Appeal Pending	24
Jon Dunkle	2/7/1990	06-04115 PJH	Northern	6/30/2006	ND Cal Petition Pending	24
Alfredo Padilla	2/7/1990	01-06305 LJO	Eastern	10/4/2001	Deceased (2008)	--
Pedro Arias	2/22/1990	99-00627 WBS	Eastern	3/29/1999	ED Cal Petition Pending	24
Dennis Lawley	2/26/1990	08-01425 LJO	Eastern	9/23/2008	Deceased (2012)	--
Larry Davis Jr.	3/8/1990	96-002443 DT	Central	4/5/1996	Relief Denied (2004) / Deceased (2005)	--
Mario Gray	3/14/1990	07-05935 DSF	Central	9/12/2007	Deceased (2013)	--
Mark Schmeck	4/5/1990	13-05415 RS	Northern	11/21/2013	ND Cal Petition Pending	24
Tracey Carter	4/20/1990	04-06524 DDP	Central	8/6/2004	State Proceedings Pending	24
Christopher Tobin	4/24/1990				State Proceedings Pending	24
Richard Letner	4/24/1990				State Proceedings Pending	24
Jerry Bailey	5/16/1990				Deceased (1998)	--

John Holt	5/30/1990	97-06210 AWI	Eastern	12/15/1997	State Proceedings Pending	24
Maureen McDermott	6/8/1990	04-00457 DOC	Central	1/26/2004	CD Cal Petition Pending	24
Mark Bradford	7/3/1990	97-06221 TJH	Central	8/19/1997	CD Cal Petition Pending	24
Steven Catlin	7/6/1990	07-01466 LJO	Eastern	10/5/2007	ED Cal Petition Pending	24
Ralph Yeoman	7/10/1990				Deceased (2014)	--
Raymond Steele	7/24/1990	03-00143 GEB	Eastern	1/24/2003	ED Cal Petition Pending	24
Jarvis Masters	7/30/1990				State Proceedings Pending	24
Kurt Michaels	7/31/1990	04-00122 JAH	Southern	1/16/2004	SD Cal Petition Pending	24
Roland Comtois	7/31/1990				Deceased (1994)	--
Joseph Muselwhite	9/25/1990	01-01443 LKK	Eastern	7/26/2001	Deceased (2010)	--
Kristin Hughes	10/2/1990	03-02666 JSW	Northern	6/6/2003	ND Cal Petition Pending	24
Evan Nakahara	11/6/1990	05-04604 DDP	Central	6/24/2005	CD Cal Petition Pending	24
Isaac Gutierrez Jr.	11/14/1990	05-03706 DOC	Central	5/18/2005	Deceased (2008)	--
Paul Brown	11/16/1990				Deceased (2004)	--
Jackie Ray Hovarter	11/30/1990				State Proceedings Pending	24
Milton Lewis	12/6/1990	02-00013 TLN	Eastern	1/3/2002	ED Cal Petition Pending	24
Ramon Salcido	12/17/1990	09-00586 MMC	Northern	2/9/2009	State Proceedings Pending	24
Raymond Gurule	12/19/1990				Deceased (2007)	--
Carmen Ward	1/28/1991	06-02009 PA	Central		State Proceedings Pending	23
James Majors	2/4/1991	99-00493 MCE	Eastern	3/12/1999	ED Cal Petition Pending	23
Christopher Box	2/22/1991	04-00619 AJB	Southern	3/26/2004	State Proceedings Pending	23
Paul Bolin	2/25/1991	99-05279 LJO	Eastern	3/11/1999	ED Cal Petition Pending	23
Raymond Lewis	3/6/1991	03-06775 LJO	Eastern	12/9/2003	ED Cal Petition Pending	23
Tauro Waidla	3/8/1991	01-00650 AG	Central	1/22/2001	CD Cal Petition Pending	23
Richard Moon	5/19/1991	08-08327 JAK	Central	12/17/2008	State Proceedings Pending	23
Robert McDonald	5/31/1991				Deceased (1993)	--
Ronald Jones	6/4/1991	98-10318 JLS	Central	12/28/1998	CD Cal Petition Pending	23
John Sapp	6/21/1991	04-04163 JSW	Northern	9/30/2004	State Proceedings Pending	23
Paul Watson	6/27/1991				State Proceedings Pending	23
Curtis Ervin	6/28/1991	00-01228 CW	Northern	4/10/2000	ND Cal Petition Pending	23
Clifford Bolden	7/19/1991	09-02365 PJH	Northern	5/28/2009	State Proceedings Pending	23

Jesse Gonzalez	7/28/1991	95-02345 JVS	Central	4/12/1995	State Proceedings Pending	23
Martin Navarette	8/14/1991	11-07066 VAP	Central	8/26/2011	State Proceedings Pending	23
Anthony Townsel	9/13/1991				State Proceedings Pending	23
Allen Morrison	10/30/1991				State Proceedings Pending	23
James O'Malley	11/21/1991				State Proceedings Pending	23
Michael Slaughter	11/27/1991	05-00922 AWI	Eastern	7/18/2005	ED Cal Petition Pending	23
Michael Jones	12/13/1991	04-02748 ODW	Central	4/20/2004	CD Cal Petition Pending	23
Dellano Cleveland	12/19/1991	05-03822 SVW	Central	5/24/2005	CD Cal Petition Pending	23
Deondre Staten	1/16/1992	01-09178 MWF	Central	10/24/2001	CD Cal Petition Pending	22
Richard Farley	1/17/1992				State Proceedings Pending	22
Chauncey Veasley	1/21/1992	05-03822 SVW	Central	4/12/2005	CD Cal Petition Pending	22
Robert Taylor	1/30/1992	07-06602 FMO	Central	10/11/2007	CD Cal Petition Pending	22
Edward Bridges	2/20/1992				Deceased (2008)	--
Ricky Earp	2/21/1992	00-06508 MMM	Central	6/19/2000	CD Cal Petition Pending	22
Colin Dickey	2/27/1992	06-00357 AWI	Eastern	3/31/2006	ED Cal Petition Pending	22
Billy Waldon	2/28/1992				State Proceedings Pending	22
Jose Casares	3/13/1992				State Proceedings Pending	22
Richard Viera	3/30/1992	05-01492 AWI	Eastern	11/22/2005	ED Cal Petition Pending	22
Gregory Smith	4/3/1992	05-08017 DSF	Central	11/9/2005	State Proceedings Pending	22
Franklin Lynch	4/28/1992				State Proceedings Pending	22
James Marlow	5/8/1992	05-06477 ABC	Central	8/31/2005	CD Cal Petition Pending	22
Paul Watkins	5/11/1992				State Proceedings Pending	22
Thomas Walker	5/12/1992				Deceased (1997)	--
Andrew Brown	5/21/1992	04-03931 AG	Central	6/2/2004	CD Cal Petition Pending	22
Alfredo Valdez	5/22/1992	10-05252 BRO	Central	7/16/2010	State Proceedings Pending	22
Marchand Elliott	6/3/1992				State Proceedings Pending	22
Morris Solomon	9/16/1992				State Proceedings Pending	22
Alfredo Prieto	6/18/1992	05-07566 AG	Central	10/20/2005	CD Cal Petition Pending	22
Jack Friend	6/19/1992				State Proceedings Pending	22
Maria Alfaro	7/14/1992	07-07072 CJC	Central	10/30/2007	CD Cal Petition Pending	22
Stephen Cole	7/16/1992	05-04971 DMG	Central	7/7/2005	CD Cal Petition Pending	22
Gregory Smith	8/14/1992	04-03436 JSW	Northern	8/19/2004	ND Cal Petition Pending	22

Rodney San Nicolas	8/31/1992	06-00942 LJO	Eastern	7/20/2006	ED Cal Petition Pending	22
Jessie Ray Moffett	9/2/1992				Deceased (1998)	--
Richard Stitley	9/14/1992				State Proceedings Pending	22
Charles Richardson	10/7/1992				State Proceedings Pending	22
James Tulk	10/9/1992				Deceased (2006)	--
Dannie Hillhouse	10/13/1992	03-00142 MCE	Eastern	1/24/2003	ED Cal Petition Pending	22
Alphonso Howard	10/20/1992	08-06851 DDP	Central	10/17/2008	CD Cal Petition Pending	22
Rudolph Roybal	10/20/1992	99-02152 JM	Southern	10/5/1999	SD Cal Petition Pending	22
David Williams	10/20/1992	12-03975 AG	Central	5/7/2012	State Proceedings Pending	22
Gerald Cruz	10/26/1992				State Proceedings Pending	22
James Beck	10/27/1992				State Proceedings Pending	22
Richard Tully	12/4/1992				State Proceedings Pending	22
Sergio Ochoa	12/10/1992	02-07774 RSWL	Central	10/4/2002	CD Cal Petition Pending	22
George Williams	12/21/1992				State Proceedings Pending	22
Ricardo Roldan	12/29/1992	09-06589 DOC	Central	9/10/2009	State Proceedings Pending	22
William Ramos	1/8/1993	05-03752 SI	Northern	9/16/2005	ND Cal Petition Pending	21
John Lewis	3/3/1993	11-06395 JAK	Central	8/3/2011	CD Cal Petition Pending	21
Gregory Tate	3/5/1993				State Proceedings Pending	21
Joseph Danks	4/2/1993	11-00223 LJO	Eastern	2/9/2011	State Proceedings Pending	21
Erik Chatman	4/9/1993	07-00640 WHA	Northern	1/31/2007	State Proceedings Pending	21
Maurice Boyette	5/7/1993	13-04376 WHO	Northern	9/20/2013	ND Cal Petition Pending	21
Omar Martinez	5/10/1993	04-09090 PA	Central	11/3/2004	CD Cal Petition Pending	21
Anthony Oliver	5/21/1993	10-08404 ODW	Central	11/4/2010	CD Cal Petition Pending	21
Albert Lewis	5/21/1993	11-00766 ODW	Central	1/26/2011	State Proceedings Pending	21
Keone Wallace	5/27/1993				State Proceedings Pending	21
Latwon Weaver	5/28/1993				State Proceedings Pending	21
Warren Bland	5/28/1993				Deceased (2001)	--
Catherine Thompson	6/10/1993				State Proceedings Pending	21
Vincente Benavides	6/16/1993				State Proceedings Pending	21
Michael Combs	6/21/1993	05-0 4777 ODW	Central	6/30/2005	CD Cal Petition Pending	21
Robert Curl	7/15/1993				State Proceedings Pending	21

Mark Crew	7/22/1993	12-04259 YGR	Northern	8/13/2012	ND Cal Petition Pending	21
Charles Stevens	7/30/1993	09-00137 WHA	Northern	1/12/2009	ND Cal Petition Pending	21
Christian Monterroso	8/12/1993	12-07888 DMG	Central	9/13/2012	CD Cal Petition Pending	21
Corvin Emdy	8/19/1993				Deceased (1993)	--
Richard Dehoyos	8/27/1993				State Proceedings Pending	21
Cedric Harrison	8/30/1993	09-05045 JW	Northern	10/22/2009	Deceased (2009)	--
Enrique Zambrano	9/8/1993	09-04917 LHK	Northern	10/15/2009	ND Cal Petition Pending	21
Eric Houston	9/20/1993	13-05609 WHA	Northern	12/4/2013	ND Cal Petition Pending	21
Robert Smith	9/24/1993	11-03062 EJD	Northern	6/21/2011	State Proceedings Pending	21
James Heard	9/28/1993				State Proceedings Pending	21
Cleophus Prince	11/5/1993				State Proceedings Pending	21
Abelino Manriquez	11/16/1993				State Proceedings Pending	21
Herbert Koontz	11/19/1993	03-01613 FCD	Eastern	7/31/2003	Deceased (2007)	--
Jose Guerra	11/22/1993				State Proceedings Pending	21
Eric Hinton	12/10/1993	10-06714 DMG	Central	9/9/2010	CD Cal Petition Pending	21
Michael Huggins	12/17/1993	06-07254 YGR	Northern	11/22/2006	State Proceedings Pending	21
Jerry Kennedy	12/20/1993	13-02041 LKK	Eastern	10/1/2013	ED Cal Petition Pending	21
Lanell Harris	1/12/1994				State Proceedings Pending	20
Steven Bell	3/7/1994				State Proceedings Pending	20
Robert Wilson	4/8/1994	07-00519 MWF	Central	1/22/2007	CD Cal Petition Pending	20
Christopher Sattiewhite	4/25/1994				State Proceedings Pending	20
Tim Depriest	5/27/1994	07-06025 JLS	Central	9/17/2007	CD Cal Petition Pending	20
Delaney Marks	6/3/1994	11-02458 LHK	Northern	5/19/2011	ND Cal Petition Pending	20
Brian Johnsen	6/9/1994				State Proceedings Pending	20
Milton Pollock	6/10/1994	05-01870 SI	Northern	5/5/2005	State Proceedings Pending	20
James Robinson	6/17/1994				State Proceedings Pending	20
Jaime Hoyos	7/11/1994	09-00388 L	Southern	2/26/2009	SD Cal Petition Pending	20
Phillip Jablonski	8/12/1994	07-03302 SI	Northern	6/22/2007	State Proceedings Pending	20
Walter Cook	9/2/1994				State Proceedings Pending	20
Tomas Cruz	9/9/1994	13-02792 JST	Northern	6/18/2013	ND Cal Petition Pending	20

Joseph Cook	9/16/1994	12-08142 CJC	Central	9/20/2012	State Proceedings Pending	20
Mary Samuels	9/16/1994	10-03225 SJO	Central	4/29/2010	CD Cal Petition Pending	20
Shaun Burney	9/16/1994	10-00546 RGK	Central	1/26/2010	State Proceedings Pending	20
Bryan Jones	9/19/1994				State Proceedings Pending	20
Ronnie Dement	9/26/1994				State Proceedings Pending	20
Robert Jurado	10/1/1994	08-01400 JLS	Southern	7/31/2008	SD Cal Petition Pending	20
Billy Riggs	10/28/1994	09-04624 JAK	Central	6/26/2009	State Proceedings Pending	20
Carl Powell	11/10/1994				State Proceedings Pending	20
Celeste Carrington	11/23/1994	10-04179 RS	Northern	9/16/2010	ND Cal Petition Pending	20
Steven Bonilla	1/20/1995	08-00471 CW	Northern	1/22/2008	ND Cal Petition Pending	19
Anthony Bankston	1/20/1995				State Proceedings Pending	19
Edgardo Sanchez-Fuentes	1/20/1995				State Proceedings Pending	19
Danny Horning	1/26/1995	10-01932 JAM	Eastern	7/21/2010	State Proceedings Pending	19
Randall Wall	1/30/1995				State Proceedings Pending	19
Steven Homick	1/31/1995				State Proceedings Pending	19
Royal Clark	2/3/1995	12-00803 LJO	Eastern	5/16/2012	State Proceedings Pending	19
Raymond Johns	2/8/1995				Deceased (2004)	--
Keith Loker	2/10/1995				State Proceedings Pending	19
Johnny Avila	3/21/1995	11-01196 AWI	Eastern	7/19/2011	State Proceedings Pending	19
Randy Garcia	3/23/1995				State Proceedings Pending	19
Hooman Panah	3/26/1995	05-07606 RGK	Central	10/21/2005	Circuit Appeal Pending	19
Ernest Jones	4/7/1995	09-002158 CJC	Central	3/27/2009	CD Cal Petition Pending	19
Glen Cornwell	4/21/1995	06-00705 TLN	Eastern	3/31/2006	ED Cal Petition Pending	19
Mark Thornton	5/15/1995				State Proceedings Pending	19
Greg Demetrulias	5/22/1995	07-01335 DOC	Central	2/28/2007	Circuit Appeal Pending	19
Kerry Dalton	5/23/1995				State Proceedings Pending	19
Ignacio Tafoya	6/6/1995				State Proceedings Pending	19
Regis Thomas	6/15/1995				State Proceedings Pending	19
Lester Virgil	6/29/1995				State Proceedings Pending	19
Johnaton George	7/17/1995				State Proceedings Pending	19
Christopher Geier	7/21/1995	10-04676 R	Central	6/24/2010	State Proceedings Pending	19

Charles Rountree	8/11/1995				State Proceedings Pending	19
Christopher Lightsey	8/15/1995				State Proceedings Pending	19
Sergio Nelson	9/9/1995				State Proceedings Pending	19
Thomas Lenart	10/6/1995	05-01912 MCE	Eastern	9/21/2005	State Proceedings Pending	19
John Beames	10/11/1995	10-01429 AWI	Eastern	8/9/2010	ED Cal Petition Pending	19
Paul Hensley	10/13/1995				State Proceedings Pending	19
Loi Vo	10/18/1995				State Proceedings Pending	19
Stephen Hajek	10/18/1995				State Proceedings Pending	19
Donald Smith	10/19/1995				State Proceedings Pending	19
Leroy Wheeler	10/19/1995				State Proceedings Pending	19
Stanley Bryant	10/19/1995				State Proceedings Pending	19
William Suff	10/26/1995				State Proceedings Pending	19
Caroline Young	10/27/1995				Deceased (2005)	--
Douglas Kelly	11/8/1995				State Proceedings Pending	19
Ernest Dykes	11/30/1995	11-04454 SI	Northern	9/7/2011	ND Cal Petition Pending	19
Demetrius Howard	12/7/1995				State Proceedings Pending	19
John Cunningham	1/12/1996				State Proceedings Pending	18
Alfredo Valencia	1/23/1996				State Proceedings Pending	18
Valamir Morelos	2/21/1996				State Proceedings Pending	18
Jerry Rodriguez	2/21/1996				State Proceedings Pending	18
Steven Brown	2/23/1996				State Proceedings Pending	18
Dexter Williams	2/28/1996	12-01344 LJO	Eastern	8/17/2012	ED Cal Petition Pending	18
Richard Gamache	4/2/1996				State Proceedings Pending	18
Andre Alexander	4/23/1996	11-07404 JAK	Central	9/8/2011	State Proceedings Pending	18
Frank Carter	4/25/1996				Deceased (2001)	--
Robert Cowan	5/8/1996				State Proceedings Pending	18
Dennis Ervine	5/31/1996				State Proceedings Pending	18
Keith Taylor	6/5/1996				State Proceedings Pending	18
Eric Leonard	6/13/1996				State Proceedings Pending	18
Keith Doolin	6/18/1996	09-01453 AWI	Eastern	8/17/2009	State Proceedings Pending	18
Daniel Whalen	6/24/1996				State Proceedings Pending	18

Edward Morgan	7/19/1996				State Proceedings Pending	18
Clifton Perry	7/26/1996	11-01367 AWI	Eastern	8/16/2011	State Proceedings Pending	18
Raymond Butler	7/29/1996				State Proceedings Pending	18
Lamar Barnwell	8/9/1996				State Proceedings Pending	18
Freddie Fuiava	8/19/1996	12-10646 VAP	Central	12/12/2013	CD Cal Petition Pending	18
Orlando Romero	8/28/1996				State Proceedings Pending	18
Christopher Self	8/28/1996				State Proceedings Pending	18
Albert Jones	9/20/1996				State Proceedings Pending	18
John Riccardi	9/20/1996				State Proceedings Pending	18
Bob Williams	9/20/1996	09-01068 AWI	Eastern	6/17/2009	State Proceedings Pending	18
Richard Davis	9/26/1996	13-00408 EMC	Northern	1/29/2013	ND Cal Petition Pending	18
Richard Leon	10/1/1996				State Proceedings Pending	18
Richard Parson	10/11/1996				Deceased (2011)	--
Darrel Lomax	10/16/1996	11-01746 JLS	Central	2/28/2011	State Proceedings Pending	18
Michael Whisenhut	10/21/1996				State Proceedings Pending	18
Charles Case	10/25/1996				State Proceedings Pending	18
James Thompson	10/26/1996				State Proceedings Pending	18
Michael Elliot	10/31/1996				State Proceedings Pending	18
Christopher Spencer	11/7/1996				State Proceedings Pending	18
Brandon Taylor	11/13/1996				State Proceedings Pending	18
George Contreras	12/11/1996				State Proceedings Pending	18
Dewayne Carey	12/16/1996				State Proceedings Pending	18
Michael Pearson	12/18/1996				State Proceedings Pending	18
Scott Collins	12/19/1996	13-07334 JFW	Central	10/3/2013	CD Cal Petition Pending	18
Maurice Harris	12/20/1996	13-04026 PA	Central	6/5/2013	CD Cal Petition Pending	18
Richard Foster	12/31/1996				State Proceedings Pending	18
Michael Ihde	1/3/1997				Deceased (2005)	--
Eric Bennet	1/9/1997				State Proceedings Pending	17
Herbert McClain	1/21/1997				State Proceedings Pending	17
Karl Holmes	1/21/1997				State Proceedings Pending	17
Lorenzo Newborn	1/21/1997				State Proceedings Pending	17

Stephen Redd	2/28/1997				State Proceedings Pending	17
Jeffery Mills	3/10/1997				State Proceedings Pending	17
Joseph Montes	3/18/1997				State Proceedings Pending	17
Johnny Mungia	4/7/1997				State Proceedings Pending	17
Johnathan D'Arcy	4/11/1997				State Proceedings Pending	17
Gene McCurdy	4/22/1997				State Proceedings Pending	17
Jimmy Palma	6/11/1997				Deceased (1997)	--
Richard Valdez	6/11/1997				State Proceedings Pending	17
Daniel Silveria	6/13/1997				State Proceedings Pending	17
John Travis	6/13/1997				State Proceedings Pending	17
Robert Scully	6/13/1997				State Proceedings Pending	17
Ramon Rogers	6/30/1997				State Proceedings Pending	17
Lawrence Bergman	7/8/1997				Deceased (2009)	--
Bobby Lopez	7/11/1997				State Proceedings Pending	17
Michael Martinez	8/29/1997				State Proceedings Pending	17
Carlos Hawthorne	9/5/1997				State Proceedings Pending	17
John Famalaro	9/5/1997				State Proceedings Pending	17
Michael Bramit	9/15/1997				State Proceedings Pending	17
Royce Scott	9/17/1997				State Proceedings Pending	17
John Abel	9/26/1997				State Proceedings Pending	17
Ronald Mendoza	10/27/1997				State Proceedings Pending	17
Terrance Page	10/31/1997				Deceased (2008)	--
Frank Becerra	10/31/1997				State Proceedings Pending	17
Sean Vines	11/7/1997				State Proceedings Pending	17
Herminio Serna	11/21/1997				State Proceedings Pending	17
James Trujeque	11/21/1997				State Proceedings Pending	17
Frank Abilez	12/4/1997				Deceased (2012)	--
Gunner Lindberg	12/12/1997	09-05509 MWF	Central	7/28/2009	State Proceedings Pending	17
Floyd Smith	12/14/1997				State Proceedings Pending	17
Bill Poyner	12/16/1997				Deceased (1998)	--
Martin Mendoza	12/23/1997				State Proceedings Pending	17
William Clark	12/29/1997				State Proceedings Pending	17

[1] The chart does not describe the case status of any individual sentenced after 1997 because for all but a small handful of those individuals, state proceedings are still ongoing, and none have completed the federal habeas process. In total, 397 of the 748 inmates currently on California's Death Row were sentenced to death between 1978 and 1997. *See* CDCR Condemned Inmate List; CDCR Summary at 2.

[2] Because most of the death sentences overturned by the California Supreme Court were overturned in the period between 1979 and 1986, inclusion of these sentences in Appendix A would not accurately reflect the current state of affairs in California's death penalty system. *See* Commission Report at 120 n.21 (noting that between 1979 and 1986, the California Supreme Court reversed 59 of 64 death judgments it reviewed, but that since that time, it has reversed death judgments less than 10 percent of the time).

[3] Despite having been granted relief by the federal courts, 10 of these 39 individuals are listed by the CDCR as being among the 748 inmates currently on Death Row. *See* CDCR Condemned Inmate List. In at least some of these cases, this fact may be explained by the State's intention to again seek the death penalty against these inmates in a new trial.

[4] The chart was compiled using publicly available information from the court dockets of the four federal judicial districts in California, the public docket of the California Supreme Court, and the CDCR's Condemned Inmate List (July 2014) and List of Inmates Who Have Died Since 1978 (2014).

[5] For inmates still on Death Row, the sentencing date listed on the chart is the sentencing date provided in CDCR's Condemned Inmate List.

[6] Federal habeas proceedings are initiated when the petitioner seeks appointment of federal habeas counsel, not when the petitioner's federal writ of habeas corpus is filed. Some individuals that have initiated federal habeas proceedings may still have state proceedings pending for exhaustion purposes. In such cases, the federal petition is effectively stayed while the state proceedings are completed.

CV 09-2158-CJC - 07/16/2014 - WEDNESDAY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE CORMAC J. CARNEY, JUDGE PRESIDING

CERTIFIED TRANSCRIPT

- - - - - - -

ERNEST DEWAYNE JONES,	)	
PETITIONER(s),	)	
vs.	)	No. CV 09-2158-CJC WEDNESDAY
KEVIN CHAPPELL,	)	
Defendant(s).	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION RE CLAIM 27

SANTA ANA, CALIFORNIA

WEDNESDAY, JULY 16, 2014

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Official Federal Reporter
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Santa Ana, CA 92701
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CV 09-2158-CJC - 07/16/2014 - WEDNESDAY

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SANTA ANA, CALIFORNIA, WEDNESDAY, JULY 16, 2014

WEDNESDAY

(9:20)

09:20 THE CLERK: Item No. 1, CV 09-2158-CJC. Ernest Dewayne Jones versus Kevin Chappell.

Counsel, please state your appearances for the record.

09:20 MR. LAURENCE: Michael Laurence for petitioner.

09:20 THE COURT: Hello, Mr. Laurence.

09:20 MR. BILDERBACK: Good morning, Your Honor. Supervising deputy attorney general Bill Bilderback with deputy attorney general Scott Hayward for the warden.

09:20 THE COURT: Good morning, gentlemen.

09:20 Mr. Bilderback, maybe I should start with you first, sir. I'm sure you have seen my order.

09:20 MR. BILDERBACK: I have.

09:20 THE COURT: It's in petitioner's favor and I want to make sure I gave you an opportunity to be heard and tell me your thoughts, comments, criticisms.

09:21 MR. BILDERBACK: Thank you, Your Honor. I have to say the first thing that struck me when I read the order this morning is I didn't see any discussion of 2254(d) or whether there is clearly established law.

09:21 THE COURT: Why don't we -- do you have a copy of it?

09:21 MR. BILDERBACK: I do.

09:21 THE COURT: Turn to page 26. But I'll let you read

first. Take a moment, if you would, to read it and then I'll respond to your inquiry.

09:21 MR. BILDERBACK: Right. And I apologize if it sounds like I'm asking the court questions, but I kind of get the sense the court is inviting me to do that.

09:22 THE COURT: I am. It's obviously a very important issue, but 2254(d) I don't believe applies because the state court has not made a decision on this claim.

09:22 MR. BILDERBACK: On the delay claim?

09:22 THE COURT: If you want to call it -- I have characterized it as an arbitrary selection for execution claim.

09:22 MR. BILDERBACK: Okay.

09:22 THE COURT: That's obviously based on delay. And the California Supreme Court has not made a decision on that. So what I thought the two relevant defenses are: Exhaustion, and the *Teague* bar. And with respect to exhaustion, as you know, 2254(b)(1)(B)(2) says where circumstances exist that render the state process in ineffective to protect the rights of the applicant, exhaustion is not required.

09:23 And basically I'm saying it doesn't make sense, given the amount of delay already, even more delay, but more importantly, Mr. Jones has demonstrated that the process is ineffective and cannot protect his rights. So I feel it's under that exception.

09:23 And then the *Teague*, I just think it's fundamental

principle that the state cannot arbitrarily select people for execution. That's embedded in due process.

09:23 MR. BILDERBACK: And I think part of the problem -- I mean, I think the exhaustion issue and the *Teague* issue are analytically related, but they're a separate legal inquiry. And the exception I would take to the exhaustion position that's laid out in the court's order is it seems to be, at least to me, predicated on the notion that because the state court is likely to reject the claim, find that it lacks merit, that that's why the court concluded that the state court process is inadequate to protect the petitioner's rights.

09:24 THE COURT: I'm not sure I would characterize it or say it that way. There has just been so much delay, and the problem is getting worse, and the state court process hasn't done anything to address the problem. And in fact, since the *Alarcon* study and the commission, the statistics show me that the problem is getting worse. So the state cannot fix it.

09:24 I'm actually a federalist by philosophy, but every once in a while an issue comes by where I just feel only the district court -- not the Ninth Circuit; the Ninth Circuit doesn't have the capacity to create an evidentiary record, only a district court does. And California Supreme Court, I think one of the problems too is they don't have really the capacity to call witnesses, receive evidence either.

09:25 MR. BILDERBACK: Certainly to the extent that petitioner

presents a claim that the court feels, the California Supreme Court feels would require evidentiary development in order to properly resolve, the California Supreme Court absolutely has that authority and exercises that authority.

09:25 THE COURT: That's true.

09:25 MR. BILDERBACK: And I certainly didn't get the impression from the order that the court was concerned that that was the defect in California's process; that their inability to take evidence on this important question.

09:26 THE COURT: No. My point, it's a simple one. It's not that complicated. The way I'm looking at it is it's a huge problem. It's been a problem for a while. And they haven't fixed it and they're not going to fix it. And I just feel I have -- not trying to preach, that's the last thing I'm trying to do -- but I have a solemn obligation to defend and protect the Constitution. And when I look at the statistics, I have at least convinced myself that there is a constitutional problem right now. And it's not going to be fixed and no one is fixing it, and I can't be passive or silent.

09:27 MR. BILDERBACK: And I appreciate that, Your Honor. But I think the problem, the basic problem that the state has with the order right now is the court's authority on federal collateral review is, of course, tailored by the statute. And it seems to us that the court has overlooked some important portions of that statute because the court has concluded, in its own mind, that

there is this substantial constitutional violation.

09:27 And I think one of the problems -- and it is a federalist problem and I am California's lawyer, after all, at least standing here today, and --

09:27 THE COURT: A very successful one I might add.

09:27 MR. BILDERBACK: That's generous of you to say, Your Honor. I think that if we are to acknowledge, for the sake of argument, that the claim as presently constituted has never been fairly presented to the state court, it's my best reading of 2254 that the state court must be given an opportunity to correct the defect before the federal court can intervene.

09:28 And I think that's where I take my greatest departure from, at least, this section of the court's order that we're discussing right now. I don't think it is fair to say that California is incapable of remedying this problem itself. I think that especially because the court seems to be convinced that there is a substantial difference from the claim at the time that it was presented to California --

09:28 THE COURT: Oh, yes.

09:28 MR. BILDERBACK: -- at the time of the appeal, and the claim is -- I'm sorry, I didn't mean to interrupt.

09:28 THE COURT: No, I was interrupting you, not trying to be rude, but I think it's important that the record is clear. The California Supreme Court has not looked at this claim.

09:28 MR. BILDERBACK: Exactly so. And I think that

principles of federalism and comity would require petitioner, before he comes to the federal court at all, is my understanding of the way it's supposed to unfold, before he comes to the federal court at all to complain that there is a constitutional defect in California's death penalty structure, that he give California an opportunity to confront, analyze and, if appropriate, grant or, if in California's wisdom they believe it's appropriate, deny relief on that claim.

09:29 For petitioner to leapfrog -- and I don't mean to lay this at the feet of the petitioner because I am familiar with the somewhat unusual procedural history of this case where the augmentation of this claim and the heightened discussion of this claim is sort of part of a conversation between the parties and the court. But however you slice it, the California courts, as we stand here today, have been completely cut out of the decision-making process.

09:30 The court has expressed some skepticism about California's capacity to properly adjudicate the claim, but I'm just going to stand here and gainsay that with all due respect, Your Honor. I think California has every capacity, has the ability to properly adjudicate constitutional defects in the California death penalty process. I think they are better situated to make that determination, frankly, than any other court, because we are examining questions of California law.

09:30 There are also complicated issues of policy that are

contemplated by the court's order that, again, the state should and must be given an opportunity to remedy those in the context of this case before federal intervention, I think, would be appropriate.

09:31 So that's -- I think that's the bottom line on the exhaustion issue for the state, is I just I have to disagree with the court that California's process is not effectual. And I have to argue in the strongest terms I can that California should and must be given an opportunity to correct these new, never before presented claims of constitutional defect before the federal court passes on them.

09:31 THE COURT: I do understand, respect, and appreciate your position. I obviously disagree for the reasons I said. But maybe we can agree on this:

09:31 I feel this is of paramount importance. Do you agree that I should certify this for partial judgment and get it to the circuit right away?

09:32 MR. BILDERBACK: Absolutely, Your Honor. And before I conclude all of my remarks, because it seems the court is kind of closing out my discussion, I also wanted to just throw out there for the court that there is a history of Ninth Circuit authority on this question, on the question of delay and its effect on the constitutionality of the state's death penalty scheme. And it's absolutely unbroken.

09:32 THE COURT: But that's never been analyzed in the

1 context of a systemic problem. It's always been on an individual
2 basis, first of all.
09:32 3 And second of all, it's where we, I guess, we started
4 out. And I realize you haven't had an opportunity to carefully
5 study my order, but simply, I feel we have come full circle from
6 *Furman*. And the delay is obviously the cause, but the claim is
7 arbitrary selection for execution in that the people that
8 California will execute are the ones that have gotten through this
9 dysfunctional process. It's not the ones that committed the most
10 egregious crime. It's not the ones who were sentenced to death at
11 the earliest date.
09:33 12 And if you look at the statistics, I mean, I was
13 actually quite troubled. I don't have a rational explanation for
14 you, but there is some of these petitions, languishing in federal
15 court, district court, not even the Ninth Circuit over 30 years;
16 33, 35 years. They're still in the federal district court.
09:33 17 So, I don't see what is the rational, reasonable basis
18 for who gets executed first other than they get through this
19 dysfunctional process. And to me, that's arbitrary.
09:34 20 MR. BILDERBACK: And I appreciate that. And I did glean
21 that from the court's order. But I think that does present the
22 *Teague* issue fairly squarely at that point, because based on the
23 comments the court just made and based on my brief reading of the
24 order, it does seem that the court is saying, if I understand the
25 court, that there is a new rule that I'm going to apply to this

CV 09-2158-CJC - 07/16/2014 - WEDNESDAY

case, which is to say I'm going to find that under these facts there is an arbitrariness to the imposition of the sanction, not the penalty, but the sanction itself of execution, that is constitutionally intolerable.

09:34 And I think it would be very difficult to survey the legal landscape, as *Teague* instructs us to do, and find that the rule that the court is applying in this case was compelled by existing precedent at the time -- I'm sorry, I'm just sort of spinning tales because I'm obviously thinking some of this stuff through.

09:35 I don't even know what the relevant point in time would be for *Teague*. Generally we speak of finality of the conviction. But the courts of course now speaking of factual changes that have occurred post conviction and the effect that those factual changes post conviction have on the arbitrariness.

09:35 So, anyway I apologize.

09:35 THE COURT: No apology. In an interesting way you are making me feel better about my decision that at least you have got to give me credit that I have thought it through.

09:35 MR. BILDERBACK: Absolutely.

09:35 THE COURT: I have addressed the *Teague* rule. And simply, this is not a new rule. That *Furman* and the Supreme Court precedence since *Furman* have made it explicitly clear that arbitrariness can have no role in the death penalty system. In fact, in any kind of punishment.

CV 09-2158-CJC - 07/16/2014 - WEDNESDAY

09:36 That's at the fabric of our due process. And given I believe the statistics show that there is arbitrariness here, it's not a new rule for *Teague* purposes.

09:36 MR. BILDERBACK: And I understand that. And I think that that's correct as far as it goes. I think the problem is there certainly has been ample authority which has pretty clearly stated that -- and I understand the court says that those cases were only concerned with delay alone, but there are ample cases. As a matter of fact, I have been unable to find a single case, until today, which has ever held that delay in execution of a capital sentence is constitutionally prohibited.

09:37 THE COURT: I'm not aware of one either, if that makes you feel better. But I would actually defer to you on the case law there as far as delay.

09:37 But again, what I'm saying here is different. Delay is one of, obviously, the causes of why it's arbitrariness. But I don't believe any court, to my knowledge, has said that you can arbitrarily select people for execution.

09:37 MR. BILDERBACK: Absolutely. And we don't disagree with that at all. Of course. I think, though, where I'm stumbling in terms of following the Court's reasoning is -- I mean, to get back to our discussion of exhaustion, really, it seemed to me that the court's principal objection to returning to state court for exhaustion is it would lengthen the delay. Not that there is a risk of arbitrariness in the state court determination

1 necessarily, but just there is no point in going back because
2 delay is such a gigantic component of the arbitrariness calculus
3 that the court is engaging in. So exacerbating the delay would
4 only make things worse.
09:38 5 THE COURT: That's part of it. That's the first point I
6 made. But more importantly is, it just seems ironic, chaotic, to
7 require Mr. Jones to go back to a system that he has demonstrated
8 is dysfunctional.
09:38 9 It gets back to the exception that I'm saying I don't
10 believe the California Supreme Court can fix this, and they have
11 demonstrated that they can't fix it. In fact, they're making the
12 problem worse. And I know you disagree with that.
09:39 13 MR. BILDERBACK: Absolutely. Of course.
09:39 14 THE COURT: And I respect your position. And so you
15 understand where I'm coming from, it's the statistics. The
16 statistics they don't lie. I'm not manipulating those statistics.
17 They are what they are. And they tell me that the California
18 Supreme Court is part of the problem. And in fact, they're making
19 the problem worse with the passage of time.
09:39 20 MR. BILDERBACK: And I'm not unmindful of that. But
21 what we're talking about specifically in the context of the
22 exhaustion inquiry is dealing with Mr. Jones specifically who has
23 very capable counsel who's already appointed to represent him, is
24 very familiar with this issue.
09:39 25 So a lot of the concerns, this sort of structural or

1 institutional concerns that inform the statistics that the court
2 is referring to, aren't currently applicable to Mr. Jones'
3 situation.
09:40 4 Historically, Mr. Jones did have some delay in the
5 appointment of counsel. Did have some delay, absolutely, in the
6 resolution of his state appeal and his state habeas. We could
7 dispute whether that delay was undue or extraordinary. But there
8 is no question that it was -- there was a passage of time that was
9 not insubstantial. Absolutely.
09:40 10 But going forward, with Mr. Jones specifically, a lot of
11 the issues that the court is talking about are really not --
12 wouldn't really impact Mr. Jones' situation because he does have a
13 lawyer already. The lawyer is already working for him. The
14 state's already recognized him as counsel. So those issues are
15 already -- are resolved in a way that would not interfere with the
16 expeditious resolution of this issue in state court.
09:40 17 THE COURT: And I'm sure you respectfully disagree with
18 me, but to me, that's a big problem. It's a big problem because
19 again, if you compare Mr. Jones to other people who have been also
20 been death qualified, i.e. they have been sentenced to death, they
21 have been on death row a lot longer. Why should he be first in
22 line once you get the protocol worked out?
09:41 23 That seems to me to be very unfair. And if we were just
24 talking about a couple people, maybe I would be more sympathetic,
25 but we're talking about hundreds of people that have been on death

CV 09-2158-CJC - 07/16/2014 - WEDNESDAY

row longer than Mr. Jones.

09:41 Like I said, the first few sheets I have, we have 35 years, 34 years, 33 years, 32 years. I mean, I can go on and on. I have hundreds of people that have been on there longer. Many of those are still in district court.

09:42 So how is it fair, how is it rational that Mr. Jones go to the front of the line and get executed when you have serial killers or people who commit just as despicable crimes not getting executed?

09:42 And out of complete candor with you, that's how I started looking at this, because I realized that, wow, Mr. Jones, relatively, he has gotten to this point after about 20 years which, to me, is an unreasonable amount of time. But relatively speaking, it's not 35 or 40 years.

09:42 But then there are so many others -- not just a few -- so many others that have been on death row for many years more than him, they're not going to get executed and he is. And I had a problem with that saying you could go ahead and execute him, go to the next step when people who have committed just as egregious, in some instances I think even more egregious crimes, are not going to get executed.

09:43 MR. BILDERBACK: And I understand the court's point, but I think the court would understand the state's frustration with a federal court expressing that excessive delay in a federal court has rendered the state process violative of the Eight Amendment.

CV 09-2158-CJC - 07/16/2014 - WEDNESDAY

09:43 1 I think the court's precisely correct, and I can speak
2 of my own personal experience, many of these cases do take a long
3 time in state court. Absolutely. But they often take just as
4 long or even longer in federal court once the state court process
5 has been completed to finality.
09:44 6 THE COURT: I think the statistics support what you are
7 saying.
09:44 8 MR. BILDERBACK: And so there is -- getting back to the
9 federalism and comity discussion we were having earlier, there is
10 something antifederalist about a federal court finding that the
11 state court process is unconscionably slow or arbitrary because
12 federal judges have issued stays in many, many cases. And that's
13 the reason those delays have occurred.
09:44 14 THE COURT: Certainly in some instances that's true.
09:44 15 MR. BILDERBACK: Yes. And I think that especially when
16 we're dealing with the terms of years for many of these cases that
17 get into the longer periods of time than are contemplated by Mr.
18 Jones' case, I would say that the vast bulk of those cases have
19 spent a long time, sometimes as long, twice as long in federal
20 court as they have in state court.
09:45 21 THE COURT: In some instances you are right.
09:45 22 MR. BILDERBACK: And I think that there is --
09:45 23 THE COURT: I think like Mr. -- one of the -- Mr.
24 Bittaker.
09:45 25 MR. BILDERBACK: *Bittaker*. That's Mr. Hayward's case as

CV 09-2158-CJC - 07/16/2014 - WEDNESDAY

a matter of fact.

09:45 THE COURT: Mr. Bittaker has been -- he was sentenced to death in 1981 and his habeas petition I think was filed 1991.

09:45 MR. BILDERBACK: In federal court.

09:45 THE COURT: In federal court.

09:45 MR. BILDERBACK: So 23 or so years ago. Exactly.

09:45 THE COURT: I can understand and appreciate your frustration. I imagine the argument in response to that, though, is federal courts have found problems in some of the death sentences and significant habeas relief has been granted by the federal courts. So the federal courts have an important role to play in the process.

09:46 MR. BILDERBACK: And we absolutely do not dispute that. And we do agree that the federal courts have an essential role to play in the process, but I am speaking of specifically the matter of taxing the state court for a delay that we would oppose, that we do not welcome.

09:46 We patiently engage in federal collateral review, but it is an interference with the state court process, albeit one that Congress has authorized. And so to say that the state court is -- the state is not acting expeditiously enough in a case in which the delay in many, if not most of the cases that we're relying on, can squarely be laid at the feet of the federal court specifically, the federal district court specifically, our hands are completely tied.

CV 09-2158-CJC - 07/16/2014 - WEDNESDAY

09:47 1 We cannot expedite federal resolution of these cases
2 anymore than we already do. We litigate these cases aggressively.
3 I think if the court were to examine -- and I'm not inviting the
4 court to do this because it would be a mind-numbing task -- but if
5 the court were to examine the amount of time that the court is
6 waiting for the state to respond out of the whole lifespan of a
7 case, it would be the shortest single element compared to the
8 court carefully considering the issues, the petitioner presenting
9 his position on the issues.
09:47 10 The state is doing everything they can to expedite these
11 cases as quickly as is reasonably possible. And nevertheless,
12 then to be told by the federal court well, because of the delay in
13 the resolution of these matters, and it's been so excessive and so
14 uneven because it doesn't seem to be rationally related to the
15 severity of the offense or the date of the offense or these other
16 factors that the court has identified, the court has placed now
17 the state in a position where we literally cannot win no matter
18 what we do. We cannot force the court to resolve these cases.
09:48 19 But then the court turns and points to the delay in the
20 resolution of the cases and says that shows that California's
21 death penalty system is irreparably and broken and violative of
22 the Eight Amendment. So we're kind of stuck in an untenable
23 position where we have no control over the thing that you are
24 saying the state is violating his rights by doing that.
09:48 25 THE COURT: Well, I do appreciate and understand your

CV 09-2158-CJC - 07/16/2014 - WEDNESDAY

1 frustration. But I would also cite you to the commission and the
2 *Alarcon* study which makes several recommendations on what
3 California can do. It's not my prerogative to micromanage the
4 attorney general to say what California should or should not do.
5 All I can rule on is this consistent with the constitution. And
6 this system, in my opinion, my humble opinion, it's not consistent
7 with the constitution.
09:49 8 And I can't -- I appreciate and respect your federalism
9 concerns because, like I said, I like to think that I am a
10 federalist, but I can't sit silent and participate in a process
11 that I think is unconstitutional. I'm on a collision course with
12 my oath. So I have to do something. And I just don't feel that
13 California can fix it, has proven that they can fix it, or are
14 taking any action to fix it because again, the *Alarcon* study and
15 the Commission have been around for years, and the situation is
16 not improving. It's actually getting worse.
09:50 17 So I don't have any confidence at all that California
18 can fix it.
09:50 19 MR. BILDERBACK: Okay. Well, then turning to the
20 question of where do we go from here, if the court would like.
21 There is a couple of things I'd ask the court to do. One is I'd
22 ask the court to consider staying the order because knowing Mr.
23 Laurence as I do, and his friends at the federal public defender,
24 they're going to be putting this order in front of every judge in
25 the federal system in order to encourage every death sentence in

1 California to be vacated, and that would become logistically
2 complicated for us to say the least.
09:51 3 So if I could ask the court to please stay the order
4 pending the resolution of the interlocutory appeal so we can --
5 rather than having to respond to 678 of these at the same time, I.
6 think the court's order stands for what it stands for. It
7 explains the court's position in great detail. I think it
8 presents the issue as squarely as we could want it to be
9 presented. So I think that if I could ask the court for that
10 indulgence, I'd be very appreciative.
09:51 11 THE COURT: I will seriously consider your request. I
12 want to hear from Mr. Laurence on the procedure issue as well.
09:51 13 MR. BILDERBACK: Thank you, Your Honor. But I do get
14 the impression that the court is going to authorize the
15 interlocutory appeal, in any event.
09:52 16 THE COURT: I will do that because I just think from the
17 state's perspective, from the petitioner's perspective, from the
18 jurors' perspective, from the taxpayers' perspective -- and I
19 don't say this trivially or lightly -- from the families of the
20 victims' perspective, this is of paramount importance. And that
21 was another motivating factor.
09:52 22 I had the Thomas Edwards case which was one of the
23 statistics. And that went through the process. Again, years of
24 delay. And at one of the proceedings one of the victims' father
25 spoke to me quite passionately. And I remember looking at the

CV 09-2158-CJC - 07/16/2014 - WEDNESDAY

"Exit" sign under the clock because it was very difficult to hear him say his only reason for living was to see Mr. Edwards get executed. But he was pretty depressed and frustrated because he doesn't have any confidence that he would see that day. That with all the experts and with everything that's given Mr. Edwards, "I'm probably going to die before then," or Edwards will die before he is executed. Either of those options.

09:53 And I affirmed the death sentence and the Ninth Circuit, remarkably, came back I think within two or three years and affirmed my decision. And then he died about a month and a half later on death row. So the worse nightmare of the father came true.

09:54 So again, I have thought a lot about this. I have had this concern for years. And then I finally started digging and I looked at the statistics and then once I looked at the statistics, I felt I had no choice.

09:54 MR. BILDERBACK: That's all I have for the court right now.

09:54 THE COURT: I appreciate it.

09:54 Mr. Laurence.

09:54 MR. LAURENCE: Good morning, Your Honor. Professor Anthony Amsterdam gave me advice as a young lawyer and that was, if you have a tentative ruling in your favor, sit down and say nothing.

09:54 But I have to deal with at least one of the issues that

he raised in objecting to the court's order, and that is with respect to the federal delays, as pointed out in our briefing, and certainly as documented by the Commission on the Fair Administration of Justice report, the primary reason of federal court delay is not because district court judges don't take their job seriously. It's not because habeas petitioners are filing dilatory motions. But rather, it's the ineffectiveness of the state process that preceded the initiation of the federal proceedings that causes the delay.

09:55 A Pricewaterhousecoopers study was done in 1989. It looked at why California cases cost far more money than any other state in the country. And it looked to the practices of the attorney general's office primarily at that point was not waiving exhaustion, insisting on procedural issues to be resolved when the merits could be resolved much quicker.

09:55 Since that time it has only gotten worse. The California system doesn't fund these cases at a sufficient rate in the state court so they come to this court unprepared. We have to spend a tremendous amount of time and money simply investigating the cases in the district court process because the California system failed to provide sufficient funds and resources to work them up in the state court system.

09:56 Then after we develop new facts, the vast majority of these cases go back for exhaustion purposes. I think the figures that I cited were 67 percent of the cases go back for exhaustion,

CV 09-2158-CJC - 07/16/2014 - WEDNESDAY

and the average time from the date that the petition is filed until the California Supreme Court resolves that petition is over three years.

09:56 And that is cases that have been resolved. It's almost difficult to really estimate how much time we would have to spend in state court exhausting this claim. And the court is absolutely right. This claim has never been resolved by the California Supreme Court and that's fairly well-established by our papers.

09:56 So 2254(d) is not an issue. The *Dickens* case very clearly says if the facts and legal basis fundamentally alter the claim that has been resolved by the state court, 2254(d) is not a problem.

09:57 But the amount of time that we would have to take to exhaust this claim is at least four years from the time that we filed that petition. And in fact, I'm only guessing because I'm only looking at cases that have been resolved. There are 176 cases before the California Supreme Court on habeas corpus proceeding. 107 of them have been sitting there for an average of four years after the reply brief has been filed, which means the California Supreme Court is not going to be able to get to this case in the foreseeable future.

09:57 So the federal court delay stems primarily from the problems of the state court system not providing adequate resources to investigate the cases. It is compounded by the fact that the California Supreme Court then does not issue a reasoned

decision, but simply issues an order that says the petition is denied, allowing everybody -- the parties and this court -- to guess at to the reasoning the court used in rejecting that claim.

09:58 Now after Cullin v. Pinholster and Harrington v. Richter, Richter v. Harrington, the problem is that we have to identify potential reasons for the California Supreme Court's decision, which as the history of this case shows, takes a tremendous amount of time and effort.

09:58 And compounding that problem is that factual disputes that were raised in state court are not resolved in state court. They are passed along to the federal district courts to resolve. And that is why the Commission pointed out that the federal system is burdened by the California dysfunctional and the primary cause of delay that we're experiencing now in federal court stems not because judges are not doing their job, but because the California system was broken beyond repair.

09:59 And to me, that is really the crux of the problem as to saddling the attorney general with the problem of the federal courts delaying these cases and insisting on us going back to exhaust claims when the reality is there is no remedy in state court.

09:59 Now, the court pointed out that futility is different from ineffective process. The futility argument is that if we went back to state court, we would get the exact same result. And quite frankly, the statistics bear that out. This issue has been

CV 09-2158-CJC - 07/16/2014 - WEDNESDAY

raised in some form or another in over 150 cases, and the California Supreme Court has not even found a prima facie case requiring the issuance of an order to show cause. So futility, to me, is a very legitimate concern and we advanced it as a reason why we should not have to go back to exhaustion.

09:59 But the court's point which is ineffective forum to me is equally as important and equally compelling with respect to exhaustion. Requiring us to go back for an additional four years at a minimum only compounds the constitutional violation, does not advance the interest of either the state or the petitioner because when we get back here in four more years, we still have the entire case still to resolve. That, to me, is an ineffective forum. To go back to the court to say California Supreme Court, you are dysfunctional, not because the court is dysfunctional, but because the state system has not funded this process sufficiently to allow the system to work.

10:00 And as we pointed out in our opening brief, it starts with the statute. The statute is incredibly broad. And in our different claim, the claim that we suggest that the California death penalty statute is unconstitutional because it fails to narrow, we provided the court with details as to the percentage of cases that could be charged as a capital crime. 95 percent of first-degree murders could be charged as a capital crime which to me is a tremendous burden on the state which, as the Commission pointed out, is exactly the root of the problem.

CV 09-2158-CJC - 07/16/2014 - WEDNESDAY

10:01 1 We have this huge influx of cases which are potential
2 capital crime and which state resources have to go to at the trial
3 court level. We have a huge number of capital sentences coming
4 into the system into the appeal process, and that process is
5 overworked from the beginning.
10:01 6 If we don't fund the system -- and we certainly have not
7 funded the system at the beginning of process -- we are only
8 asking for arbitrariness and unconscionable delay, as this court
9 points out.
10:01 10 To me, that is the crux of the problem. And I served on
11 the Commission of Fair Administration of Justice. I was a
12 minority member because there were very few defense lawyers on
13 that commission. And I was struck by the unanimous consideration
14 given by all of the members. We took testimony from 70-some
15 witnesses. We read thousands of pages of information about how
16 the system works in California, comparing it to other states.
17 That, to me, is remarkable about how unique California is.
10:02 18 Twenty-five to 30 years from sentencing to execution is
19 unheard of in the rest of the world, let alone the rest of the
20 country. Virginia averages six to seven years. Even Texas
21 averages about 10 years. And to me, the issue is a system that
22 has been looked at in 2006 and have made recommendations by a
23 commission which was largely composed of prosecutors and law
24 enforcement personnel recommending these kinds of changes as the
25 only way to fix this system and having now waited eight years for

somebody to read the report is very disheartening.

10:02 Every year my office has submitted budget change proposals to increase the size of my office so that we could handle the backlog of cases, and every year those have been denied since the commission report.

10:03 There is no change even though we have money this year. In fact, I have $470 less in this budget than I had in last year's budget, and I still don't have sufficient funding to fully staff my office.

10:03 So Mr. Jones, who comes through the system in a relatively quick fashion because he had appointed counsel for habeas proceedings five years after his judgment. As we pointed out in our papers, many people have waited 10 to 15 and even 20 years, 22 years for Mr. Solomon without habeas counsel.

10:03 Mr. Jones is plucked from the stream of cases coming into the California Supreme Court and is assigned habeas counsel relatively quickly. And he is short-circuited on time because at the time we were appointed to represent him, there's only two years permitted for us to investigate and fully develop his claims for his habeas petition.

10:03 Now the California Supreme Court realizes that given the size of these cases, the difficulty of finding lawyers who are willing and capable to take these cases, habeas petitioners have three years to do that kind of work. So Mr. Jones, plucked from that stream and given a less time than most of these people, filed

his petition two years after the appointment. The case sat for six and a half years before the California Supreme Court issued its very cursory denial.

10:04 Mr. Jones has now been the benefit of the only state institution in California that is designed to do habeas cases and he is now paying the price for it because in 1995 he was sentenced to death and he is virtually the only person at this stage of these proceedings. That's the arbitrariness that this court has identified and that's the arbitrariness that is unconstitutional under *Furman* and *Greg*.

10:04 I mean, the question about *Teague* to me is an easy one. *Furman*, the very language of every one of the opinions that formed the majority opinion talk about being struck by lightening. Execution being arbitrary because so few people are selected to be executed and are actually executed. There is nothing new about that law. That is bedrock law that was established in Furman v. Georgia and reaffirmed in Greg v. Georgia. *Furman* is still good law. No case has ever overruled Furman v. Georgia. And *Greg*, in fact, the plurality opinion, endorsed it as controlling law of the United States of Supreme Court. So *Teague* has no issue to me whatsoever.

10:05 That leaves us now with simply what do we do about the procedure. The state would have us go back. Go back to the California Supreme Court.

10:05 THE COURT: That's not going to happen. I think Mr.

CV 09-2158-CJC - 07/16/2014 - WEDNESDAY

Bilderback actually recognizes that. I didn't mean to cut you off. I could listen to you all morning. But I'm going to be issuing my order. What I do want you to address for me is the procedure from here.

10:06 I do feel strongly -- I haven't made up my final decision -- but I feel strongly I should certify this and it should go to the circuit as quickly as possible. I don't want to hold this up for me to resolve the other claims.

10:06 MR. LAURENCE: And I agree, Your Honor. The question is whether or not you can stay an order and also then certify it for interlocutory appeal. I don't believe you can. The order has to be a final order. Not a final judgment, but has to be a final order. Under rule 5, this court has to grant permission for the interlocutory appeal and then the circuit has to grant interlocutory appeal after this court issues its certification of the order.

10:06 The court can stay -- it can't stay the order, but it can delay the certification of the order. I don't see a reason for doing so, Your Honor. I think we probably have fully exhausted the facts that this court obviously has looked at very carefully. The legal issues are fairly well developed. And I think California habeas corpus petitioners, the state, the victims' families, everyone needs to have the issue resolved. And I fully agree that it should be certified as an interlocutory order.

CV 09-2158-CJC - 07/16/2014 - WEDNESDAY

10:07 1 Now the one issue I did want to address is -- and I
2 apologize that I made some errors obviously in my original
3 declaration in computing some of the facts. I don't think they
4 made a very big difference, but certainly I think all of the
5 numbers we provided the court in those two declarations is now
6 accurate.
10:07 7 With respect to appendix A, we had submitted track-
8 changed version to account for some of the additional facts that
9 we came -- as we were reviewing our own statistics. And I don't
10 know if the court wanted me to address any of those issues.
10:07 11 THE COURT: No. I agreed with them and I have revised
12 the appendix. So the revised appendix that's going to be attached
13 to the order reflects the changes you made.
10:08 14 MR. LAURENCE: Then, Your Honor, I submit the order to
15 the court.
10:08 16 THE COURT: Okay. Mr. Bilderback, I will certify this.
17 I'm not inclined at this point to stay the order.
10:08 18 MR. BILDERBACK: I think Mr. Laurence was right about
19 that. I made a mistake.
10:08 20 THE COURT: Okay. You are both so professional. I
21 would appreciate if you could submit a proposed partial judgment
22 with the certification. And it sounds to me like you can agree on
23 what the wording of that should be so you can get to the circuit
24 quicker rather than later.
10:08 25 Could you get that to me within a week?

CV 09-2158-CJC - 07/16/2014 - WEDNESDAY

10:09 1 MR. LAURENCE: Yes, Your Honor. I have got to fly to
2 Durham, North Carolina this afternoon for a training I'm
3 conducting through Sunday.
10:09 4 THE COURT: Okay. Would you like two weeks?
10:09 5 MR. LAURENCE: It will be in before two weeks.
10:09 6 THE COURT: So if you could submit a partial judgment
7 granting petitioner's claim 27 and vacating his death sentence.
8 And then the certification, that there is no just reason for the
9 delay. Resolving the constitutionality of California's
10 administration of the death penalty system is of paramount
11 importance to the state, to petitioner, to jurors, taxpayers, and
12 the families of the victims. And I don't believe waiting is in
13 anybody's interest, especially given my view that the
14 constitutional problem is only going to get worse.
10:09 15 And if you could run it by the attorney general and make
16 sure that they are comfortable with it and then submit it, and
17 I'll sign it.
10:10 18 MR. LAURENCE: Yes, Your Honor.
10:10 19 THE COURT: Okay. I appreciate the parting your
20 thoughts. And it's a difficult decision and it was a humbling
21 decision. All right. Thank you.
10:10 22 THE CLERK: All rise. Court is now adjourned .
23 *(Whereupon the proceedings were adjourned at*
24 *10:10.)*
25

CV 09-2158-CJC - 07/16/2014 - WEDNESDAY

-oOo-

CERTIFICATE

I hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter.

Date: JULY 16, 2014

/S/
_____
MARIA BEESLEY, RPR, RMR
OFFICIAL COURT REPORTER

SUPREME COURT
FILED
MAR 16 2009
Frederick K. Ohlrich Clerk
Deputy

S110791

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re ERNEST DEWAYNE JONES on Habeas Corpus

The order filed on March 11, 2009, is amended to read, in its entirety;

"The petition for writ of habeas corpus, filed October 21, 2002, is denied.

All claims are denied on the merits.

To the extent they were raised and rejected on appeal, and except insofar as they allege ineffective assistance of counsel, paragraph 2 of Claim Q, and Claims B, C, M and U are barred by *In re Waltreus* (1965) 62 Cal.2d 218, 225.

To the extent they were not raised on appeal, and except insofar as they allege ineffective assistance of counsel, paragraph 1 of Claim G, paragraphs 3 and 4 of Claim H, Claim I (with the exception of paragraph 5, subdivision (c)), Claim Q (with the exception of paragraph 2), and all of Claims C, K, L, M, P, R, and U are barred by *In re Harris* (1993) 5 Cal.4th 813, 825 & fn. 3, 826-829, and *In re Dixon* (1953) 41 Cal.2d 756, 759.

Except to the extent they allege ineffective assistance of trial counsel, paragraphs 1 and 2 of Claim H, paragraph 5(c) of Claim I, and Claims N and Y are denied because petitioner failed to raise them in the trial court. (*In re Seaton* (2004) 34 Cal.4th 193.)

To the extent Claim K alleges insufficiency of the evidence, it is not cognizable on habeas corpus. (*In re Lindley* (1947) 29 Cal.2d 709, 723.)

Justice Werdegar would not hold that any of petitioner's claims are barred under *In re Seaton* (2004) 34 Cal.4th 193, 201."

GEORGE

Chief Justice

Filed 3/17/03

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,	)	
	)	
Plaintiff and Respondent,	)	
	)	S046117
v.	)	
	)	
ERNEST DWAYNE JONES,	)	
	)	Los Angeles County
Defendant and Appellant.	)	Super.Ct.No. BA063825
	)	

A jury convicted defendant Ernest Dwayne Jones of the first degree murder (Pen. Code,[1] §§ 187, 189) and rape (§ 261) of Julia Miller, and it found true the special circumstance allegation that the murder was committed in the commission of the rape. The jury found that defendant was not guilty of burglary (§ 459) or robbery (§ 211) of Mrs. Miller, and it found not true the special circumstance allegations that the murder of Mrs. Miller was committed in the commission of burglary or robbery. Finally, the jury found true the allegations that defendant personally used a deadly weapon, i.e., a knife, to commit the crimes (§ 12022, subd. (b)) and that he had served a prior prison term (§ 667.5). The jury set the penalty at death. The trial court denied defendant's motion for a new trial (§ 1179

[1] All further statutory references are to the Penal Code unless otherwise designated.

et seq.) and his motion for modification of the sentence (§ 190.4, subd. (e)). This appeal is automatic. (§ 1239.)

We conclude the judgment should be affirmed in its entirety.

I. FACTS

A. Guilt Phase

1. The People's Case

Shortly after midnight on August 25, 1992, in Los Angeles, Chester Miller returned home from work and noticed the family station wagon was missing from the driveway. Mr. Miller went into his house and found his wife, Julia, lying dead at the foot of their bed. Mrs. Miller's robe was open, her nightgown was bunched above her waist, and she was naked from the waist down. A telephone cord and a purse strap had been used to tie Mrs. Miller's arms over her head, and a nightgown had been used to loosely tie her ankles together. Mrs. Miller had been gagged with two rags, one in her mouth and another around her face. Two kitchen knives were sticking out of her neck. Pieces of three other knives were found on or around her body.

Defendant and the Millers' daughter, Pam, lived together in an apartment about two and one-half miles from the Millers. Around 6:00 p.m. on the previous day, August 24, 1992, Pam had been on the phone with her mother. Defendant had interrupted Pam to ask her whether her parents were at home. Pam told defendant that her father was at work, but that her mother was home.

Around 7:40 p.m. the same evening, defendant left the apartment. Pam later noticed defendant had apparently switched off the ringer on their phone, something he had never done before. At 9:30 p.m., defendant returned to the apartment, smoked a joint of marijuana and cocaine, and then left again at 10:00 p.m. He had again switched off the phone ringer. Defendant returned in 20 minutes and rolled some more "joints."

Pam always slept with the television on, but this night defendant told her to turn it off because he had things on his mind. Around midnight she woke up and saw defendant looking out the window. At some point in the evening he had changed clothes. At 1:00 a.m., their doorbell rang. Defendant told Pam not to answer it. Hearing her name called, Pam looked out of the bedroom window and saw her grandmother, who told her to open the apartment door. When defendant did so, Pam's grandfather said her mother had been killed. Pam repeatedly asked defendant to accompany her to her grandparents' house, but defendant refused, saying he would come when he got his sister's car.

When Pam arrived at her grandparents' house, she called her friend Shamaine Love. Pam told Love that Mrs. Miller had been killed. Love, a childhood friend of Pam's, as well as a drug dealer who regularly sold cocaine to her and to defendant, lived near Mr. and Mrs. Miller. Love told Pam that several times during the day Mrs. Miller had been murdered defendant had been to Love's house to buy drugs from her. Two of defendant's trips to Love's house were in the afternoon; on both occasions he paid for the drugs in cash. Shortly after sunset, which would have been sometime between 7:30 and 7:55 p.m., defendant had again visited Love, this time paying for cocaine and marijuana with a gold chain. Later that night defendant again bought cocaine from Love, paying for it with a pearl necklace, pearl earrings, and a pearl bracelet. Pam identified the pearl jewelry, and later the gold chain, as Mrs. Miller's. Pam took the pearl jewelry to the Miller house and showed it to detectives there. Pam told the officers that she knew who had killed her mother and that they should go to the apartment.

At 3:00 a.m., police officers staked out the Millers' station wagon, which they found parked around the corner from the apartment. Shortly thereafter defendant got into the station wagon and drove away. The officers followed in their marked patrol car. Defendant looked back in the officers' direction, reached

into the back seat, and brought a rifle into the front seat. Defendant then sped up, and the officers gave chase, their lights and sirens on. Defendant ran red lights and stop signs. Other patrol cars joined in pursuit. Defendant hit a traffic island and blew out the tires on the driver's side of the station wagon. He continued driving on the rims, however, and entered a freeway. First the wheels, and then the rims on the station wagon disintegrated, forcing defendant to stop. The pursuit lasted 40 minutes. Defendant was ordered out of the station wagon, but instead he placed the rifle to his chest and shot himself. A subsequent search of the apartment revealed that the front and back doors had been barricaded with furniture.

The deputy medical examiner with the Los Angeles County Coroner's Office who performed the autopsy on Mrs. Miller's body concluded, on the basis of the following evidence, that she had been stabbed to death: Two knives were sticking out of Mrs. Miller's neck. She also had 14 stab wounds in her abdomen and one in her vagina, but the fatal stab wound, which penetrated to the spine, was the one in the middle of her chest. Aside from the stab wound, there was no evidence of trauma to the vaginal region.

At the crime scene, a criminalist with the Los Angeles County Coroner's Office took swabs of Mrs. Miller's vagina. Another criminalist found a great abundance of intact spermatozoa on the vaginal swab, leading him to conclude that ejaculation occurred no more than five to 10 hours before Mrs. Miller's death. A blood sample was taken from defendant. A molecular biologist for Cellmark Diagnostics performed deoxyribonucleic acid (DNA) testing on the blood sample taken from defendant and on the vaginal swabs taken from Mrs. Miller. This testing yields banding patterns that are, with the exception of identical twins, unique to every individual. There is only one chance in 78 million that a random individual would have the same DNA banding pattern as defendant. The tests

showed that the banding pattern in the DNA from defendant's blood sample matched the banding pattern of the semen on the vaginal swab taken from Mrs. Miller.

Defendant's prior conviction for sexually assaulting Dorothea H.

Previously, defendant had lived with Glynnis H. and their infant son in a garage behind the home of Glynnis's mother, Dorothea H. (Mrs. H.). After defendant and Glynnis broke up and Glynnis moved away, Mrs. H. told defendant to move out of the garage. On March 29, 1985, around 6:30 a.m., Mrs. H. heard the gate to her backyard rattle and then heard a window in the bedroom nearest the garage, the bedroom Glynnis had used, break. Mrs. H. investigated and found defendant standing in her hallway. Appearing desperate, defendant asked Mrs. H. where Glynnis and the infant were. When he learned they were not there, defendant, telling her not to scream, took Mrs. H. into her bedroom. Defendant gagged Mrs. H. and bound her arms and legs. The binding permitted Mrs. H.'s legs to be separated a bit. Defendant then raped and sodomized her.

After the assault, while defendant was resting on the bed, the doorbell rang. After peeking outside, defendant untied Mrs. H., told her not to say anything, and stood behind her as she opened the door. It was a delivery from the United Parcel Service—a package from Glynnis containing a photograph of Glynnis, defendant and their infant. When he saw the photograph, defendant began crying. He told Mrs. H. he was not going to kill her because Mrs. H., who was a teacher, could take care of the baby financially.

Defendant then took a knife from the kitchen drawer, placed it against his stomach, and asked Mrs. H. to kill him. When Mrs. H. said she couldn't, that it would be against her religion, defendant bound her to her bed, took $40 dollars from her purse, and asked her for her neighbor's phone number, saying that after

he left he would call her neighbor. Defendant did so, and the neighbor released Mrs. H.

As a result of this incident, defendant was convicted of first degree burglary (§§ 459, 460, subd. (a)), residential robbery (former § 213.5, repealed by Stats. 1986, ch. 1428, § 5, p. 5124; see now § 213), assault with a deadly weapon (§ 245, subd. (a)(1)), rape (§ 261, subd. (a)(2)), and sodomy (§ 286, subd. (c)(2)). In April 1986, defendant was sentenced to prison for 12 years, and he was paroled in 1991, 10 months before the murder of Mrs. Miller.

2. The Defense Case

Defendant testified as follows: Around 3:00 p.m. on the day he killed Mrs. Miller, defendant, feeling depressed, bought rock cocaine and marijuana from Shamaine Love, paying $20 in cash. He went to the apartment and smoked some of the drugs, and not having used drugs for seven years, became very high and paranoid. Pam came home to the apartment around 5:30 p.m. She was also high on drugs. Giving defendant a gold chain, pearl necklace, pearl earrings, and a pearl bracelet, Pam told defendant to use the jewelry to buy drugs from Shamaine Love. Defendant had seen Pam with Mrs. Miller's jewelry before, but he did not recognize this jewelry as belonging to Mrs. Miller. After Pam spoke on the phone with her mother, defendant took the bus to Shamaine Love's house, arriving around 7:30 p.m., and bought cocaine from her, paying $125 in cash plus the jewelry.

After waiting at a bus stop for 30 or 40 minutes, defendant decided to walk to the Millers' nearby home and ask Mrs. Miller for a ride back to the apartment. He did so for two reasons: He was feeling the effects of the drugs and liquor he had consumed throughout the day, and Love had told him police were patrolling the neighborhood. Mrs. Miller invited defendant into her house and agreed to give him a ride to the apartment.

A few weeks earlier, defendant had broken his thumb in six places. Defendant had previously given Mrs. Miller a more innocuous explanation—that he had broken it in the course of horseplay with Pam—but now Mrs. Miller asked him how he had really broken it. Defendant admitted that when Pam had come home late one night, he had confronted her, she had walked away from him, and he had grabbed at her waist and missed, jamming his thumb into the door frame.

Upon hearing this, Mrs. Miller became very angry. She told defendant she would kill him if he hurt Pam, and that she would lie to his parole officer to get him sent back to prison, a threat she had made on a previous occasion. Mrs. Miller took a knife from the kitchen drawer. Defendant pushed her. "You bastard," Mrs. Miller said, "My husband don't put his hands on me." As Mrs. Miller came at defendant with the knife, defendant responded by grabbing a knife out of the kitchen drawer himself. Defendant told Mrs. Miller he did not want to hurt her. Mrs. Miller swung at defendant with her knife, missing him. Defendant swung back at her, cutting her arm. "Just wait until I get my gun," Mrs. Miller said, running to her bedroom. Defendant followed Mrs. Miller and as she was taking a rifle out of the bedroom closet, defendant grabbed her from behind and spun her around. Mrs. Miller lost her grip on the rifle and fell to the floor. As defendant stood over her, Mrs. Miller said, "Give it to me."

Defendant then "kind of slipped back into [his] childhood" and had a vision of walking into a room where his mother was with a man "who wasn't [his] father." He picked up a knife and began stabbing Mrs. Miller. The next thing defendant knew he was curled up in a ball, crying, and Mrs. Miller was tied up on the floor with knives sticking out of her neck. Defendant remembered nothing after the first few stabs, but he admitted that he must have been the one who tied Mrs. Miller up, sexually assaulted her, and killed her. He insisted he had not come to the Miller house with the intention of robbing, raping, or killing Mrs. Miller.

After the killing, defendant "started experiencing things that [he] had not experienced for a while." He was "hearing . . . things in [his] head telling [him] to do certain things. [He] guess[ed] you could call it paranoia, thinking someone was coming to kill [him]." He grabbed a second rifle and bullets from the bedroom closet with the intention of taking his life. Defendant drove the Millers' station wagon to the apartment and parked around the corner, leaving the rifle in the station wagon. He locked all the windows and doors in the apartment, believing someone was coming to kill him, yet he went outside later to smoke some of the drugs he had purchased from Shamaine Love. When Pam's grandparents informed her of Mrs. Miller's death, and she left with them, defendant barricaded the doors of the apartment.

When defendant left the apartment he intended to drive the station wagon off a cliff and kill himself. Following the police chase, after the station wagon was disabled, a voice inside his head said, "They're going to kill you." Defendant then put the rifle to his chest and pulled the trigger. He was hospitalized for three weeks, recovering from the wound, and for the first week he was unconscious and on a respirator.

With regard to his prior conviction for sexually assaulting Mrs. H., defendant testified he was "not denying any of that."

B. Penalty Phase

1. The People's Case

Mr. and Mrs. Miller were married for 30 years, and he died eight months after Mrs. Miller was murdered. In Pam's opinion, Mr. Miller "grieved himself to death."

Gloria Hanks, defendant's sister, testified that defendant told her he "didn't give a fuck about Pam or her family."

During the entire year they lived together, defendant did not tell Pam he heard voices; he did not, in Pam's opinion, act like someone who was hearing voices; and he did not display such behavior when he returned to the apartment after killing Mrs. Miller.

The rape of Kim, J.

On May 28, 1984, Kim J. attended a barbecue party given by defendant's sister, Gloria Hanks. Kim and defendant smoked marijuana together at the party, and then they went to Kim's house and smoked some more. Kim considered defendant to be like a brother. However, when she suggested it was time for him to leave, defendant grabbed her by the throat, told her he would kill her if she screamed, and then raped her at knifepoint. While defendant was attacking Kim "he seemed to be in a trance. His eyes got big and glassy and his whole demeanor changed. [¶] It was like he took on a new person, like he was in a trance, and then afterwards, he seemed to snap back." Defendant apologized and asked Kim whether she was going to tell anyone. She said she would not, but later, urged by her mother to do so, Kim called the police. She testified against defendant at a preliminary hearing, but then dropped the charges because she had known defendant "practically all of his life" and she was "best friends with two of his sisters." "[F]or whatever reason I was thinking he needs a second chance."

2. The Defense Case

In the words of an aunt, defendant's home life was a "living hell." Defendant's father and mother were alcoholics. They also used marijuana in front of their children. The father and mother had "pretty rough fights" with one another, and on one occasion the mother stabbed the father in the hand. The mother had numerous affairs. Once, the father caught the mother in bed with one of the father's friends, and defendant and his sister were in the bed at the time. After that incident, the father began beating the mother and "stomped her in her

vagina." When the father left the family, the mother and her boyfriend drank heavily and often the family had no money for food. The mother beat the children. "Whatever she had in her hands, she might hit them with it." In defendant's presence, defendant's mother told his father that defendant was not in fact his child.

In the opinion of James Park, a corrections consultant and retired Department of Corrections employee, defendant was likely to be a good prisoner and unlikely to become involved in violence. Mr. Park based his opinion on the following factors: Younger prisoners are more likely to be violent, and at 30, defendant was older; during his previous eight-year prison term, defendant had relatively few infractions, and only one for fighting; finally, defendant had completed the requirements for a high school degree.

In the opinion of Dr. Claudewell S. Thomas, a psychiatrist appointed by the court at the request of the defense, defendant suffered from schizoaffective schizophrenia, a major psychiatric disorder. In reaching his diagnosis, Dr. Caldwell interviewed defendant and reviewed various documents: A 1985 report by a psychologist concluding that defendant's mental processes were intact and he was not psychotic; a 1985 report by a psychiatrist concluding defendant suffered from a chronic underlying depressive mental illness exacerbated by alcohol and drug abuse; a report by a psychologist who examined defendant in 1994 concluding that defendant was schizophrenic.

II. Discussion

A. Pretrial Issues

1. Marsden Motion

Pursuant to People v. Marsden (1970) 2 Cal.3d 118 (Marsden), defendant moved to have substitute trial counsel appointed. Defendant contends the trial court failed to conduct an adequate inquiry into the grounds for the motion before

given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation." Here, defendant did not make his statement to Ms. Hanks until the trial started, and, as defense counsel acknowledged and the trial court found, the prosecution disclosed the statement to the defense as soon as the prosecution learned of it. Therefore, defendant received timely notice. Moreover, Ms. Hanks's testimony was introduced in rebuttal to mitigation evidence introduced by the defendant in the guilt phase. Therefore, notice was not required by section 190.3 in any event.

Finally, defendant contends Ms. Hanks's testimony should have been excluded on the ground that it was "confusing, misleading, and highly prejudicial while bereft of probative value." Defendant claims Ms. Hank's testimony was unreliable because she "was 'a bottle and a half' into her New Year's celebration" when she had the telephone conversation with defendant. Ms. Hanks admitted she could not remember the entirety of the conversation, "just bits and pieces of it," because she had been drinking. However, the fact that Ms. Hanks had been drinking when the conversation occurred goes to the weight of the evidence, not its admissibility. Pursuant to Evidence Code section 352, the trial court ruled the probative value of Ms. Hanks's testimony was not outweighed by its prejudicial effect. We find no error.

5. Constitutionality of the Death Penalty

Defendant contends the statutory scheme governing the death penalty in California is unconstitutional on several grounds. We have repeatedly rejected similar contentions and do so again here. Specifically, the death penalty law is constitutional though it (1) does not require the jury to make specific written findings as to aggravating factors (see, e.g., People v. Lewis (2001) 25 Cal.4th 610, 677 ["Written findings by the penalty phase trier of fact are not

constitutionally required"]); (2) does not require that the jury return unanimous written findings as to the aggravating factors (see, e.g., People v. Seaton, supra, 26 Cal.4th at p. 688; People v. Taylor (1990) 52 Cal.3d 719, 749 ["We have consistently held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard"]); (3) does not require that the jury be instructed on the presumption of life (see, e.g., People v. Arias (1996) 13 Cal.4th 92, 190 [rejecting the contention that the death penalty statute is "constitutionally deficient because it 'fails to require a presumption that life without parole is the appropriate sentence' "]); (4) does not provide for intercase proportionality review (see, e.g., People v. Anderson (2001) 25 Cal.4th 543, 602 [rejecting the contention that intercase proportionality review is required "as a matter of due process, equal protection, fair trial, or cruel and/or unusual punishment concerns"]).

Defendant's argument that "one under judgment of death suffers cruel and unusual punishment by the inherent delays in resolving his appeal is untenable. If the appeal results in reversal of the death judgment, he has suffered no conceivable prejudice, while if the judgment is affirmed, the delay has prolonged his life. [Citation.]" (People v. Anderson, supra, 25 Cal.4th at p. 606.) Finally, death by lethal injection does not constitute cruel or unusual punishment. (See, e.g., People v. Samayoa (1997) 15 Cal.4th 795, 864.)

8. International Law

Defendant contends "[t]he due process violations and racial discrimination that [he] suffered throughout his trial and sentencing phase are prohibited by customary international law." Because defendant has entirely failed to establish the predicates of his argument—that he suffered prejudicial violations of due process or racial discrimination during his trial—we have no occasion to consider

14-56373

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EARNEST DEWAYNE JONES,

Petitioner-Appellee,

v.

KEVIN CHAPPELL, Warden,

Respondent-Appellant.

On Appeal from the United States District Court
for the Central District of California, No. 09-CV-02158-CJC
The Honorable Cormac J. Carney, Judge

EXCERPTS OF RECORD VOLUME II OF II

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INDEX – VOLUME II

Document	Page No.
8/21/2014 - Notice Of Appeal (Docket no. 128)	94
7/3/2014 - Order Amending Briefing Schedule And Advancing Hearing on Claim 27 (Docket no. 114)	95
6/11/2014 - Order Amending Briefing Schedule And Setting Hearing on Claim 27 (Docket no. 110)	96-114
4/28/2014 - First Amended Petition Excerpt (Cover & Claim 27) (Docket no. 105)	115-129
4/14/2014 - Order Directing Petitioner To File Amendment to Petition (Docket no. 104)	130-131
4/10/2014 - Order Re: Briefing And Settlement Discussions (Docket no. 103)	132-136
3/10/2010 - Federal Petition Excerpt (Cover & Claim 27) (Docket no. 26)	137-142
6/19/2001 - Cal. Supreme Court Appellant Opening Brief Excerpt (Cover & Claim 18) (Docket no. 29, lodgment B.1)	143-158
Docket Sheet, District Court case no. CV09-02158-CJC	159-174

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Ernest DeWayne Jones PLAINTIFF(S), v. Kevin Chappell, Warden of San Quentin State Prison, DEFENDANT(S).	CASE NUMBER: CV 09-2158-CJC **NOTICE OF APPEAL**

NOTICE IS HEREBY GIVEN that Kevin Chappell, Warden of San Quenin State Prison hereby appeals to
Name of Appellant
the United States Court of Appeals for the Ninth Circuit from:

Criminal Matter

☐ Conviction only [F.R.Cr.P. 32(j)(1)(A)]
☐ Conviction and Sentence
☐ Sentence Only (18 U.S.C. 3742)
☐ Pursuant to F.R.Cr.P. 32(j)(2)
☐ Interlocutory Appeals
☐ Sentence imposed:

☐ Bail status:

Civil Matter

☐ Order (specify):

☒ Judgment (specify):
Final Judgment on Claim 27 (FRCP 54(b))

☐ Other (specify):

Imposed or Filed on July 25, 2014. Entered on the docket in this action on July 25, 2014.

A copy of said judgment or order is attached hereto.

August 21, 2014
Date

/s/ James William Bilderback II
Signature
☐ Appellant/ProSe ☒ Counsel for Appellant ☐ Deputy Clerk

Note: The Notice of Appeal shall contain the names of all parties to the judgment or order and the names and addresses of the attorneys for each party. Also, if not electronically filed in a criminal case, the Clerk shall be furnished a sufficient number of copies of the Notice of Appeal to permit prompt compliance with the service requirements of FRAP 3(d).

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ERNEST DEWAYNE JONES, **Petitioner,** **vs.** **KEVIN CHAPPELL, Warden of California State Prison at San Quentin,** **Respondent.**	**Case No.: CV 09-02158-CJC** **ORDER AMENDING BRIEFING SCHEDULE AND ADVANCING HEARING ON CLAIM 27**

Having considered the parties' responsive briefs as to Claim 27 of Mr. Jones's Amended Petition for the Writ of Habeas Corpus, the Court finds that further briefing on the issue is unnecessary, and that the interests of the parties and of justice are best served by a prompt resolution of Mr. Jones's claim. Accordingly, the parties are hereby relieved of their obligation to file reply briefs. Moreover, the hearing on Mr. Jones's claim, previously set for August 4, 2014 at 11 a.m. is hereby advanced to July 16, 2014 at 9 a.m.

DATED: July 3, 2014

CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ERNEST DEWAYNE JONES, **Petitioner,** **vs.** **KEVIN CHAPPELL, Warden of California State Prison at San Quentin,** **Respondent.**	**Case No.: CV 09-02158-CJC** **ORDER AMENDING BRIEFING SCHEDULE AND SETTING HEARING ON CLAIM 27**

The Court is in receipt of the parties' opening briefs regarding Claim 27 in Petitioner's First Amended Petition for Writ of Habeas Corpus. Having reviewed Petitioner's brief, as well as Respondent's 8-page brief, the Court no longer believes that an extended briefing schedule on this matter is necessary. Accordingly, the briefing schedule on Claim 27 is hereby amended as follows:

1. The parties' simultaneous responsive briefs shall be filed by July 3, 2014;
2. The parties' simultaneous reply briefs shall be filed by July 18, 2014; and
3. The hearing on Claim 27 is scheduled for August 4, 2014 at 11 a.m.

Attached to this Order is a chart of the case status of 496 individuals sentenced to death in California between 1978 and 1997. The chart is a compilation of publicly available information from the court dockets of the four federal judicial districts in California, the public docket of the California Supreme Court, and the California Department of Corrections and Rehabilitation's ("CDCR") list of condemned inmates.[1] The chart strongly suggests that executing those essentially random few who outlive the dysfunctional post-conviction review process serves no penological purpose and is arbitrary in violation of well-established constitutional principles. The parties are encouraged to address the chart and the troubling issues it raises in their responsive briefs.

DATED: June 11, 2014

CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE

[1] The CDCR's list is available at http://www.cdcr.ca.gov/capital_punishment/docs/condemnedinmatelistsecure.pdf. A summary of the CDCR list is available at http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateSummary.pdf. Finally, the CDCR's list of Death Row inmates that have died on Death Row since 1978 is available at http://www.cdcr.ca.gov/Capital_Punishment/docs/CONDEMNEDINMATESWHOHAVEDIEDSINCE1978.pdf.

Death Sentences in California, 1978 – 1997[1]

Between 1978 and 1997, 591 death judgments were imposed by the State of California. This chart describes the current case status of the 496 individuals sentenced in that time period whose death sentences have not been overturned by the California Supreme Court (unless subsequently reinstated) and whose post-conviction proceedings have not been stayed to determine their mental competency to face the death penalty. Of these 496 individuals, 13 were executed by the State (Red), 18 had relief denied by the federal courts but have had their executions stayed (Pink), 37 had their death sentences vacated by the federal courts and are no longer on Death Row (Blue), 80 died on Death Row from causes other than execution by the State of California (Orange), 167 are currently having their habeas petitions evaluated by federal district courts (Green) or the Ninth Circuit Court of Appeals (Purple), and 181 are still having their appeals reviewed by the California Supreme Court, either on direct or collateral review (Yellow). The chart is current through April 2014.[2]

Name	Date Sentenced	Federal Case Number	Federal Judicial District	Date Federal Habeas Proceedings Initiated[3]	Current Case Status	Years Since Sentenced
Lavell Frierson	8/14/1978	92-06251 DDP	Central	10/19/1992	Relief Granted (2007)	--
Doug Stankewitz	10/12/1978	91-00616 AWI	Eastern	11/15/1991	Relief Granted (2012)	--
Ronald Bell	3/2/1979	99-20615 RMW	Northern	4/12/1991	CD Cal Petition Pending	35
Robert Harris	3/9/1979	90-00380 E	Southern	3/26/1990	Executed (1992)	--
Earl Jackson	3/19/1979	95-03286 ER	Central	5/17/1995	Relief Granted (2008) / Resentenced to Death (2010)	35
Keith Williams	4/13/1979	89-00160 REC	Eastern	2/22/1989	Executed (1996)	--
David Murtishaw	4/27/1979	91-00508 OWW	Eastern	9/10/1991	Relief Granted (2001) / Resentenced to Death / Deceased (2011)	--
Robert Massie	5/25/1979	99-02861 CAL	Northern	6/14/1999	Executed (2001)	--
Richard Chase	6/8/1979				Deceased (1980)	--
Stevie Fields	8/29/1979	92-00465 AHM	Central	1/23/1992	Relief Denied (2007) / Execution Stayed	35
David Ghent	10/30/1979	90-02763 RMW	Northern	9/26/1990	Relief Granted (2002)	--
Richard Montiel	11/20/1979	96-05412 LJO	Eastern	4/22/1996	ED Cal Petition Pending	35
James Anderson	11/30/1979	03-07948 JLS	Central	11/4/2003	CD Cal Petition Pending	35
Steven Ainsworth	1/30/1980	90-00329 LKK	Eastern	3/16/1990	Relief Granted (2001)	--
Richard Phillips	2/20/1980	92-05167 AWI	Eastern	3/4/1992	Relief Granted (2012)	--
Alejandro Ruiz	2/21/1980	89-04126 FMC	Central	7/11/1989	Deceased (2007)	--
David Moore	4/30/1980				Deceased (1980)	--
Marvin Walker	9/8/1980	94-01997 PJH	Northern	6/7/1994	ND Cal Petition Pending	34

Darrell Rich	1/23/1981	89-00823 EJG	Eastern	6/12/1989	Executed (2000)	--
Jerry Bunyard	2/2/1981				State Proceedings Pending	33
Bernard Hamilton	3/2/1981	92-00474 B	Southern	3/31/1992	Relief Granted (1994) / Resentenced to Death (1996)	33
Lawrence Bittaker	3/22/1981	91-01643 TJH	Central	3/27/1991	CD Cal Petition Pending	33
Harvey Heishman	3/30/1981	90-01815 VRW	Northern	6/26/1990	Relief Denied (2010) / Execution Stayed	33
Eric Kimble	4/6/1981	90-04826 SVW	Central	9/7/1990	CD Cal Petition Pending	33
Stanley Williams	4/15/1981	89-00327 SVW	Central	1/18/1989	Executed (2006)	--
Robert McLain	5/12/1981	89-03061 JGD	Central	5/18/1989	Relief Granted (1998)	--
Joe Johnson	5/28/1981				State Proceedings Pending	33
Anthony Bean	7/20/1981	90-00648 WBS	Eastern	5/18/1990	Relief Granted (1998)	--
Stephen Anderson	7/24/1981	92-00488 JGD	Central	1/24/1992	Executed (2002)	--
Oscar Gates	8/7/1981	88-02779 WHA	Northern	7/14/1988	ND Cal Petition Pending	33
Michael Burgener	9/4/1981	10-03399 GHK	Central	5/6/2010	State Proceedings Pending	33
Ronald Hawkins	9/20/1981				Deceased (1983)	--
Billy Ray Hamilton	10/16/1981	89-03758 THE	Northern	10/4/1989	Deceased (2007)	--
John Davenport	11/4/1981	96-06883 DSF	Central	9/30/1996	State Proceedings Pending	33
Russell Coleman	11/20/1981	89-01906 RMW	Northern	6/2/1989	Relief Granted (2000)	--
Edgar Hendricks	12/4/1981	89-02901 EFL	Northern	8/7/1989	Relief Granted (1995)	--
Gary Guzman	12/22/1981				Deceased (1991)	--
Fernando Caro	1/5/1982	93-04159 JW	Northern	11/23/1993	Relief Granted (2002)	--
Bluford Hayes Jr.	1/22/1982	92-00603 DFL	Eastern	4/14/1992	Relief Granted (2005)	--
Phillip Lucero	1/26/1982	01-02823 VAP	Central	3/27/2001	CD Cal Petition Pending	32
Richard Hovey	2/10/1982	89-01430 MHP	Northern	4/26/1989	Relief Granted (2006)	--
Carlos Avena	2/12/1982	96-08034 GHK	Central	11/15/1996	Circuit Appeal Pending	32
Albert Brown	2/22/1982	94-08150 ABC	Central	12/5/1994	Relief Denied (2008) / Execution Stayed	32
Willie Branner	2/26/1982	90-03219 DLJ	Northern	11/9/1990	ND Cal Petition Pending	32
Rondald Sanders	3/3/1982	92-05471 LJO	Eastern	7/13/1992	ED Cal Petition Pending	32
William Payton	3/5/1982	94-04779 R	Central	7/18/1994	Relief Denied (2011) / Execution Stayed	32
William Bonin	3/12/1982	91-00693 ER	Central	2/7/1991	Executed (1996)	--
Benjamin Silva	3/15/1982	90-03311 DT	Central	6/26/1990	Relief Granted (2005)	--
Darnell Lucky	4/7/1982	91-00583 TJH	Central	2/1/1991	CD Cal Petition Pending	32
Richard Boyde	4/20/1982	91-02522 GPS	Central	5/9/1991	Relief Granted (2008)	--

Melvin Wade	5/21/1982	89-00173 R	Central		Relief Granted (1994)	--
George Carpenter	5/21/1982				Deceased (1984)	
Gary Howard	5/27/1982	88-07240 WJR	Central	12/8/1988	Relief Granted (1996)	--
Richard Grant	5/28/1982	90-00779 JAM	Eastern	6/18/1990	Relief Granted (2010)	--
John Brown	6/15/1982	90-02815 AHS	Central	6/1/1990	CD Cal Petition Pending	32
Manuel Babbitt	7/8/1982	89-01407 WBS	Eastern	8/1/1989	Executed (1999)	--
Mose Willis	7/26/1982				Deceased (1988)	--
Prentice Snow	8/31/1982				State Proceedings Pending	32
Adam Miranda	9/17/1982	89-07130 JLS	Central	12/11/1989	CD Cal Petition Pending	32
James Karis	9/17/1982	89-00527 LKK	Eastern	4/13/1989	Relief Granted (1998) / Resentenced to Death (2007)	--
James Karis	9/17/1982				Deceased (2013)	--
Brett Pensinger	9/20/1982	92-01928 DSF	Central	3/30/1992	Circuit Appeal Pending	32
Fernando Belmontes	10/6/1982	89-00736 JAM	Eastern	5/25/1989	Relief Denied (2010) / Execution Stayed	32
Bronte Wright	10/29/1982	92-06918 AHM	Central	11/20/1992	Deceased (2000)	--
Ronald Deere	11/10/1982	92-01684 CAS	Central	3/18/1992	Circuit Appeal Pending	32
Joseph Poggi	11/12/1982				Deceased (1990)	--
Clarence Allen	11/22/1982	88-01123 FCD	Eastern	8/31/1988	Executed (2006)	--
Ricardo Sanders	12/3/1982	96-07429 JFW	Central	10/22/1996	Circuit Appeal Pending	32
Craig Ross	12/10/1982	96-02720 SVW	Central	4/16/1996	CD Cal Petition Pending	32
Steven Champion	12/10/1982	96-02845 SVW	Central	4/22/1996	State Proceedings Pending	32
Michael Hamilton	12/17/1982	90-00363 OWW	Eastern	6/12/1990	Relief Granted (2009)	--
Maurice Keenan	1/21/1983	89-02167 DLJ	Northern	6/22/1989	Relief Granted (2001)	--
Ronald Fuller	2/3/1983				Deceased (1989)	--
Denny Mickle	2/24/1983	92-02951 THE	Northern	7/30/1992	ND Cal Petition Pending	31
Douglas Clark	3/16/1983	92-06567 PA	Central	11/3/1992	CD Cal Petition Pending	31
James Melton	3/18/1983	89-04182 RMT	Central	7/13/1989	Relief Granted (2007)	--
Michael Williams	4/1/1983	90-01212 R	Southern	8/31/1990	Relief Granted (1993)	--
Jaturun Siripongs	4/22/1983	89-06530 WDK	Central	11/9/1989	Executed (1999)	--
Malcolm Robbins	5/12/1983	91-04748 TJH	Central	9/4/1991	CD Cal Petition Pending	31
Larry Roberts	5/27/1983	93-00254 TLN	Eastern	2/18/1993	ED Cal Petition Pending	31
Larry Webster	6/9/1983	93-00306 LKK	Eastern	2/25/1993	ED Cal Petition Pending	31

Michael Morales	6/14/1983	91-00682 DT	Central	2/6/1991	Relief Denied (2005) / Execution Stayed	31
Kevin Malone	6/14/1983	96-04040 WJR	Central	6/7/1996	Executed by Missouri (1999)	--
Gerald Gallego	6/21/1983	92-00653 SBA	Northern	2/4/1992	Deceased (2002)	--
William Proctor	6/28/1983	96-01401 JAM	Eastern	7/31/1996	ED Cal Petition Pending	31
George Marshall	6/28/1983	97-05493 AWI	Eastern	5/12/1997	Deceased (2001)	--
Martin Gonzalez	7/8/1983				Deceased (1990)	--
Keith Adcox	7/11/1983	92-05830 LJO	Eastern	12/1/1992	State Proceedings Pending	31
Francis Hernandez	7/12/1983	90-04638 RSWL	Central	8/28/1990	Circuit Appeal Pending	31
Albert Howard	8/3/1983	93-05726 LJO	Eastern	10/25/1993	Deceased (2009)	--
Douglas Mickey	9/23/1983	93-00243 RMW	Northern	1/22/1993	Relief Denied (2010) / Execution Stayed	31
Alfred Dyer	9/26/1983	93-02823 VRW	Northern	7/29/1993	Relief Granted (1998)	--
Demetrie Mayfield	9/30/1983	94-06011 ER	Central	9/2/1994	Relief Granted (2001)	--
Constantino Carrera	10/7/1983	90-00478 AWI	Eastern	7/31/1990	Relief Denied (2012) / Execution Stayed	31
John Visciotti	10/21/1983	97-04591 R	Central	6/23/1997	Circuit Appeal Pending	31
Donald Miller	11/10/1983	91-02652 NM	Central	5/16/1991	Deceased (2005)	--
Robert Thompson	12/6/1983	90-06605 CBM	Central	12/5/1990	Deceased (2006)	--
David Mason	1/27/1984		Eastern		Executed (1993)	--
Jackson Daniels	1/31/1984	92-04683 JSL	Central	8/5/1992	Relief Granted (2006) / Resentenced to Death (2010)	30
Mark Reilly	2/1/1984	93-07055 JAK	Central	11/22/1993	CD Cal Petition Pending	30
Andrew Robertson	2/3/1984	90-04850 CBM	Central	9/10/1990	Deceased (1998)	--
Donald Beardslee	3/13/1984	92-03990 SBA	Northern	10/1/1992	Executed (2005)	--
Michael Jennings	3/27/1984	89-01360 JW	Northern	3/19/1989	Relief Granted (2003)	--
Michael Hunter	3/28/1984	90-03275 JW	Northern	11/13/1990	Relief Granted (2001)	--
Charles Moore	5/16/1984	91-05976 KN	Central	11/1/1991	Relief Granted (1997) / Resentenced to Death (1998)	30
Michael Jackson	5/21/1984	91-04249 R	Central	8/8/1991	Relief Granted (2001) / Resentenced to Death (2002)	30
Scott Pinholster	6/4/1984	95-06240 GLT	Central	9/19/1995	Relief Denied (2011) / Execution Stayed	30
Richard Ramirez	6/4/1984	07-08310 BRO	Central	12/26/2007	Deceased (2013)	--
Jesse Andrews	6/8/1984	02-08969 R	Central	11/21/2002	Circuit Appeal Pending	30
Robert Diaz	6/15/1984	93-06309 TJH	Central	10/19/1993	Deceased (2010)	--
Stephan Mitcham	7/6/1984	97-03825 LHK	Northern	8/10/1994	ND Cal Petition Pending	30
Robert Bloom	7/23/1984	90-02581	Central	5/22/1990	Relief Granted (1997) / Resentenced to Death (2001)	30

Robert Bloom	7/23/1984				State Proceedings Pending	30
Jay Kaurish	7/27/1984	92-01623 DT	Central	3/16/1992	Deceased (1992)	--
William Kirkpatrick	8/14/1984	96-00351 WDK	Central	1/18/1996	Circuit Appeal Pending	30
Thomas Thompson	8/17/1984	89-03630 DT	Central	6/15/1989	Executed (1998)	--
Watson Allison	10/2/1984	92-06404 CAS	Central	10/26/1992	Relief Granted (2010)	--
Charles McDowell	10/23/1984	90-04009 MRP	Central	7/30/1990	Relief Granted (1998) / Resentenced to Death (1999)	30
Robert Lewis	11/1/1984				State Proceedings Pending	30
Kenneth Lang	12/5/1984	91-04061 MMM	Central	7/29/1991	CD Cal Petition Pending	30
Richard Boyer	12/14/1984	06-07584 GAF	Central	11/29/2006	Circuit Appeal Pending	30
Thaddaeus Turner	12/21/1984	91-00153 LJO	Eastern	4/1/1991	Relief Granted (2009)	--
William Clark	2/1/1985	95-00334 DOC	Central	1/18/1995	Relief Granted (2006)	--
Earl Jones	2/22/1985	94-00816 TJH	Central	2/7/1994	Deceased (2006)	--
Ward Weaver	4/4/1985	02-05583 AWI	Eastern	5/17/2002	ED Cal Petition Pending	29
Fred Douglas	4/5/1985	91-03055 RSWL	Central	6/6/1991	Relief Granted (2003)	--
Patrick Gordon	5/3/1985	91-00882 LKK	Eastern	7/5/1991	ED Cal Petition Pending	29
Kevin Cooper	5/15/1985	92-00427 H	Southern	3/24/1992	Relief Denied (2009) / Execution Stayed	29
Charles Whitt	5/23/1985	94-07960 WJR	Central	11/23/1994	Deceased (2004)	--
Andre Burton	6/4/1985	91-01652 AHM	Central	3/27/1991	Circuit Appeal Pending	29
Brian Mincey	6/14/1985	93-02554 PSG	Central	5/3/1993	CD Cal Petition Pending	29
Randy Haskett	6/28/1985	92-06192 GAF	Central	10/15/1992	Relief Granted (2009)	--
Duane Holloway	7/8/1985	05-02089 KJM	Eastern	10/19/2005	ED Cal Petition Pending	29
Robert Stansbury	7/15/1985	95-08532 WMB	Central	12/11/1995	Deceased (2003)	--
Richard Ramierz	8/8/1985	91-03802 CBM	Central	7/15/1998	Relief Granted (2009)	--
Raynard Cummings	9/20/1985	95-07118 CBM	Central	10/20/1995	Circuit Appeal Pending	29
Kenneth Gay	9/20/1985	01-05368 GAF	Central	6/18/2001	State Proceedings Pending	29
Michael Cox	11/26/1985	04-00065 MCE	Eastern	1/5/2004	ED Cal Petition Pending	29
Jeffrey Sheldon	12/19/1985	96-05545 TJH	Central	8/13/1996	CD Cal Petition Pending	29
Stephen DeSantis	2/3/1986	93-01083 FCD	Eastern	7/1/1993	Deceased (2002)	--
Michael Mattson	2/7/1986	91-05453 FMC	Central	10/8/1991	Deceased (2009)	--
Tiequon Cox	4/30/1986	92-03370 CBM	Central	6/4/1992	Relief Denied (2011) / Execution Stayed	28
Henry Duncan	5/5/1986	92-01403 AHS	Central	3/4/1992	Relief Granted (2008)	--
Ronald McPeters	5/7/1986	95-05108 LJO	Eastern	2/13/1995	ED Cal Petition Pending	28

Chay'im Ben-Sholom	5/9/1986	93-05531 AWI	Eastern	8/10/1993	Relief Granted (2012)	--
Freddie Taylor	5/30/1986	92-01627 EMC	Northern	4/30/1992	ND Cal Petition Pending	28
Ralph Thomas	6/4/1986	93-00616 MHP	Northern	2/18/1993	Relief Granted (2013)	--
Curtis Price	7/10/1986	93-00277 PJH	Northern	1/25/1993	ND Cal Petition Pending	28
Barry Williams	7/11/1986	00-10637 DOC	Central	10/4/2000	CD Cal Petition Pending	28
Anthony Sully	7/15/1986	92-00829 WHA	Northern	2/21/1992	Relief Denied (2013) / Execution Stayed	28
Troy Ashmus	7/25/1986	93-00594 THE	Northern	2/17/1993	ND Cal Petition Pending	28
Mauricio Silva	8/1/1986				State Proceedings Pending	28
Royal Hayes	8/8/1986	01-03926 MHP	Northern	10/18/2001	Relief Denied (2011) / Execution Stayed	28
Rodney Alcala	8/20/1986	94-1424 SVW	Central	3/4/1994	Relief Granted (2003) / Resentenced to Death (2010)	28
Antonio Espinoza	9/17/1986	94-01665 LKK	Eastern	10/13/1994	ED Cal Petition Pending	28
Wilbur Jennings	11/12/1986	91-00684 AWI	Eastern	12/16/1991	Deceased (2014)	--
Robert Danielson	11/13/1986	95-02378 SI	Northern	7/8/1994	Deceased (1995)	--
Thomas Edwards	12/11/1986	93-07151 CJC	Central	11/26/1993	Relief Denied (2009) / Deceased (2009)	--
Anderson Hawthorne	12/19/1986	92-00488 JGD	Central	11/13/1995	CD Cal Petition Pending	28
Theodore Frank	2/23/1987	91-06287 AHS	Central	11/18/1991	Deceased (2001)	--
Teofilio Medina	2/25/1987	94-01892 RSWL	Central	3/25/1994	Circuit Appeal Pending	27
Christopher Day	3/3/1987				Deceased (1994)	--
David Breaux	3/12/1987	93-00570 JAM	Eastern	4/6/1993	ED Cal Petition Pending	27
Conrad Zapien	3/23/1987	94-01455 WDK	Central	3/7/1994	Circuit Appeal Pending	27
Richard Benson	4/30/1987	94-05363 AHM	Central	8/8/1994	Circuit Appeal Pending	27
Robert Nicolaus	6/23/1987	95-02335 MMC	Northern	9/17/1992	Deceased (2003)	--
Alfred Sandoval	6/30/1987	94-08206 R	Central	12/7/1994	Relief Granted (2001)	--
Steven Livaditis	7/8/1987	96-02833 SVW	Central	4/22/1996	CD Cal Petition Pending	27
Harold Memro (Reno)	7/17/1987	96-02768 CBM	Central	4/18/1996	State Proceedings Pending	27
George Wharton	7/22/1987	92-03469 CJC	Central	6/9/1992	Circuit Appeal Pending	27
Robert Garceau	7/30/1987	95-05363 OWW	Eastern	5/12/1995	Deceased (2004)	--
Willie Johnson	8/5/1987	98-04043 SI	Northern	10/21/1998	ND Cal Petition Pending	27
Timothy Pride	8/6/1987	93-00926 GEB	Eastern	6/9/1993	Deceased (1994)	--

Bruce Morris	8/27/1987	92-00483 EJH	Eastern	3/27/1992	Relief Granted (2007)	--
Jeffrey Wash	9/1/1987	95-01133 CAL	Northern	4/3/1995	Deceased (1996)	--
Donrell Thomas	9/10/1987				Deceased (1992)	--
Mitchell Sims	9/11/1987	95-05267 GHK	Central	8/8/1995	Relief Denied (2006) / Execution Stayed	27
Martin Kipp	9/18/1987	99-04973 ABC	Central	5/10/1999	CD Cal Petition Pending	27
Paul Tuilaepa	9/25/1987	95-04619 DDP	Central	7/13/1995	State Proceedings Pending	27
Fred Freeman	10/7/1987	99-20614 JW	Northern	9/22/1995	Deceased (2009)	--
Kenneth Clair	12/4/1987	93-01133 CAS	Central	2/26/1993	Circuit Appeal Pending	27
Keith Fudge	12/11/1987	95-05369 RGK	Central	8/11/1995	CD Cal Petition Pending	27
Richard Clark	12/18/1987	97-20618 WHA	Northern	8/5/1994	Circuit Appeal Pending	27
Michael Wader	1/5/1988	96-05482 HLH	Central	8/9/1996	Deceased (1997)	--
Michael Hill	1/21/1988	94-00641 CW	Northern	2/24/1994	ND Cal Petition Pending	26
William Noguera	1/29/1988	94-06417 CAS	Central	9/23/1994	CD Cal Petition Pending	26
Horace Kelly	3/24/1988	98-02722 TJH	Central	4/6/1998	CD Cal Petition Pending	26
Laverne Johnson	4/1/1988	95-00305 THE	Northern	1/26/1995	ND Cal Petition Pending	26
Lance Osband	4/8/1988	97-00152 KJM	Eastern	1/30/1997	ED Cal Petition Pending	26
Marcelino Ramos	4/27/1988	98-02037 AHS	Central	3/20/1988	Deceased (2007)	--
David Rogers	5/2/1988				State Proceedings Pending	26
Dennis Brewer (Mayfield)	5/4/1988	97-03742 FMO	Central	5/19/1997	CD Cal Petition Pending	26
Bill Bradford	5/11/1988	98-05799 RSWL	Central	7/20/1998	Deceased (2008)	--
Curtis Fauber	5/16/1988	95-06601 GW	Central	10/3/1995	CD Cal Petition Pending	26
David Raley	5/17/1988	93-02071 JW	Northern	6/1/1993	Relief Denied (2007) / Execution Stayed	26
Theodore Wrest	5/18/1988	95-00214 DDP	Central	1/11/1995	CD Cal Petition Pending	26
William Hart	5/27/1988	05-03633 MMM	Central	5/16/2005	CD Cal Petition Pending	26
Armenia Cudjo	5/31/1988	99-08089 JFW	Central	8/9/1999	Relief Granted (2013)	--
Joselito Cinco	6/10/1988				Deceased (1988)	--
David Carpenter	6/27/1988	00-03706 MMC	Northern	10/6/2000	ND Cal Petition Pending	26
Richard Samayoa	6/28/1988	00-02118 W	Southern	10/16/2000	Relief Denied (2012) / Execution Stayed	26
Guy Rowland	6/29/1988	94-03037 WHA	Northern	8/26/1994	Circuit Appeal Pending	26
Gary Hines	7/8/1988	98-00784 TLN	Eastern	5/1/1998	ED Cal Petition Pending	26
Tracy Cain	7/12/1988	96-2584 ABC	Central	4/11/1996	Circuit Appeal Pending	26

Dennis Webb	8/15/1988	97-00956 VAP	Central	2/13/1997	CD Cal Petition Pending	26
William Dennis	9/6/1988	98-021027	Northern	10/9/1998	ND Cal Petition Pending	26
Jerry Frye	9/12/1988	99-00628 LKK	Eastern	3/29/1999	ED Cal Petition Pending	26
Daniel Jenkins	10/6/1988	07-01918 JGB	Central	3/22/2007	State Proceedings Pending	26
Charles Riel	10/14/1988	01-00507 LKK	Eastern	3/14/2001	ED Cal Petition Pending	26
Richard Turner	10/19/1988	09-07449 BRO	Central	10/14/2009	State Proceedings Pending	26
Jose Rodrigues	10/21/1988	96-01831 CW	Northern	5/17/1996	ND Cal Petition Pending	26
Sammy Marshall	10/27/1988				Deceased (1997)	--
Teddy Sanchez	10/31/1988	97-06134 AWI	Eastern	11/20/1997	ED Cal Petition Pending	26
Aurthur Halvorsen	11/18/1988				State Proceedings Pending	26
Rodney Berryman	11/28/1988	95-05309 AWI	Eastern	4/27/1995	Circuit Appeal Pending	26
Max Barnett	11/30/1988	99-02416 JAM	Eastern	12/8/1999	State Proceedings Pending	26
Manuel Mendoza	1/6/1989	03-06194 SJO	Central	8/29/2003	CD Cal Petition Pending	25
Herbert Coddington	1/20/1989	01-01290 KJM	Eastern	7/3/2001	ED Cal Petition Pending	25
Reynaldo Ayala	2/9/1989	01-00741 BTM	Southern	4/27/2001	Circuit Appeal Pending	25
Lester Ochoa	3/20/1989	99-11129 DSF	Central	10/22/1999	CD Cal Petition Pending	25
Drax Quartermain	4/10/1989				Deceased (2005)	--
Rodney Beeler	5/5/1989	96-00606 GW	Central	1/29/1996	CD Cal Petition Pending	25
James Scott	5/18/1989	03-00978 ODW	Central	2/10/2003	CD Cal Petition Pending	25
Jeffrey Kolmetz	5/18/1989				Deceased (1996)	--
Steven Crittenden	6/12/1989	95-01957 KJM	Eastern	10/26/1995	Circuit Appeal Pending	25
Jack Farnam	6/15/1989	06-00917 SJO	Central	2/15/2006	State Proceedings Pending	25
Albert Cunningham	6/16/1989	02-07170 GHK	Central	9/13/2002	Relief Denied (2013) / Execution Stayed	25
Louis Craine	6/27/1989				Deceased (1989)	--
George Smithey	7/18/1989				Deceased (2010)	--
David Welch	7/25/1989	00-20242 RMW	Northern	2/28/2000	State Proceedings Pending	25
Ronald Seaton	7/27/1989	04-09339 FMO	Central	11/12/2004	CD Cal Petition Pending	25
James Blair	8/9/1989	06-04550 VAP	Central	7/20/2006	CD Cal Petition Pending	25
Cynthia Coffman	8/31/1989	06-07304 ABC	Central	11/15/2006	CD Cal Petition Pending	25
Robert Fairbank	9/5/1989	98-01027 CRB	Northern	3/16/1998	Relief Denied (2011) / Execution Stayed	25
Manuel Alvarez	9/14/1989	97-01895 GEB	Eastern	10/8/1997	ED Cal Petition Pending	25

David Lucas	9/19/1989				State Proceedings Pending	25
David Rundle	9/21/1989	08-01879 TLN	Eastern	8/13/2008	ED Cal Petition Pending	25
Robert Maury	10/27/1989	12-01043 WBS	Eastern	4/19/2012	ED Cal Petition Pending	25
Terry Bemore	11/2/1989	08-00311 LAB	Southern	2/15/2008	Circuit Appeal Pending	25
Stanley Davis	11/15/1989				State Proceedings Pending	25
Randy Kraft	11/29/1989	01-04623 AG	Central	5/23/2001	CD Cal Petition Pending	25
Hector Ayala	11/30/1989	01-01322 IEG	Southern	7/20/2001	Circuit Appeal Pending	25
Jeffrey Hawkins	1/31/1990	96-01155 TLN	Eastern	6/19/1996	ED Cal Petition Pending	24
Dean Carter	2/6/1990	06-04532 RGK	Central	7/20/2006	Circuit Appeal Pending	24
Jon Dunkle	2/7/1990	06-04115 PJH	Northern	6/30/2006	ND Cal Petition Pending	24
Alfredo Padilla	2/7/1990	01-06305 LJO	Eastern	10/4/2001	Deceased (2008)	--
Fermin Ledesma	2/7/1990	07-02130 PJH	Northern	4/17/2007	State Proceedings Pending	24
Pedro Arias	2/22/1990	99-00627 WBS	Eastern	3/29/1999	ED Cal Petition Pending	24
Dennis Lawley	2/26/1990	08-01425 LJO	Eastern	9/23/2008	Deceased (2012)	--
Larry Davis Jr.	3/8/1990	96-002443 DT	Central	4/5/1996	Relief Denied (2004) / Deceased (2005)	--
Mario Gray	3/14/1990	07-05935 DSF	Central	9/12/2007	Deceased (2013)	--
Mark Schmeck	4/5/1990	13-05415 RS	Northern	11/21/2013	ND Cal Petition Pending	24
Tracey Carter	4/20/1990	04-06524 DDP	Central	8/6/2004	State Proceedings Pending	24
Christopher Tobin	4/24/1990				State Proceedings Pending	24
Richard Letner	4/24/1990				State Proceedings Pending	24
Jerry Bailey	5/16/1990				Deceased (1998)	--
John Holt	5/30/1990	97-06210 AWI	Eastern	12/15/1997	State Proceedings Pending	24
Maureen McDermott	6/8/1990	04-00457 DOC	Central	1/26/2004	CD Cal Petition Pending	24
Mark Bradford	7/3/1990	97-06221 TJH	Central	8/19/1997	CD Cal Petition Pending	24
Steven Catlin	7/6/1990	07-01466 LJO	Eastern	10/5/2007	ED Cal Petition Pending	24
Ralph Yeoman	7/10/1990				Deceased (2014)	--
Raymond Steele	7/24/1990	03-00143 GEB	Eastern	1/24/2003	ED Cal Petition Pending	24
Jarvis Masters	7/30/1990				State Proceedings Pending	24
Kurt Michaels	7/31/1990	04-00122 JAH	Southern	1/16/2004	SD Cal Petition Pending	24
Roland Comtois	7/31/1990				Deceased (1994)	--
Joseph Muselwhite	9/25/1990	01-01443 LKK	Eastern	7/26/2001	Deceased (2010)	--

Kristin Hughes	10/2/1990	03-02666 JSW	Northern	6/6/2003	ND Cal Petition Pending	24
Evan Nakahara	11/6/1990	05-04604 DDP	Central	6/24/2005	CD Cal Petition Pending	24
Isaac Gutierrez Jr.	11/14/1990	05-03706 DOC	Central	5/18/2005	Deceased (2008)	--
Paul Brown	11/16/1990				Deceased (2004)	--
Milton Lewis	12/6/1990	02-00013 TLN	Eastern	1/3/2002	ED Cal Petition Pending	24
Ramon Salcido	12/17/1990	09-00586 MMC	Northern	2/9/2009	State Proceedings Pending	24
Raymond Gurule	12/19/1990				Deceased (2007)	--
Carmen Ward	1/28/1991	06-02009 PA	Central		State Proceedings Pending	23
James Majors	2/4/1991	99-00493 MCE	Eastern	3/12/1999	ED Cal Petition Pending	23
Christopher Box	2/22/1991	04-00619 AJB	Southern	3/26/2004	State Proceedings Pending	23
Paul Bolin	2/25/1991	99-05279 LJO	Eastern	3/11/1999	ED Cal Petition Pending	23
Raymond Lewis	3/6/1991	03-06775 LJO	Eastern	12/9/2003	ED Cal Petition Pending	23
Tauro Waidla	3/8/1991	01-00650 AG	Central	1/22/2001	CD Cal Petition Pending	23
Richard Moon	5/19/1991	08-08327 JAK	Central	12/17/2008	State Proceedings Pending	23
Robert McDonald	5/31/1991				Deceased (1993)	--
Ronald Jones	6/4/1991	98-10318 JLS	Central	12/28/1998	CD Cal Petition Pending	23
John Sapp	6/21/1991	04-04163 JSW	Northern	9/30/2004	State Proceedings Pending	23
Paul Watson	6/27/1991				State Proceedings Pending	23
Curtis Ervin	6/28/1991	00-01228 CW	Northern	4/10/2000	ND Cal Petition Pending	23
Clifford Bolden	7/19/1991	09-02365 PJH	Northern	5/28/2009	State Proceedings Pending	23
Jesse Gonzalez	7/28/1991	95-02345 JVS	Central	4/12/1995	State Proceedings Pending	23
Martin Navarette	8/14/1991	11-07066 VAP	Central	8/26/2011	State Proceedings Pending	23
Anthony Townsel	9/13/1991				State Proceedings Pending	23
James O'Malley	11/21/1991				State Proceedings Pending	23
Michael Slaughter	11/27/1991	05-00922 AWI	Eastern	7/18/2005	State Proceedings Pending	23
Michael Jones	12/13/1991	04-02748 ODW	Central	4/20/2004	CD Cal Petition Pending	23
Dellano Cleveland	12/19/1991	05-03822 SVW	Central	5/24/2005	CD Cal Petition Pending	23
Deondre Staten	1/16/1992	01-09178 MWF	Central	10/24/2001	CD Cal Petition Pending	22
Richard Farley	1/17/1992				State Proceedings Pending	22
Chauncey Veasley	1/21/1992	05-03822 SVW	Central	4/12/2005	CD Cal Petition Pending	22
Robert Taylor	1/30/1992	07-06602 FMO	Central	10/11/2007	CD Cal Petition Pending	22
Edward Bridges	2/20/1992				Deceased (2008)	--

Ricky Earp	2/21/1992	00-06508 MMM	Central	6/19/2000	CD Cal Petition Pending	22
Colin Dickey	2/27/1992	06-00357 AWI	Eastern	3/31/2006	ED Cal Petition Pending	22
Billy Waldon	2/28/1992				State Proceedings Pending	22
Jose Casares	3/13/1992				State Proceedings Pending	22
Richard Viera	3/30/1992	05-01492 AWI	Eastern	11/22/2005	ED Cal Petition Pending	22
Gregory Smith	4/3/1992	05-08017 DSF	Central	11/9/2005	State Proceedings Pending	22
Franklin Lynch	4/28/1992				State Proceedings Pending	22
James Marlow	5/8/1992	05-06477 ABC	Central	8/31/2005	CD Cal Petition Pending	22
Paul Watkins	5/11/1992				State Proceedings Pending	22
Thomas Walker	5/12/1992				Deceased (1997)	--
Andrew Brown	5/21/1992	04-03931 AG	Central	6/2/2004	CD Cal Petition Pending	22
Alfredo Valdez	5/22/1992	10-05252 BRO	Central	7/16/2010	State Proceedings Pending	22
Marchand Elliott	6/3/1992				State Proceedings Pending	22
Alfredo Prieto	6/18/1992	05-07566 AG	Central	10/20/2005	State Proceedings Pending	22
Jack Friend	6/19/1992				State Proceedings Pending	22
Maria Alfaro	7/14/1992	07-07072 CJC	Central	10/30/2007	CD Cal Petition Pending	22
Stephen Cole	7/16/1992	05-04971 DMG	Central	7/7/2005	CD Cal Petition Pending	22
Gregory Smith	8/14/1992	04-03436 JSW	Northern	8/19/2004	ND Cal Petition Pending	22
Rodney San Nicolas	8/31/1992	06-00942 LJO	Eastern	7/20/2006	ED Cal Petition Pending	22
Jessie Ray Moffett	9/2/1992				Deceased (1998)	--
James Tulk	10/9/1992				Deceased (2006)	--
Dannie Hillhouse	10/13/1992	03-00142 MCE	Eastern	1/24/2003	ED Cal Petition Pending	22
Alphonso Howard	10/20/1992	08-06851 DDP	Central	10/17/2008	CD Cal Petition Pending	22
Rudolph Roybal	10/20/1992	99-02152 JM	Southern	10/5/1999	SD Cal Petition Pending	22
David Williams	10/20/1992	12-03975 AG	Central	5/7/2012	State Proceedings Pending	22
Gerald Cruz	10/26/1992				State Proceedings Pending	22
James Beck	10/27/1992				State Proceedings Pending	22
Richard Tully	12/4/1992				State Proceedings Pending	22
Sergio Ochoa	12/10/1992	02-07774 RSWL	Central	10/4/2002	CD Cal Petition Pending	22
George Williams	12/21/1992				State Proceedings Pending	22
Ricardo Roldan	12/29/1992	09-06589 DOC	Central	9/10/2009	CD Cal Petition Pending	22
William Ramos	1/8/1993	05-03752 SI	Northern	9/16/2005	ND Cal Petition Pending	21

John Lewis	3/3/1993	11-06395 JAK	Central	8/3/2011	CD Cal Petition Pending	21
Gregory Tate	3/5/1993				State Proceedings Pending	21
Joseph Danks	4/2/1993	11-00223 LJO	Eastern	2/9/2011	State Proceedings Pending	21
Erik Chatman	4/9/1993	07-00640 WHA	Northern	1/31/2007	State Proceedings Pending	21
Maurice Boyette	5/7/1993	13-04376 WHO	Northern	9/20/2013	ND Cal Petition Pending	21
Omar Martinez	5/10/1993	04-09090 PA	Central	11/3/2004	State Proceedings Pending	21
Anthony Oliver	5/21/1993	10-08404 ODW	Central	11/4/2010	CD Cal Petition Pending	21
Albert Lewis	5/21/1993	11-00766 ODW	Central	1/26/2011	State Proceedings Pending	21
Latwon Weaver	5/28/1993	12-02140 MMA	Southern	8/30/2012	SD Cal Petition Pending	21
Warren Bland	5/28/1993				Deceased (2001)	--
Catherine Thompson	6/10/1993				State Proceedings Pending	21
Vincente Benavides	6/16/1993				State Proceedings Pending	21
Michael Combs	6/21/1993	05-0 4777 ODW	Central	6/30/2005	CD Cal Petition Pending	21
Robert Curl	7/15/1993				State Proceedings Pending	21
Mark Crew	7/22/1993	12-04259 YGR	Northern	8/13/2012	ND Cal Petition Pending	21
Charles Stevens	7/30/1993	09-00137 WHA	Northern	1/12/2009	ND Cal Petition Pending	21
Christian Monterroso	8/12/1993	12-07888 DMG	Central	9/13/2012	CD Cal Petition Pending	21
Corvin Emdy	8/19/1993				Deceased (1993)	--
Richard Dehoyos	8/27/1993				State Proceedings Pending	21
Cedric Harrison	8/30/1993	09-05045 JW	Northern	10/22/2009	Deceased (2009)	--
Enrique Zambrano	9/8/1993	09-04917 LHK	Northern	10/15/2009	ND Cal Petition Pending	21
Eric Houston	9/20/1993	13-05609 WHA	Northern	12/4/2013	ND Cal Petition Pending	21
Robert Smith	9/24/1993	11-03062 EJD	Northern	6/21/2011	ND Cal Petition Pending	21
James Heard	9/28/1993				State Proceedings Pending	21
Cleophus Prince	11/5/1993				State Proceedings Pending	21
Abelino Manriquez	11/16/1993				State Proceedings Pending	21
Herbert Koontz	11/19/1993	03-01613 FCD	Eastern	7/31/2003	Deceased (2007)	--
Eric Hinton	12/10/1993	10-06714 DMG	Central	9/9/2010	CD Cal Petition Pending	21
Michael Huggins	12/17/1993	06-07254 YGR	Northern	11/22/2006	State Proceedings Pending	21
Jerry Kennedy	12/20/1993	13-02041 LKK	Eastern	10/1/2013	ED Cal Petition Pending	21

Lanell Harris	1/12/1994				State Proceedings Pending	20
Steven Bell	3/7/1994				State Proceedings Pending	20
Robert Wilson	4/8/1994	07-00519 MWF	Central	1/22/2007	CD Cal Petition Pending	20
Christopher Sattiewhite	4/25/1994				State Proceedings Pending	20
Tim Depriest	5/27/1994	07-06025 JLS	Central	9/17/2007	CD Cal Petition Pending	20
Delaney Marks	6/3/1994	11-02458 LHK	Northern	5/19/2011	ND Cal Petition Pending	20
Brian Johnsen	6/9/1994				State Proceedings Pending	20
Milton Pollock	6/10/1994	05-01870 SI	Northern	5/5/2005	State Proceedings Pending	20
James Robinson	6/17/1994				State Proceedings Pending	20
Jaime Hoyos	7/11/1994	09-00388 L	Southern	2/26/2009	SD Cal Petition Pending	20
Phillip Jablonski	8/12/1994	07-03302 SI	Northern	6/22/2007	State Proceedings Pending	20
Walter Cook	9/2/1994				State Proceedings Pending	20
Tomas Cruz	9/9/1994	13-02792 JST	Northern	6/18/2013	ND Cal Petition Pending	20
Joseph Cook	9/16/1994	12-08142 CJC	Central	9/20/2012	CD Cal Petition Pending	20
Mary Samuels	9/16/1994	10-03225 SJO	Central	4/29/2010	CD Cal Petition Pending	20
Shaun Burney	9/16/1994	10-00546 RGK	Central	1/26/2010	State Proceedings Pending	20
Bryan Jones	9/19/1994				State Proceedings Pending	20
Ronnie Dement	9/26/1994				State Proceedings Pending	20
Robert Jurado	10/1/1994	08-01400 JLS	Southern	7/31/2008	SD Cal Petition Pending	20
Billy Riggs	10/28/1994	09-04624 JAK	Central	6/26/2009	State Proceedings Pending	20
Carl Powell	11/10/1994				State Proceedings Pending	20
Celeste Carrington	11/23/1994	10-04179 RS	Northern	9/16/2010	ND Cal Petition Pending	20
Steven Bonilla	1/20/1995	08-00471 CW	Northern	1/22/2008	ND Cal Petition Pending	19
Anthony Bankston	1/20/1995				State Proceedings Pending	19
Edgardo Sanchez-Fuentes	1/20/1995				State Proceedings Pending	19
Danny Horning	1/26/1995	10-01932 JAM	Eastern	7/21/2010	State Proceedings Pending	19
Randall Wall	1/30/1995				State Proceedings Pending	19
Steven Homick	1/31/1995				State Proceedings Pending	19
Royal Clark	2/3/1995	12-00803 LJO	Eastern	5/16/2012	State Proceedings Pending	19
Raymond Johns	2/8/1995				Deceased (2004)	--

Keith Loker	2/10/1995				State Proceedings Pending	19
Johnny Avila	3/21/1995	11-01196 AWI	Eastern	7/19/2011	State Proceedings Pending	19
Randy Garcia	3/23/1995				State Proceedings Pending	19
Hooman Panah	3/26/1995	05-07606 RGK	Central	10/21/2005	Circuit Appeal Pending	19
Ernest Jones	4/7/1995	09-002158 CJC	Central	3/27/2009	CD Cal Petition Pending	19
Glen Cornwell	4/21/1995	06-00705 TLN	Eastern	3/31/2006	ED Cal Petition Pending	19
Mark Thornton	5/15/1995				State Proceedings Pending	19
Greg Demetrulias	5/22/1995	07-01335 DOC	Central	2/28/2007	Circuit Appeal Pending	19
Kerry Dalton	5/23/1995				State Proceedings Pending	19
Regis Thomas	6/15/1995				State Proceedings Pending	19
Lester Virgil	6/29/1995				State Proceedings Pending	19
Johnaton George	7/17/1995				State Proceedings Pending	19
Christopher Geier	7/21/1995	10-04676 R	Central	6/24/2010	State Proceedings Pending	19
Charles Rountree	8/11/1995				State Proceedings Pending	19
Christopher Lightsey	8/15/1995				State Proceedings Pending	19
Sergio Nelson	9/9/1995				State Proceedings Pending	19
Thomas Lenart	10/6/1995	05-01912 MCE	Eastern	9/21/2005	State Proceedings Pending	19
John Beames	10/11/1995	10-01429 AWI	Eastern	8/9/2010	ED Cal Petition Pending	19
Paul Hensley	10/13/1995				State Proceedings Pending	19
Loi Vo	10/18/1995				State Proceedings Pending	19
Stephen Hajek	10/18/1995				State Proceedings Pending	19
Donald Smith	10/19/1995				State Proceedings Pending	19
Leroy Wheeler	10/19/1995				State Proceedings Pending	19
Stanley Bryant	10/19/1995				State Proceedings Pending	19
William Suff	10/26/1995				State Proceedings Pending	19
William Suff	10/26/1995				State Proceedings Pending	19
Caroline Young	10/27/1995				Deceased (2005)	--
Douglas Kelly	11/8/1995				State Proceedings Pending	19
Ernest Dykes	11/30/1995	11-04454 SI	Northern	9/7/2011	ND Cal Petition Pending	19
Demetrius Howard	12/7/1995				State Proceedings Pending	19
John Cunningham	1/12/1996				State Proceedings Pending	18

Alfredo Valencia	1/23/1996				State Proceedings Pending	18
Valamir Morelos	2/21/1996				State Proceedings Pending	18
Jerry Rodriguez	2/21/1996				State Proceedings Pending	18
Steven Brown	2/23/1996				State Proceedings Pending	18
Dexter Williams	2/28/1996	12-01344 LJO	Eastern	8/17/2012	ED Cal Petition Pending	18
Richard Gamache	4/2/1996				State Proceedings Pending	18
Andre Alexander	4/23/1996	11-07404 JAK	Central	9/8/2011	State Proceedings Pending	18
Frank Carter	4/25/1996				Deceased (2001)	--
Robert Cowan	5/8/1996				State Proceedings Pending	18
Dennis Ervine	5/31/1996				State Proceedings Pending	18
Keith Taylor	6/5/1996				State Proceedings Pending	18
Eric Leonard	6/13/1996				State Proceedings Pending	18
Keith Doolin	6/18/1996	09-01453 AWI	Eastern	8/17/2009	State Proceedings Pending	18
Daniel Whalen	6/24/1996				State Proceedings Pending	18
Edward Morgan	7/19/1996				State Proceedings Pending	18
Clifton Perry	7/26/1996	11-01367 AWI	Eastern	8/16/2011	State Proceedings Pending	18
Raymond Butler	7/29/1996				State Proceedings Pending	18
Lamar Barnwell	8/9/1996				State Proceedings Pending	18
Freddie Fuiava	8/19/1996	12-10646 VAP	Central	12/12/2013	CD Cal Petition Pending	18
Christopher Self	8/28/1996				State Proceedings Pending	18
Albert Jones	9/20/1996				State Proceedings Pending	18
John Riccardi	9/20/1996				State Proceedings Pending	18
Bob Williams	9/20/1996	09-01068 AWI	Eastern	6/17/2009	State Proceedings Pending	18
Richard Davis	9/26/1996	13-00408 EMC	Northern	1/29/2013	ND Cal Petition Pending	18
Richard Leon	10/1/1996				State Proceedings Pending	18
Richard Parson	10/11/1996				Deceased (2011)	--
Darrel Lomax	10/16/1996	11-01746 JLS	Central	2/28/2011	State Proceedings Pending	18
Charles Case	10/25/1996				State Proceedings Pending	18
James Thompson	10/26/1996				State Proceedings Pending	18
Michael Elliot	10/31/1996				State Proceedings Pending	18
Christopher Spencer	11/7/1996				State Proceedings Pending	18

Brandon Taylor	11/13/1996				State Proceedings Pending	18
George Contreras	12/11/1996				State Proceedings Pending	18
Dewayne Carey	12/16/1996				State Proceedings Pending	18
Michael Pearson	12/18/1996				State Proceedings Pending	18
Scott Collins	12/19/1996	13-07334 JFW	Central	10/3/2013	CD Cal Petition Pending	18
Maurice Harris	12/20/1996	13-04026 PA	Central	6/5/2013	CD Cal Petition Pending	18
Richard Foster	12/31/1996				State Proceedings Pending	18
Michael Ihde	1/3/1997				Deceased (2005)	--
Eric Bennet	1/9/1997				State Proceedings Pending	17
Herbert McClain	1/21/1997				State Proceedings Pending	17
Karl Holmes	1/21/1997				State Proceedings Pending	17
Lorenzo Newborn	1/21/1997				State Proceedings Pending	17
Stephen Redd	2/28/1997				State Proceedings Pending	17
Jeffery Mills	3/10/1997				State Proceedings Pending	17
Joseph Montes	3/18/1997				State Proceedings Pending	17
Johnny Mungia	4/7/1997				State Proceedings Pending	17
Johnathan D'Arcy	4/11/1997				State Proceedings Pending	17
Jimmy Palma	6/11/1997				Deceased (1997)	--
Richard Valdez	6/11/1997				State Proceedings Pending	17
Daniel Silveria	6/13/1997				State Proceedings Pending	17
John Travis	6/13/1997				State Proceedings Pending	17
Robert Scully	6/13/1997				State Proceedings Pending	17
Ramon Rogers	6/30/1997				State Proceedings Pending	17
Lawrence Bergman	7/8/1997				Deceased (2009)	--
Bobby Lopez	7/11/1997				State Proceedings Pending	17
Michael Martinez	8/29/1997				State Proceedings Pending	17
Carlos Hawthorne	9/5/1997				State Proceedings Pending	17
John Famalaro	9/5/1997				State Proceedings Pending	17
Michael Bramit	9/15/1997				State Proceedings Pending	17
Royce Scott	9/17/1997				State Proceedings Pending	17
John Abel	9/26/1997				State Proceedings Pending	17
Ronald Mendoza	10/27/1997				State Proceedings Pending	17

Terrance Page	10/31/1997				Deceased (2008)	--
Frank Becerra	10/31/1997				State Proceedings Pending	17
Sean Vines	11/7/1997				State Proceedings Pending	17
Herminio Serna	11/21/1997				State Proceedings Pending	17
James Trujeque	11/21/1997				State Proceedings Pending	17
Frank Abilez	12/4/1997				Deceased (2012)	--
Gunner Lindberg	12/12/1997	09-05509 MWF	Central	7/28/2009	State Proceedings Pending	17
Floyd Smith	12/14/1997				State Proceedings Pending	17
Bill Poyner	12/16/1997				Deceased (1998)	--
Martin Mendoza	12/23/1997				State Proceedings Pending	17
William Clark	12/29/1997				State Proceedings Pending	17

[1] The chart describes the case status of any individual sentenced in 1997 or earlier because all such individuals, unless deceased, executed, or granted a writ of habeas corpus, have spent at least 17 years on Death Row, the amount of time Justice Stevens posited might be constitutionally problematic in *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., respecting the denial of certiorari). In total, 366 of the 746 inmates currently on California's Death Row were sentenced to death 17 or more years ago. For all but a small handful of those individuals sentenced to death *after* 1997, state proceedings are still ongoing, and none have completed the federal habeas process.

[2] The chart was compiled using publicly available information from the court dockets of the four federal judicial districts in California, the public docket of the California Supreme Court, and the California Department of Corrections and Rehabilitation's ("CDCR") list of condemned inmates, which is available at http://www.cdcr.ca.gov/capital_punishment/docs/condemnedinmatelistsecure.pdf, and the CDCR's list of condemned inmates who have died since 1978, which is available at http://www.cdcr.ca.gov/Capital_Punishment/docs/CONDEMNEDINMATESWHOHAVEDIEDSINCE1978.pdf.

[3] Federal habeas proceedings are initiated when the petitioner seeks appointment of federal habeas counsel, not when the petitioner's federal writ of habeas corpus is filed. Some individuals that have initiated federal habeas proceedings may still have state proceedings pending for exhaustion purposes. In such cases, the federal petition is effectively stayed while the state proceedings are completed.

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

ERNEST DEWAYNE JONES, Petitioner, v. KEVIN CHAPPELL, Warden of California State Prison at San Quentin, Respondent	Case No. CV-09-2158-CJC **DEATH PENALTY CASE**

FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS BY A PRISONER IN STATE CUSTODY (28 U.S.C. § 2254)

Living Center, 473 U.S. 432 (1985) ("all persons similarly situated should be treated alike"); (*supra* Claims Sixteen and Twenty-three.). Petitioner's moral culpability was substantially diminished by the severity of his mental illness, making his death verdict unlawfully disproportionate to his actual, personal responsibility for the crime. *Gregg v. Georgia*, 428 U.S. 153 (1976) (joint opinion of Stewart, Powell and Stevens, JJ) (a sentence that is "grossly out of proportion to the severity of the crime" violates the Eighth Amendment).

23. Petitioner's convictions and death sentence also are unlawful because the conduct of criminal proceedings and the imposition of the death penalty in a racially discriminatory manner violate provisions of international treaties binding upon the United States. (*See supra* Claims Fourteen, Nineteen, Twenty-two, and Twenty-five.)

24. State and federal procedural laws, rules or practices may not be applied to deprive petitioner of his international rights.

AA. CLAIM TWENTY-SEVEN: THE EXTRAORDINARILY LENGHTY DELAY IN EXECUTION OF SENTENCE IN MR. JONES'S CASE, COUPLED WITH THE GRAVE UNCERTAINTY OF NOT KNOWING WHETHER HIS EXECUTION WILL EVER BE CARRIED OUT, RENDERS HIS DEATH SENTENCE UNCONSTITUTIONAL.

Mr. Jones has spent nineteen years awaiting review of his conviction and sentence of death because California's death penalty system is dysfunctional. Moreover, because California's review process fails to correct constitutional errors in capital cases, Mr. Jones likely will spend several more years litigating his convictions and sentences. At the end of this lengthy process, Mr. Jones likely will be granted a new trial, just as the federal courts have done in the majority of California capital habeas corpus proceedings. Even should the state prevail in these proceedings, the state's inability to create a lawful execution procedure renders it gravely uncertain when or whether Mr. Jones's execution will ever be conducted. California's appellate and post-conviction processes thus has failed to provide Mr. Jones with a full, fair, and timely review of his conviction, and sentence, his confinement is rendered

unnecessarily lengthy, tortuous, and inhumane, and his execution is unconstitutional. Mr. Jones's sentence of death and continued confinement are unlawful and violate his rights to due process; equal protection; meaningful appellate review; and freedom from the infliction of torture and cruel and unusual punishment, ex post facto punishment, and double jeopardy as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, international law as set forth in treaties, customary law, international human rights law, including but not limited to the European Convention on Human Rights and international decisional law, and under the doctrine of jus cogens.

In support of this claim, Mr. Jones alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. The protracted period between the imposition of Mr. Jones's judgment of death and the filing of this Amended Petition has negated the purposes of the death penalty deemed constitutionally acceptable. Mr. Jones was arrested and charged with capital murder in August 1992 when he was twenty-eight years old. 1 CT 87-89; Ex. 26 at 268. He was formally sentenced to death on April 9, 1995, at age thirty. 2 CT 504; Ex. 26 at 268. He will be fifty years old on June 27, 2014. Ex. 26 at 268. To date, Mr. Jones has been on Death Row continuously under a sentence of death at San Quentin State Prison for nineteen years.

2. The length of time between the imposition of sentence and the final review of the legality of his convictions and death sentence is attributable to no fault of Mr. Jones. The delay is a direct consequence of inadequacies in California's death penalty system and the state's inability to implement capital punishment in a manner that does not violate the Constitution. "The elapsed time between judgment and execution in California exceeds that of every other death penalty state" (California Commission on the Fair Administration of Justice, Report and Recommendation on the Administration of the Death Penalty in California at 114 (Gerald Uelmen ed., 2008)

(Commission Report) (available at http://www.ccfaj.org/documents/CCFAJ FinalReport.pdf)), averaging over two decades for the handful of executions that have occurred in California (Commission Report at 116).

a. Mr. Jones was, and at all times has been, indigent and therefore forced to rely on the courts for the appointment of counsel in state and federal proceedings.

b. The California Supreme Court has had great difficulty recruiting experienced counsel to represent death-sentenced prisoners in automatic appeals because of the unique combination of skills necessary for such representation. Appeal from a judgment of death is automatic, mandatory, and cannot be waived by individuals sentenced to death. The obligation to undergo this process stems, in part, from the state's interest in insuring reliability in legal proceedings that result in a sentence of death. Moreover, counsel in a capital appeal have a duty to raise all meritorious issues, and the California Supreme Court has a duty to examine the complete record to determine whether the trial that resulted in a death sentence was fair. The delayed appeal process was typically lengthy in Mr. Jones's case. More than four years passed before the California Supreme Court appointed counsel to represent Mr. Jones in his automatic appeal on April 13, 1999. Mr. Jones's automatic appeal was not fully briefed until February 26, 2002. On March 17, 2003, the California Supreme Court affirmed Mr. Jones's conviction (*People v. Jones*, 29 Cal. 4th 1229, 64 P.3d 762 (2003)), and the judgment became final on October 21, 2003 (*Jones v. California*, 540 U.S. 952, 124 S. Ct. 395, 157 L. Ed. 2d 286 (2003)), over eight years after he was sentenced.

c. The California Supreme Court further delayed timely review of Mr. Jones's judgment during the state post-conviction proceedings. As a result of a lack of funding and other state created disincentives, recruitment of experienced counsel to represent death-sentenced prisoners has been virtually impossible. Commission Report at 133-36. At the time that Mr. Jones was appointed habeas corpus counsel in

2000, there were approximately 215 inmates on California's death row without habeas corpus counsel. Habeas Corpus Resource Center, Annual Report 1999-2000, at 6. Currently, there are 353 men and women under sentence of death in California without habeas corpus counsel.

d. Over five years after Mr. Jones was sentenced to death, on October 20, 2000, the California Supreme Court appointed the Habeas Corpus Resource Center to represent him in state habeas corpus proceedings. Mr. Jones filed his state petition on October 21, 2002,[21] containing detailed allegations of the constitutional claims asserted and supplied numerous supporting records and declarations.

e. The size of the court's caseload, and limitations on judicial resources, resulted in the passage of another six-and-a-half years before the court denied Mr. Jones's state habeas petition on March 11, 2009, without conducting a hearing or resolving factual disputes.

f. As with the automatic appeal process, California's state habeas process is in place to protect California's interest in safeguarding the rights of its citizens by ensuring compliance with the Constitution and the correctness of procedures resulting in sentences of death, as set forth in California Government Code section 68662. *In re Morgan*, 50 Cal. 4th 932, 941 n.7, 237 P.3d 993 (2010). The delay, therefore, is essential to California's vindication of its own interests and was not a stratagem on the part of Mr. Jones to postpone execution of his sentence.

3. As a consequence of California's inadequate review process, federal

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[21] At the time of filing the state petition, the California Supreme Court's policies provided that Mr. Jones's petition would be considered timely if it was filed two years from the date of appointment of counsel. The California Supreme Court has since determined that the minimum amount of time required to investigate and present legally sufficient challenges to a petitioner's conviction, sentence and confinement is three years. Supreme Court Policies Regarding Cases Arising from Judgments of Death, Policy 3 Timeliness Standard 1-1.1 (as amended Nov. 30, 2005) (available at http://www.courts.ca.gov/documents/ PoliciesMar2012.pdf).

litigation of Mr. Jones's challenges to his convictions and death sentence will be protracted and likely result in the granting of habeas corpus relief.

a. The California Supreme Court has granted some form of relief in capital habeas corpus proceedings only eighteen times since 1978. The Court summarily denies the overwhelming majority of capital habeas corpus petitions without any explication of its reasoning after reviewing only the petition and, usually, the requested informal briefing. Arthur L. Alarcón, *Remedies for California's Death Row Deadlock*, 80 S. Cal. L. Rev. 697, 741 (2007); see also Commission Report at 134. Indeed, the Supreme Court historically has issued orders to show cause in fewer than eight percent of habeas corpus proceedings, and held evidentiary hearings in less than five percent of the cases. Commission Report at 134; *see also* Judge Arthur L. Alarcon, *Remedies for California's Death Row Deadlock*, 80 S. Cal. L. Rev. at 741.

b. Mr. Jones timely filed a Petition for Writ of Habeas Corpus by a Prisoner in State Custody (28 U.S.C. § 2254) (Petition) on March 10, 2010, in this Court. ECF No. 26. Respondent filed an Answer to Petition for Writ of Habeas Corpus (Answer) on April 6, 2010, in which he generally denied each and every allegation raised by Mr. Jones. Answer at 22, 23, 25, 26, 28, 29, 31, 33, 35, 37, 38, 41, 42, 45, 47, 48, 50, 51, 53, 54, 56, 58, 60, 61, 63, 65, 67, 69, 71, & 72, ECF No. 28..

c. On February 17, 2011, Mr. Jones filed a Motion for Evidentiary Hearing. ECF No. 59. On April 4, 2011, the United States Supreme Court issued its opinion in *Cullen v. Pinholster*, __ U.S. __, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011), holding that the bar to federal habeas corpus relief set forth in 28 U.S.C. section 2254(d)(1) must be evaluated solely by reference to "the record that was before the state court that adjudicated the claim on the merits." *Id*. at 1398. In response to the opinion, this Court vacated the remaining briefing schedule for Mr. Jones's Motion for Evidentiary Hearing and ordered the parties to brief Mr. Jones's entitlement to an evidentiary hearing in light of *Pinholster*, which they completed. *See* ECF Nos. 62, 68, 71, & 74. In an order denying Mr. Jones's Motion for an Evidentiary Hearing

without prejudice, this Court ordered the parties to conduct merits briefing to "set forth how each claim satisfies section 2254(d)(1) and/or section 2254(d)(2) on the basis of the record that was before the state court that adjudicated the claim on the merits." ECF No. 75. That briefing was completed on January 27, 2014. *See* ECF Nos. 84, 91, & 100.

d. Litigation in this Court and the appellate courts likely will be protracted, further delaying the ultimate resolution of whether his judgment is constitutionally infirm. Moreover, much of the delay in federal court proceedings is "attributable to the absence of a published opinion and/or evidentiary hearing in the state courts." Commission Report at 123.

e. In stark contrast to the Supreme Court's rates of affirmance and denial in death penalty cases, federal courts have granted relief in federal habeas corpus proceedings arising from California death judgments in more than a majority of the cases reviewed. As reported by the Commission on the Fair Administration of Justice in 2008, "federal courts have rendered final judgment in 54 habeas corpus challenges to California death penalty judgments" and "[r]elief in the form of a new guilt trial or a new penalty hearing was granted in 38 of the cases, or 70%." Commission Report at 115. Between the 2008 publication of the Commission's report and an article on California's death penalty system authored by Judge Alarcon and Paula M. Mitchell in 2011, "federal habeas corpus relief has been granted in five additional cases, and denied in four additional cases, all of which are final judgments, making the rate at which relief has been granted 68.25%." Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Debacle*, 44 Loy. L.A. L. Rev. S41, S55 n.26 (2011).

4. The death penalty as currently implemented in California has functionally deprived Mr. Jones of his due process right of access to the courts. *See e.g.*, *Jones v. State*, 740 So. 2d 520 (Fla. 1999) (holding twelve year delay in holding competency

hearing while defendant on death row violated due process). In that case, the Florida Supreme Court likened the egregious delay to hold a competency hearing to the delays in death penalty appeals criticized as excessive by Justice Breyer in *Elledge v. Florida*, 525 U.S. 944, 119 S. Ct. 366, 142 L. Ed. 2d 303 (1998).

5. Prolonged confinement under sentence of death is physically and psychologically torturous in violation of the Eighth Amendment to the Constitution of the United States.

a. At San Quentin, Mr. Jones has been housed with several hundred other condemned inmates in East Block. East Block is "a looming warehouse-like structure constructed in 1930," and is described as being the length of two football fields, forty yards wide, and six stories high. "It is like a giant empty warehouse into which a smaller five-story concrete structure has been concentrically placed." The five stories, or tiers, have two sides. Each side of these five tiers contains approximately 54 cells, making approximately 250 cells per side, and 500 cells in the block. "Each cell is fully encased by concrete, with a grated metal door that adjoins the narrow walkway running the length of the tier." Armed officers patrol narrow gun rails built into the outer wall. There are two such gun rails that run the circumference of the four interior walls. Guards look into the cells across the space separating the gun rails from the tiers. *Lancaster v. Tilton*, No. C 79-01630 WHA, 2008 WL 449844 at *5 (N.D. Cal. Feb. 15, 2008). Mr. Jones lives in a windowless, six by eight foot cell with three concrete walls and bars on the cell front, fitted with metal grating. *See Toussaint v. McCarthy,* 597 F. Supp. 1388, 1394-95 (N.D. Cal. 1984), *aff'd in part, rev'd in part*, 801 F.2d 1080 (9th Cir. 1986).

b. During Mr. Jones's confinement on Death Row, living conditions there have been found so substandard, unhealthy, and inhumane, and the medical and mental health care determined to be so deficient and below minimally acceptable constitutional standards - both on the Row and in other relevant areas of San Quentin - that lawsuits and the long-term intervention and oversight of the courts have been

required. *See, e.g.*, *Plata v. Brown*, Case No. C-01-1351 TEH (N.D. Cal.) (finding prison medical care, including that on Death Row, to be deficient); *Coleman v. Wilson*, 912 F. Supp. 1282 (E.D. Cal. 1995) (concerning deficiencies in prison mental health care); *Thompson v. Enomoto*, 815 F.2d 1323 (9th Cir. 1987) (alleging conditions and treatment on Death Row violate Eighth and Fourteenth Amendments); *Toussaint*, 597 F. Supp. 1388 (describing conditions in East Block); *Lancaster*, 2008 WL 449844 (continuation of Thompson litigation).

c. Since Mr. Jones's confinement at San Quentin in 1995, twelve men have been executed (one in Missouri), thirteen have committed suicide, and sixty have died of natural causes or other means. During this time, several of the executions have been botched, and unprecedented publicity has focused on the torturous nature of the method of execution in California.

6. California does not currently have a method of execution that comports with state and federal law.

a. California Penal Code Section 3604(a) provides that "[t]he punishment of death shall be inflicted by the administration of a lethal gas or by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, by standards established under the direction of the Department of Corrections."

b. California's use of lethal gas executions has been found to violate the Eighth Amendment. *Fierro v. Gomez*, 865 F. Supp. 1387 (N.D. Cal. 1994) (finding that California's method of execution by lethal gas was cruel and unusual under the Eighth Amendment, due to the pain inflicted and the evidence of the rejection of the method by society), *vacated on other grounds*, *Fierro v. Terhune*, 147 F.3d 1158 (1998) (holding that current plaintiffs lacked standing). In addition, the California Department of Corrections and Rehabilitation (CDCR) has not issued lawful regulations to conduct such executions.

c. Because of litigation challenging California's lethal injection

protocol, there have been no executions since January 2006. In December 2006, the United States District Court for the Northern District of California declared the manner in which the CDCR implemented its lethal injection protocol violated the Eighth Amendment's prohibition on cruel and unusual punishment. *Morales v. Tilton* 465 F. Supp. 2d 972 (N.D. Cal. 2006).

d. In May 2007, the CDCR revised its lethal injection protocol. The CDCR, however, failed to follow the appropriate regulatory process, and the Marin County Superior Court enjoined the CDCR from executing condemned inmates by lethal injection until the necessary regulations were enacted in compliance with the California Administrative Procedures Act (APA). The CDCR appealed and, in 2008, the California Court of Appeal affirmed the trial court's decision. *Morales v. California Dept. of Corrections & Rehabilitation*, 168 Cal. App. 4th 729, 85 Cal. Rptr. 3d 724 (2008).

In response, the CDCR began to promulgate new regulations in May 2009, the validity of which were once again challenged in state court. In May 2013, the California Court of Appeal held that the revised protocol was invalid for failure to comply with the provisions of the APA, and permanently enjoined the execution of any inmate by lethal injection unless and until new regulations governing lethal injection are promulgated. *Sims v. Dep't of Corr. & Rehab.*, 216 Cal. App. 4th 1059, 1064, 157 Cal. Rptr. 3d 409, 413 (2013)

e. At this time, California does not have a lethal injection protocol in place. *Morales v. Cate*, 5-6-CV-219-RS-HRL, 2012 WL 5878383 (N.D. Cal. Nov. 21, 2012). Moreover, California will not have a valid lethal injection protocol for the foreseeable future because the state must first comply with the APA requirements for publishing the regulations and responding to comments and because any such regulations likely will be subjected to protracted litigation in state and federal court.

7. A death sentence, such as Mr. Jones's, that does not serve legitimate and substantial penological goals, and that cannot be accomplished by alternative sentence

violates the Eighth Amendment. The legitimate penological goals of a death sentence are deterrence and retribution. *See, e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008); *Gregg v. Georgia*, 429 U.S. 153, 183, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). *But see Furman v. Georgia*, 408 U.S. 238, 343, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (Marshall, J., concurring) ("Retaliation, vengeance, and retribution have been roundly condemned as intolerable aspirations for a government . . . Punishment as retribution has been condemned by scholars for centuries, and the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance.") (citations omitted). A punishment is deemed excessive and unconstitutional if it serves no penological purpose more effectively than would a less severe punishment. *See, e.g., Furman*, 408 U.S. at 280 (Brennan, J., concurring), 312-13 (White, J., concurring); *Ceja v. Stewart*, 134 F.3d 1368, 1373-78 (9th Cir. 1998).

8. Execution of Mr. Jones following lengthy and torturous incarceration constitutes cruel and unusual punishment both because of the physical and psychological suffering inflicted on Mr. Jones, and because of the failure of such an extraordinary sentence to serve any legitimate state interest. *See, e.g.*, *Thompson v. McNeil*, 129 S. Ct. 1299, 129 S. Ct. 1299 (2009) (statement of Justice Stevens respecting the denial of the petition for writ of certiorari); *Knight v. Florida*, 528 U.S. 990, 120 S. Ct. 459, 145 L. Ed. 2d 370 (Breyer, J., dissenting from denial of certiorari); *Elledge v. Florida*, 525 U.S. 944 (1998) (Breyer, J., dissenting from denial of certiorari); *Lackey v. Texas*, 514 U.S. 1045, 1047, 115 S. Ct. 1421, 131 L. Ed. 2d 304 (1995) (Stevens, J., joined by Breyer, J., respecting the denial of certiorari); *Ceja v. Stewart*, 134 F.3d 1368 (9th Cir. 1998) (Fletcher, J., dissenting from order denying stay of execution). Delay in the execution of death judgments "frustrates the public interest in deterrence and eviscerates the only rational justification for that type of punishment." *Gomez v. Fierro*, 519 U.S. 918, 117 S. Ct. 285, 136 L. Ed. 2d 204 (1996) (Stevens, J., dissenting).

9. Carrying out Mr. Jones's sentence after this extraordinary delay violates

the Eighth Amendment:

a. To confine an individual, such as Mr. Jones, on death row for a protracted period of time constitutes cruel and unusual punishment. *See e.g.*, *Knight v. Florida*, 528 U.S. at 990; *Lackey v. Texas*, 514 U.S. at 1047. Over a century ago, the United States Supreme Court recognized that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *In re Medley*, 134 U.S. 160, 172, 10 S. Ct. 384, 33 L. Ed. 835 (1890); *see also Solesbee v. Balkcom*, 339 U.S. 9, 14, 70 S. Ct. 457, 94 L. Ed. 604 (1950) (Frankfurter, J., dissenting) ("In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon").

b. Execution following lengthy and torturous incarcerations constitutes cruel and unusual punishment because the State's ability to exact retribution and deter other serious offenses by actually carrying out such a sentence is drastically diminished. *See, e.g.*, *Ceja v. Stewart*, 134 F.3d 1368 (9th Cir. 1998).

(1) To survive Eighth Amendment scrutiny, a death sentence must serve legitimate and substantial penological goals. When the death penalty "ceases realistically to further these purposes, . . . its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Furman*, 408 U.S. at 312; *see also Gregg v. Georgia*, 428 U.S. at 183 ("[T]he sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.").

(2) In order to satisfy the Eighth Amendment, "the imposition of the death penalty must serve some legitimate penological end that could not be otherwise accomplished. If 'the punishment serves no penal purpose more effectively than a less severe punishment,' then it is unnecessarily excessive within the meaning of

the Punishments Clause." *Ceja v. Stewart*, 134 F.3d at 1373 (quoting *Furman*, 408 U.S. at 280 (1972) (Brennan, J., concurring)).

c. Mr. Jones has had the uncertainty of awaiting execution of his sentence for nineteen years. The acceptable state interest in retribution is and has been satisfied by the psychological and physical harshness and severity of that sentence. In Medley, the period of uncertainty in question was just four weeks. 134 U.S. at 172. "That description should apply with even greater force" here in Mr. Jones's case where the delay has lasted nineteen years and will likely be several more years. *Lackey*, 514 U.S. at 1045-47 (Stevens, J., dissenting from denial of certiorari).

d. The state's interest also has been satisfied by the additional deterrent effect of many years in prison and a continued life of incarceration. The additional deterrent effect of an actual execution in this case is minimal at best.

10. The application of the Eighth Amendment in this context must be interpreted in light of evolving public opinion. "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100-01, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958) (footnote omitted). Moreover, "the Clause forbidding 'cruel and unusual' punishments 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.'" Gregg, 428 U.S. at 171 (quoting Weems v. United States, 217 U.S. 349, 378, 30 S. Ct. 544, 54 L. Ed 793 (1910)). Since 1995, the year Mr. Jones was sentenced to death, forty-one countries have abolished the death penalty for all crimes, *see* Amnesty International (available at http://www.amnesty.org/en/death-penalty/countries-abolitionist-for-all-crimes). Since Mr. Jones's arrival on Death Row, six states have abolished capital punishment - New York and New Jersey in 2007; New Mexico in 2009; Illinois in 2011; Connecticut in 2012; and Maryland in 2013. *See* Death Penalty Information Center (available at http://www.deathpenaltyinfo.org/ states-and-without-death-penalty). A closely divided electorate very nearly abolished capital punishment in California in the general

election of 2012. Society is clearly maturing and evolving away from imposition of the death penalty. As consensus grows, the more obvious it becomes that execution of an inmate following a long and torturous incarceration under sentence of death violates the standards of decency that give the Eighth Amendment its meaning.

11. Mr. Jones's prolonged confinement under sentence of death violates international human rights law.

a. The European Court of Human Rights has held that protracted postconviction, pre-execution confinement is a human rights violation of sufficient magnitude to prohibit the United Kingdom from sending an accused to face such a fate. *Soering v. United Kingdom*, App. No. 14038/88, 11 Eur. H. R. Rep. 439 (1989) (six to eight year delay before execution in Virginia prohibited United Kingdom from extraditing potential capital defendant to that state).

b. The Canadian Supreme Court cited such delays as a relevant consideration in deciding that extradition of a murder suspect to the United States without first obtaining assurances that the death penalty would not be imposed violated principles of fundamental justice. *United States v. Burns*, 1 S.C.R. 283, 353 (2001).

c. Courts in other countries, even those assuming the lawfulness of a death sentence, have held that "lengthy delay in administering a lawful death penalty renders ultimate execution inhuman, degrading, or unusually cruel." *Knight v. Florida*, 120 S. Ct. at 462 (Breyer, J., dissenting from denial of certiorari). A delay of fourteen years (less than the amount of time Mr. Jones has been condemned) is deemed "shocking," and delays of more than five years are described as "inhuman or degrading punishment." *Id*. at 463 (internal citations omitted).

12. Moreover, the state has no legitimate penological interest (deterrent or retributive) in executing Mr. Jones and his execution would involve the needless infliction of avoidable mental anguish and psychological pain and suffering were it to occur because of the unique facts of his case. The facts and exhibits set forth in claims 1, 2, 3, 4, 19, 25, and 28 concerning petitioner's mental state at the time of the crime

and serious questions about his role in the crime, his character and background, and his neurocognitive and mental vulnerabilities are incorporated by this reference.

13. The cruelty that has attended the delay to date of the execution of Mr. Jones's death sentence renders that sentence excessive under currently prevailing and evolving standards of decency under the state and federal constitutions, as well as international law. Accordingly, Mr. Jones's death sentence is unconstitutional.

BB. CLAIM TWENTY-EIGHT: PETITIONER WAS DEPRIVED OF THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL.

Petitioner's conviction, sentence, and confinement were unlawfully obtained in violation of petitioner's Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights. Petitioner was denied his right to due process, equal protection, the right to counsel and the effective assistance thereof, full and fair appellate proceedings, and a reliable determination of his guilt, death eligibility, and punishment due to appellate counsel's representation, which prejudicially fell below minimally acceptable standards of competence by counsel acting as a zealous advocate in a capital case.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing.

1. The California Supreme Court appointed appellate counsel to represent petitioner in his automatic appeal on April 13, 1999. The court certified the record on April 28, 2000. Thereafter, appellate counsel requested and received seven extensions of time. Appellate counsel filed petitioner's direct appeal brief on June 19, 2001, and the reply brief on February 26, 2002.

2. Omissions by appellate counsel, such as the failure to present all available facts in support of legal claims, the failure to advance legal claims that could have been raised on appeal because they fully appear on the certified record, or the failure to advance every available legal basis for a litigated claim were not the product of a

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ERNEST DEWAYNE JONES, Petitioner, v. KEVIN CAPPELL, Warden of California State Prison at San Quentin, Respondent.	CASE NO. CV 09-02158 CJC **DEATH PENALTY CASE** ORDER DIRECTING PETITIONER TO FILE AMENDMENT TO PETITION

This Court believes petitioner may have a viable claim for habeas relief based on the long delay in the execution of his death sentence as a result of the extremely protracted nature of post-conviction proceedings in state and federal court in his case, coupled with the grave uncertainty of not knowing whether his execution will ever, in fact, be carried out. See, e.g., Gomez v. Fierro, 519 U.S. 918, 918-19 (1996) (Stevens, J., dissenting); Ceja v. Stewart, 134 F.3d 1368, 1369-78 (9th Cir.) (Fletcher, J., dissenting), cert. denied, 522 U.S. 1085 (1998).

THEREFORE, THE COURT ORDERS:

1. Within 14 days of the filing date of this Order, petitioner shall serve and file an amendment to his operative petition for writ of habeas corpus alleging s claim that the long delay in execution of sentence in his case, coupled with the grave uncertainty of not knowing whether his execution will ever, in fact, be carried out, renders his death sentence unconstitutional.

2. In the briefing contemplated by this Court's Order of April 10, 2014, the parties shall address, in addition to the issues raised in that order, whether petitioner's new claim states a viable basis for granting habeas corpus relief.

IT IS SO ORDERED.

Dated: April 14, 2014.

Cormac J. Carney
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ERNEST DEWAYNE JONES, Petitioner, v. KEVIN CAPPELL, Warden of California State Prison at San Quentin, Respondent.	CASE NO. CV 09-02158 CJC **DEATH PENALTY CASE** ORDER RE: BRIEFING AND SETTLEMENT DISCUSSIONS

This Court is extremely troubled by the long delays in execution of sentence in this and other California death penalty cases.

In claim 27, petitioner contends that his continuous confinement since 1995 under a death sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment under the principles which Justice Stevens articulated in his memorandum "respecting the denial of certiorari" in Lackey v. Texas, 514 U.S. 1045 (1995) (denying petition for writ of certiorari). (Pet., at 414-

18). While the death penalty can be justified by "retribution and deterrence of capital crimes by prospective offenders," an execution "cannot be so totally without penological justification that it results in the gratuitous infliction of suffering." Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion). Justice White, concurring in Furman v. Georgia, 408 U.S. 238 (1972), opined that:

> At the moment that [a proposed execution] ceases realistically to further these purposes [of deterrence and the coherent expression of moral outrage], the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment. It is my view that it would, for its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.

Furman, 408 U.S. at 312April 10, 2014 (White, J., concurring).

In addition, the State has a strong interest in expeditiously "exercising its sovereign power to enforce the criminal law." In re Blodgett, 502 U.S. 236, 239 (1992). In this California capital case, this interest

has been utterly stymied for two reasons. First, in California, the state and federal procedures for litigating, post-conviction, a capital defendant's Constitutional claims are especially protracted and fraught with delay. See generally, Judge Arthur L. Alarcón and Paula M. Mitchell, Executing the Will of the Voters?: a Roadmap to Mend or End the California Legislature's Multi-billion-dollar Death Penalty Debacle, 44 Loy. L. Rev. 41 (2011); Judge Arthur L. Alarcón, Remedies for California's Death Row Deadlock, 80 S. Cal. L. Rev. 697 (2007).

Second, all California executions have been indefinitely stayed while the courts resolve the Constitutionality of California's lethal injection protocol. See, e.g., Morales v. Cate, 2012 WL 5878383, at *1-*3 (N.D.Cal., Nov. 21, 2012) (summarizing the protracted procedural history of litigation in the Northern District of California, in which the plaintiffs have challenged California's execution protocol as unconstitutional, noting that, "California at this juncture lacks a lethal-injection protocol that is valid under state law.").

Thus, in addition to facing the uncertainty that, as Justice Stevens and Justice Blackmun noted in their opinions in Lackey and Furman, all capital defendants face while they await execution, in this case, both petitioner

and the State must labor under the grave uncertainty of not knowing whether petitioner's execution will ever, in fact, be carried out.

The Court believes this state of affairs is intolerable, for both petitioner and the State, and that petitioner may have a claim that his death sentence is arbitrarily inflicted and unusually cruel because of the inordinate delay and unpredictability of the federal and state appellate process.

The Court believes that briefing and oral argument are necessary and appropriate on petitioner's potential claim. Accordingly, the Court sets the following briefing and hearing schedule:

1. The parties shall serve and file simultaneous opening briefs which address the issues raised in this Order no later than **June 9, 2014.**

2. The parties shall serve and file simultaneous responsive briefs which address the issues raised in this Order no later than 45 days after the opening briefs have been served and filed.

3. The parties shall serve and file simultaneous reply briefs which address the issues raised in this Order no later than 30 days after the responsive briefs have been served and filed.

4. The Court will set a hearing date shortly after the parties have filed their simultaneous replies.

The parties are encouraged to submit, and to address in their briefing, the relevant statistics reported in the two law review articles referenced above, as well as any other reliable studies or public records addressing the delay associated with the administration of California's death penalty, the number of individuals on death row and the likelihood that any of those individuals will ever be executed or will instead die of natural causes or suicide.

In addition, the Court believes that, particularly in light of the state of affairs described above, this case may benefit from mediation or settlement discussions. Therefore, the parties are ORDERED to meet and confer, and to submit to the Court within 60 days of the filing date of this order a joint statement discussing whether mediation or settlement discussions would be appropriate in this case, and, if so, what form the mediation or discussions should take, including whether it would be appropriate for the Court to appoint a mediation Judge.

IT IS SO ORDERED.

Dated: April 10, 2014.

Cormac J. Carney
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

ERNEST DEWAYNE JONES, Petitioner, v. ROBERT K. WONG, Acting Warden of California State Prison at San Quentin, Respondent	Case No. CV-09-2158-CJC **DEATH PENALTY CASE**

PETITION FOR WRIT OF HABEAS CORPUS BY A PRISONER IN STATE CUSTODY (28 U.S.C. § 2254)

mental illness and was as a result unable to conform his conduct to the requirements of the law. *See Atkins v. Virginia*, 536 U.S. 304 (2002); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) ("all persons similarly situated should be treated alike"); (*supra* Claims Sixteen and Twenty-three.). Petitioner's moral culpability was substantially diminished by the severity of his mental illness, making his death verdict unlawfully disproportionate to his actual, personal responsibility for the crime. *Gregg v. Georgia*, 428 U.S. 153 (1976) (joint opinion of Stewart, Powell and Stevens, JJ) (a sentence that is "grossly out of proportion to the severity of the crime" violates the Eighth Amendment).

23. Petitioner's convictions and death sentence also are unlawful because the conduct of criminal proceedings and the imposition of the death penalty in a racially discriminatory manner violate provisions of international treaties binding upon the United States. (*See supra* Claims Fourteen, Nineteen, Twenty-two, and Twenty-five.)

24. State and federal procedural laws, rules or practices may not be applied to deprive petitioner of his international rights.

AA. CLAIM TWENTY-SEVEN: EXECUTION FOLLOWING A LONG PERIOD OF CONFINEMENT UNDER A SENTENCE OF DEATH WOULD VIOLATE PETITIONER'S RIGHT TO BE FREE FROM CRUEL, TORTUROUS, AND UNUSUAL PUNISHMENT.

Petitioner's sentence of death and continued confinement are unlawful and unconstitutional under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and international law as set forth in treaties, customary law, international human rights law, and under the doctrine of *jus cogens* because the California death penalty post-conviction procedures failed to provide petitioner with a constitutionally full, fair, and timely review of his conviction and sentence.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Petitioner was sentenced to death on April 7, 1995. (2 CT 504.)

2. Through no fault of petitioner, more than four years passed before the California Supreme Court appointed counsel on April 13, 1999, to represent petitioner on appeal.

3. Through no fault on petitioner's part, Appellant's Opening Brief was not filed until June 19, 2001, more than two years after the initial appointment of counsel. Respondent's Brief on appeal was filed on November 6, 2001, and Appellant's Reply Brief was filed on February 26, 2002.

4. Petitioner's conviction and sentence were affirmed by the California Supreme Court on March 17, 2003, and petitioner's petition for a writ of certiorari to the United States Supreme Court was denied on October 14, 2003, over eight years after he was sentenced to death.

5. Petitioner's state habeas petition was filed on October 21, 2002. His state habeas petition was denied by the California Supreme Court on March 11, 2009, fourteen years after he was sentenced to death.

6. California's procedure for review of death judgments does not permit a condemned person to choose whether he wishes to appeal his sentence, as the appeal is automatic. Cal. Penal Code § 1239(b). But even if it did, petitioner's right to make use of the automatic appeal and habeas corpus remedies provided by law in California does not negate the cruel and degrading character of the length of continuous confinement of many years under a judgment of death. Petitioner had no control over the major causes of delay in his case, including delays in the appointment of his counsel.

7. Petitioner was received at San Quentin on April 24, 1995, and assigned to Death Row, where he currently lives.

8. Since petitioner's confinement at San Quentin in 1995, eleven men have been executed, several inmates came within hours of their execution before those executions were stayed, eight more committed suicide, and forty-five more have died of natural causes or violent means, and the cause of death of one additional man is still

being investigated by the Marin County Coroner. During this time, several of the executions have been botched, and unprecedented publicity has focused on the torturous nature of the method of execution currently employed in California.

9. Petitioner lives in a solitary cell, a 5-by-10 foot box, consisting of three concrete walls and a fourth wall of bars and wire mesh. Petitioner cannot see other prisoners through the bars. Either in or out of his cell, petitioner is under surveillance by one or more guards armed with loaded weapons. He eats meals in his cell, and is restricted severely in the amount and type of personal property that he is permitted to possess. His time out of his cell is restricted and whenever he is transported he is handcuffed behind his back.

10. The United States stands virtually alone among the nations of the world in confining individuals for periods of many years continuously under a sentence of death.

a. The international community recognizes that, without regard for the question of the appropriateness or inappropriateness of the death penalty itself, prolonged confinement under these circumstances is cruel and degrading and in violation of international human rights law. *Pratt v. Attorney General for Jamaica*, 4 All.E.R. 769 (P.C. 1993); *Soering v. United Kingdom*, 11 E.H.R.R. 439, 440-41 (1989) (Eur. Ct. H.R.).

b. *Soering* specifically held that, for this reason, it would be unlawful for the government of Great Britain to extradite a man under indictment for capital murder in the State of Virginia, in the absence of assurances that he would not be sentenced to death.

c. The developing international consensus demonstrates that, in addition to being cruel and degrading, what the Europeans refer to as the "death row phenomenon" in the United States is also "unusual," within the meaning of the Eighth Amendment, entitling petitioner to relief for that reason as well.

d. The delay in final resolution of cases in California far exceeds that

of any other state with capital punishment. The excessive delay thus violates the Eighth Amendment's evolving standards of decency.

11. Execution of petitioner following such confinement under a sentence of death for this lengthy period of time would constitute cruel and unusual punishment because of the physical and psychological suffering inflicted on petitioner.

a. Given the psychologically torturous, degrading, brutalizing, and dehumanizing experience of living on Death Row, the confinement itself constitutes cruel and unusual punishment.

b. "[W]hen a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *In re Medley,* 134 U.S. 160, 172 (1890) (four week period of confinement); *see also Lackey v. Texas,* 514 U.S. 1045 (1995) (Stevens, J., joined by Breyer, J., respecting the denial of certiorari) (seventeen years).

12. Execution of petitioner following such confinement under a sentence of death for this lengthy period of time would constitute cruel and unusual punishment because the State's ability to exact retribution and to deter other serious offenses by actually carrying out such a sentence is drastically diminished, such that this extraordinary sentence does not serve any legitimate state interest.

a. Imposition of a death sentence must serve legitimate and substantial penological goals that could not otherwise be accomplished in order to survive Eighth Amendment scrutiny.

b. If the punishment serves no penal purpose more effectively than a less severe punishment, then it is unnecessarily excessive within the meaning of the Punishments Clause. *Furman v. Georgia,* 408 U.S. 238, 280 (Brennan, J. concurring) (1974); *id.* at 312-13, (White, J. concurring); *Ceja v. Stewart,* 134 F.3d 1368, 1373-78 (9th Cir. 1998) (Fletcher, J. dissenting from order denying stay of execution).

c. A death sentence executed against petitioner serves neither a

deterrent nor retributive purpose given his extended existence on Death Row. The acceptable state interest in retribution has been satisfied by the psychological and physical severity of his sentence and the additional deterrent effect after many years in prison (and a continuing lifetime of incarceration) is minimal at best.

13. Because of the following circumstances, the state has no legitimate penological interest (deterrent or retributive) in executing petitioner and his execution would involve the needless infliction of avoidable mental anguish and psychological pain and suffering were it to occur.

a. The facts and exhibits set forth in claims One, Four, Sixteen, and Twenty-three concerning petitioner's mental state at the time of the crime, his character and background, and his neurocognitive and mental vulnerabilities are incorporated by this reference.

b. Eighteen years have passed since his arrest and approximately fifteen years have passed since the judgment of death occurred; several more years likely will pass before his sentence, if affirmed, will be implemented.

14. Petitioner's sentence of death under these circumstances is prohibited by the Constitution and must be set aside and modified.

BB. CLAIM TWENTY-EIGHT: PETITIONER WAS DEPRIVED OF THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL.

Petitioner's conviction, sentence, and confinement were unlawfully obtained in violation of petitioner's Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights. Petitioner was denied his right to due process, equal protection, the right to counsel and the effective assistance thereof, full and fair appellate proceedings, and a reliable determination of his guilt, death eligibility, and punishment due to appellate counsel's representation, which prejudicially fell below minimally acceptable standards of competence by counsel acting as a zealous advocate in a capital case.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA	)	
	)	
Plaintiff and Respondent,	)	
	)	Crim. No. S046117
v.	)	
	)	Los Angeles County
ERNEST DWAYNE JONES	)	No. BA063825
	)	
Defendant and Appellant.	)	
	)	

AUTOMATIC APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF LOS ANGELES COUNTY THE HONORABLE EDWARD A. FERNS

APPELLANT'S OPENING BRIEF

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XVIII. BECAUSE DEATH SERVES NO LEGITIMATE PENOLOGICAL OR SOCIETAL PURPOSE AFTER THE EXTRAORDINARY DELAY BETWEEN SENTENCE AND EXECUTION, AND BECAUSE OF THE RESULTING EXTENSIVE SUFFERING OF THE INMATE, INTERNATIONALLY RECOGNIZED AS THE "DEATH ROW PHENOMENON," BOTH LARGELY THE RESULT OF INADEQUATE RESOURCES PROVIDED BY THE STATE TO REVIEW DEATH VERDICTS AND THE COMPLEXITY OF REVIEW MANDATED BY PAST ABUSES, IMPOSITION OF THE DEATH PENALTY IS A VIOLATION OF THE NORMS OF A CIVILIZED SOCIETY AND THUS OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

In *Lackey v. Texas* (1995) 514 U.S. 1045, in a memorandum respecting the denial of certiorari, Justice Stevens addressed petitioner Lackey's argument that executing a prisoner who has already spent seventeen years on death row would violate the Eighth Amendment's prohibition against cruel and unusual punishment. Justice Stevens stated that "though novel, petitioner's claim is not without foundation," and "petitioner's claim, with its legal complexity and its potential for far-reaching consequences, seems an ideal example of one which would benefit from further study" by state and federal courts. (*Ibid.*) Justice Breyer noted his agreement, stating that "the issue is an important undecided one." (*Ibid.; accord, Ceja v. Stewart* (9th Cir. 1998) 134 F.3d 1368, 1369 (Fletcher, J., dissenting).)

Two years ago, Justice Breyer again agreed with Justice Steven's analysis in *Lackey* in another dissent from the denial of certiorari. (*Knight v. Florida* (1999) 528 U.S. 990.) In a case where the petitioner had been on Death Row for 20 years, Justice Breyer argued that "[w]here a delay, measured in decades, reflects the State's own failure to comply with the Constitution's demands, the claim that time has rendered the execution inhuman is a particularly strong one." (*Id.*, at p. 8, slip opn., 120 S.Ct. 459,

p. 8.) Justice Breyer noted that as of 1997, there were 125 people on Death Row in the United States who had been convicted during or prior to 1980. (*Id.*, at p. 21, slip opn.)

Jones respectfully requests that this court address this important issue and hold that the extraordinary delay in this and other cases renders the imposition of the death penalty cruel and unusual within the meaning of the Eighth Amendment to the United States Constitution, as well as the Due Process Clauses of the Fifth and Fourteenth Amendments.

The "death row phenomenon" is the term used to describe the cumulative circumstances—including both the physical conditions and the emotional and mental anguish—that a death row inmate necessarily faces over a period of years as part of his daily existence there. This aspect of the sentence of death is recognized by international norms as affecting whether the sentence in a particular case constitutes torture or inhuman or degrading punishment. (*Soering v. United Kingdom* (1989) 161 Eur. Ct. H.R. (ser. A), at p. 34 [reprinted in 11 Eur. Hum. Rts. Rep. 439] [hereinafter *Soering*]; *accord*, *Lackey v. Texas*, *supra*, 514 U.S. 1045 (memorandum of Justice Stevens respecting the denial of certiorari).)

"Combine a hospital ward for the terminally ill, an institution for the criminally insane, and an ultramaximum security wing in a penitentiary, and one begins to approach the horror of death row. The inherent dangerousness of the inmates, their utter despair, the futility of any efforts at rehabilitation or training all contribute to a carceral environment that combines extreme security measures, confinement to cells for most of the day, and virtual inactivity." (William A. Schabas, *Developments in Criminal Law and Criminal Justice: Execution Delayed, Execution Denied* (1994) Rutgers Univ. School of Law 5 Crim. L.F. 180, 184.)

In his *Lackey* dissent, Justice Stevens noted that there had been frequent commentators on the toll of those waiting years, citing the

following authorities: "*People v. Anderson* (1972) 6 Cal.3d 628 ('The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture') (footnote omitted); *Furman v. Georgia* (1972) 408 U.S. 238, 288-289 (Brennan, J., concurring) ('The prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death'); *Solesbee v. Balkcom,* 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting) ('In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon'); *Suffolk County District Attorney v. Watson*, 381 Mass. 648, 673, 411 N.E.2d 1274, 1287 (1980) (Braucher, J. concurring) (death penalty is unconstitutional under state constitution in part because 'it will be carried out only after agonizing months and years of uncertainty'); id., at 675-686, 411 N.E.2d at 1289-1295 (Liacos, J., concurring). (Lackey v. Texas, supra, 514 U.S. at 1045; see also Michael L. Radelet, editor, Facing the Death Penalty: Essays on a Cruel and Unusual Punishment (1989) .)

The Eighth Amendment's proscription against cruel and unusual punishment is an "evolving standard of decency." In *Thompson v. Oklahoma* (1988) 487 U.S. 815, 821, Justice Stevens, writing for the majority observed:

> "The authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishments, but they made no attempt to define the contours of that category. They delegated that task to future generations of judges who have been guided by the 'evolving

> standards of decency that mark the progress of a maturing society.' *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion) (Warren, C.J.). In performing that task the Court has reviewed the work product of state legislatures and sentencing juries, and has carefully considered the reasons why a civilized society may accept or reject the death penalty in certain types of cases. [Fns. Omitted.]" (*Thompson v. Oklahoma*, supra, at p. 821-822.)

The Court held early in this century that fifteen years of hard, chained labor, deprivation of civil rights, and a perpetual state of surveillance constituted "cruel and unusual punishment" under the Bill of Rights of the Philippines (then under United States control.) (*Weems v. United States* (1910) 217 U.S. 349, 373.) The Court premised its opinion on the similarity of the Philippine "cruel and unusual punishments" clause to that of the United States and wrote: "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gives it birth." (*Id.* at pp. 373-374.) The Court concluded, "The [cruel and unusual punishments clause] in the opinion of the learned commentators may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." (*Id.* at p. 378.)

In *Hutto v. Finney* (1978) 437 U.S. 678, Justice Stevens noted that the clause also prohibits penalties that transgress today's "'broad and idealistic concepts of dignity, civilized standards, humanity, and decency.'" [Citations omitted.]" (*Id.* at p. 685.) Justices Goldberg, Douglas, and Brennan, dissenting from the denial of a petition for certiorari, believed that assessment should be whether punishment was cruel and unusual in consideration of the standards of decency which mark the progress of a

maturing society, or standards of decency that are more or less universally accepted. (*Rudolph v. Alabama* (1963) 375 U.S. 889, 890.)

"To borrow a phrase from Justice Potter Stewart, inhuman treatment may be difficult to define but we should know it when we see it." (Schabas, *supra,* Rutgers Univ. School of Law 5 Crim. L.F. at p. 185 [citing *Jacobellis v. Ohio* (1964) 378 U.S. 184, 197 (Stewart, J., concurring) ("I shall not today attempt…to define [hard-core pornography]….but I know it when I see it ….")].)

International human rights standards are relied on to provide interpretative guidance in federal and state constitutional provisions, including the Eighth Amendment. (*See, e.g., Thompson v. Oklahoma, supra*, 487 U.S. at pp. 830-831, 851-852 [plur. opn. conc. opn. of O'Connor, J.] [reference to international treaties and practices to preclude execution of juveniles under age 16 as an Eighth Amendment violation]; *Coker v. Georgia* (1987) 433 U.S. 584, 596, fn. 10 [Eighth Amendment violation in part because only three major nations retained death penalty for rape]; *Enmund v. Florida* (1982) 458 U.S. 782, 796, fn. 22 [death penalty for defendant who did not intend to kill found cruel based on practices of Europe]; *Trop v. Dulles* (1958) 356 U.S. 86, 102, and n. 35, [divestiture of citizenship for desertion from military, a condition deplored by the international community]; *see also Hilton v. Guyot* (1895) 159 U.S. 113, 163 ["International law…is part of our law…."]; *Filartiga v. Pena-Irala* (2d Cir. 1980) 630 F.2d 876, 886 [same]; *Forti v. Suarez-Mason* (N.D. Cal. 1987) 672 F.Supp. 1177, 1187 n.9 [mod. On other grds. (2d Cir. 1981) 651 F.2d 96]; *see generally* Strossen, *Recent U.S. And International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis* (1990) 41 Hast.L.J. 805 [hereinafter "Strossen"].)

Jones' contention is further supported by three recent decisions of foreign courts criticizing the American "death row phenomenon" – the

protracted incarceration of condemned prisoners under a sentence of death in extreme conditions of confinement. These cases reflect the growing international recognition of the need to redress institutional failures that have resulted in an added dimension of punishment in capital cases that was unknown at the time the Eighth Amendment was ratified.

The most recent decision comes from the Privy Council of the British House of Lords, the highest court in England and the most authoritative interpreter of British common law. (*Pratt & Morgan v. Attorney General for Jamaica* (Privy Council 19930 3 SLR 995, 2 AC 1, 4 ALL ER 769 (en banc).) American Courts have long been guided by the decisions of the Privy Council. Sitting en banc for the first time in fifty years, the Privy Council unanimously held that to execute two inmates who had been on death row for fourteen years and who had been read execution warrants on three occasions would constitute "torture or inhuman or degrading punishment" in violation of section 17(1) of the Jamaican Constitution, a document rooted in the English common law tradition. (Slip op. at pp. 13, 20.) The Privy Council explained that "[t]here is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time." (Id. at 16.)

The Privy Council commuted the sentences of the two men to life imprisonment. Though the decision did not involve an interpretation of the cruel and unusual punishment of the English Bill of Rights of 1689—the source of the Eighth Amendment of the U.S. Constitution—the Privy Council did survey English common law and conclude that extended imprisonment on death row and the repeated setting of execution dates were not practices condoned historically at common law. Such a

conclusion strongly suggests that the cruel and unusual punishment clause of the 1689 Bill of Rights, and in turn the cruel and unusual punishment clause of our Eighth Amendment, would prohibit the execution of an inmate who had been under a sentence of death for a protracted period of time.

In regard to the State's attempt to assign fault for the delay of execution, the Privy Council reasoned,

"[A] State that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. 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. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such a delay and not to the prisoner who takes advantage of it. (Id. at 20)

As one commentator observed, "Yet reconciling the two norms of prompt execution and fair appeal may well be impossible, with capital punishment caught in a judicial 'Catch 22.'" (Schabas, *supra*, Rutgers Univ. School of Law 5 Crim. L.F. at p. 189; *see also* David Pannick, *Judicial Review of the Death Penalty* 77-89, 84, fn. 17 (1982) ["A legalistic society will be unable to impose the death penalty without an unconstitutionally cruel delay, and hence it will be unable lawfully to impose the death penalty at all. It must, at the very least, be accepted by a society committed to due process of law and the rule of law that a death sentence becomes constitutionally cruel unless carried out within a reasonable time after it has been awarded, and without the incidental infringement of any of the other rights (such as the right to appeal against conviction and sentence) guaranteed by due process."]; 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 ["Inmates are put to the Hobson's choice of prolonged torture by incarceration or swift torture by execution. An inmate's 'choice' of the latter alternative over the former is no more voluntary than a confession beaten out of a police suspect during a custodial interrogation; only the method utilized to exact that 'choice' is unique"].)

The second foreign decision concerning the death row phenomenon also comes from a court following the English common law tradition. In *Catholic Comm'n for Justice & Peace in Zimbabwe v. Attorney General*, No. S.C. 73 (Zimb. June 24, 1993) (reported in 14 Hum. Rts L. J. 323 (1993)), the Supreme Court of Zimbabwe held that prolonged death row incarceration constituted "inhuman or degrading punishment" in violation of its constitution, and thus forbade the execution of four prisoners confined under death sentence for between four-and-a-half and six years. (Slip op. 9, 45-46.) In reaching its decision, the Court considered such factors as the "physical conditions endured daily" on death row and "the mental anguish" of the condemned prisoners. (Id. at 4-5.)

The third decision comes from the tribunal that enforces the European Convention on Human Rights: the European Court of Human Rights. (Strossen, supra, 41 Hast.L.J. at p. 807.) In *Soering v. United Kingdom, supra*, 161 Eur. Ct. H.R. (ser. A), at p. 34 [reprinted in 11 Eur. Hum. Rts. Rep. 439], the court was presented with the issue of whether Great Britain's extradition of a German national to the State of Virginia, where capital murder charges were pending against him, would violate the European Convention prohibition against inhuman or degrading treatment or punishment. The European Commission on Human Rights had held that the protracted delays in carrying out death sentences in Virginia, which it

averaged between six and eight years, constituted inhuman and degrading punishment in violation of Article 3 of The European Human Rights Convention Charter, a provision that "enshrines one of the fundamental values of the democratic societies making up the council of Europe." (*Id.*, 161 Eur. Ct. H.R. (ser. A) at p. 26.) Reviewing the commission's decision, the Court, in a unanimous opinion by eighteen judges, held that subjecting an individual to prosecution for capital murder, so as to expose him to the "death row phenomenon," violates the prohibition against "inhuman or degrading treatment or punishment" in Article 3 of the European Convention. The Court recognized that the conditions of detention awaiting execution are examples of the factors that can render the sentence in violation of the European Convention of Human Rights. (Id. at 41.)

In California, the average stay would be much longer than a mere six to eight years. Indeed, at the time of filing of this brief—the first filed in Ernest Jones' appeal, he has now been on Death Row for seven years. By the time this appeal is decided, another two or three years are likely to have passed. If the decision goes against him, the state habeas petition will still need to be resolved, and the federal post-conviction process will only then begin. In federal court, an ever-increasing glut of California death cases works its way through the system. Thus, the "length of stay" considerations in *Soering* are even greater as the death penalty is currently administered in this state and in this case.

The European Court in *Soering* also recognized that the time required by the inmate to pursue collateral remedies was largely beyond the inmate's control since it is within his constitutional rights to pursue every available remedy open to him. The Court weighed more heavily the consequences of the complex Virginia post-sentencing procedures; "[t]he condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present

shadow of death." (Ibid.) The Court also considered the daily conditions to which the condemned person would be subjected on death row. (*Soering, supra,* 161 Eur. Ct. H.R. (ser. A), at pp. 27-28, 42.) The condemned prisoner's regime is worsened in the Court's view because he is subjected to it for an extended time. (Id. at p. 43.) (See generally *Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. And Civ. Confinement 339, 354-355.)

Additionally, in finding an Article 3 violation, the *Soering* Court was also influenced by the circumstance that the failure to extradite would not result in a criminal going unpunished, since Soering could be extradited to Germany and punished there. (*Soering, supra,* 161 Eur. Ct. H.R. (ser. A), at p. 44.)

The European Convention does not expressly prohibit the imposition of the death penalty, although the death penalty no longer exists in peacetime in any contracting state. (Id. at 40.) However, even if Soering's exposure to the penalty of death alone had been insufficient to constitute inhuman or degrading treatment or punishment under Article 3 of the European Convention, the Court concluded this does not mean circumstances relating to a death sentence can never give rise to an issue under Article 3. (Id. at 41.) As the Court stated:

"The manner in which it is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, *as well as the conditions of detention awaiting execution*, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3. (*Ibid.* [emphasis added].)

The Court concluded *Soering's* possible exposure to the "death row phenomenon" was such serious treatment that his extradition would be

contrary to Article 3. (*Ibid.*) In his memorandum respecting the denial of certiorari in *Lackey v. Texas, supra*, 514 U.S. 1045, Justice Stevens observed that although the Court in *Gregg v. Georgia*, (1976) 428 U.S. 153 had held that the Eighth Amendment does not prohibit capital punishment, that decision rested in large part on the grounds that (1) the death penalty was considered permissible by the Framers, *see id.*, at p. 177 (opinion of Stewart, Powell, and Stevens, JJ.), and (2) the death penalty might serve "two principal social purposes: retribution and deterrence," *id.*, at 183. (*Lackey, supra*, 514 U.S. 1045.) Justice Stevens noted that neither of these arguments retained much validity for a prisoner who had spent some 17 years under a sentence of death. (*Ibid.*)

"Such a delay, if it ever occurred, certainly would have been rare in 1789, and thus the practice of the Framers would not justify a denial of petitioner's claim. Moreover, after such an extended time, the acceptable state interest in retribution has arguably been satisfied by the sever punishment already inflicted. Over a century ago, this Court recognized that 'when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it.' *In re Medley*, 134 U.S. 160, 172, 33 L. Ed. 835, 10 S. Ct. 384 (1890). If the Court accurately described the effect of the uncertainty in *Medley*, which involved a period of four weeks, see ibid., that description should apply with even greater force in the case of delays that last for many years. [Fn. *Supra*.] Finally, the additional deterrent effect from an actual execution now, on prisoner's continued incarceration for life, on the other, seems minimal. See, e.g., *Coleman v. Balkcom*, (1981) 451 U.S. 949, 952 [68 L. Ed. 2d 334, 101 S. Ct. 2031] (Stevens, J., respecting denial of certiorari) ('the deterrent value of incarceration during that period of uncertainty may well be comparable to the consequences of

the ultimate step itself'). As Justice White noted, when the death penalty 'ceases realistically to further these purposes, ... its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.' *Furman v. Georgia*, 408 U.S. 238, 312, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972) (opinion concurring in judgment); see also *Gregg v. Georgia*, 428 U.S. at 183 ("The sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering"). (*Lackey, supra*, 514 U.S. 1045.)

The concerns expressed above apply equally to Jones' death sentence. He, too, has had to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death. Indeed, San Quentin's death row has been under the scrutiny of a consent degree and court-appointed monitor for over a decade in response to allegations that conditions there constituted cruel and unusual punishment and a denial of due process under the state and federal constitutions. (*Thompson v. Enomoto* (9th Cir. 1990) 915 F.2d 1383.) (Currently the case is titled *Thompson v. Gomez*, C-79-1630 N.D. Cal.)

Mr. Jones' would have to so endure even if this Court were to reverse his conviction or sentence on direct appeal, because the automatic appeal process takes years, and still more time is required to present and litigate meritorious claims in collateral proceedings. It is therefore a certainty that Jones will live "in the ever-present shadow of death" for at least a decade, and probably substantially more, under any circumstances which are the result of the nature of the process and no fault of his own.

Jones' claim here is twofold: first, that delay in itself constitutes cruel and unusual punishment; and second, that the actual carrying out of

his execution would serve no legitimate penological ends. These are issues that have not yet been addressed by the full Supreme Court. (*Lackey v. Texas, supra* 514 U.S. 1045 (memorandum of Justice Stevens respecting the denial of certiorari; *Ceja v. Stewart, supra*, 137 F.3d at p. 1370 (Fletcher, J., dissenting).) Federal appellate courts have only addressed the first of these issues, and to date have rejected the argument. (*Ibid.*, *Carter v. Johnson* (5th Cir. 1997) 131 F.3d 452, 466; *Bonin v. Calderon* (9th Cir. 1996) 77 F.3d 1155, 1160-1161; *White v. Johnson* (5th Cir. 1996) 79 F.3d 432, 437-438; *Stafford v. Ward* (10th Cir. 1995) 59 F.3d 1025, 1025 *cert. denied* 115 S.Ct. 2640; *Richmond v. Lewis* (9th Cir. 1990) 948 F.2d 1473, 1491; *Andrew v. Shulsen* (D. Utah 1984) 600 F.Supp. 408, 431, aff'd, 802 F.2d 1256.

Since the current state postconviction review renders the "death row phenomenon" inevitable, at least in California, the sentence of death should be reversed as violative of the Eighth and Fourteenth Amendments. In Jones' case should his sentence be reversed, he would not be unpunished. As in *Soering* he would be sentenced to life imprisonment without the possibility of parole, the only alternative for such crimes in this state.

Soering represents the current state of international law as interpreted by civilized Western nations. Its holding is solidly in accord with established Eighth Amendment jurisprudence as interpreted and expressed in United States Supreme Court opinions. (See, e.g., *Sawyer v. Whitley* (1992) 505 U.S. 333, 360 (Blackmun, J., concurring) [Court expressed concern that the legitimacy of the death penalty could be undermined by the Court's placement of more procedural barriers on the federal court's power to reach and address the constitutional claims of those sentenced to death]; *Maynard v. Cartwright* (1988) 486 U.S. 356, 362 [the Eighth Amendment requires channeling and limiting of the sentencer's discretion in imposing the death penalty in order to sufficiently minimize

the risk of wholly arbitrary and capricious action]; *Godfrey v. Georgia* (1980) 446 U.S. 420, 438-439, 441-442 (plur. opn.) [the death penalty may be unconstitutional because objective standards and even handedness in imposing the death penalty cannot be reached]; *Hutto v. Finney, supra*, 428 U.S. at pp. 169-173 [Eighth Amendment has been interpreted in a flexible and dynamic manner to accord with contemporary values and evolving standards of decency]; *Woodson v. North Carolina* (1967) 428 U.S. 280, 288-301 [contemporary community standards and evolving social values are relevant in determining what constituted cruel and unusual infliction of punishment]; *Furman v. Georgia* (1972) 408 U.S. 238, 271, 272 (Brennan, J., concurring) [mental suffering, demoralization, uncertainty and consequent psychological hurt inherent in the punishment must be considered in interpreting Eighth Amendment]; *Furman v. Georgia, supra*, at p. 288 (Brennan, J., concurring) [death penalty is extremely severe and cruel and unusual, in part, because the prospect of pending execution exacts a frightful toll during the inevitably long wait between the imposition of sentence and the actual infliction of death]; *Trop v. Dulles, supra*, 356 U.S. at pp. 100-101 [the words of the Eighth Amendment are not precise, and their scope is not static; the Eighth Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society]; *Weems v. United States, supra*, 217 U.S. at p. 378 [Eighth Amendment is progressive, "not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."]; *Weems v. United States, supra*, at p. 372 [the Eighth Amendment does not only limit infliction of physical pain or mutilation but also infliction of severe mental suffering].

Until a system of postconviction review is developed that avoids the death row phenomenon, and especially under the particular circumstances of appellant's case, maintenance of the pending sentence of death would be

cruel and unusual punishment in violation of the federal and state constitutions, irrespective of whether such a sentence is ever ultimately imposed. To carry out the execution long years after the sentence serves no legitimate penological purpose and would therefore be cruel and unusual in violation in the federal and state Constitutions.

Consequently, even if the guilt judgment is not reversed, the judgment of death should be vacated, and a sentence imposed of life imprisonment without the possibility of parole. (*Ceja v. Stewart, supra*, 13 F.3d at p. 1378 (Fletcher, J., dissenting).)

APPEAL

UNITED STATES DISTRICT COURT for the CENTRAL DISTRICT OF CALIFORNIA (Western Division - Los Angeles)
CIVIL DOCKET FOR CASE #: 2:09-cv-02158-CJC

Ernest DeWayne Jones v. Kevin Chappell
Assigned to: Judge Cormac J. Carney
Case in other court: 9th CCA, 14-56302
9TH CCA, 14-56373
Cause: 28:2254 Ptn for Writ of H/C - Stay of Execution

Date Filed: 03/27/2009
Jury Demand: None
Nature of Suit: 535 Death Penalty - Habeas Corpus
Jurisdiction: Federal Question

Petitioner

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Date Filed	#	Docket Text
03/27/2009	1	EX PARTE APPLICATION for Appointment of Counsel; Request for Stay of Execution and Status Conference; Notice of Intention to File Petition for Writ to Habeas Corpus; and Declaration in Support, filed by petitioner Ernest DeWayne Jones. Lodged Proposed Order.(ghap) (Entered: 03/27/2009)
03/27/2009	2	NOTICE: this capital habeas corpus case was initiated on 3/27/09 and has been assigned to Judge Cormac J. Carney for all further proceedings. (ghap) (Entered: 03/27/2009)

03/27/2009	3	ORDER by Judge James V. Selna: STAYING EXECUTION Upon request 1 of petitioner, through the Habeas Corpus Resource Center, and pursuant to LR 83-17.6(a) and (c), IT IS HEREBY ORDERED that the execution of petitioner's sentence of death and any and all court and other proceedings related to the execution of that sentence, including preparation for execution and the setting of an execution date, are stayed pending final disposition of Ernest Jones's Petition for Writ of Habeas Corpus and throughout all appellate proceedings in this matter, and the stay of execution shall terminate when the mandate of the Ninth Circuit Court of Appeals is issued, filed and spread on the minutes of the United States District Court, unless otherwise ordered. (See document for further details.) (rla) Modified on 3/30/2009 (rla). (Entered: 03/30/2009)
03/30/2009	4	NOTICE OF CLERICAL ERROR: Order 3 was issued by Judge James V. Selna. During the initial docketing of this Order 3 Judge Carmac J. Carney was erroneously reflected as the issuing judge. Docket text has been modified and now correctly reflects Judge Selna. (rla) Modified on 3/30/2009 (rla). (Entered: 03/30/2009)
03/31/2009	5	ORDER AMENDING ORDER STAYING EXECUTION by Judge Cormac J. Carney: IT IS HEREBY ORDERED that the execution of petitioner's sentence of death and any and all court and other proceedings related to the execution of that sentence, including preparation fro execution and the setting of an execution date, are stayed until ninety days after the date this Court appoints counsel to represent petitioner. (See document for further details.) IT IS SO ORDERED. (rla) (Entered: 03/31/2009)
03/31/2009	6	ORDER by Judge Cormac J. Carney, REFERRING MATTER TO DEATH PENALTY COMMITTEE FOR APPOINTMENT OF COUNSEL: Pursuant to Local Rule 83-17.4(a), this matter is hereby referred to the Death Penalty Committee to recommend qualified counsel to represent petitioner. IT IS SO ORDERED. (rla) (Entered: 03/31/2009)
03/31/2009	7	Proof of Notification filed by Court(jal) (Entered: 03/31/2009)
04/06/2009	8	NOTICE of Appearance filed by attorney Herbert S Tetef on behalf of Respondent Robert K. Wong (Tetef, Herbert) (Entered: 04/06/2009)
04/14/2009	9	ORDER APPOINTING COUNSEL by Judge David O. Carter, IT IS HEREBY ORDERED that Michael Laurence and Patricia Daniels of Habeas Corpus Resource Center are appointed as counsel for petitioner Ernest DeWayne Jones in this action. The address and telephone number of counsel is 303 Second Street, Suite 400 South, San Francisco, California 94107, (415) 348-3800. IT IS SO ORDERED. (rla) Modified on 4/15/2009 (rla). (Entered: 04/15/2009)
04/15/2009	10	NOTICE OF CLERICAL ERROR Judge Cormac J. Carney was reflected on docket entry #9: Docket entry #9 has been modified to appropriately reflect Judge David O. Carter as the Judge that signed the Order Appointing Counsel 9 . (rla) (Entered: 04/15/2009)
04/23/2009	11	ORDER by Judge Cormac J. Carney, OUTLINING PROCEDURES FOR LITIGATION OF CAPITAL HABEAS CASE: Central District of California has adopted its Plan for Budgeting and Case Management in Capital Habeas Cases, as required by the Judicial Council of the Ninth Circuit. This case shall be governed

		by the Plan. The parties shall appear at a case management conference on June 12, 2009 at 10:30 a.m. following the issuance of this Order, to discuss implementation of a case management plan and budget for this case. (See document for details.) (rla) (Entered: 04/23/2009)
05/14/2009	12	NOTICE OF DISCREPANCY AND ORDER: by Judge Cormac J. Carney, ORDERING Death Penalty Case; Stipulation and Request for Order Continuing Initial case Management Conference; Proposed Order received on 5/11/2009 is not to be filed but instead rejected. Denial based on: Pursuant to G.O. 08-02, Case designated for e-filing. (lwag) (Entered: 05/14/2009)
05/14/2009	13	STIPULATION to Continue Initial Case Management Conference from June 12, 2009 to TBD filed by Petitioner Ernest DeWayne Jones. (Attachments: # 1 Proposed Order)(Laurence, Michael) (Entered: 05/14/2009)
05/18/2009	14	ORDER CONTINUING INITIAL CASE MANAGEMENT CONFERENCE by Judge Cormac J. Carney: Pursuant to the parties' stipulation 13 and for good cause shown, it is hereby ordered that the Initial Case Management Conference previously set for 6/12/09 at 10:30 a.m. shall be continued to 7/17/2009 at 10:30 AM. IT IS SO ORDERED. (mu) (Entered: 05/22/2009)
07/02/2009	15	CONFIDENTIAL CASE EVALUATION FORM filed by Respondent Robert K. Wong (Tetef, Herbert) (Entered: 07/02/2009)
07/07/2009	16	NOTICE of Under Seal Filing filed Ernest DeWayne Jones (Laurence, Michael) (Entered: 07/07/2009)
07/07/2009	18	SEALED DOCUMENT - CONFIDENTIAL CASE EVALUATION FORM (smi) (Entered: 07/13/2009)
07/09/2009	17	STATUS REPORT *(JOINT)* filed by Respondent Robert K. Wong. (Tetef, Herbert) (Entered: 07/09/2009)
07/16/2009	19	MINUTES OF IN CHAMBERS ORDER RESETTING CASE MANAGEMENT CONFERENCE AS TO TIME ONLY held before Judge Cormac J. Carney: The Court hereby resets the case management conference from Friday, July 17, 2009 at 10:30 a.m. to Friday, July 17, 2009 at 2:00 p.m. (mu) (Entered: 07/16/2009)
07/17/2009	20	MINUTES OF CASE MANAGEMENT CONFERENCE (Phase I) held before Judge Cormac J. Carney: Court and counsel confer regarding status of case. Mr. Laurence makes an oral request for an order to be issued for a stay of execution. Court grants the request and directs death penalty law clerk to prepare an order. Court schedules a status conference for June 21, 2010 at 3:30 p.m. Court Reporter: Maria Dellaneve. (mu) (Entered: 07/21/2009)
07/23/2009	21	MINUTES OF IN CHAMBERS ORDER RE PETITIONERS REQUEST FOR A STAY OF EXECUTION held before Judge Cormac J. Carney: Pursuant to the Patriot Act, Petitioner is entitled to a stay of execution for 90 days following the appointment of counsel but prior to the filing of the petition. See 28 U.S.C. § 2251(a). Following the filing of the petition, Petitioner may request a stay of execution for the duration of these federal habeas proceedings. (mu) (Entered: 07/24/2009)
09/23/2009	22	MINUTES OF IN CHAMBERS ORDER by Judge Cormac J. Carney: Petitioner's

		Budgeting Materials: Petitioner is directed to file his Phase I and II Budgeting Materials under seal on or before October 15, 2009. (rla) (Entered: 09/24/2009)
10/09/2009	23	NOTICE of Manual Filing filed by Petitioner Ernest DeWayne Jones of Petitioner's Phase I and II Budgeting Forms and Declaration of Counsel in Support. (Laurence, Michael) (Entered: 10/09/2009)
10/13/2009	24	SEALED DOCUMENT RE: CASE MANAGEMENT Plan and Budget for Phases I & II (Attachments: # 1 1, # 2 2) (ade) (Entered: 10/13/2009)
10/26/2009	25	SEALED DOCUMENT - ORDER (nbo) (Entered: 11/19/2009)
03/10/2010	26	APPLICATION for Writ of of Habeas Corpus filed by Petitioner Ernest DeWayne Jones. (Laurence, Michael) (Entered: 03/10/2010)
03/17/2010	27	MINUTES OF IN CHAMBERS ORDER held before Judge Cormac J. Carney, re: SETTING BRIEFING SCHEDULE: The Court is in receipt of the Petition 26 and now directs the parties to meet and confer. Within 30 days after the entry of this Order, the parties shall file a proposed briefing schedule regarding the direction of the litigation of this matter. Within 30 days of the filing of the proposed briefing schedule, Petitioner shall file his proposed Phase III budget. Pursuant to Local Rule 83-17.6 and 28 U.S.C. § 2251(a), the Court issues a stay of execution for the duration of these federal habeas proceedings. IT IS SO ORDERED. (rla) (Entered: 03/17/2010)
04/06/2010	28	ANSWER *to Petition for Writ of Habeas Corpus* filed by Respondent Robert K. Wong.(Tetef, Herbert) (Entered: 04/06/2010)
04/06/2010	29	NOTICE OF LODGING filed re Answer to Complaint 28 (Tetef, Herbert) (Additional attachment(s) added on 10/28/2014: # 1 A1 Vol 1, # 2 A1 Vol 2, # 3 A1 Vol 3, # 4 A1 Vol 4, # 5 A1 Vol 5, # 6 A1 Vol 6, # 7 A1 Vol 7, # 8 A1 Vol 8, # 9 A1 Vol 9, # 10 A1 Vol 10, # 11 A1 Vol 11, # 12 A1 Vol 12, # 13 A1 Vol 13, # 14 A1 Vol 14, # 15 A1 Vol 15, # 16 A1 Vol 16, # 17 A1 Vol 17, # 18 A1 Vol 18, # 19 A1 Vol 19, # 20 A1 Vol 20, # 21 A1 Vol 21, # 22 A1 Vol 22, # 23 A1 Vol 23, # 24 A1 Vol 24, # 25 A1 Vol 25, # 26 A1 Vol 26, # 27 A1 Vol 27, # 28 A2, # 29 A2 Vol 1, # 30 A2 Vol 2, # 31 A2 Vol 3, # 32 A2 Vol 4, # 33 A2 Vol 5, # 34 A2 Vol 6, # 35 A2 Vol 7, # 36 A2 Vol 8, # 37 A2 Vol 9, # 38 A2 Vol 10, # 39 A2 Vol 11, # 40 A2 Vol 12, # 41 A2 Vol 13, # 42 A2 Vol 14, # 43 A2 Vol 15, # 44 A2 Vol 16, # 45 A2 Vol 17, # 46 A2 Vol 18, # 47 A2 Vol 19, # 48 A2 Vol 20, # 49 A2 Vol 21, # 50 A2 Vol 22, # 51 A2 Vol 23, # 52 A2 Vol 24, # 53 A2 Vol 25, # 54 A2 Vol 26, # 55 A2 Vol 27, # 56 A2 Vol 28, # 57 A2 Vol 29, # 58 A2 Vol 30, # 59 A2 Vol 31, # 60 A2 Vol 32, # 61 B1, # 62 B2, # 63 B3, # 64 B4, # 65 B5, # 66 B6, # 67 B7, # 68 C1 Vol 1, # 69 C1 Vol 2, # 70 C2 Vol 1, # 71 C2 Vol 2 - Part 1, # 72 C2 Vol 2 - Part 2, # 73 C2 Vol 3 - Part 1, # 74 C2 Vol 3 - Part 2, # 75 C2 Vol 4 - Part 1, # 76 C2 Vol 4 - Part 2, # 77 C2 Vol 5 - Part 1, # 78 C2 Vol 5 - Part 2, # 79 C2 Vol 6 - Part 1, # 80 C2 Vol 6 - Part 2, # 81 C2 Vol 7 - Part 1, # 82 C2 Vol 7 - Part 2, # 83 C2 Vol 8, # 84 C2 Vol 9 - Part 1, # 85 C2 Vol 9 - Part 2, # 86 C2 Vol 10, # 87 C2 Vol 11, # 88 C2 Vol 12, # 89 C3, # 90 C4, # 91 C5, # 92 C6, # 93 C7, # 94 D1, # 95 D2, # 96 D3, # 97 D4, # 98 D5, # 99 D6, # 100 E1 Vol 1 - Part 1, # 101 E1 Vol 1 - Part 2, # 102 E1 Vol 1 - Part 3, # 103 E1 Vol 2 - Part 1, # 104 E1 Vol 2 - Part 2, # 105 E1 Vol 2 - Part 3, # 106 E1 Vol 3 - Part 1, # 107 E1 Vol 3 - Part 2, # 108 E1 Vol 3 - Part 3, # 109 E1 Vol 4 - Part 1, # 110 E1 Vol 4 - Part 2, # 111 E1 Vol 4 - Part 3, # 112 E2) (nl). (Entered: 04/06/2010)

04/08/2010	30	Joint STIPULATION for Order Re: Briefing Schedule filed by Respondent Robert K. Wong. (Attachments: # 1 Proposed Order)(Tetef, Herbert) (Entered: 04/08/2010)
04/12/2010	31	ORDER by Judge Cormac J. Carney, REGARDING JOINT STIPULATION RE: BRIEFING SCHEDULE 30 : The Joint Stipulation Re: Briefing Schedule 30 , lodged with the Court on April 8, 2010, is hereby adopted by this Court. The parties shall adhere to the filing deadlines set forth therein. The status conference previously set for June 21, 2010, at 3:30 p.m., is taken off calendar. IT IS SO ORDERED. (rla) (Entered: 04/12/2010)
04/23/2010	32	NOTICE OF MOTION AND MOTION for More Definite Statement filed by Petitioner Ernest DeWayne Jones. Motion set for hearing on 5/24/2010 at 01:30 PM before Judge Cormac J. Carney. (Attachments: # 1 Proposed Order Granting Motion for More Definite Statement)(Laurence, Michael) Modified on 6/8/2010 (rla). (Entered: 04/23/2010)
04/26/2010	33	NOTICE of Manual Filing filed by Respondent Robert K. Wong of 1) Application to Lodge Probation Report Under Seal; 2) Proposed Order; 3) Probation Report. (Tetef, Herbert) (Entered: 04/26/2010)
04/28/2010	34	EX PARTE APPLICATION FOR ENLARGEMENT OF TIME to File Traverse and Phase III Budget filed by Petitioner Ernest DeWayne Jones. (Attachments: # 1 Proposed Order Enlarging Time to File the Traverse and Phase III Budget) (Laurence, Michael) (Entered: 04/28/2010)
04/29/2010	38	APPLICATION to Lodge Probation Report Under Seal; filed by respondent Robert K. Wong. (rla) (Entered: 05/10/2010)
04/29/2010	39	ORDER by Judge Cormac J. Carney: granting APPLICATION 38 . IT IS ORDERED that Petitioner's confidential probation report is lodged under seal. (rla) Modified on 5/13/2010 (lwag). (Entered: 05/10/2010)
04/30/2010	35	MINUTES (IN CHAMBERS): ORDER by Judge Cormac J. Carney: ENLARGING TIME TO FILE TRAVERSE AND PHASE III BUDGET: 34 Ex Parte Application For An Order Enlarging The Time To File Traverse And Phase III Budget is HEREBY GRANTED. Petitioner is ordered to file the Traverse and Phase III budget thirty (30) days after respondent files a supplemental answer or, in the event that this Court denies petitioner's motion, petitioner will file a traverse thirty (30) days after this Court's order denying his motion. (rla) (Entered: 04/30/2010)
05/03/2010	36	OPPOSITION re: MOTION for More Definite Statement 32 filed by Respondent Robert K. Wong. (Attachments: # 1 Proposed Order)(Tetef, Herbert) (Entered: 05/03/2010)
05/06/2010	37	MINUTES (IN CHAMBERS): ORDER by Judge Cormac J. Carney: Hearing calendared for May 24, 2010, is vacated and the matter is taken off calendar, as the Court finds that this matter is appropriate for decision without oral argument, re: Motion for More Definite Statement 32 . IT IS SO ORDERED. (rla) (Entered: 05/06/2010)
05/10/2010	40	REPLY in Support of MOTION for More Definite Statement 32 filed by Petitioner Ernest DeWayne Jones. (Laurence, Michael) (Entered: 05/10/2010)

05/13/2010	41	NOTICE filed by Respondent Robert K. Wong. *(NOTICE OF ERRATA)* (Tetef, Herbert) (Entered: 05/13/2010)
05/13/2010	42	NOTICE OF LODGING filed *(SUPPLEMENTAL)* re Notice of Lodging 29 (Tetef, Herbert) (Additional attachment(s) added on 10/28/2014: # 1 F1, # 2 F2, # 3 F3, # 4 F4, # 5 F5, # 6 F6, # 7 F7, # 8 F8, # 9 F9, # 10 F10) (nl). (Entered: 05/13/2010)
06/08/2010	43	ORDER by Judge Cormac J. Carney: denying 32 Motion for More Definite Statement and Directing the Filing of Stipulation and Phase III Budget: Petitioner has thirty days from the date of this order to file a Traverse should he elect to file one. The parties also shall file within thirty (30) days of this order a stipulation setting forth a proposed briefing schedule for Petitioner's motion for an evidentiary hearing. The proposed briefing schedule should accommodate any discovery the parties intend to conduct prior to the filing of Petitioner's evidentiary motion. Finally, Petitioner shall file under seal within thirty (30) days of this order his Proposed Phase III Plan and Budget. IT IS SO ORDERED. (rla) (Entered: 06/08/2010)
06/08/2010	44	ORDER by Judge Cormac J. Carney, On Respondent's request, the Answer 28 filed by Respondent is deemed amended to replace all representations therein that Respondent denies or lacks sufficient knowledge to admit or deny the factual allegations with the following response: The state court record is the best evidence of the facts alleged in support of the claims in the federal Petition. Respondent hereby defers to the factual findings and evidence existing in the state court record. (rla) (Entered: 06/08/2010)
07/07/2010	45	NOTICE Notice of Manual Filing of Petitioner's Phase III Budgeting Forms and Declaration of Counsel filed by petitioner Ernest DeWayne Jones. (Daniels, Patricia) (Entered: 07/07/2010)
07/07/2010	46	STIPULATION for Discovery filed by petitioner Ernest DeWayne Jones. (Attachments: # 1 Proposed Order Proposed Order re Joint Briefing Schedule) (Daniels, Patricia) (Entered: 07/07/2010)
07/08/2010	48	SEALED DOCUMENT - PETITIONER'S PHASE III CASE MANAGEMENT & BUDGET FORMS AND DECLARATION OF COUNSEL IN SUPPORT REPORT (rla) (Entered: 07/13/2010)
07/12/2010	47	ORDER by Judge Cormac J. Carney, re Discovery and Joint Briefing Schedule 46 : The Joint Stipulation Re: Discovery and Joint Briefing Schedule lodged with the Court on July 7, 2010 is hereby adopted by this Court. The parties shall adhere to the filing deadlines set forth therein. (rla) (Entered: 07/12/2010)
07/28/2010	49	**DOCUMENT SEALED** ORDER APPROVING PHASE III BUDGET by Judge Cormac J. Carney (ade) (Entered: 07/30/2010)
11/01/2010	50	First EX PARTE APPLICATION FOR ENLARGEMENT OF TIME to File Motion for Evidentiary Hearing filed by Petitioner Ernest DeWayne Jones. (Attachments: # 1 Proposed Order Granting Extension of Time to File Motion for Evidentiary Hearing)(Laurence, Michael) (Entered: 11/01/2010)
11/03/2010	51	ORDER re: Stipulation for Continuance of Hearing Date for Def.'s Motion for

		Partial Summary Judgment of Non-Infringement U.S. Patent No. 6298488. The hearing date originally scheduled for Nov. 22, 2010 for the DefendantsMotion for Partial Summary Judgment has been continued to Nov. 29, 2010. (See Order for further details) (db) (Entered: 11/04/2010)
11/03/2010	53	ORDER by Judge Cormac J. Carney: granting Ex Parte Application for Enlargement of Time to File His Motion for Evidentiary Hearing 50 . Petitioner is ordered to file a Motion on 1/4/11. (twdb) (Entered: 11/04/2010)
11/04/2010	52	NOTICE OF CLERICAL ERROR. Document 51 was posted to incorrect docket. Document has now been posted to correct docket. (db) (Entered: 11/04/2010)
12/28/2010	54	Second EXPARTE APPLICATION for Extension of Time to File Motion For Evidentiary Hearing filed by Petitioner Ernest DeWayne Jones. (Attachments: # 1 Proposed Order Proposed Order)(Daniels, Patricia) (Entered: 12/28/2010)
01/03/2011	55	ORDER by Judge Cormac J. Carney: GRANTING PETITIONER'S APPLICATION FOR A 30-DAY EXTENSION OF TIME TO FILE HIS MOTION FOR EVIDENTIARY HEARING 54 : Petitioner is ordered to file a Motion for Evidentiary Hearing on February 3, 2011. (rla) (Entered: 01/04/2011)
01/28/2011	56	Third EXPARTE APPLICATION for Extension of Time to File Motion For EvidentiaryHearing filed by Petitioner Ernest DeWayne Jones. (Attachments: # 1 Proposed Order Proposed Order)(Daniels, Patricia) (Entered: 01/28/2011)
01/31/2011	57	ORDER by Judge Cormac J. Carney: granting Petitioner's Ex Parte Application for a 14-Day Extension of Time to File His Motion for Evidentiary Hearing 56 . Petitioner is ordered to file a Motion for Evidentiary Hearing on February 17, 2011. (mt) (Entered: 02/01/2011)
02/17/2011	58	First EX PARTE APPLICATION to Exceed Page Limitation Motion For Evidentiary Hearing filed by Petitioner Ernest DeWayne Jones. (Attachments: # 1 Proposed Order Propsed Order Granting Application For Oversized Brief) (Daniels, Patricia) (Entered: 02/17/2011)
02/17/2011	59	NOTICE OF MOTION AND First MOTION for Hearing Evidentiary Hearing filed by Petitioner Ernest DeWayne Jones. (Attachments: # 1 Exhibit Volume 1 Of Exhibits In Support of Motion For Evidentiary Hearing, # 2 Exhibit Volume 2 Of Exhibits In Support of Motion For Evidentiary Hearing, # 3 Exhibit Volume 3 Of Exhibits In Support of Motion For Evidentiary Hearing, # 4 Exhibit Volume 4 Of Exhibits In Support of Motion For Evidentiary Hearing, # 5 Exhibit Volume 5 Of Exhibits In Support of Motion For Evidentiary Hearing, # 6 Exhibit Volume 6 Of Exhibits In Support of Motion For Evidentiary Hearing)(Daniels, Patricia) (Entered: 02/17/2011)
03/03/2011	60	ORDER GRANTING PETITIONERS APPLICATION TO FILE AN OVERSIZE MOTION FORAN EVIDENTIARY HEARING by Judge Cormac J. Carney: GOOD CAUSE APPEARING, petitioners Ex Parte Application To File Oversize Motion For An Evidentiary Hearing 58 is HEREBY GRANTED and the Motionis ordered filed. (mu) (Entered: 03/03/2011)
03/28/2011	61	NOTICE of Change of Attorney Information for attorney Sarah Jean Farhat counsel for Respondent Robert K. Wong. Adding Sarah J. Farhat as attorney as counsel of record for Robert K. Wong for the reason indicated in the G-06 Notice.

		Filed by Respondent Robert K. Wong (Farhat, Sarah) (Entered: 03/28/2011)
04/06/2011	62	IN CHAMBERS MINUTE ORDER VACATING BRIEFING SCHEDULE AND ORDERING SUPPLEMENTAL BRIEFING by Judge Cormac J. Carney: The Court vacates the current briefing schedule on Petitioners Motion for Evidentiary Hearing. On or before May 18, 2011, Petitioner shall file a Supplemental Brief addressing his entitlement to an evidentiary hearing in view of the Supreme Courts holding in Cullen v. Pinholster, 2011 WL 1225705 (April 4, 2011). (see document for details) (mu) (Entered: 04/06/2011)
05/17/2011	63	First EXPARTE APPLICATION for Extension of Time to File Supplemental Brief Addressing Petitioner's Entitlement To An Evidentiary Hearing filed by Petitioner Ernest DeWayne Jones. (Attachments: # 1 Proposed Order Proposed Order)(Daniels, Patricia) (Entered: 05/17/2011)
05/19/2011	64	ORDER by Judge Cormac J. Carney, granting 63 Ex Parte Application for Extension of Time to File. GOOD CAUSE APPEARING, petitioner's Ex Parte Application For A 30-DayExtension Of Time To File A Supplemental Brief Addressing His Entitlement To An Evidentiary Hearing is HEREBY GRANTED. Petitioner is ordered to file a Supplemental Brief Addressing His Entitlement To An Evidentiary Hearing on or before June 17, 2011. IT IS SO ORDERED (dro) (Entered: 05/19/2011)
06/10/2011	65	Second EXPARTE APPLICATION for Extension of Time to File SUPPLEMENTAL BRIEF ADDRESSING HIS ENTITLEMENT TO AN EVIDENTIARY HEARING and PROPOSED ORDER filed by Petitioner Ernest DeWayne Jones.(Laurence, Michael) (Entered: 06/10/2011)
06/13/2011	66	ORDER by Judge Cormac J. Carney: granting 65 Ex Parte Application for Extension of Time to File a Supplemental Brief Addressing his Entitlement to an Evidentiary Hearing. Petitioner is ordered to file a Supplemental Brief Addressing His Entitlement To An Evidentiary Hearing on or before July 18, 2011. (twdb) (Entered: 06/14/2011)
07/07/2011	67	NOTICE of Change of Attorney Information for attorney Cliona R Plunkett counsel for Petitioner Ernest DeWayne Jones. Patricia C. Daniels will no longer receive service of documents from the Clerks Office for the reason indicated in the G-06 Notice.Patricia C. Daniels is no longer attorney of record for the aforementioned party in this case for the reason indicated in the G-06 Notice. Filed by Petitioner Ernest D. Jones (Plunkett, Cliona) (Entered: 07/07/2011)
07/18/2011	68	Supplemental BRIEF filed by Petitioner Ernest DeWayne Jones. *on the Effect of Cullen v. Pinholster on the Court's Power to Grant an Evidentiary Hearing* regarding First MOTION for Hearing Evidentiary Hearing 59 . (Laurence, Michael) (Entered: 07/18/2011)
08/11/2011	69	APPLICATION for Extension of Time to File Opposition to Petitioner's Supplemental Brief filed by Respondent Robert K. Wong. (Attachments: # 1 Proposed Order)(Tetef, Herbert) (Entered: 08/11/2011)
08/16/2011	70	ORDER by Judge Cormac J. Carney: granting 69 Application for Extension of Time to File. IT IS ORDERED that Respondent is granted to andincluding September 14, 2011, in which to file an Opposition to PetitionersSupplemental

		Brief on the Effect of Cullen v. Pinholster on the Courts Power to Grant an Evidentiary Hearing. Petitioners Reply in support of his SupplementalBrief shall be filed by September 28, 2011. (twdb) (Entered: 08/16/2011)
09/14/2011	71	OPPOSITION *TO PETITIONER'S SUPPLEMENTAL BRIEF ON EFFECT OF CULLEN v. PINHOLSTER* filed by Respondent Robert K. Wong. (Tetef, Herbert) (Entered: 09/14/2011)
09/22/2011	72	EX PARTE APPLICATION FOR ENLARGEMENT OF TIME to File Reply to Respondent's Opposition to Petitioner's Supplemental Brief on the Court's Power to Grant an Evidentiary Hearing filed by Petitioner Ernest DeWayne Jones. (Attachments: # 1 Proposed Order)(Laurence, Michael) (Entered: 09/22/2011)
09/27/2011	73	ORDER by Judge Cormac J. Carney: GRANTING 72 Ex Parte Application for a 30-Day Extension of Time to File a Reply to Respondent's Opposition to Petitioner's Supplemental Brief on the Court's Power to Grant an Evidentiary Hearing: Petitioner is ordered to file a Reply on or before October 28,2011. (rla) (Entered: 09/27/2011)
10/28/2011	74	Supplemental Reply BRIEF filed by Petitioner Ernest DeWayne Jones. *on the Effect of Cullen v. Pinholster on the Court's Power to Grant an Evidentiary Hearing* (Laurence, Michael) (Entered: 10/28/2011)
03/26/2012	75	ORDER by Judge Cormac J. Carney: DENYING WITHOUT PREJUDICE MOTION FOR EVIDENTIARY HEARING 59 . (See document for details.) Mr. Jones' motion for an evidentiary hearing is DENIED WITHOUT PREJUDICE. The parties shall submit a proposed merits briefing schedule on or before April 16, 2012. Petitioners merits briefing shall set forth how each claim satisfies section 2254(d)(1) and/or section 2254(d)(2) on the basis of the record that was before the state court that adjudicated the claim on the merits. (rla) (Entered: 03/26/2012)
04/12/2012	76	STATEMENT JOINT STIPULATION AND [PROPOSED] ORDER RE: SCHEDULE FOR MERITS BRIEFING UNDER 28 U.S.C. § 2254(d)(1) and 2254(d)(2) filed by Petitioner Ernest DeWayne Jones (Plunkett, Cliona) (Entered: 04/12/2012)
04/16/2012	77	ORDER RE Schedule for merits briefing by Judge Cormac J. Carney, re joint stipulation 76 . Petitioner shall file his opening brief addressing how each claim satisfies 28 U.S.C. section 2254(d)(1) and/or (d)(2) on or before September 10, 2012, Respondent shall file an Opposition 90 days after Petitioners opening brief, and Petitioner shall file a Reply 60 days after Respondents Opposition. (twdb) (Entered: 04/17/2012)
09/04/2012	78	APPLICATION for Extension of Time to File Opening Brief on the Application of 28 U.S.C. Section 2254 filed by Petitioner Ernest DeWayne Jones. (Attachments: # 1 Proposed Order)(Laurence, Michael) (Entered: 09/04/2012)
09/05/2012	79	OPPOSITION Opposition re: APPLICATION for Extension of Time to File Opening Brief on the Application of 28 U.S.C. Section 2254 78 filed by Respondent Robert K. Wong. (Cook, David) (Entered: 09/05/2012)
09/06/2012	80	REPLY in Opposition to APPLICATION for Extension of Time to File Opening Brief on the Application of 28 U.S.C. Section 2254 78 filed by Petitioner Ernest DeWayne Jones. (Laurence, Michael) (Entered: 09/06/2012)

09/06/2012	81	MINUTES (IN CHAMBERS): ORDER by Judge Cormac J. Carney: GRANTING EXTENSION TO FILE OPENING BRIEF AND IMPOSING PAGE LIMIT 78 : Petitioner shall file his Opening Brief on or before December 10, 2012. All other briefing schedules from the Court's April 16, 2012 Order re: Scheduling for Merits Briefing under 2254(d)(1) and 2254(d)(2) shall remainin place.In addition, Petitioner's Opening Brief shall be limited to 100 pages; Respondent's Opposition shall be limited to 100 pages; and Petitioner's Reply shall be limited to 50 pages. (rla) (Entered: 09/06/2012)
10/05/2012	82	Notice of Change of Attorney Information filed by Petitioner Ernest DeWayne Jones (Plunkett, Cliona) (Entered: 10/05/2012)
12/04/2012	83	EX PARTE APPLICATION to Exceed Page Limitation for Petitioner's Opening Brief on Section 2254(d) filed by Petitioner Ernest DeWayne Jones. (Attachments: # 1 Proposed Order)(Laurence, Michael) (Entered: 12/04/2012)
12/10/2012	84	BRIEF filed by Petitioner Ernest DeWayne Jones. *Opening 2254(d) Brief on Evidentiary Hearing Claims* (Laurence, Michael) (Entered: 12/10/2012)
12/10/2012	85	ORDER by Judge Cormac J. Carney: GRANTING EX PARTE APPLICATION TO FILE PETITIONER'S OPENING BRIEF ON SECTION 2254(D) IN EXCESS OF PAGE LIMITS 83 : Petitioner's opening brief shall be limited to 150 pages. (rla) (Entered: 12/11/2012)
03/01/2013	86	EX PARTE APPLICATION FOR ENLARGEMENT OF TIME to File Opposition to Petitioner's Opening 2254(d) Brief on Evidentiary Hearing Claims *; Declaration of Herbert S. Tetef* filed by Respondent Robert K. Wong. (Attachments: # 1 Proposed Order)(Tetef, Herbert) (Entered: 03/01/2013)
03/06/2013	87	ORDER by Judge Cormac J. Carney: IT IS ORDERED that Respondent is granted to and including May 10, 2013, in which to file his Opposition to Petitioner's Opening 2254(D) Brief on Evidentiary Hearing Claims. All other briefing schedules from the Court's April 16, 2012 Order re: Schedule For Merits Briefing Under 28 U.S.C. 2254(d)(1) and 2254(d)(2) shall remain in effect. Granting 86 Ex Parte Application for Enlargement of Time to File. (rla) (Entered: 03/06/2013)
05/02/2013	88	EX PARTE APPLICATION FOR ENLARGEMENT OF TIME to File OPPOSITION TO PETITIONERS OPENING 2254(D) BRIEF ON EVIDENTIARY HEARING CLAIMS *; Declaration of Herbert S. Tetef* filed by Respondent Robert K. Wong. (Attachments: # 1 Proposed Order)(Tetef, Herbert) (Entered: 05/02/2013)
05/07/2013	89	ORDER by Judge Cormac J. Carney: Granting 88 Ex Parte Application for Enlargement of Time to File. IT IS ORDERED that Respondent is granted to and including June 24, 2013, in which to file the Opposition to Petitioner's Opening 2254(D) Brief on Evidentiary Hearing Claims. All other briefing schedules from the Court's April 16, 2012 Order re: Schedule For Merits Briefing Under 28 U.S.C. 2254(d)(1) and 2254(d)(2) shall remain in effect. (rla) (Entered: 05/08/2013)
06/14/2013	90	EX PARTE APPLICATION to Exceed Page Limitation to File Opposition to Petitioner's Opening 2254 (d) Brief on Evidentiary Hearing Claims filed by Respondent Kevin Chappell. (Attachments: # 1 Proposed Order)(Tetef, Herbert)

		(Entered: 06/14/2013)
06/14/2013	91	OBJECTIONS to Brief (non-motion non-appeal) 84 *OPPOSITION TO PETITIONERS OPENING 2254(D) BRIEF ON EVIDENTIARY HEARING CLAIMS* filed by Respondent Kevin Chappell. (Tetef, Herbert) (Entered: 06/14/2013)
06/19/2013	92	ORDER by Judge Cormac J. Carney: IT IS ORDERED that Respondent is granted leave to file his Opposition to Petitioners Opening 2254(d) Brief on Evidentiary Hearing Claims in excess of 100 pages, not to exceed 170 pages. Granting 90 Ex Parte Application for Leave to File Excess Pages. (rla) (Entered: 06/20/2013)
08/02/2013	93	First APPLICATION for Extension of Time to File 2254(d) Reply Brief filed by Petitioner Ernest DeWayne Jones. (Attachments: # 1 Proposed Order)(Plunkett, Cliona) (Entered: 08/02/2013)
08/05/2013	94	ORDER by Judge Cormac J. Carney: granting 93 Application for Extension of Time to File. Petitioner is ordered to file an Opening Brief on theApplication of 28 U.S.C. § 2254(d) on or before November 12, 2013. (twdb) (Entered: 08/06/2013)
11/08/2013	95	Second APPLICATION for Extension of Time to File Reply Brief on Application of 2254(d) filed by Petitioner Ernest DeWayne Jones. (Attachments: # 1 Proposed Order)(Plunkett, Cliona) (Entered: 11/08/2013)
11/12/2013	96	ORDER by Judge Cormac J. Carney: granting 95 Application for Extension of Time to File A Reply Brief. (twdb) (Entered: 11/13/2013)
11/15/2013	97	Notice of Appearance or Withdrawal of Counsel: for attorney Cliona R Plunkett counsel for Petitioner Ernest DeWayne Jones. Bethany Lobo is no longer attorney of record for the aforementioned party in this case for the reason indicated in the G-123 Notice. Filed by Petitioner Ernest Dewayne Jones. (Plunkett, Cliona) (Entered: 11/15/2013)
01/07/2014	98	Third APPLICATION for Extension of Time to File 2254(d) Brief on Non-Evidentiary Hearing Claims filed by Petitioner Ernest DeWayne Jones. (Attachments: # 1 Proposed Order)(Plunkett, Cliona) (Entered: 01/07/2014)
01/09/2014	99	ORDER by Judge Cormac J. Carney granting 98 Petitioner's Third Ex Parte Application for Extension of Time to File a Reply Brief. Petitioner Ernest Dewayne Jones's third ex parte application for additional time to file a reply brief on the application of 28 U.S.C. § 2254(d) to the claims in his habeas petition, (Dkt. No. 98), is GRANTED. Petitioner shall file his brief no later than January 27, 2014. No further requests for an extension will be granted. (dro) (Entered: 01/10/2014)
01/27/2014	100	REPLY *Brief Re: Application of 28 USC 2254(d)* filed by Petitioner Ernest DeWayne Jones. (Plunkett, Cliona) (Entered: 01/27/2014)
01/27/2014	101	APPLICATION to Exceed Page Limitation Reply Brief Re: Application of 28 USC 2254(d) filed by Petitioner Ernest DeWayne Jones. (Attachments: # 1 Proposed Order)(Plunkett, Cliona) (Entered: 01/27/2014)
01/30/2014	102	ORDER by Judge Cormac J. Carney: granting 101 Application for Leave to File

		Excess Pages. Petitioners reply brief shall be limited to 265 pages. (twdb) (Entered: 01/30/2014)
04/10/2014	103	ORDER RE: BRIEFING AND SETTLEMENT DISCUSSIONS by Judge Cormac J. Carney: The Court believes that briefing and oral argument are necessary and appropriate on petitioners potential claim. Accordingly, the Court sets the following briefing and hearing schedule: 1. The parties shall serve and file simultaneous opening briefs which address the issues raised in this Order no later than June 9, 2014.(see document for complete details) (mu) (Entered: 04/10/2014)
04/14/2014	104	ORDER by Judge Cormac J. Carney: Directing Petitioner to File Amendment to Petition. See document for further details. (mba) (Entered: 04/14/2014)
04/28/2014	105	*First Amended Petition for Writ of Habeas Corpus* (Plunkett, Cliona) (Entered: 04/28/2014)
06/05/2014	106	STATEMENT Joint Statement Re: Mediation and Settlement filed by Petitioner Ernest DeWayne Jones (Plunkett, Cliona) (Entered: 06/05/2014)
06/09/2014	107	RESPONSE filed by Respondent Kevin Chappellto Order, 103 *Opening Brief on Claim 27 that Lengthy Confinement of Petitioner Under Sentence of Death Violates Eighth Amendment* (Tetef, Herbert) (Entered: 06/09/2014)
06/09/2014	108	APPLICATION to Exceed Page Limitation Petitioner's Opening Brief on Claim 27 filed by Petitioner Ernest DeWayne Jones. (Attachments: # 1 Proposed Order) (Plunkett, Cliona) (Entered: 06/09/2014)
06/09/2014	109	BRIEF filed by Petitioner Ernest DeWayne Jones. *Opening Brief on Claim 27* (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit)(Plunkett, Cliona) (Entered: 06/09/2014)
06/11/2014	110	ORDER AMENDING BRIEFING SCHEDULE AND SETTING HEARING ON CLAIM 27 by Judge Cormac J. Carney: Accordingly, the briefing schedule on Claim 27 is hereby amended as follows: 3. The hearing on Claim 27 is scheduled for August 4, 2014 at 11 a.m. (see document for complete details) (Attachments: # 1 Supplement) (mu) (Entered: 06/11/2014)
06/11/2014	111	ORDER by Judge Cormac J. Carney: granting 108 Application for Leave to File Excess Pages. GOOD CAUSE APPEARING, Petitioners Ex Parte Application to File Petitioners Opening Brief on Claim 27 in Excess of Page Limits is HEREBY GRANTED. (twdb) (Entered: 06/12/2014)
07/01/2014	112	RESPONSE filed by Respondent Kevin Chappellto Brief (non-motion non-appeal) 109 *RESPONDENT'S RESPONSIVE BRIEF ON CLAIM 27* (Tetef, Herbert) (Entered: 07/01/2014)
07/03/2014	113	RESPONSE filed by Petitioner Ernest DeWayne Jonesto Response (non-motion) 107 *to Respondent's Opening Brief on Claim 27* (Attachments: # 1 Appendix Death Sentences in California, 1978-1997 (Revised))(Laurence, Michael) (Entered: 07/03/2014)
07/03/2014	114	ORDER AMENDING BRIEFING SCHEDULE AND ADVANCING HEARING ON CLAIM 27 by Judge Cormac J. Carney: Accordingly, the parties are hereby relieved of their obligation to file reply briefs. Moreover, the hearing on Mr. Joness claim, previously set for August 4, 2014 at 11 a.m. is hereby advanced to

		July 16, 2014 at 9 a.m. (see document for details) (mu) (Entered: 07/07/2014)
07/09/2014	115	NOTICE of Appearance filed by attorney James W Bilderback, II on behalf of Respondent Kevin Chappell (Attorney James W Bilderback, II added to party Kevin Chappell(pty:res))(Bilderback, James) (Entered: 07/09/2014)
07/14/2014	116	DECLARATION of Michael Laurence re Brief (non-motion non-appeal) 109 *in Support of Claim 27 (Supplemental)* filed by Petitioner Ernest DeWayne Jones. (Attachments: # 1 Appendix Data Used in Declaration of Michael Laurence) (Laurence, Michael) (Entered: 07/14/2014)
07/16/2014	117	ORDER DECLARING CALIFORNIAS DEATH PENALTY SYSTEM UNCONSTITUTIONAL AND VACATING PETITIONERS DEATH SENTENCE by Judge Cormac J. Carney: Accordingly, the Court hereby VACATES Mr. Joness death sentence. (see document for details) (Attachments: # 1 Supplement) (mu) (Entered: 07/16/2014)
07/16/2014	118	MINUTES OF Motion RE CLAIM 27 Hearing held before Judge Cormac J. Carney: Order issued to counsel before hearing held. Motion hearing held. Court confers with counsel. Court hears oral argument. Mr. Bilderback makes an oral motion for the Court to stay its order pending the interlocutory appeal. Court denies the motion. Final order signed and filed this date. Court directs the parties to prepare and submit a proposed partial judgment with certification as stated on the record within two weeks. Court Reporter: Maria Dellaneve. (twdb) (Entered: 07/17/2014)
07/18/2014	119	*CORRECTED TRANSCRIPT IS ATTACHED TO DOCKET ENTRY 121*TRANSCRIPT for proceedings held on July 16, 2014. Court Reporter/Electronic Court Recorder: MARIA DELLANEVE, phone number 714-564-9259. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Electronic Court Recorder before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Notice of Intent to Redact due within 7 days of this date. Redaction Request due 8/8/2014. Redacted Transcript Deadline set for 8/18/2014. Release of Transcript Restriction set for 10/16/2014. (Dellaneve, Maria) Modified on 7/22/2014 (lwag). (Entered: 07/18/2014)
07/18/2014	120	NOTICE OF FILING TRANSCRIPT filed for proceedings JULY 16, 2014 re Transcript 119 THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (Dellaneve, Maria) TEXT ONLY ENTRY (Entered: 07/18/2014)
07/22/2014	121	TRANSCRIPT for proceedings held on July 16, 2014. Court Reporter/Electronic Court Recorder: MARIA DELLANEVE, phone number 714-564-9259. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Electronic Court Recorder before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Notice of Intent to Redact due within 7 days of this date. Redaction Request due 8/12/2014. Redacted Transcript Deadline set for 8/22/2014. Release of Transcript Restriction set for 10/20/2014. (Dellaneve, Maria) (Entered: 07/22/2014)
07/22/2014	122	NOTICE OF FILING TRANSCRIPT filed for proceedings JULY 16, 2014 re Transcript 121 THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (Dellaneve, Maria) TEXT ONLY ENTRY (Entered: 07/22/2014)

07/25/2014	123	STIPULATION for Judgment as to Claim 27 filed by Petitioner Ernest DeWayne Jones.(Laurence, Michael) (Entered: 07/25/2014)
07/25/2014	124	FINAL JUDGMENT ON CLAIM 27 (FRCP 54(b)) by Judge Cormac J. Carney: Pursuant to the Courts Order Declaring Californias Death Penalty System Unconstitutional and Vacating Petitioners Death Sentence, July 16, 2014, ECF No. 117, Petitioners Claim 27 is GRANTED and his death sentence is VACATED. (see document for details) (mu) (Entered: 07/25/2014)
08/11/2014	125	NOTICE OF APPEAL from Order Declaring California's Death Penalty System Unconstitutional, to the 9th CCA filed by Petitioner Ernest DeWayne Jones. Appeal of Order 117 Filed On: 7/16/14; Entered On: 7/17/14; Filing fee $505, PAID, receipt number LA101326. (mat) (Entered: 08/11/2014)
08/12/2014	126	NOTIFICATION by Circuit Court of Appellate Docket Number 14-56302, 9th CCA regarding Notice of Appeal to 9th Circuit Court of Appeals 125 as to Petitioner Ernest DeWayne Jones. (mat) (Entered: 08/14/2014)
08/12/2014	127	ORDER from 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals, 125 filed by Ernest DeWayne Jones, CCA # 14-56302. The Order is By August 26, 2014, non-parties Emery Soos and Robert Justice shall move in this Court for voluntary dismissal of this appeal or explain in writing why the appeal should not be dismissed for lack of jurisdiction due to their lack of standing to appeal. All filings must be served on all parties to the district court proceeding. Failure to comply with this order will result in the automatic dismissal of the appeal. Order received in this district on 8/12/14. [See document for all details] (mat) (Entered: 08/14/2014)
08/21/2014	128	NOTICE OF APPEAL to the 9th CCA filed by Respondent Kevin Chappell. Appeal of Order, 117 , Order, 124 (Appeal fee FEE NOT PAID.) (Attachments: # 1 Exhibit Attachment 1 - Judgment and Order, # 2 Exhibit Attachment 2 - Appendix A)(Bilderback, James) (Entered: 08/21/2014)
08/21/2014		APPEAL FEE PAID: as to Appellant Kevin Chappell; Receipt Number: LA101954 in the amount of $505. (rsm) Modified on 8/22/2014 (cp). (Entered: 08/21/2014)
08/21/2014	129	NOTIFICATION by Circuit Court of Appellate Docket Number 14-56373, 9TH CCA regarding Notice of Appeal to 9th Circuit Court of Appeals, 128 as to Respondent Kevin Chappell. (car) (Entered: 08/22/2014)
08/22/2014	130	NOTICE OF CLERICAL ERROR: Due to clerical error the $505 fee for the Notice of Appeal (#128) was submitted by appellant Kevin Chappell. However, the docket entry erroneously listed appellee, Ernest DeWayne Jones as having paid the filing fee. The docket entry has been corrected to reflect Kevin Chappell as the payer. (dmap) (Entered: 08/22/2014)

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