APPEAL NO. 14-56373

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERNEST DEWAYNE JONES,

Petitioner-Appellee,

v.

RON DAVIS, Warden,

Respondent-Appellant.

AMICUS-CURIAE BRIEF OF CORRECTIONAL LIEUTENANT MARSHALL THOMPSON, RETIRED IN SUPPORT OF AFFIRMANCE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA, NO. 09-CV-02158-CJC
THE HONORABLE CORMAC J. CARNEY

O'MELVENY & MYERS LLP
STEVEN J. OLSON
CHRISTOPHER B. CRAIG
400 SOUTH HOPE STREET
LOS ANGELES, CA 90071
TELEPHONE: (213) 430-6000
FACSIMILE: (213) 430-6407

Pro Bono Attorneys for Amicus-Curiae
MARSHALL THOMPSON

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I.
INTRODUCTION

The most recent man to exhaust his appeals and face execution at San Quentin Prison was a 76-year-old blind man, suffering from diabetes and confined to a wheelchair. His confinement cost the State of California $2 million more than a sentence of life without parole ("LWOP"), a product of the 23 years he waited on death row—only slightly more than the 17.5-year average before execution in California. Nor were the circumstances of his execution unique. With roughly nine hundred inmates sentenced to death, but only thirteen executed over three-and-a-half decades, it is facially implausible that executions are anything but capricious. Rather than reserving executions for the carefully-vetted worst-of-the-worst, California broadly sentences men and women to death, but then saves executions for the infirm, the poorly represented, and the volunteers. Either the appellate process has failed, or California is arbitrarily sentencing men and women to die—there is no other explanation for the 1-in-70 rate of execution that more closely resembles a lottery than a sane appellate process.

The result of the appellate lottery is that state-sanctioned execution is one of the rarer causes of death for an inmate on death row at San Quentin State Prison. California's appellate system renders death row inmates five-times more likely to die of old age than to be strapped to a gurney—but at a total, post-*Furman* cost to the state of $4 billion. Yet Supreme Court precedent dating from *Furman* makes it

clear that arbitrary use of executions is constitutionally infirm, in violation of the Eighth and Fourteenth Amendment prohibitions on cruel and unusual punishment. The ruling of Judge Carney, astutely striking down the California death penalty for this well-established constitutional shortcoming, should be upheld.

II.
STATEMENT OF INTEREST OF AMICUS CURIAE

Lieutenant Marshall Thompson is a retired Correctional Lieutenant formerly stationed at San Quentin State Prison, the home of California's death row. Lieutenant Thompson spent 27 years working with the California Department of Corrections and Rehabilitation ("CDCR") before retiring in 2010, and had a front row seat as the California death row mushroomed from 6 to 747 inmates. Thompson served on the execution team at San Quentin for four executions, and so he is uniquely aware of the arbitrariness of California's death penalty and the absence of penological purpose in its random implementation. Pursuant to Federal Rule of Appellate Procedure Rule 29(a), Correctional Lieutenant Thompson files this brief with the consent of all the parties to this appeal.

III.
STATEMENT OF COUNSEL

This brief was authored entirely by counsel at O'Melveny & Myers, LLP. Counsel at O'Melveny contributed all costs associated with preparing and filing this brief, and no other person contributed to its preparation or filing.

IV.
STATEMENT OF ISSUES

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?[1]

V.
ARGUMENT

A. California's System for Appellate Review of Death Sentences Violates the Eighth Amendment by Rendering Execution Arbitrary

The Eighth Amendment defect in California's death penalty process is not mere delay in execution of sentence—rather, the randomness and uncertainty of execution, even after a sentence of death, renders the California death penalty unconstitutionally arbitrary. Appellants' brief manufactures a distinction between arbitrary sentencing and arbitrary execution of sentence—arguing that only the former is prohibited by Supreme Court jurisprudence. To the contrary, there is no authority for the proposition that the death penalty may be used arbitrarily provided that trial and sentencing are fair and the randomness in its application is confined to the appellate phase.

The *Furman* Court offers no such distinction, with a majority of the Court recognizing that arbitrarily imposing—or *carrying out*—a death sentence is an

[1] Correctional Lieutenant Thompson's amicus brief will address only the Eighth Amendment questions, and not the remaining issues raised by Respondent-Appellant.

Eighth Amendment violation. *Furman v. Georgia*, 408 U.S. 238, 239 (1972) (per curiam) ("The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment . . . ."). Nor do the individual concurrences betray an intent to abolish solely arbitrary sentencing, while tolerating arbitrary death. *See id.* at 291 (Douglas, J., concurring) ("[T]he State may not arbitrarily inflict an unusually severe punishment. The outstanding characteristic of our present practice of punishing criminals by death is the infrequency with which we resort to it."); *see also id*. at 309 (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual."); *id*. at 312 (White, J., concurring) ("[C]ommon sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct and that the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring those crimes for which it may be exacted.").

An adequate appellate process was likewise essential to the *Gregg* Court in finding that Georgia's revised death penalty procedure met Eighth Amendment muster. "An important aspect of the new Georgia legislative scheme, however, is its provision for appellate review. Prompt review by the Georgia Supreme Court is provided for in every case in which the death penalty is imposed." *Gregg v. Georgia*, 428 U.S. 153, 211 (1976). The keystone of the Eighth Amendment

adequacy of appellate review is whether such review renders execution less arbitrary. *Id*. at 195 ("meaningful appellate review . . . ensures that death sentences are not imposed capriciously or in a freakish manner.").

Only an execution, and not the death sentence itself, conveys society's harshest penalty. Yet the current California appellate process renders actual execution at best a matter of chance and at worst a macabre variant on suicide-by-cop, actively sought by those few death row inmates who have grown weary of the appellate process. A death sentence that has barely more than a 1 percent chance of resulting in an execution is the judicial equivalent of a bolt of lightning, and cannot be tolerated under the Eighth Amendment.

1. An Inmate on Death Row at San Quentin is Almost Twice as Likely to Die from Suicide and Five Times as Likely to Die from Natural Causes as by Execution.

There have been only thirteen executions out of more than 900 post-*Gregg* death sentences. ER-3. By contrast, 63 death row inmates have died of natural causes, and 22 have committed suicide. ER-5. In other words, the likelihood of being executed after a sentence of death is pronounced in California is not only lower than the odds of dying of natural causes, it is substantially lower than the odds of picking the winning number on a roulette wheel.

This is not merely a matter of comparing probabilities. The relevant constitutional question is not whether inmates spared from death benefit from the

long delay that assures the fairness of their sentence, but the converse. Does the rare inmate put to death by California reflect the deterrent and retributive purposes that can be the only proper motivations for the death penalty under the Eighth Amendment? To the contrary, the very small probability of execution renders the death penalty either volitional for the inmate, or a strike of bad fortune—not a result of the carefully considered judgment of the state.

2. Executions During Lieutenant Thompson's Tenure at CDCR Illustrate the Arbitrary Imposition of the Death Penalty.

The thirteen men executed during Lt. Thompson's tenure at CDCR—Robert Alton Harris, David Edwin Mason, William George Bonin, Keith Daniel Williams, Thomas M. Thompson, Jaturun Siripongs, Manuel Babbitt, Darrell Keith Rich, Robert Lee Massie, Stephen Wayne Anderson, Donald Beardslee, Stanley Williams, and Clarence Ray Allen—are notable mostly for their arbitrary selection from among the hundreds on death row at the time.

Massie and Mason both refused to exhaust their appeals. Mason fired his attorney for attempting to pursue Federal habeas review over Mason's objection. *See* Richard Paddock, *Keeping His Vow, Killer is Executed*, L.A. TIMES, Aug. 24, 1993, *available at*: http://articles.latimes.com/1993-08-24/news/mn-27489_1_san-quentin-s-gas-chamber. San Quentin Warden Jeanne Woodford asked Massie two minutes before the execution commenced if he wanted to reconsider his right to appeal. Massie chose to proceed with his own execution. *See* Kurt Streeter,

Serene Inmate Never Wavered as His Execution Drew Near, L.A. TIMES, March 28, 2001, *available at*: http://articles.latimes.com/print/2001/mar/28/news/mn-43657. Under the California death penalty appellate system, San Quentin death row inmates have the sole right to assisted suicide in the state.

Other executions also stand out as a failure of any careful, deliberative effort to promote retribution and deterrence. The executions of Anderson and Siripongs were opposed by the families of their victims. *See* Scott Gold, *Death Row Inmate Was Calm, Alone to End*, L.A. TIMES, Jan. 30, 2002, *available at*: http://articles.latimes.com/print/2002/jan/30/local/me-execute30; Richard Marosi, *Convicted Killer Siripongs Put to Death*, L.A. TIMES, Feb. 9, 1999, *available at*: http://articles.latimes.com/print/1999/feb/09/news/mn-6386. Babbitt was a decorated Vietnam veteran who served at the siege of Khe Sanh, and killed his sole-victim in the fog of PTSD. Maria La Ganga, *Babbitt is Executed After Appeal Fails*, L.A. TIMES, May 4, 1999, *available at*: http://articles.latimes.com/print/1999/may/04/news/mn-33688. Darrell Rich, though responsible for four horrible murders at the age of 23, died as "Young Elk" after discovering his Cherokee heritage on death row, and ate a last meal of only broth and Gatorade. He was eventually executed at the age of 45, after being held on death row for 19 years. Bettina Boxall, *Killer Held on Death Row Since '81 Is*

Executed, L.A. TIMES, March 15, 2000, *available at*:

http://articles.latimes.com/print/2000/mar/15/news/mn-9085.

The long delay between the imposition and execution of a death sentence renders death arbitrary not merely because it results in only a small and random sample of inmates who die at the hands of the state, but because the sentence is imposed on inmates who are often substantially changed between the time of their execution and the time of their sentence. Murder is typically the province of the young, but California's capital system assures that it is primarily the old who will be finally strapped to the gurney. Clarence Ray Allen, the most recent man to be executed in California, was "76 years old . . . blind, suffer[ed] from diabetes, [wa]s confined to a wheelchair, and ha[d] been on death row for 23 years" at the time of his execution. *Allen v. Ornoski*, 546 U.S. 1136, 1136 (2006) (Breyer, J., dissenting from denial of certiorari). A death penalty appellate system which so long delays punishment has neither deterrent nor retributive effect—after 20 years, a sentence of death is not even carried out by the same generation who imposed it.

B. Implementation of the California Death Penalty Is Costly, Burdensome, and Does Not Increase Public Safety.

California's system is not only an arbitrary imposition on those few men who are ultimately executed; it is also an arbitrary imposition on the tax base. The expense of the death system impugns any retributive or deterrent effect the death penalty might otherwise enjoy, as the opportunity cost of a death sentence robs the

state of pursuing deterrence and retribution by more cost-effective means. Though routine executions might arguably have a deterrent effect, an enormous death row in which executions are an extreme rarity has the opposite impact, as death row inmates receive special protections—coming at great taxpayer expense—that are not afforded to those in the general population of even San Quentin inmates.

California is home to the largest death row in the country, operating at an estimated annual cost of $137 million. Cal. Comm'n on the Fair Admin. of Justice, Final Report and Recommendations on the Administration of the Death Penalty in California 117 (2008), *available at* http://www.ccfaj.org/documents/CCFAJFinalReport.pdf. All male inmates sentenced to death must be housed at San Quentin State Prison, and all executions must be performed there. CAL. PENAL CODE §§ 3600, 3603. 748 inmates are currently housed in San Quentin's death row, ER 4, and the California Department of Corrections and Rehabilitation ("CDCR") must expend additional resources, at significant cost, to secure and house each of those inmates. Replacing the death penalty with a sentence of life without the possibility of parole ("LWOP") would save the under-resourced state prison system millions of dollars each year without jeopardizing the safety of prison personnel or the public.

1. The Operation of Death Row Costs Significantly More Than Housing Inmates Serving LWOP Sentences, but Confers No Additional Safety Benefits.

Since the sentence was reinstated in 1978, California has expended $4 billion on the administration of the death penalty. 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, S41 (2011). The cost of confinement alone is an estimated $90,000 more per year, per person, for a condemned inmate than for an inmate serving LWOP.[2] *Id*. at S105. Recent studies estimate that California taxpayers will pay approximately $3.4 billion over the cost of housing LWOP inmates to house condemned inmates between now and 2050. Arthur L. Alarcón & Paula M. Mitchell, *Costs of Capital Punishment in California: Will Voters Choose Reform This November?*, 44 Loy. L.A. L. Rev. 221, 244 (2012).

These extra costs are due to the additional security measures and legal safeguards required to house inmates on death row, and pervade all aspects of CDCR's treatment of condemned inmates at San Quentin. For example, unlike the majority of CDCR inmates, all condemned inmates are housed in single cells. Alarcón, *Executing the Will of the Voters?*, *supra*, at S57, n. 32. While many

[2] CDCR does not release information regarding the per capita cost to house a condemned inmate, but this data has been calculated by independent third-party sources. *See* sources cited *infra* Part V.C.

condemned inmates are entitled to access prison exercise yards, purchase canteen goods, receive visitors, and attend religious services and self-help programs with other inmates, their participation in these activities comes at a significant additional cost. Each time that a condemned inmate leaves his cell, he is escorted by between one and three correctional officers. Alarcón, *Costs of Capital Punishment*, *supra*, at 243. This practice is enforced entirely due to the inmate's death sentence, not to an assessment of his individual security risk. Escort costs for medical visits are particularly high for condemned inmates due to the physical layout of the prison at San Quentin. *Id*.

California's prolonged appeals process, as articulated by the District Court below, compounds the costs to CDCR to comply with condemned inmates' constitutional right to access legal resources. *See Bounds v. Smith*, 430 U.S. 817 (1977). Because their cases generally last decades, condemned inmates require more resources to process legal mail and manage legal records. *Id*; *see also* ER 4 (finding that more than 40 percent of death row inmates "have been there longer than 19 years")

In addition to the cost of housing and securing condemned inmates, CDCR spends significant funds on death row facilities at San Quentin. For example, CDCR constructed a new execution chamber in 2007 at a cost of approximately $800,000. However, the chamber has never been used, as all executions have been

indefinitely stayed pending the outcome of legal challenges to California's lethal injection protocol. ER 134. CDCR has also proposed building a new housing facility, the Condemned Inmate Complex, at San Quentin. The California State Auditor estimated that the complex would cost nearly $400 million to build and $1.2 billion to operate over the first twenty years of use. Cal. State Auditor, *California Department of Corrections and Rehabilitation: Although Building a Condemned Inmate Complex at San Quentin May Cost More than Expected, the Costs of Other Alternatives for Housing Condemned Inmates Are Likely to Be Even Higher* (July 29, 2008), *available at* https://www.auditor.ca.gov/reports. Current California Governor Jerry Brown halted the project in 2011, stating that it would be "unconscionable" to undertake such a "massive expenditure" in the face of California's budget deficit crisis. *Brown Cancels California's $365 Million 'Cadillac' Death Row*, Bloomberg News, Apr. 28, 2011, *available at* http://www.bloomberg.com/news/articles/2011-04-28/brown-cancels-356-million-cadillac-death-row-at-san-quentin-california. As it is, funding for the CDCR comprises approximately 10 percent of the state's General Fund expenditures—about the same amount spent on higher education. Cal. Dept. of Fin., Chart C, General Fund Program Distribution, *available at* http://www.dof.ca.gov/budgeting/budget_faqs/information/documents/CHART-C.pdf; *see also* Cal. State Auditor, *California Department of Corrections and*

Rehabilitation: It Fails to Track and Use Data That Would Allow It to More Effectively Monitor and Manage Its Operations 1 (2009), *available at* http://www.bsa.ca.gov/pdfs/reports/2009-107.1.pdf. The operation of death row is an added expense that California simply can't afford.

Despite the additional resources used to house and secure death row inmates, LWOP is equally effective as the death penalty at protecting both prison personnel and the public at large. CDCR's Level IV maximum security units, where the majority of LWOP inmates are housed,[3] have equally low escape rates as the condemned housing unit at San Quentin.[4] *See* Cal. Dep't of Corr. & Rehab., Annual Escape Report, Calendar Year 2012, Table 2, Table 5, *available at*

[3] All CDCR inmates are given a security placement score, based on their criminal history, institutional behavior, and other factors. *See* Cal. Code Regs. tit. 15, § 3375 (2010). Inmates are assigned to a facility with a security level ranging from, in ascending order of security, Level I (which includes CDCR camp facilities) to Level IV. *Id.* § 3375.1. All condemned inmates have a mandatory minimum placement score assigning them to Level IV facilities. Beginning in June 2012, the mandatory minimum placement score for inmates serving LWOP was lowered to allow some qualifying inmates to be housed in Level III facilities. *Id.* § 3375.2(a)(6).

[4] There were 20 escapes from adult CDCR institutions and camps in 2012, the most recent available data year. No escapes occurred at any Level IV housing units, including the San Quentin condemned unit. Twelve inmates escaped from camps, four escaped from Level I minimum security units, three escaped from Level II units, and two inmates escaped from Level III units. A total of 11 inmates escaped from CDCR facilities in 2011, and a total of 15 escaped in 2010. None of these escapes were from Level IV facilities, and only one was from a Level III facility. The overall escape rate has remained at 0.01% since 2001.

http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/BEH4/BEH4d2012.pdf.

Further, there is no evidence that the implementation of the death penalty has any effect on the rate of death-eligible crimes. In fact, jurisdictions that use the death penalty have a consistently *higher* homicide rate than those states that sentence murderers to LWOP. Death Penalty Info. Ctr., Deterrence: States Without the Death Penalty Have Had Consistently Lower Murder Rates (2011), *available at* http://www.deathpenaltyinfo.org/deterrence-states-without-death-penalty-have-had-consistently-lower-murder-rates. A 2000 national study found that from 1980 to 2000, the homicide rate in states with the death penalty was 48 percent to 101 percent higher than in states without the sentence. Raymond Bonner & Ford Fessenden, *Absence of Executions: A special report; States With No Death Penalty Share Lower Homicide Rates*, N.Y. Times, Sept. 22, 2000, *available at* http://www.nytimes.com/2000/09/22/us/absence-executions-special-report-states-with-no-death-penalty-share-lower.html. Ten of the twelve states without capital punishment at that time had homicide rates below the national average, compared to only half of the states with the sentence. *Id*.

Jurisdictions that have recently abolished the death penalty further demonstrate that the death penalty is no more effective than LWOP in deterring homicides. In Connecticut, for example, the murder rate dropped in 2013, the year

after the state abolished capital punishment. Fed. Bureau of Investigations, Uniform Crime Report, Crime in the United States, *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/4tabledatadecoverviewpdf/table_4_crime_in_the_united_states_by_region_geographic_division_and_state_2012-2013.xls. New York, New Mexico, and Illinois have also experienced a decrease in homicide rates since abolishing the death penalty in 2007, 2009, and 2011, respectively. *Id.* Such data plainly undermines any claim that the death penalty serves the penological goal of deterrence. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion); *see also* Pet. Br. Sec. II.B.2.

2. The Death Penalty Burdens the Operation of the Rest of the Already Overcrowded and Under-Resourced California Prison System.

The expense to implement the death penalty aggravates the constitutional deficiencies that have plagued the California prison system for years. In 1995, a special master was appointed to oversee CDCR's mental health care system after a federal district court determined the care provided to inmates was so inadequate that it violated the Eighth Amendment's ban on cruel and unusual punishment. *Coleman v. Wilson*, 912 F. Supp. 1282, 1323 (E.D. Cal. 1995). After several years of remedial efforts, mentally ill inmates in California prisons were still "languishing in horrific conditions without access to immediate necessary mental

health care." *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882, 898 (E.D. Cal. 2009). In 2005, both the mental health and medical care systems were found to cause such an "unconscionable degree of suffering and death" that the CDCR was placed under a federal receivership of "unprecedented scope and dimension," stripping the Secretary of the CDCR of all powers to direct the delivery of medical care. *Plata v. Schwarzenegger*, No. C01-1351 THE, 2005 WL 2932253, at *3 (N.D. Cal. Oct. 3, 2005).

Severe overcrowding and underfunding have led the California state prison system to its current state. California's prisons operated at around 200 percent their design capacity from the late 1990s until 2005, when they were placed under receivership. *Brown v. Plata*, 131 S. Ct. 1910, 1924 (2011). Such "exceptional" overcrowding "has overtaken the limited resources of prison staff; imposed demands well beyond the capacity of medical and mental health facilities, and created unsanitary and unsafe conditions." *Id*. at 1923. Under the direction of the federal government, the state has begun to reduce its prison population, but the problems facing the prisons persist. The drastic costs to administer the death penalty outlined above only exacerbate the dire lack of resources available to properly operate the massive prison system.

C. California's State Capital Appeals Process Compounds the Death Penalty's Costs to San Quentin.

As discussed above, several studies have found that, in California, incarcerating death row inmates costs significantly more than incarcerating LWOP inmates. *See, e.g.*, Judge Arthur L. Alarcón & Paula M. Mitchell, *Costs of Capital Punishment in California: Will Voters Choose Reform this November?*, 46 Loy. L.A. L. Rev. S1, S23-24 (2012); Cal. Legislative Analyst's Office, LAO Analysis of Proposition 34 (July 18, 2012), available at http://www.lao.ca.gov/ballot/2012/34_11_2012.pdf; Trisha McMahon & Tim Gage, *Replacing the Death Penalty Without Parole: The Impact of California Prison Costs* 10 (June 14, 2012) (unpublished study).

The delays in California's state capital appeals process compound these costs: the longer the inmate must litigate his appeals, the longer the inmate must spend on death row, and the more San Quentin must spend housing that inmate. Using existing research, we estimate that these delays alone cost San Quentin between $320,000 to $900,000 per death row inmate. We review our methodology below.

1. California's state capital appeals process takes significantly longer than other state capital appeals processes in the Ninth Circuit.

In California, the capital appeals process has three stages: automatic direct appeal to the California Supreme Court; petition for a writ of state habeas corpus at

the California Supreme Court; and petition for a writ of federal habeas corpus at federal district court. Because the district court below only addressed the constitutional issues raised by California's state appeals process, this brief will focus on delays at the direct appeal and state habeas corpus stages.[5]

Under California law, all death sentences are first appealed to the California Supreme Court on "direct appeal." *See* CAL. PENAL CODE § 1239. On direct appeal, the California Supreme Court reviews the trial court record to determine whether the defendant's conviction or sentence was illegal.

California's direct appeals process averages between 11.7 to 13.7 years per defendant. In other words, the average delay from the trial court's initial entry of conviction and death sentence to the California Supreme Court's final disposition of the direct appeal is between 11.7 and 13.7 years. *See* Cal. Comm'n on the Fair

[5] California's state capital appeals process itself delays federal habeas corpus review. If an inmate's federal habeas corpus petition includes claims that have not been exhausted in the state appeals process, the federal district court must either stay or dismiss the federal habeas proceedings until the defendant exhausts his claims in state courts. *See Rhines v. Weber*, 544 U.S. 269, 277–78 (2005). Because California underfunds appellate counsel on state habeas, nearly 75% of all federal habeas corpus petitions filed by California death row inmates are stayed for exhaustion under this rule. *See* Arthur L. Alarcón, *Remedies for California's Death Row Deadlock*, 80 S. Cal. L. Rev. 697, 749 (2007). These stays increase the delay in deciding federal habeas petitions by at least two years. Gerald F. Uelmen, *Death Penalty Appeals and Habeas Proceedings: The California Experience*, 93 Marq. L. Rev. 495, 499 (2009). As discussed *infra* at Section B.1, the two-year delay at federal habeas attributable to state habeas likely costs San Quentin an additional $90,000 or more per inmate.

Admin. of Justice, *supra*, at 131. This delay is significantly longer than the delays in the direct appeal processes from other states, including those in the Ninth Circuit. For example, Nevada's direct appeal process averages only 2.77 years per capital case. Nev. Legis. Auditor, *Performance Audit: Fiscal Costs of the Death Penalty* 42 (2014), *available at* http://tinyurl.com/pfwb47o. Similarly, Idaho's direct appeal process averages only 3.3 years per capital case. Idaho Leg. Office of Performance Evaluations, *Financial Costs of the Death Penalty* 27 (2014), *available at* http://www.legislature.idaho.gov/ope/publications/reports/r1402.pdf. Furthermore, the median length for Washington's state direct appeal process from 1992 to 2002 was 3.3 years per capital case, while in Arizona the median length for direct appeal of capital cases over that same period was just 2.9 years. *See* Barry Latzer & James N.G. Cauthen, Nat'l Inst. of Just., *Justice Delayed? Time Consumption in Capital Appeals: A Multistate Study* 30 (2007), *available at* http://www.cjlf.org/files/LatzerTechnicalReport.pdf.

After direct appeal, the inmate may then seek review of his conviction or sentence through a state habeas petition. *See* CAL. PENAL CODE § 1473. California's state habeas corpus process takes an average of 22 months per defendant: the delay from the initial filing of a state habeas corpus petition to the California Supreme Court's decision will typically last 22 months. Cal. Comm'n on the Fair Admin. of Justice, *supra*, at 123.

Totaling the delays at both direct appeal and state habeas, California's state capital appeals process thus averages between 13.5 to 15.5 years per inmate.[6] *Id.* Using comparative data on the delays from other states within the Ninth Circuit, we can then conservatively estimate that California's state capital appeals process adds at least an additional 8.4-10.4 year delay above and beyond whatever delays typically occur in an adequately-functioning state capital appeals processes.

[6] This figure significantly underestimates current delays, for at least two reasons. First, there is currently no active death penalty in California: as the district court below explained, federal and state courts have ordered moratoriums on all executions within California. R. at 6. In 2006, the Northern District of California enjoined California's death penalty because the State's three-drug lethal injection protocol violated the Eighth Amendment. *Morales v. Tilton*, 465 F. Supp. 2d 972 (N.D. Cal. 2006). In response to the federal court's ruling, California amended the protocol, but a state court enjoined executions under the amended protocol because it was not promulgated in compliance with California's Administrative Procedure Act (APA). *Morales v. Cal. Dep't of Corr. & Rehab.*, 168 Cal. App. 4th 729 (Cal. Ct. App. 2008). In response to the state court's ruling, California promulgated a new lethal injection protocol through the state APA rulemaking process, but a state court enjoined executions under this new protocol because the protocol did not comply with the APA. *Sims v. Dep't of Corr. & Rehab.*, 216 Cal. App. 4th 1059 (Cal. Ct. App. 2013). Governor Jerry Brown intends to promulgate a one-drug lethal injection protocol, but no protocol has been promulgated yet. Maura Dolan, Brown orders consideration of single-drug execution method, L.A. Times, Apr. 27, 2012. Second, and as California's death row expands because of the moratorium, delays in the state appeals process will only increase. For example, the district court noted that, the average delay in the state appeals process for inmates who had their state habeas petitions decided between 2008 and 2014 increased to 17.2 years. R. at 5.

2. The anomalous delays in California's state capital appeals process alone cost San Quentin an additional $336,000 to $936,000 per death row inmate.

As discussed in Section B, *supra*, various researchers have estimated the difference in costs between housing death row inmates and LWOP inmates in California. These estimates vary widely. Most conservatively, McMahon and Gage estimate that the difference is $40,000 per inmate, per year: housing death row inmates costs $85,000 per inmate per year, while housing maximum security LWOP inmates costs $45,000. Trisha McMahon & Tim Gage, *Replacing the Death Penalty Without Parole: The Impact of California Prison Costs* 3-4 (2012) (unpublished study); *see* Judge Arthur L. Alarcón & Paula M. Mitchell, *supra* at S23-24 (arguing that the McMahon and Gage estimate is "too low" because it is not supported by the California Department of Correction's published data on overall per capita inmate costs). The California Department of Corrections and Rehabilitation—which manages the budget for San Quentin—estimates that the difference is $90,000 per inmate, per year: housing death row inmates costs $124,150 per inmate, per year, while housing LWOP inmates costs $34,150. Cal. Comm'n on the Fair Admin. of Justice, *supra*, at 146.

Using this data and the comparative length of delay data in subsection (II)(A), we can then estimate the costs that anomalous delays in California's state

capital appeals process impose on San Quentin.[7] In short, using the CDCR's own estimates, the delays cost an additional $936,000 per inmate. Even a more conservative estimate suggests the additional cost is $336,000. Any penological purpose that might exist behind the death penalty is vitiated by the reality of San Quentin's death row—it is not a place of retributive justice, but an overpriced special housing unit for a small percentage of inmates. Its unnecessary but expensive upkeep only renders the remaining mission of the CDCR that much more difficult.

VI.
CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the District Court.

[7] To calculate these estimates, we multiplied the difference between the average length of California's state capital appeals process and the average length of California's state capital appeals process in other states by the difference between the per inmate, per year costs of housing death row and LWOP inmates at San Quentin. For the most conservative estimate, we used existing research finding that the difference in length is 8.4 years, and the difference in cost is $40,000 per inmate, per year. For the least conservative inmate, we used existing research finding that the difference in length is 10.4 years, and the difference in cost is $90,000 per inmate, per year.

Dated: March 6, 2015

Respectfully submitted,

s/ Christopher B. Craig

CHRISTOPHER B. CRAIG
STEVEN J. OLSON
O'MELVENY & MYERS LLP
400 S. HOPE STREET
LOS ANGELES, CA 90071
TELEPHONE: (213) 430-6000
FACSIMILE: (213) 430-6407

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Fed. R. App. P. 32(a)(7)(B)(i) and contains 5,154 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Dated: March 6, 2015

STEVEN J. OLSON
CHRISTOPHER B. CRAIG
O'MELVENY & MYERS LLP

By: s/ Christopher B. Craig
Christopher B. Craig
Attorney for Amicus-Curiae
Marshall Thompson

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 6, 2015.

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

Dated: March 6, 2015

STEVEN J. OLSON
CHRISTOPHER B. CRAIG
O'MELVENY & MYERS LLP

By: s/ Christopher B. Craig
Christopher B. Craig
Attorney for Amicus-Curiae
Marshall Thompson