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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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).

[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]

[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]

[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

(continued…)

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

(…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]

[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).

[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.").

[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,

[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

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This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 and is

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☐ 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

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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