No. 14-56373

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERNEST DEWAYNE JONES,

Petitioner-Appellee,

vs.

RON DAVIS, Warden,

Respondent-Appellant.

BRIEF OF *AMICI CURIAE* CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND MEXICAN CAPITAL LEGAL ASSISTANCE PROGRAM IN SUPPORT OF PETITIONER-APPELLEE AND SUPPORTING AFFIRMANCE

John T. Philipsborn, CSBN 83944
Law Offices of John T. Philipsborn
507 Polk Street, Suite 350
San Francisco, CA 94102
(415) 771-3801
jtpoffice@aol.com

Counsel of Record for *Amici Curiae*
CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE,
MEXICAN CAPITAL LEGAL ASSISTANCE PROGRAM, and
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Christopher W. Adams
Law Offices
102 Broad Street, Suite C
Charleston, SC 29401-2276
(843) 577-2153
chris@chrisadamslaw.com

Attorney for *Amicus Curiae*
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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IDENTIFICATION AND INTEREST OF *AMICI CURIAE*

California Attorneys for Criminal Justice (CACJ) is a non-profit California corporation found to support and protect the Constitution of the United States and the Constitution of California, and to protect the rights of individuals. CACJ's members are criminal defense lawyers and associated professions, most of whom practice in California. CACJ members regularly litigate death penalty cases in

California's trial and reviewing courts. CACJ on its own, and also together with other organizations, provides training for lawyers and allied professionals involved in the defense of capital cases both in California and elsewhere in the United States. CACJ co-hosts the largest yearly educational seminar on capital case defense in the United States and is also involved in the week-long California Death Penalty Defense College held yearly. CACJ is a publisher of the California Death Penalty Defense Manual, which is updated yearly. CACJ has appeared before this Court in matters of interest to its membership.

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation headquartered in Washington, D.C., and is the largest professional organization of criminal defense lawyers in the United States. NACDL has affiliate criminal defense organizations throughout the United States, including CACJ. NACDL is involved in a number of activities of interest to the criminal defense function, including matters directly related to the death penalty, and NACDL members defend and litigate death penalty cases throughout the United States. NACDL has also participated in the dissemination of reports and information to legislative bodies bearing on the funding and administration of the defense function, including in death penalty cases. NACDL sponsors continuing education programs regularly, and publishes a wide range of material related to the

defense function, including specific materials addressing aspects of death penalty defense. NACDL has appeared before this Court to address matters of interest and concern to its membership.

The Mexican Capital Legal Assistance Program (MCLAP) is an organization funded by the Government of Mexico, supervised through the Mexican Foreign Office in Mexico City, and directed in the United States by an established criminal defense lawyer headquartered in Arizona. It is staffed by highly experienced capital case defense counsel located throughout the United States, and who work with MCLAP on a part-time basis to monitor and provide assistance to counsel of record in death penalty cases in state and federal courts involving Mexican Nationals. MCLAP works with Mexican consular personnel and, where necessary, asserts Mexico's interests in capital case litigation in California and elsewhere in the United States. MCLAP also provides training to capital case defense counsel. MCLAP has appeared as *amicus curiae* in matters of concern to Mexico.

CACJ, NCADL, and MCLAP (hereafter 'combined *amici*') have combined here to support the District Court's finding that California's death row inmates are not responsible for pervasive post-conviction litigation delays, and that the State's difficulties in timely affording appellants and petitioners the right to counsel is

part of the reason for the systemic delays. These California issues also implicate Due Process Clause concerns where delays in post-conviction litigation prejudice individuals contesting death penalty judgments.

CACJ, NACDL, and MCLAP, hereafter 'combined *amici*,' support affirming the District Court's Order.

Consent of the Parties

Both parties have consented to the filing of this brief.

Statement of Compliance with the Circuit's Requirements Concerning This Brief and FRAP 26.1 Disclosure Statement

Identified counsel for *amici* prepared and are submitting this brief and no other organizations or person other than below appearing counsel for *amici* contributed money or content to this brief. CACJ and NACDL are both non-profit corporations, with no parent corporations.

SUMMARY OF ARGUMENT

The District Court's ruling that the California death penalty system cannot withstand scrutiny under the Constitution is correct. Combined *amici* here focus on the District Court's finding, and analysis, that habeas corpus petitioners in California cannot be found at fault for delays in the system. The District Court is correct that "...much of the delay in California's post-conviction review process is created by the State itself...." [District Court Order, hereafter 'Order,' at p.24.]

Combined *amici* also urge this Court to recognize that the demonstrated delays inherent in California's death penalty scheme can threaten the integrity and reliability of the review of death judgments in specific cases. Delays in capital case habeas corpus in California are chronic and characteristic. California's undermining of the defense function in California capital cases affects the pace of their eventual adjudication and resolution.

As reports and studies relied on by the District Court have demonstrated, the failure to provide timely and adequate counsel-related services delays preparation and investigation and results in delayed litigation of necessary and meritorious claims. These known characteristics of the California death penalty litigation process have resulted in the systemic reality that California death penalty cases transition to Federal courts after a decade or more of litigation accompanied by often short and conclusory written denials of habeas corpus by the California Supreme Court. Combined *amici* submit that the delays in the appointment of California reviewing court post-conviction counsel, together with delays and litigation related to attempts by habeas petitioners to get adequate ancillary funding and post-conviction discovery undermine the validity, in Eighth Amendment terms, of the death penalty judgments upheld in California.

Combined *amici* urge this Court to uphold the District Court's finding that the State of California has created and perpetuated the delays complained of by Petitioner-Appellee. This litigation is also an opportunity for the Court, should it disagree with the District Court's invalidating California's death penalty scheme, to underscore that in individual cases delay may affect the integrity of a death penalty litigation in California to such a degree that the combination of the Fifth, Eighth, and Fourteenth Amendments will prohibit upholding specific California death penalty judgments.

ARGUMENT

I. Delays in California's Review of Death Penalty Judgments Are Attributable in Significant Part to the State's Failure to Timely Provide and Protect the Function of Court-Appointed Counsel

In its analysis of the issues before it, the District Court addressed whether California's death row inmates, and capital case defendants, should be found to have prompted, or engaged in, the systemic delays that characterize California capital case post-conviction litigation. (Order, beginning at p.22, Section C.) The District Court specifically considered whether the available evidence supported the contention that in California death row habeas litigants were responsible for systemic delays. (Order, at pp. 22-23, and fn.18.) It concluded that there was no such evidence:

> ...there is no basis to conclude that inmates on California's Death Row are simply more dilatory, or have stronger incentive to needlessly delay the capital appeals process, than are those Death Row inmates in other states. Most of the delay in California's post-conviction process then is attributable to California's own system, not the inmates themselves.

District Court Order, p. 25.

Respondent-Appellant attempts to counter the District Court's conclusion and reliance on the abundant information and evidence about the reasons for delay, and concerns about the adequacy of the implementation of California's statutory right to post-conviction and appellate counsel in death judgment cases, with unconvincing references to developments outside of California – as demonstrated below. The District Court reviewed in detail the lengthy and highly informative proceedings of the *California Commission On The Fair Administration Of Justice*, summarized in the Commission's Final Report, referenced in the District Court's ruling (and here) as the 'Commission Report.' (District Court ruling, at p.2, fn.1.) The District Court also reviewed statistics and documents maintained by the State of California, and scholarly literature about California's death penalty scheme to arrive at its findings. In doing so, the District Court made reference to the late Judge Alarcon's significant research and published analyses of California's death penalty scheme as bases for its Order.

The District Court's Order is well supported by definitive evidence describing the California system.

In its Order, the District Court clearly took note of factors related directly to California's procedures for considering death penalty appeals and habeas corpus petitions. Only after that review did the District Court conclude that there is a lack of evidence that anything other than the State's procedural structure and governmental practices is the most readily identifiable causes of delays in capital case post-conviction litigation. Judge Alarcon and the California Commission published their focused analyses on the operation of the death penalty in 2007 and 2008 respectively. The Commission's proceedings included hearings that allowed the Commissioners to hear and consider a wide array of witnesses addressing issues concerning the death penalty in California, including representatives of police, prosecutors, defense counsel, families of victims, researchers, and scholars.

The Commission Report offers the conclusion that the pool of qualified (according to California's criteria) lawyers available to represent persons on California's death row has been drying up and declining – both because of cuts in the funding of the institutional offices created by the State specifically to help litigate post-conviction capital cases, and also because of the inadequacy of funding for private defense and related ancillary services. The District Court

found "...that the low rate at which private appointed counsel are paid by the State" is a significant factor in the decline of the pool of such lawyers available to handle appeals of death cases. (Order, at p.8, relying also in part on Alarcon, *Remedies for California's Death Row Deadlock*, 80 S.Cal.L.Rev. 697 (2007).)

Judge Alarcon arrived at his conclusions about California's capital case litigation system through extensive review of court and other public records in California and through a systematic analysis of California capital case 'flow' through half of the last decade.[1] While the Commission Report and Judge Alarcon's findings are now several years old, the problem of counsel related delays persists even today. As the former Director of the Commission, Professor Uelmen, wrote in the latter part of 2014, the funding problem has not been remedied.[2] Combined *amici* are aware that as of January 2015: 353 death row inmates have no habeas corpus lawyers; 76 of the 353 have had their direct appeals ruled on; at least 62 of the 353 have had neither appellate nor habeas corpus counsel.[3]

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[1] Alarcon, *Remedies for California's Death Row Deadlock*. 80 S.Cal.L.Rev. 697, 727-49 (2007). The analysis offered contains 313 footnotes, most involving highly specific references to verifiable public records, laws, or formal court policies.

[2] Uelmen, "California's Death Penalty Remains a 'Hollow Promise'" *Sacramento Bee*, 12/20/2014, at www.sacbee.com/opinion.

[3] Exhibit 232, Decl. Of Michael Laurence at pp. 5406-7. This indicates that California's death row has grown since the Commission Report. See Mallicoat, "The

California's right to counsel on direct appeal is embodied in its Penal Code §§1239 and 1240; the right to counsel for indigents to pursue capital case habeas corpus is provided by California Government Code §§68662 and 68663. The District Court found that implementation of California's right to counsel on appeal and habeas review of death judgments is a key problem.

Most of the lawyers representing death row inmates on habeas corpus by California Supreme Court appointment are private lawyers. (District Court Ruling, at p.9:15.) Lawyers are reluctant to take on the cases due to the long-standing and still unremedied and pervasive under-funding of the defense function. (Order, at p.10, relying on the Commission and Judge Alarcon's study.) It is not only the rates of payment and payment benchmarks that are problematic but also known individual disputes over the extent of payments and limitations in ancillary services funds that are unresolved issues. The underlying information and evidence warrants further comment.

One of the sources referenced by the District Court that supplies background for the understanding of the California system is Professor Uelmen's *Death Penalty Appeals and Habeas Proceedings: The California Experience*, 93

State of California's System of Capital Punishment," Cal. State Fullerton, Working Paper Series 2014, at cpp.fullerton.edu/publications, noting more than 80 California death judgments since the Commission Report.

Marq.L.Rev. 495 (2009). (Order, at p.4.) Uelmen, former Executive Director of the California Commission, former Dean of the University of Santa Clara Law School, and an acknowledged authority on the California courts, explains California's compensation procedures, noting that the California Supreme Court "...sets benchmarks to create presumptions regarding how many hours are allowable for a given task." *Id.*, at 499.[4] Indeed, California Supreme Court administers the post-conviction and appellate right to counsel in death penalty cases against a background of its published 'Policies' concerning the appointment and compensation of counsel and payment formulas for lawyers and necessary expenses.

The California criminal defense bar has, for years, made known its concerns about problems in the funding of the capital defense function during the California Chief Justices' informal periodic meetings with representatives of the defense stake holders in the capital case process. For a number of years, according to California Supreme Court 'Policies,' private counsel appointed to cases can choose between two compensation options. One is hourly rate compensation tied to a menu of benchmarks that set forth the time parameters for particular tasks

[4] See also the California Supreme Court's "Policies In Cases Arising From Judgments of Death." www.courts.ca.gov/documents/policies. Also, *In Re Reno,* 55 Cal. 4th 428, 456, fn 9, where the California Supreme Court reviews payment policies.

(and thus the presumed compensation). The alternative is a fixed fee and expenses payment option for direct appeal, habeas corpus, and clemency proceedings.[5] The fixed fee option generally ties compensation according to the size of the known record.

Where private counsel under-estimated, or was misinformed about, the complexities of the case, counsel will often bill in excess of the benchmarks and will then be left to an informal process of negotiation and accommodation – or negotiation leading to the submission of disputes to the Supreme Court's administration. For those working on an hourly pay basis, billings not infrequently exceed benchmarks. The fact of periodic disagreements between counsel and California's payment apparatus is known. 'Funding issues' are matters commonly discussed within the community of lawyers who represent death row clients (and appeal or pursue habeas) in death penalty cases. This 'knowledge' about California capital case work was discussed during the hearings held before the California Commission. These problems are part of the reason that experienced counsel may opt out of California's capital case review process after having litigated a case or two.

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[5] "Guidelines For Fixed Fee Appointments On An Optional Basis." www.courts.ca.gov/documents/policies. The compensation amount depends in part on the size of the record of the case.

Arguably more problematic are the issues that have arisen over applications or claims for payment or reimbursement of ancillary expenses incurred by counsel.[6] Lawyers responsible for these cases are opposing Government offices that are funded to defend the State's position. As the Commission observed, particularly on habeas, "[f]requently, volunteer counsel handling habeas proceedings pay out of pocket expenses for in excess of available reimbursement on a pro bono basis. [footnote omitted]"[7] Solo practitioners, who make up a sizeable number of the lawyers involved, cannot afford to finance an adequate habeas investigation litigation in complex and protracted cases, and as a result the investigations are "hampered by underfunding."[8] This known state of affairs combined with periodically disallowed ancillary funds applications is also part of the cautionary note that has kept some experienced lawyers from returning to work

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[6] It has been a periodic function of criminal defense organizations in California, including CACJ and the California Public Defenders Association (CPDA) to meet with some of the California Supreme Court Justices and Supreme Court capital case related staff to try to address payment issues. Thus, in addition to being informed by periodical literature, scholarly publication, and other sources about problems identified with the California death penalty appeal compensation problem, the Chief Justice of the California Supreme Court, some of the Associate Justices, and some of the Court's staff have been provided detailed reports and in-person discussions about the problems that are keeping lawyers who might be eligible to handle death penalty appeals and habeas cases in California from accepting appointment to them.

[7] Commission Report, at p.135.

[8] Order, at p.11, fn.12, referencing Judge Alarcon's work.

on appointed death penalty work before the California Supreme Court. And as the Commission pointed out, under the circumstances, private lawyers "are reluctant to accept appointments" in habeas cases when they know that a client will be better represented (and funded) if represented by a State funded office.[9]

Respondent-Appellant argues that California's system for reviewing capital sentences is designed to avoid arbitrary results, and that this is demonstrated by the fact that private lawyers working on California death penalty habeas cases can earn more than their colleagues in Texas or Florida on a case. (Respondent-Appellant's brief, Dkt entry 4-1, at p.45, e-page 56.) The argument ignores the delay inherent in California litigation and the higher cost of living and practicing in California.[10] A $130,000 to $200,000 fee for one case is indeed a sizeable and attractive sounding fee, as argued by Respondent-Appellant.[11] (Respondent-Appellant's brief, dkt entry 4-1, at e-page 56.) When placed in accurate and appropriate context – that it is a fee that will be earned over 10 to 18 years (or

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[9] Commission Report, at p.135.

[10] A review of various cost of living indices, including the Consumer Price Index, reveals that Texas and Florida have lower costs of living than California.

[11] This argument from Respondent-Appellant appears to have been taken from the California Supreme Court's spirited attempt to defend its habeas policies against attack from a habeas petitioner in *In Re Reno, supra,* 55 Cal. 4th 428. The California Supreme Court's comparisons to the Florida and Texas systems appears in fn 9 at p. 456.

more) – it becomes less attractive, especially if the lawyer involved is also fronting cost monies that may never be reimbursed.

In California, the lawyer who has been ordered into a post-conviction capital case evidentiary hearing may (or may not) be reimbursed for all costs associated with the hearing – a factor that Respondent-Appellant does not address at all. The State covers Respondent's costs. These erratic payment issues were made known to the California Commission, and have been discussed with California's Chief Justices.

Respondent-Appellant makes reference to *In re Reno*, *supra,* 55 Cal.4th 428, to persuade this Court that California's payment policies facilitate adequate post-conviction payment and funding packages. (Respondent's Brief, Dkt 4-1, at e-page 56.) What escapes mention is that in *Reno,* the last lead lawyer on that case had payment and ancillary funding issues with the California Supreme Court and was threatened with sanctions such that defense bar groups showed interest. *Id.* at 442, 443, 471-2. As easily demonstrated by a review of the Ninth Circuit's expenditures for Federal capital trial and habeas corpus cases, it is often left to Federal District Courts to fund efforts that could or would not be funded during capital case litigation while the case was being litigated in California state courts.

Respondent-Appellant's further answer to the District Court's Order is that the time spent to litigate a California death penalty review demonstrates systemic care 'in every case.' (Respondent-Appellant's Opening Brief, at pages 47-48.) Respondent-Appellant concludes that the structure of the California review system '[does] serve important interests' (Respondent-Appellant's brief, at p.49) and that in this respect California compares favorably with large death row states like Florida and Texas. (Respondent-Appellant's brief, at pp. 45-46.) The points of comparison, however, do not withstand scrutiny.

As the ABA's Death Penalty Due Process Review Project report points out in its assessment, the Florida system is seriously flawed. Florida has led the nation in death row exonerations and is characterized by persistent and inadequacies of funding.[12] Florida, like California, has many death judgments overturned in Federal courts. In both states, there are complaints about systematic, damaging, under-funding of the post-conviction system. In May of 2012, as reported by the American Bar Association, a former Florida Supreme Court Justice (Justice Cantero) and a member of ABA's Florida Assessment Team called for the enactment of reforms described in the 2006 *ABA Assessment on the Death*

[12] *Florida Death Penalty Assessment Report and Supplemental Materials*. www.americanbar.org/content, Executive Summary.

Penalty.[13] Florida and California share the characteristic of having reports on their appellate and post-conviction systems lament the lack of adequate defense funding.

The ABA's *Texas Assessment on the Death Penalty* noted that in 2007, Texas had created a regional public defender for capital cases "...to represent indigent capital defendants at trial in an increasing number of Texas's 254 counties."[14] Not so California, according to the California Commission. California still has 58 different county systems in place – one in each of its counties. Texas created its Office of Capital Writs in 2009. Like Texas, California has been criticized for the highly variable discovery procedures used by its prosecutors – including criticism related to cases that were in litigation, years after the conviction, before this Court.[15]

Respondent-Appellant is correct that there are differences in the procedures employed by California and other death penalty states like Florida and Texas. But major criticisms of all three systems are the same. And neither Texas nor Florida

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[13] *Florida Death Penalty Assessment Report and Supplemental Materials.* www.americanbar.org/groups/individualrights/projects.

[14] *Texas Assessment on the Death Penalty*. www.americanbar.org/content.

[15] Dolan, M. "U.S. Judges See 'Epidemic' of Prosecutorial Misconduct in State." *Los Angeles Times*. January 31, 2015. www.latimes.com. Referencing recent oral argument in a California case.

has as monumental a delay built into its death penalty review system as does California. The comparisons do little to explain away the California delay. The District Court's findings about the causes of delay in California, and the problems that need to be overcome to address that delay, are uncontradicted.

The District Court's reason for carefully considering the causes of the California delay was to assess whether it can usefully be argued that California's death row inmates are the cause of delay in California post-conviction litigation. The District Court overcame that possible objection. The information available overwhelmingly supports the District Court's conclusions.

A. The District Court's Analysis of the Inadequacies of California's Implementation of the Right to Counsel Throughout the State's Death Penalty Litigation Process is Well Supported

The District Court relied on state agency records; court rulings; writings of a former California Chief Justice, scholarship based on California records from a celebrated jurist, Judge Alarcon of this Court, and findings of a legislatively created California Commission in arriving at its conclusions and findings. Respondent-Appellant does not offer factual challenges to the foundation of the District Court's Order. That Order was well supported by available evidence. The California Supreme Court's published policies and procedures, as Professor Uelmen has pointed out, are largely unchanged today.

B. Several Characteristics of California's Death Penalty Litigation System Contribute to the Systemic Delays

California's capital cases are, on average, much longer than its non-capital trials. A few years into the reintroduction of the death penalty, one researcher had found that California's capital trials take an average of six weeks of court time.[16] This is a matter that this Court's Senior Judge Wallace Tashima reflected on several years later[17] – more than a decade before Judge Alarcon and the California Commission pursued their investigation of the California system.

A study from the National Center for State Courts focused on felony case flow in nine state criminal trial courts (at least two of which were in California), demonstrated that taking *non-capital case flow* into account, at least as of 1999, the major court systems of Oakland and Sacramento, California, were just as time-efficient as a selection of other states' urban courts.[18] California's capital cases are a different story, however. While the Commission Report does not contain a comparison of the amount of time that a California capital case takes from trial level charging through trial level judgment (and thus did not update data relied on

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[16] Garey, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 UC Davis L.R. 1221, 1221-27 (1985).

[17] Tashima, "A Costly Sanction." *The Los Angeles Daily Journal* (June 20, 1991).

[18] Ostrom and Hanson, *Efficiency, Timeliness, and Quality: A New Perspective From Non-State Criminal Trial Courts*, National Center for State Courts (1999) available at www.ncjrs.gov.

by Judge Tashima), there is little doubt that capital cases take longer to litigate in California trial courts than do non-capital felony cases. California's cases clearly continue to result in relatively lengthy trials since, as the Commission stated, the average record in a capital case is "...in excess of 9,000 pages of Reporters and Clerk's transcripts...."[19] The California Supreme Court puts it at an average of 10,000 pages.[20]

The delays inherent in the California system are related not only to the length of capital trials but also because of the variations in the ways that California's counties staff, support, and litigate the cases at trial. It is readily ascertainable that: "The leading cause of reversal of death judgments in California is the failure of counsel to adequately investigate potential mitigating evidence."[21] California's indigent defense apparatus at the trial level, which was briefly described by the Commission Report, is an element that bears on the District Court's finding of systemic delay.

California has 58 counties, most of which use one or more institutional public defender offices, combined with panels of eligible private practitioners, or

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[19] Commission Report, at p.131.

[20] *In re Reno*, 55 Cal.4th, at 456, fn.9.

[21] Commission Report, at p.129.

designated contractors, to provide defense services to the indigent.[22] A significant proportion of capital case defendants are represented by some form of publically funded institutional defense or contract defense office. Counties also rely on individual private practitioners to work on trial level cases. Cases involving death judgements from California trial courts may, or may not, have been represented by an adequately staffed defense. The unevenness of defense funding at the trial level bears on the adequacy of California trial counsel, particularly where local rulings and policies limit trial level preparation.

The California Commission noted that some of the most problematic funding formulas have been all-inclusive fixed fee contracts (requiring a contractor to pay himself and ancillary services from a lump sum contract) and capped contracts, which allow a contractor a limited ability to supplement the contract among with additional cost funds allocations.[23] The Commission recommendation is that the legislature in California enact legislation to require that contract services provide separate funding for ancillary services of various kinds, including investigators and experts.[24]

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[22] Commission Report, at p.92.

[23] Commission Report, at pp.94-96.

[24] Commission Report, at p.96.

California statutes also permit the allocation of ancillary services monies – though the State of California has no statewide budget to fund all trial level capital litigation. Trial level capital litigation is paid for through a patchwork of funding that includes county trial court funding, other county funding, and various state funds made available either to assist beleaguered counties or to assist with very specific issues. Trial level funding denials have been addressed in some California post-conviction rulings. For example, this Court commented on the implications of funding denials in a Riverside, California death judgment case which this Court reversed in 2005.[25] If funding related to allegedly necessary services is denied, on habeas corpus (or appeal, if possible) counsel will seek to demonstrate both the omission and the prejudice by seeking the funding from the California Supreme Court, and doing the omitted work. The State Supreme Court's Policies, as argued above, will allow only limited fact development in most cases which the trial court, or local contracts, curtailed the funding of the defense function.

Periodically, ancillary services issues have resulted in published California decisions. See, for example, *Coronevsky v. Superior Court*, 36 Cal.3d 307 (1984), which relied in part on this Court's decision in *Mason v. Arizona*, 504 F.2d 1345,

[25] The Riverside case was *Daniels v. Woodford*, 428 F.3d 1181 (9th Cir., 2005), cert. denied, 550 U.S. 968 (2007).

1351 (9th Cir., 1974), to require that a California county provide ancillary funding to the defense of an individual who had been death eligible, but for failure of funding, whose case became non-capital. A review of California case law, however, reveals that in comparison with the number of California death judgments, the number of published rulings on funding issues arising pre-judgment through California's interlocutory writ procedures has been small. *Coronevsky, supra*, is a notable and unique case because a lack of funding resulted in a pretrial bar to pursing the death penalty. The majority of California's death judgment cases involving alleged deprivations of necessary funding claims will be litigated on appeal or on habeas, which magnifies the importance of the need for adequacy of post-conviction counsel and ancillary funding.

II. Systemic Delays Can Cause Prejudice

This Court observed some time ago in addressing an allegation of excessive charging delay amounting to an alleged Due Process violation at the trial level, that prejudice can result from "...the loss of witnesses and/or physical evidence or the impairment of their use, e.g., dimming of the witnesses' memory." *U.S. v. Mays*, 549 F.2d 670, 675-78 (9th Cir., 1977). Combined *amici* are clear that the issue framed before this Court is not pretrial or trial-related claims of delay that resulted in Due Process violations. See, generally, *U.S. v. Marion*, 404 U.S. 307,

325-26 (1971). Nonetheless, at various junctures in the adjudication of cases, there is recognition that an accused may be harmed by delay in being able to answer criminal charges. *Barker v. Wingo*, 407 U.S. 514, 532 (1972).

The District Court found that in California, there is such pervasive delay that use of the death penalty has lost its legitimacy, and the Constitutional justifications for its use have been dissipated. The District Court was correct in finding that there is overwhelming evidence to support its conclusion that death row habeas corpus petitioners in California do not cause the delays in the death penalty review and adjudication process. Delays in the appointment of counsel, in the funding of defense efforts, or failures to fund reasonable ancillary services are not orchestrated by criminal case defendants, appellants, or habeas petitioners. Indeed, it is a court that regulates the pace of the implementation and the extent of the right to counsel. Delay in staffing and/or funding a litigation effort can have a profound effect on the reliability of the evidence available to the parties, and to the adjudicating tribunal. This case provides this Court the opportunity to stress that point.

Some time ago, California recognized that in the assessment of the denial of the right to a speedy trial, the alleged systemic unavailability of public funding for the defense function will not excuse prejudicial delay. Justice White pointed this

out in his concurring opinion in *Barker v. Wingo*, *supra*, 407 U.S. 514, 538, noting that a 'limited resources' justification will not overcome the constitutional right to a speedy trial. California recognizes this legal reality in *People v. Johnson*, 26 Cal.3d 557, 571-72 (1980). But this recognition has not triggered necessary reforms of the post-conviction funding situation in California.

A capital case habeas corpus petitioner in Federal court may be able to overcome claims of the inadequacy of his factual record by pointing to prior state rulings that should allow necessary investigation and expansion of the record in the Ninth Circuit as discussed in *Jones v. Wood*, 114 F.3d 1002 (9th Cir., 1997). There may, however, be cases in which an individual habeas corpus petitioner may be so prejudiced by the loss of access to records and evidence, and to necessary witnesses, as to make useful expansion of the record or discovery during Federal post-conviction litigation both an empty exercise. For some California death row inmates, systemic delay related to the appointment and funding of counsel and to the discovery process may be a significant prejudicial factor. Systemic delays in California are not due to some special attention to procedural and substantive 'correctness' of death judgments. Significant delays are attributable to California's governmental inertia.

CONCLUSION

For the reasons stated above, argued by Petitioner-Respondent Jones, and by other *amici* supporting Jones, combined *amici* urge this Court to uphold the District Court's order.

Dated: March 5, 2015

Respectfully Submitted,

JOHN T. PHILIPSBORN

/s/ John T. Philipsborn
By JOHN T. PHILIPSBORN
Attorney for *Amici Curiae*
CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE and
MEXICAN CAPITAL LEGAL ASSISTANCE PROGRAM;
Appearing as Counsel of Record for Joined *Amici*
Member of the Bar of the Ninth Circuit Court of Appeals

/s/ Christopher W. Adams
By CHRISTOPHER W. ADAMS
Attorney for *Amicus Curiae*
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(5), (6), (7)(B) and (C) and Ninth Circuit Rule 32, I certify that the attached *Amici Curiae* Brief for the California Attorneys for Criminal Justice and Mexican Capital Legal Assistance Program is proportionately spaced, uses 14-point Times New Roman type, and contains 6,247 words.

Dated: March 5, 2015 */s/ Melissa Stern*

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of March, 2015, I caused the foregoing brief to be electronically filed with the United States Court of Appeals for the Ninth Circuit via ECF system. The brief is served electronically on the following counsel:

Michael Laurence
Nisah Shah
Habeas Corpus Resource Center
303 Second Street, Suite 400 South
San Francisco, CA 94107
mlaurence@hcrc.ca.gov
Counsel for Petitioner-Appellee
Ernest Dewayne Jones

Kent Scheidegger, Legal Director
Criminal Justice Legal Foundation
2131 L Street
Sacramento, CA 95816-4924
ks_temp4@cjlf.org
Counsel for *Amicus Curiae*
Criminal Justice Legal Foundation

James Bilderback, II
Supervising Deputy Attorney General
Sarah Farhat, Deputy Attorney General
Herbert Tetef, Deputy Attorney General
AGCA-Office of the California
Attorney General
300 South Spring Street
Los Angeles, CA 90013
bill.bilderback@doj.ca.gov
sarah.farhat@doj.ca.gov
herbert.tetef@doj.ca.gov
Counsel for Respondent-Appellant
Ron Davis

Dated: March 5, 2015 */s/ Melissa Stern*