14-56373

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ERNEST DEWAYNE JONES,

Petitioner-Appellee,

v.

RON DAVIS, Warden,

Respondent-Appellant.

On Appeal from the United States District Court
For the Central District of California
Hon. Cormac J. Carney, District Judge

BRIEF OF *AMICUS CURIAE* DEATH PENALTY FOCUS IN SUPPORT OF PETITIONER-APPELLEE AND SUPPORTING AFFIRMANCE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES (CONTINUED)

Other Authorities

TABLE OF AUTHORITIES (CONTINUED)

TABLE OF AUTHORITIES (CONTINUED)

INTEREST OF *AMICUS CURIAE*[1]

Death Penalty Focus ("DPF") has a vital interest in the questions presented in this appeal. DPF is a not-for-profit organization based in San Francisco that brings together a broad and varied coalition of groups and individuals—including not only death row inmates and their families, but also law enforcement, corrections personnel, former prosecutors and judges, victims of crime and their families, clergy and faith leaders, community leaders, elected officials, and exonerees—to promote fairness and justice in criminal prosecutions and sentencing; to examine the implications of the death penalty in individual cases and for society as a whole; to identify and raise public awareness of its flaws and the affirmative and irreparable injuries that it breeds; and to advocate for alternatives.

DPF agrees with the district court below and Appellee here that the system of capital punishment administered by the State of California is dysfunctional and that sentences imposed and carried out thereunder violate the Cruel and Unusual Punishment Clause of the Eighth Amendment. DPF submits this brief to demonstrate to the Court how the decades-long delays in processing capital cases

[1] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, *amicus curiae* affirms that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person or entity other than *amicus curiae*, its members, or its counsel contributed money intended to fund preparing or submitting this brief. Both parties have consented to the filing of this brief.

in California often effectively preclude inmates who are actually innocent or whose trials were infected with constitutional error from obtaining relief because the inmate's natural death precedes completion of judicial review or because the inmate is no longer competent to defend himself by the time a new trial is granted.

The State's exorbitant delays in processing capital cases also inflict needless and protracted suffering upon the families of death row inmates, as their loved one's impending death impedes their ability to engage with society and lead productive lives during the many years' wait for the review process to finish. Where the inmate is actually innocent or where constitutional error requires a new trial, the years the inmate is wrongfully incarcerated are stolen from the family as well—a particularly tragic outcome that cannot be justified by the State.

Because their stories are seldom told, the loved ones of death row inmates are sometimes referred to as the death penalty's "hidden victims." Through this brief, DPF also seeks to inform the Court of the torment the State's broken system causes this oft-forgotten group.

INTRODUCTION AND SUMMARY

The State argues that the decades of delay inherent in California's capital punishment system benefit death row inmates by ensuring the accuracy of their convictions and sentences, and by prolonging their lives while they await review.

See Opening Br. 20, 43-52. In fact, in many cases this delay deprives inmates of due process.

Capital cases are plagued by ineffective assistance of counsel, prosecutorial misconduct, and numerous other errors that lead to relief in the majority of federal habeas petitions—60%, as the district court found. Typically, however, it takes an inmate on death row in California three decades to complete the direct review process, exhaust his state court remedies, and obtain a ruling on a federal habeas petition. By that time, many inmates are unable to benefit from the retrials that are ordered because the evidence that might establish their innocence has been lost. Even worse, an inmate with meritorious claims may die before his claims are heard, or, after many years on death row, an inmate's mental health may have deteriorated so badly that he is no longer competent to stand trial when a new trial is finally granted. In such cases, far from ensuring the reliability of capital sentences, the protracted delays in the California capital punishment system deny inmates a fair opportunity to defend themselves and establish their innocence or otherwise obtain relief from their convictions and sentences of death.

In addition, the inordinate delays in and unpredictability of the California capital punishment system impose enormous suffering on the families of death row inmates, and particularly on the families of those inmates who are wrongfully incarcerated because they are actually innocent or because constitutional error

requires reversal of their convictions or sentences. As numerous studies have established, capital sentences inflict punishment not only on the convicted but also on their families in the form of guilt, stigma, and social isolation arising from their kinship with a death row prisoner, which in turns leads to debilitating depression, hopelessness, and even suicide. This suffering is exacerbated by the decades-long delays in the California capital punishment system because, especially in light of the high percentage of capital sentences that are overturned, an inmate's family members cannot be sure of their loved one's fate until the review process, both direct and collateral, has been completed. As a result, the families of death row inmates are seldom able to come to grips with a capital sentence, and instead remain in a state of unremitting despair for decades.

The unfairness and anguish caused by California's broken capital punishment system is only getting worse. As the State's death row population continues to rise, the delays in appointing appellate counsel, ruling on direct appeals, appointing habeas counsel, and ruling on habeas petitions grow ever longer; indeed, the current average delay of nearly thirty years to exhaust all state and federal remedies will soon reach forty. As a result, five hundred more inmates are likely to die before the courts rule on their right to relief, and the grief endured by their families will be further prolonged and compounded. This increasing danger that inmates who have been deprived of a fair trial and may be actually

innocent will be denied meaningful review and that the anguish and suffering inflicted on their families will be exacerbated belies the State's assertion that its dysfunctional death penalty system is an unalloyed benefit to those caught within it.

ARGUMENT

I. THE DECADES-LONG DELAYS IN THE STATE'S CAPITAL PUNISHMENT SYSTEM PREVENT MANY ON DEATH ROW FROM ESTABLISHING THEIR INNOCENCE AND PROLONG THE SUFFERING OF THOSE ABLE TO DO SO

The State asserts that the excessive delays in adjudicating its capital cases benefit death row inmates because the length of the process ensures reliable sentences and prolongs the lives of death row inmates while they await review. *See* Opening Br. 20, 43-52. In fact, the decades of delay in the review process do not ensure that capital sentences are accurate. To the contrary, the delay often prevents death row inmates from establishing their innocence because exculpatory evidence is either lost or has become stale. Worse still, in the decades taken to review their convictions and sentences, many inmates die or lose the ability to defend themselves. This is especially troubling given that habeas relief is granted in approximately 60% of the capital cases that reach the federal courts. ER 6, 14. Moreover, even if a death row inmate is eventually able to establish his innocence, he will suffer irreparable injury from the decades spent in prison while his case is reviewed. Three cases vividly illustrate these problems.

Ralph International Thomas. Ralph International Thomas was convicted of murder and sentenced to death in 1986. In 2009, twenty-three years later, his conviction was vacated due to ineffective assistance of counsel in failing to develop evidence that Mr. Thomas did not commit the murders in question. By that time, however, Mr. Thomas' mental health had deteriorated so seriously that he was no longer competent to stand trial, and he eventually died in state custody without any retrial.

Mr. Thomas was charged with the murders of two "Deadheads"—devoted fans of the Grateful Dead who followed the band from concert to concert—at an encampment of homeless and drifters on the outskirts of Berkeley where Thomas lived. *See People v. Thomas*, 828 P.2d 101, 106 & n.2 (Cal. 1992) (en banc). Thomas, a black man, admitted that the night before the murders he shared beer and marijuana with the victims, who were both white, and that he owned a rifle, which he had reported stolen before the murders, that could have inflicted the fatal wounds. *See id.* at 109-10.

At the preliminary hearing, another resident of the encampment, Vivian Cercy, identified the murderer as a tall, blonde man. *Id*. at 111. Ms. Cercy, however, was unavailable at trial, and although the evidence against Mr. Thomas was only circumstantial, the State persuaded the jury to disregard Ms. Cercy's

testimony from the preliminary hearing. *Id.* at 111-12,122-24 & n.14; *accord In re Thomas*, 129 P.3d 49, 51, 56-57 (Cal. 2006).

The California Supreme Court affirmed the conviction and sentence on direct appeal. *See Thomas*, 828 P.2d at 105. Mr. Thomas subsequently filed a petition for a writ of habeas corpus in state court asserting ineffective assistance of counsel based upon his public defender's failure to investigate Ms. Cercy's testimony and to develop evidence concerning "Bo," the man she identified as the murderer. *See In re Thomas*, 129 P.3d at 50-52. In 2002, after the California Supreme Court finally granted Mr. Thomas an evidentiary hearing, he presented testimony from nine former Deadheads about another Deadhead named "Bo," who fit Ms. Cercy's description of the murderer. *Id.* at 70 (Kennard, J., dissenting). The California Supreme Court found that, by failing to investigate and develop evidence corroborating Ms. Cercy's testimony at the preliminary hearing, Mr. Thomas' public defender failed to satisfy the Sixth Amendment. *Id.* at 56 (majority opinion). Nevertheless, the Court denied Mr. Thomas' ineffective assistance claim on the ground that he could not demonstrate prejudice because "what [defense counsel] would have found 20 years ago with a competent investigation is difficult to know," *id*. at 62; *see also id.* at 50 ("Thomas has not shown prejudice … as best as can be determined 20 years after the fact")—that is, because of the delay in reviewing his conviction.

Mr. Thomas subsequently filed a federal petition for a writ of habeas corpus. Disagreeing with the California Supreme Court, the district court held that Mr. Thomas had shown prejudice and granted his petition on September 9, 2009. *See Thomas v. Wong*, No. 3:93-cv-00616, slip op. at 10, 27-28 (N.D. Cal. Sept. 9, 2009) (ECF No. 258). On May 10, 2012, this Court affirmed, vacating Mr. Thomas' conviction and ordering a new trial nearly thirty years after he was sentenced to death. *Thomas v. Chappell*, 678 F.3d 1086, 1106 (9th Cir. 2012).

Mr. Thomas was unable to benefit from this new trial. Beginning in 2006, approximately twenty-four years after his conviction, and three years before his conviction was vacated, Thomas suffered a series of strokes and seizures. Petitioner's Request for Release from Custody Pending State's Appeal at 2-3, *Thomas v. Wong*, No. 3:93-cv-00616 (N.D. Cal. Oct. 16, 2009) (ECF No. 265). Thus, by the time the writ was granted by the district court in 2009, Mr. Thomas' mental health had deteriorated so greatly that he was no longer competent to stand trial:

> Mr. Thomas is unable to bathe or groom himself, or go to the toilet unaided; he suffers from both urinary and defecatory incontinence. He cannot walk unaided and his speech is impaired. He cannot recall how to operate a telephone. He does not understand why he is being confined. He repeats himself and keeps asking questions that have been answered within the last few minutes. He cannot recognize people that he has known for years ….

Id. at 4.

Mr. Thomas was adjudicated incompetent, and, rather than participating in the new trial to which he was constitutionally entitled, he was committed to a state mental health facility. *People v. Thomas*, No. 83244 (Cal. Super. Ct. Alameda Cnty. Nov. 28, 2012) (minute order). On January 22, 2014, Mr. Thomas died in state custody, having been incarcerated for twenty-eight years after a trial this Court found tainted by constitutional error, forever denied a fair opportunity to establish his innocence.

Dennis Lawley. Dennis Lawley, a diagnosed schizophrenic who represented himself at trial, was convicted of murder and sentenced to death in 1990. *People v. Lawley*, 38 P.3d 461, 470, 478 (Cal. 2002). Although another man subsequently confessed to the murder and a potential murder weapon corroborating this confession was found, Mr. Lawley was unable to obtain a new trial because, by the time he died in 2012, more than two decades after his initial conviction, he was still awaiting a hearing on his habeas corpus petition.

The State charged that Mr. Lawley hired a friend, Brian Seabourn, to kill the victim and stashed the murder weapon—a Ruger .357 magnum pistol—in his home. *Id.* at 473, 497. Because his family could not afford to hire an attorney to represent him at trial, Mr. Lawley represented himself. His defense was that he had been framed by someone opposed to his efforts to "go down in history as 'the Beast in Revelations'"—that is, Satan—a defense that was clearly a product of his

mental illness. *Id.* at 475. Based on the testimony of the State's ballistics expert that the gun found in Lawley's home was the murder weapon, the jury convicted Mr. Lawley and sentence him to death. *Id.* at 473.

In 2002, thirteen years after trial, the California Supreme Court rejected Mr. Lawley's direct appeal. *Lawley*, 38 P.3d at 470. While this appeal was pending, Mr. Lawley filed a state habeas corpus petition based upon newly discovered evidence of his innocence. *See In re Lawley*, 179 P.3d 891, 896 (Cal. 2008). As Mr. Lawley showed in a 2003 evidentiary hearing, Mr. Seabourn, the man who committed the murder, confessed that he did so at the behest of the Aryan Brotherhood prison gang and testified that Lawley had no involvement. *Id.* at 899. Seabourn further testified that the Ruger .357 magnum pistol found in Mr. Lawley's home was not the gun he had used in the murder and that he had buried the murder weapon in a field in Modesto. *Id.* at 902. The referee found that Mr. Seabourn's testimony was not credible and concluded that Mr. Lawley "had not established his actual innocence." *Id.* at 899.

In December 2007, after the referee issued his findings, Mr. Lawley's counsel informed the California Supreme Court that he had "personally unearthed a mud-encrusted and rusted Smith & Wesson .357" 1970's-era firearm in the Modesto field where Mr. Seabourn claimed to have buried it. Petition for Writ of Habeas Corpus ¶ 43, *In re Lawley*, No. S163136 (Cal. Apr. 29, 2008). However,

the California Supreme Court declined to expand the record of the evidentiary hearing to consider this new evidence, and in 2008 it rejected Mr. Lawley's petition. *See In re Lawley*, 179 P.3d at 894 & 902 n.10.

Mr. Lawley filed a new petition for habeas corpus the following year and two years later moved to expedite this petition. This motion was never ruled on, and no evidentiary hearing was conducted on the new petition. On March 11, 2012, after nearly twenty-three years on death row without having the opportunity to file a federal habeas petition or to have a court consider the new evidence of the gun found in December 2007, Mr. Lawley died in his cell at San Quentin.

Jarvis Masters. Even when the extreme delays in California's death penalty system do not entirely deprive inmates of the opportunity to establish their innocence, these delays nonetheless irreparably harm the inmates by depriving them of their freedom and the opportunity to rebuild their lives during the decades spent reviewing their convictions. *See Peyton v. Rowe*, 391 U.S. 54, 64 (1968) ("Rowe and Thacker eventually may establish that the convictions they challenge were obtained in violation of the Constitution. If they do, each day they are incarcerated under those convictions while their cases are in the courts will be time that they might properly have enjoyed as free men."); *see also* Alex Kozinski & Sam Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 22 (1995) ("No one can give back the twenty years someone has wrongfully

spent behind bars."). This loss is especially poignant for inmates such as Jarvis Masters who, against all odds, have built a potentially rich life outside of death row.

Mr. Masters was nineteen years old in 1981 when he was sentenced to twenty-three years in prison for a series of armed robberies. *See People v. Masters*, 185 Cal. Rptr. 134, 135-36 & n.1 (Cal. Ct. App. 1982); JARVIS JAY MASTERS, THAT BIRD HAS MY WINGS: THE AUTOBIOGRAPHY OF AN INNOCENT MAN ON DEATH ROW 226 (2009). Although he completed this sentence in 2004, Mr. Masters was not released because, in 1990, he was sentenced to death in connection with the murder of a correctional officer. *See* Appellant's Opening Brief at 1, 7, *People v. Masters*, No. S016883 (Cal. Dec. 7, 2001). The State alleged that the murder was part of a wide-ranging conspiracy by a prison gang and that Masters participated in the conspiracy by, *inter alia*, sharpening and supplying the shank used to kill the officer in question. *Id.* at 2. At the preliminary hearing, the State's primary witness, Rufus Willis, described Mr. Masters as in his early thirties, 5'7", clean-shaven, free of tattoos, and bespectacled, although at the time of the murder, Mr. Masters was twenty-three-years old, 6'1", with a mustache and goatee, a tattoo on his left cheek, and no glasses. *Id.* at 50-51. Moreover, prior to trial, another inmate, Harold Richardson, confessed to playing precisely the role in the conspiracy that the State ascribed to Mr. Masters. *Id.* at 44. The State,

however, failed to disclose Mr. Richardson's confession prior to trial, and the trial court refused the defense's request at the preliminary hearing for a lineup to challenge the description provided by Mr. Willis. *Id.* at 54-55. When Mr. Masters learned during trial of the confession by Mr. Richardson—who fit Willis' description—the court denied the defense leave to recall Mr. Willis to question him concerning Mr. Richardson. *Id.* at 72-73.

Mr. Masters challenged this ruling and other errors in his direct appeal. Although that appeal was fully briefed by the fall of 2003, it remains pending today, twelve years later and eleven years after Mr. Masters completed his earlier sentence. *See* Docket, *People v. Masters*, No. S016833 (Cal. Nov. 24, 2003).

Even if Mr. Masters' direct appeal is successful and he is granted a new trial—or his conviction is reversed altogether and he is immediately set free—he will have suffered irreparable injury from the nearly thirteen-year delay in adjudicating his direct appeal. This injury is particularly acute because, although Mr. Masters has now lived thirty-five years at San Quentin, he has managed to build a potentially fulfilling and life and career outside of prison. In addition to becoming a devout Buddhist, Mr. Masters has become a writer, publishing two acclaimed literary works concerning his life before and in prison, *Finding Freedom: Writings from Death Row* (1997), and *That Bird Has My Wings: The Autobiography of an Innocent Man on Death Row* (2009). He is, however, unable

to enjoy the fruits of his rehabilitation because his appeal is stuck in the interminable delays endemic to the California capital punishment system. Indeed, like Mr. Thomas and Mr. Lawley, he may not survive long enough to complete his appeal and establish his innocence of the murder for which he is incarcerated.

As the late Judge Alarcón observed, there is "a point at which delays in judicial review of capital cases become cruel and unusual, because such delays effectively deprive many condemned inmates of the opportunity for meaningful review of their claims of constitutional violations." Judge Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 LOY. L.A. L. REV. S41, S179 (2011). Mr. Thomas', Mr. Lawley's, and Mr. Masters' cases establish that the decades-long delays in California have reached that point.[2]

[2] While the State is correct that the choices it has made with respect to the funding of its capital punishment system are a matter of policy, as the State concedes, those choices must be "sufficient under the Constitution." Opening Br. 51; *see id.* at 49-52. Where, as here, the State's policy leads to the deprivation of constitutional rights, this Court must declare the policy unconstitutional. *See, e.g.*, *Furman v. Georgia*, 408 U.S. 238 (1972); *Brown v. Plata*, 131 S. Ct. 1910 (2011); *see also Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) ("[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.").

II. THE FAMILIES OF CONDEMNED INMATES SUFFER SEVERE AND IRREPARABLE HARM AS A RESULT OF THE EXTREME DELAYS AND ARBITRARINESS IN THE STATE'S DEATH PENALTY SYSTEM

Over a quarter-century ago, Governor Pat Brown drew attention to the "mental anguish" suffered by the families of condemned inmates in the years prior to execution. *See* EDMUND G. BROWN & DICK ADLER, PUBLIC JUSTICE, PRIVATE MERCY: A GOVERNOR'S EDUCATION ON DEATH ROW 158 (1989). With fewer than 250 men on death row at that time, it took, on average, seven years for an inmate to exhaust his appeals. *Id.* at 158-59. Since then, the delay has grown to nearly thirty years, *Time on Death Row*, HABEAS CORPUS RESOURCE CENTER, http://www.hcrc.ca.gov/time (last visited Mar. 5, 2015), and Governor Brown's prescient recognition of the suffering inflicted on the families of inmates now has been confirmed by numerous studies on the impact of capital sentencing.[3]

When a defendant is sentenced to death, his loved ones must contend with their grief at the prospect of his execution as well as substantial public hostility,

[3] The Court may properly consider the suffering the State's dysfunctional system causes the families of death row inmates in assessing whether that system comports with the Eighth Amendment's prohibition on cruel and unusual punishment. *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (considering emotional injury to children of same-sex couples in determining whether federal statute violated same-sex couples' Fifth Amendment right to equal protection of the laws); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 320 (1990) (O'Connor, J., concurring) (noting that the "family's suffering is protracted" in assessing a patient's due process right to decline unwanted medical treatment).

even blame, for the crime of which their family member stands convicted and sentenced to death. SUSAN F. SHARP, HIDDEN VICTIMS: THE EFFECTS OF THE DEATH PENALTY ON FAMILIES OF THE ACCUSED 61-63, 164-65 (2005); Elizabeth Beck et al., *Seeking Sanctuary: Interviews With Family Members of Capital Defendants*, 88 CORNELL L. REV. 382, 399-400 (2003).[4] In addition, family members often find themselves socially ostracized or isolate themselves out of shame or to avoid harassment. *See, e.g.*, John Ortiz Smykla, *The Human Impact of Capital Punishment: Interviews With Families of Persons on Death Row*, 15 J. CRIM. JUST. 331, 343-45 (1987); Beck et al., *supra*, at 411. Indeed, empirical studies show that nearly all family members close to condemned inmates become clinically depressed, a majority experience post-traumatic stress disorder, and some even commit suicide. *See, e.g.*, ELIZABETH BECK, SARAH BRITTO, & ARLENE ANDREWS, IN THE SHADOW OF DEATH: RESTORATIVE JUSTICE AND DEATH ROW FAMILIES 107, 119-30, 134-35 (2007); RACHEL KING, CAPITAL CONSEQUENCES: FAMILIES OF THE CONDEMNED TELL THEIR STORIES 105-06 (2005).[5] Inmates'

[4] *See also, e.g.*, Sandra J. Jones & Elizabeth Beck, *Disenfranchised Grief and Nonfinite Loss as Experienced by the Families of Death Row Inmates*, 54 OMEGA 281, 293-96 (2006-2007); Kate King, *It Hurts So Bad: Comparing Grieving Patterns of the Families of Murder Victims With Those of Families of Death Row Inmates*, 15 CRIM. JUST. POL'Y REV. 193, 197 (2004); Walter C. Long, *Trauma Therapy for Death Row Families*, 12 J. TRAUMA & DISSOCIATION 482, 487-89 (2011).

[5] *See also, e.g.*, Elizabeth Beck & Sandra J. Jones, *Children of the Condemned: Grieving the Loss of a Father to Death Row*, 56 OMEGA 191, 208

children in particular are prone to ridicule, intense anger, and self-destructive behavior and are at an increased risk of suicide, drug use, and dropping out of school. *See, e.g.*, Beck & Jones, *supra*, at 198-99, 209; King, *It Hurts So Bad*, *supra*, at 198-99.

The decades taken in California to review a capital sentence exacerbates the suffering experienced by families of death row inmates. *See* Michael L. Radelet, Margaret Vandiver & Felix M. Berardo, *Families, Prisons, and Men with Death Sentences: The Human Impact of Structured Uncertainty*, 4 J. FAM. ISSUES 593, 609 (1983); Smykla, *supra*, at 342. This delay leaves the families of death row inmates in a "chronic state of despair," anticipating execution at some uncertain future date but unable to resolve their grief and move on with their lives. Jones & Beck, *supra*, at 282; *see id.* at 286-91.[6] Indeed, in multiple studies, families of death row inmates have emphasized that their suffering was at its peak in the decades spent *awaiting* execution. *See, e.g.*, SHARP, *supra*, at 168-69; Jones & Beck, *supra*, at 286-91. Thus, the *de facto* life sentences that the State effectively imposes on most inmates on death row, *see* ER 1-2, cause the families of the

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(2007-2008); Beck et al., *supra*, at 405-07; Jones & Beck, *supra*, at 283, 296; Smykla, *supra*, at 345.

[6] *See also, e.g.*, BECK, BRITTO & ANDREWS, *supra*, at 117-30; Radelet, Vandiver & Berardo, *supra*, at 609; Rachel King, *The Impact of Capital Punishment on Families of Defendants and Murder Victims' Family Members*, JUDICATURE, Mar.–Apr. 2006, at 295.

inmates greater suffering than either *de jure* life sentences (which do not present the unique and omnipresent fear of impending death) or the death penalty *simpliciter*. *See* Angela April Sun, Note, *"Killing Time" in the Valley of the Shadow of Death: Why Systematic Preexecution Delays on Death Row Are Cruel and Unusual*, 113 COLUM. L. REV. 1585, 1619 (2013); *see also* Beck & Jones, *supra*, at 213-14 (comparing the experience of death row inmates' families with the families of inmates incarcerated for non-capital crimes); BECK, BRITTO & ANDREWS, *supra*, at 143 (explaining that symptoms of depression and PTSD in family members of death row inmates begin to lift when a death sentence is reduced to life without parole). This is particularly so for the families of inmates who are actually innocent or who have meritorious claims, as each day that passes brings with it a greater sense of helplessness and a fear that justice will not, in fact, prevail. *See* SHARP, *supra*, at 117-22, 129-30.

The experience of Dennis Lawley's family underscores the suffering that the prolonged delays in California's capital sentencing inflict upon the families of those inmates on death row who are actually innocent. His parents initially secured counsel for a $16,000 retainer, but when he learned that a full trial would cost $60,000, Mr. Lawley insisted that he could not allow his parents, who had scant resources, to incur such expense. *See* Susan Herendeen, *Gun Found in Field Off-Limits in Death Sentence Challenge*, MODESTO BEE, Jan. 9, 2008, at A1. As a

consequence, his 95-year-old mother blames herself for the deluded defense that her schizophrenic son presented, *see supra* pp. 9-10, and believes that "he wouldn't have gone to death row if he'd had a lawyer." Interview with Norene Lawley, in Modesto, Cal. (Jan. 28, 2015) (notes on file with undersigned counsel). Moreover, because Mr. Lawley died before the California Supreme Court considered exculpatory effect of the gun his counsel eventually unearthed from the field, his mother will never know if her son would have been exonerated. Instead, her final years will be plagued with uncertainty and guilt.

The same holds true for the family of Mr. Thomas. A single working mother of ten, Mr. Thomas' mother could not afford to retain private counsel for her son. Telephone Interview with Hattie Irvin (Jan. 29, 2015). Nor were she and the rest of his family able to help him to rebuild his life after his release from death row, as Mr. Thomas was no longer competent to stand trial by the time a new trial was granted. *Id.*; Interview with Theresa Thomas, in San Jose, Cal. (Jan. 28, 2015). Instead, his family will always be despondent over his horrible fate, knowing that—but for the ineffective assistance provided by his public defender—his life might have turned out quite differently.

The suffering of families such as the Lawleys and the Thomases will not abate anytime soon. To the contrary, their agony will worsen as the delay in the State's capital sentencing system continues to grow. For the 423 inmates who

have not been assigned counsel for either their automatic appeal or their state habeas corpus petitions, *see* ER 8, 11, review of their convictions is likely to take forty years or more, *see* Answer Br. 22. At this rate, by 2050, over five hundred more inmates will die on death row before their claims are fully and finally heard. Judge Arthur L. Alarcón & Paula M. Mitchell, *Costs of Capital Punishment in California: Will Voters Choose Reform This November?* 46 LOY. L.A. L. REV. 221, 255 (2012).

Moreover, the circle of irreparably injured family members is expanding exponentially. Researchers estimate that, for every death sentence, eight family members are profoundly and permanently affected, and those effects reverberate for generations. Rachel King, *No Due Process: How the Death Penalty Violates the Constitutional Rights of the Family Members of Death Row Prisoners*, 16 PUB. INT. L.J. 195, 198, 209 (2007); SUSANNAH SHEFFER & RENNY CUSHING, MURDER VICTIMS' FAMILIES FOR HUMAN RIGHTS, CREATING MORE VICTIMS: HOW EXECUTIONS HURT THE FAMILIES LEFT BEHIND 7-12 (2006). Although the systemic dysfunction of the State's capital punishment scheme correlates directly with its enormous death row population, which is the largest in the nation,[7] the

[7] *See* CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT AND RECOMMENDATIONS ON THE ADMINISTRATION OF THE DEATH PENALTY IN CALIFORNIA 119-21 (Gerald Uelmen ed., 2008), *available at* http://www.ccfaj.org/documents//ccfajfinalreport.pdf; *see also* CAL. DEP'T OF CORR. & REHAB., DIV. OF ADULT OPERATIONS, CONDEMNED INMATE LIST (SECURE)

State nonetheless continues to seek death sentences, and the number of condemned inmates continues to mount. [8]

The State has no rational interest in compounding the collateral anguish and suffering already attendant to capital sentences. That is, however, the direct result of the arbitrariness and extreme delay that characterizes California's administration of its death penalty scheme. *See Furman*, 408 U.S. at 411 (Blackmun, J., dissenting) (observing that *Furman*'s plurality was "somewhat propelled toward its result" by the California Supreme Court's decision in *People v. Anderson*, 493 P.2d 880 (Cal. 1972), and noting that "more prisoners were on death row there than in any other State"); *see also Anderson*, 493 P.2d at 887 (referring to "104 persons under sentence of death in California, some for as long as 8 years" as an "awesome

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29 (Feb. 6, 2015), *available at* http://www.cdcr.ca.gov/capital_punishment/docs/condemnedinmatelistsecure.pdf (noting that there are currently 750 inmates on California's death row); Alarcón & Mitchell, *Executing the Will of the Voters?*, *supra*, at S111.

[8] *See, e.g.*, *Elderly Man Sentenced to Death in Decades-Old Northern California Murders of Prostitutes*, N.Y. DAILY NEWS, Nov. 22, 2013, http://www.nydailynews.com/news/crime/elderly-man-sentenced-death-decades-old-murders-article-1.1526160; Jason Kotowski, *Oildale Man Sentenced to Death for 2009 Murders of Wife, Mother-in-Law*, BAKERSFIELD CALIFORNIAN, Jan. 14, 2015, at A3; Brian Melley, *Death Penalty Could Delay Trial for Accused LAX Gunman*, AOL.COM (Jan. 5, 2015), http://www.aol.com/article/2015/01/05/death-penalty-could-delay-trial-for-accused-lax-gunman/21124410; Joe Nelson & Ryan Hagen, *San Bernardino Man Faces Death Penalty for Fatally Beating Son*, SAN BERNARDINO SUN, Feb. 11, 2015, at A1.

problem"). For this reason as well, the State's defense of its capital punishment system as presently administered fails.

CONCLUSION

For the foregoing reasons, and for those stated by the Appellee, the district court's order should be affirmed.

DATED: March 6, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d), Fed. R. App. P. 32(a)(7)(C), and Circuit Rule 32-1, the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 5,329 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii), as counted by the Microsoft Word 2007 application.

DATED: March 6, 2015

/s/ Molly Alana Karlin
Molly Alana Karlin

CERTIFICATE OF SERVICE

I, Molly Alana Karlin, a member of the Bar of this Court, hereby certify that on March 6, 2015, I electronically filed the foregoing "Brief of *Amicus Curiae* Death Penalty Focus in Support of Petitioner-Appellee and Supporting Affirmance" with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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