NO. 14-56373

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ERNEST DEWAYNE JONES,

Petitioner-Appellee,

v.

RON DAVIS, WARDEN,

Respondent-Appellant.

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

BRIEF FOR THE INNOCENCE PROJECT, INC. AS AMICUS CURIAE IN SUPPORT OF ERNEST DEWAYNE JONES, PETITIONER-APPELLEE

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CORPORATE DISCLOSURE STATEMENT
(per Fed. R. App. P. 26.1)

The Innocence Project is an association dedicated to providing pro bono legal and/or investigative services to prisoners. The Innocence Project does not have a parent corporation, and there is no publicly-held corporation that has a 10% or greater ownership interest in the Innocence Project.

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INTEREST OF AMICUS CURIAE[1]

The Innocence Project is one of the 69 member organizations of the Innocence Network. The Network is dedicated to providing pro bono legal and investigative services to wrongly convicted individuals seeking to prove their innocence. The Network represents hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Canada, the United Kingdom, Ireland, Australia, New Zealand, and the Netherlands. The Network and its members also seek to prevent future wrongful convictions by researching the causes of wrongful convictions and pursuing legislative and administrative reform initiatives designed to enhance the truth-seeking functions of the criminal justice system.

STATEMENT OF THE CASE

California's post-death-conviction process has, over the past four decades, been plagued by inordinate and unpredictable delay that greatly damages the chances of success for defendants who have been wrongly convicted. Furthermore, "[t]he State has allowed such dysfunction to creep into its death penalty system that the few executions it does carry out are arbitrary." Order

[1] Pursuant to Rule 37.6, *Amicus* certifies that no counsel for a party authored this brief in whole or in part. This brief was written by undersigned counsel. No person or entity other than *Amicus* and its counsel made any monetary contribution to the preparation of this brief.

Declaring Cal.'s Death Penalty Unconstitutional and Vacating Pet'r's Death Sentence (the "Order"), p. 22.

The District Court found that California's inordinate delay can be attributed, in part, to the dearth of qualified attorneys. At least eight to ten years elapse between the death sentence and the appointment of state habeas counsel – an essential first step in the process of post-conviction review. *Id.* at 24. Thus, a substantial percentage of California's death row inmates are effectively denied timely access to post-conviction investigation and courts. The delay is wholly unrelated to the ultimate merits resolution of a defendant's legal claims. Rather, the failure to assign counsel to the most complex of cases – and to allow them to drift slowly through the system with death sentences at stake – is the delay's root cause. For the cases that made it through the state court process and were evaluated by federal courts, sixty percent of the petitioners were granted relief from the death sentence. *Id.* at 5.

Such delay has an especially pernicious effect on innocent prisoners. Post-conviction DNA testing has demonstrated with unprecedented certainty that more innocent people suffer in prison – many awaiting wrongful execution – than most

lay citizens and legal scholars have ever imagined.[2] The DNA exonerations have also exposed deeply-rooted, systemic problems with the criminal justice system, including issues with eyewitness testimony, unvalidated or unreliable forensics, informant testimony, and false confessions.[3] Without the ability to investigate these factually intensive claims in a timely manner, potentially exonerative evidence may never be advanced. California prisons hold 754[4] death row inmates, 25 percent of the nation's total. The dissipation of these inmates' innocence claims – many of which are genuine – over the years it takes for post-conviction counsel to even be assigned creates an intolerable risk that an innocent person may be among those arbitrarily executed. That risk will not be cured by simply now speeding up the process for California's death row population. This epidemic delay has already caused irreparable harm for the 754 individuals on California's death row. At this point, then, churning forward the post-conviction process that ends in execution will only increase the already intolerable risk of executing an innocent person.

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[2] DNA exonerations have "laid bare" the "fabric of false guilt." Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence: Five Days to Execution, and Other Dispatches from the Wrongly Convicted* (2000).

[3] Innocence Project, http://www.innocenceproject.org/causes-wrongful-conviction.

[4] http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateSummary.pdf

The nation's experience with wrongful convictions compels this conclusion.[5]Three DNA exonerations in Washington, D.C. led the FBI to review "flawed forensic evidence involving microscopic hair matches." Spencer S. Hsu, *Federal review stalled after finding forensic errors by FBI lab unit spanned two decades,* The Washington Post, July 29, 2014. The FBI review will encompass thousands of cases, and scores of capital cases, and raises concerns about convicting the innocent. In 95 percent of the first 286 cases completed in the review, analysts erred by overstating "matches" in a manner favorable to the prosecution. Spencer S. Hsu, *FBI admits flaws in hair analysis over decades,* The Washington Post, April 18, 2015. In 32 of those cases a death sentence was imposed, and 14 of those sentenced to death were executed or died in prison. *Id.* The review, still in progress, involves cases in 46 states. Moreover, the FBI trained 500-1000 state analysts to give similar testimony in state proceedings. The FBI's investigation will expand to an astonishing 19 other disciplines, where "scientific" evidence was admitted in court, but the underlying discipline was never validated. *Id.*

The evidentiary problems and reinvestigation issues involved in these cases will likely extend beyond the flawed forensic testimony. Often there is more than

[5]The FBI, however, stalled the investigation for 11 months when errors were found in a "vast majority" of the cases, including death penalty cases. Spencer S. Hsu, *Report: "'Irreversible harm' when FBI didn't reveal flawed lab work in death-row cases,"* The Washington Post, July 16, 2014.

one root cause in wrongful conviction cases: false forensic testimony may bolster informant testimony or eyewitness testimony or both.[6] Without being able to reliably investigate other claims – a chief failure of the California system – the full impact of potentially exonerative evidence may never be presented in court.

California holds 754 death row inmates. While the epidemic delay and resulting arbitrariness of who is to be executed has profound Eighth Amendment implications, those concerns sound more deeply for those who are condemned to die but are haphazardly allotted the resources necessary for full access to state habeas structures to advance innocence claims.

ARGUMENT AND AUTHORITIES

A. DNA Exonerations Reveal an Intolerable Risk of Wrongful Execution

DNA testing has conclusively exonerated 329 people, with 18 of those having served time on death row.[7] Many more death row inmates – 152 in total – have been exonerated since 1973 by means in addition to DNA testing.[8] These numbers

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[6] Innocence Project, http://www.innocenceproject.org/faqs/how-many-of-the-wrongful-convictions-overturned-by-dna-evidence-had-multiple-causes-or-contributing-factors. Earl Washington and Kirk Bloodsworth are two of the cases that involved multiple causes of wrongful conviction. *See* Innocence Project, http://www.innocenceproject.org/cases-false-imprisonment/earl-washington?searchterm=washington; http://www.innocenceproject.org/cases-false-imprisonment/kirk-bloodsworth.

[7] Innocence Project, http://www.innocenceproject.org/free-innocent.

[8] Innocence and the Death Penalty, Death Penalty Information Center (DPIC), available at http://www.deathpenaltyinfo.org/innocence-and-death-penalty.

grossly understate the scope of the problem, however, as they only reflect those people who were able to prove their innocence. The "dark figure" of the number of innocents sentenced to die cannot be known with precision, a 2013 study extrapolated from known exonerations using statistical methods to approximate the false conviction rate among people on death row in the United States.[9] It found that approximately 4.1% of capital defendants in the United States (or approximately 1 out of every 25 death row inmates) are sentenced to death for crimes they did not commit.[10] Another study, which looked at the more narrowly defined universe of capital rape-murders in the 1980s, largely corroborates these numbers, finding an error rate between 3.3% and 5%. *See* Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. Crim. L. & Criminology 761 (2007). There are currently 754 inmates on California's death row, meaning there are approximately 30 innocent people currently awaiting execution in a state which determines who lives and dies by an arbitrary process divorced from questions of guilt or innocence.

These numbers and what they portend have not gone unnoticed by courts and commentators. Rather, concerns about the execution of the innocent have

[9] Samuel R. Gross, et al., "*Rate of False Conviction of Criminal Defendants Who Are Sentenced To Death*," *available at* http://www.pnas.org/content/111/20/7230.full.

[10] *Id.*

been a major theme of both judicial and scholarly work. The Supreme Court itself has recognized that a "disturbing number of inmates on death row have been exonerated." *Atkins v. Virginia*, 536 U.S. 304, 321 n.25 (2002). Similarly, in a dissent joined by Justices Stevens, Ginsburg, and Breyer, Justice Souter acknowledged that wrongful convictions are both "remarkable in number" and "probably disproportionately high in capital cases." *Kansas v. Marsh*, 548 U.S. 163, 210 (2006) (Souter, J., dissenting) (noting that "these false verdicts defy correction"). As Justice Souter explained, this "new body of fact" regarding wrongful convictions "must be accounted for in deciding what, in practical terms, the Eighth Amendment guarantees should tolerate, for the period starting in 1989 has seen repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests." *Id.* at 207-08; *see also id.* at 205 (noting that the constitutionality of the death penalty rests in part on the state's ability to ensure that "the jury's choice of sentence" is informed by "evidence about the crime as actually committed and *about the specific individual who committed it*.") (emphasis added).

Justice Stevens, too, has written extensively about the dangers the death penalty poses for innocent people. In a concurrence in *Baze v. Rees*, Justice Stevens wrote that

> [G]iven the real risk of error in this class of cases [i.e., capital cases], the irrevocable nature of the consequences is of decisive importance to me.

> Whether or not any innocent defendants have actually been executed, abundant evidence accumulated in recent years has resulted in the exoneration of an unacceptable number of defendants found guilty of capital offenses. The risk of executing innocent defendants can be entirely eliminated by treating any penalty more severe than life imprisonment without the possibility of parole as constitutionally excessive.

Baze v. Rees, 553 U.S. 35, 85-86 (2008) (Stevens, J., concurring) (internal citations omitted). As Justice Stevens further explained in recent remarks, the risk of killing an innocent person is a "sufficient argument against the death penalty: society should not take the risk that that might happen again, because it's intolerable to think that our government, for really not very powerful reasons, runs the risk of executing innocent people." *See* Columbia Law School, *Professor James Liebman Proves Innocent Man Executed, Retired Supreme Court Justice Says*, Jan. 26, 2015.[11] Justice Stevens also concluded in those same remarks that there was at least one proven execution of an innocent person. *Id.*

Legal scholars and commentators as well have spoken extensively on the risks – almost certainly realized – of executing an innocent person; many have concluded, as did Justice Blackmun, that we should no longer "tinker with the machinery of death." *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from the denial of certioriari). One important example comes from the American Law Institute ("ALI"), the influential body which promulgated the

[11] *Available at* https://www.law.columbia.edu/media_inquiries/news_events/2015/january2015/stevens-liebman.

influential Model Penal Code ("MPC"). In 2009, the ALI withdrew the MPC's death penalty provisions "in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment." Carol S. Steiker & Jordan M. Steiker, *No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code*, 89 Tex. L. Rev. 353, 360 (2010). In the ALI report which led to the withdrawal of the MPC provisions, the problem of innocent people on death row was considered to be a major concern. The report noted that "the problem of wrongful convictions in the capital context has proven to be larger and more intractable than might have been predicted." *Id*. at 385. It further concluded that "[t]he large numbers of exonerations in capital cases may be due in part to the fact that many of the systemic failures that lead to wrongful convictions are likely to be more common in capital than other cases." *Id*. Simply put, courts and scholars alike now recognize that "[e]ven the most sophisticated death penalty schemes are unable to prevent human error from condemning the innocent. Innocent persons have been executed . . . and will continue to be executed under our death penalty scheme." *Callins*, 510 U.S. at 1149 n.8 (Blackmun, J., dissenting from the denial of certioriari).

The execution of Cameron Todd Willingham in Texas exemplifies the risk of executing the innocent as well as the arbitrary application of the death penalty.

Willingham was convicted and sentenced to death after his three young children died in a house fire that Willingham himself survived. *See Willingham v. State*, 897 S.W.2d 351 (Tex. Crim. App. 1995). Arson investigators concluded that the fire was intentionally set, and a jailhouse informant later claimed that Willingham admitted to setting the fire. *Id*. at 358. Although the informant's credibility was poor, his testimony was bolstered by the fact that (1) he claimed he was not provided incentives for his testimony, and (2) his account corresponded with the arson expert's description of how the fire was set.

Willingham's case proceeded through the Courts without any meaningful challenge to either the evidence of arson or the testimony of the jailhouse informant. In the weeks preceding Willingham's February 2004 execution, however, his attorney consulted with and presented a report from an expert in fire science who explained that the State arson investigators were wrong -- there was no reliable evidence suggesting that the fire that killed Willingham's children was arson. *See* David Gahn, *Trial by Fire*, New Yorker, Sept. 7, 2009, *available at* http://www.newyorker.com/magazine/2009/09/07/trial-by-fire. Despite last-minute appeals presenting this new scientific evidence, Willingham's execution went forward based in part on the State's reliance on the informant testimony. *See id*.

Since Willingham's execution, it has been universally acknowledged that there was no reliable evidence of arson in the case and that the expert testimony offered at trial did not belong in court. *See, e.g.*, Report of the Texas Forensic Science Comission, Willingham/Willis Investigation (April 15, 2011), *available at* http://www.fsc.state.tx.us/documents/FINAL.pdf. In fact, another Texas death row prisoner Earnest Willis was ultimately exonerated after identical arson testimony was discredited. *Id*. at 13. Furthermore, the informant who claimed to have heard Willingham's confession has recanted his testimony, and documents demonstrate that the informant was actually provided with a substantially reduced punishment and other benefits in exchange for his testimony against Willingham. *See* Maurice Possley, *Fresh Doubts over a Texas Execution*, Washington Post, Aug. 3, 2014. The prosecutor who presented the informant's testimony is currently facing a Texas State Bar disciplinary action based on his handling of the informant. *See* Original Disciplinary Petition, *Commission for Lawyer Discipline v. John H. Jackson*, No. D15-23949 (Navarro County Tex. Dist. Ct. filed March 5, 2015). Of course, all of these events came too late to save Mr. Willingham's life.

B. The Myriad Causes of Wrongful Conviction Reveal that Even A Properly Functioning Post-Conviction System May Not Be Capable of Detecting Every Instance of Wrongful Conviction

Wrongful conviction cases are not isolated incidents of miscarriages of justice. Rather, the DNA exonerations have revealed systemic concerns about the

reliability of evidence admitted at criminal trials. Review of those systemic issues makes plain that innocent individuals are incarcerated and are part of the death row prison population. As DNA evidence is only available in about 10 percent of all cases, most wrongly convicted prisoners must rely on traditional post-conviction means to prove innocence.[12] Yet, in the same way that three exonerations involving hair microscopy evidence in Washington, D.C. led to a variety of concerns about the evidence admitted in non-DNA cases, DNA exonerations have uncovered systemic issues indicative of wrongful convictions in non-DNA prosecutions, even in death row prosecutions.

Eyewitness Identification

"Exoneration cases have altered the ways judges, lawyers, legislators, the public, and scholars perceive the criminal system's accuracy," Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 57 (2008). Concerns about the criminal system's accuracy and human error are never more apparent than in cases involving witness identification. All 11 of the California DNA exonerations involved misidentification. This is consistent with the systemic issues seen nation-wide, as eye-witness misidentification is the leading contributing cause of

[12] The Smart on Crime Coalition, Recommendations for the Administration and Congress (2011), *available at* http:// www.constitutionproject.org/wp-content/uploads/2014/10/SmartOnCrime_Complete.pdf, p. 28.

wrongful convictions, occurring in nearly 75 percent of DNA exonerations.[13] In a full 34 percent of these cases, multiple witnesses misidentified the same innocent suspect.

Thirty years of scientific research offers important findings about how eyewitness memory and perception work, how identifications can go wrong. Many research findings of the past 30 years were recently reviewed by the National Academy of Science ("NAS") and endorsed in a report, which took issue with the *Manson v. Braithwaite* framework, concluding the test "includes factors that are not diagnostic of reliability" and thus called for the admission of eyewitness testimony to be guided by scientific evidence rather than "constitutional ruling." This landmark report confirms the systemic issues with eye-witness testimony, underscores that wrongful conviction cases exemplify systemic issues with criminal trials, and that particularly in capital cases, post-conviction counsel must re-investigate eyewitness testimony and track down leads to other suspects that may have been stalled by a false identification.

[13] *See* Brandon L. Garrett, *Convicting The Innocent: Where Criminal Prosecutions Go Wrong*, 48 (2011); Daniel Medwed, *Up the River Without a Procedure: Innocent Prisoners And Newly Discovered Non-DNA Evidence In State Courts*, 47 Ariz. L. Rev., 655 (2005).

Forensics

Like eye-witness identification, new research and DNA exonerations have revealed how flawed forensics frustrates the truth-seeking function of trials. Indeed, invalidated or flawed forensics is "the second-greatest contributor to wrongful convictions that have been overturned with DNA testing."[14] A 2009 study of 137 DNA exoneree convictions confirmed the broad impact of flawed forensic evidence, finding that in 60% of the cases studied, forensic analysts provided flawed testimony in favor of the prosecution.[15] The study also found that the scientifically invalid testimony "was not the product of just a few analysts in a few states, but of 72 forensic analysts employed by 52 laboratories or medical practices in 25 states."[16]

The forensic evidence in these cases is oftentimes predicated on techniques that were devised for investigative needs, but never subject to scientific evaluation or testing. Concerned with issues of methodology and validation, the NAS examined ways to improve the quality of forensics. The NAS summarized its findings in a 2009 report, which found that "[w]ith the exception of nuclear DNA

[14] Innocence Project, http://www.innocenceproject.org/causes-wrongful-conviction/unvalidated-or-improper-forensic-science.

[15] Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 9 (2009).

[16] *Id.*

analysis, . . . no forensic method has been rigorously shown to have the capacity to consistently . . . demonstrate a connection between evidence and a specific individual or source," and recommended sweeping reforms to improve the reliability, accuracy, and presentation of forensic evidence.[17] The concerns of such pattern evidence extend beyond the massive federal investigation into hair microscopy cases, which will eventually encompass an astonishing 19 disciplines. Not only do countless people remain imprisoned on the basis of what we now know to be false forensic evidence, but many of these techniques continue to be used in criminal trials – again raising systemic concerns. The evidentiary problems and reinvestigation issues involved in these cases will likely extend beyond the flawed forensic testimony, and there is danger that they cannot be reliably resolved in California's post-conviction system.

False Confessions

False confessions, too, contribute significantly to wrongful conviction, and implicate broader systemic concerns: the Supreme Court acknowledged the "mounting empirical evidence that these pressures [associated with custodial police interrogation] can induce a frighteningly high percentage of people to confess to

[17]Comm. on Identifying the Needs of the Forensic Sci. Cmty., Nat'l Research Council of the Nat'l Acads., Strengthening Forensic Science in the United States: A Path Forward 7 (2009) [hereinafter "NAS Report"], *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf.

crimes they never committed." *Corley v. United States*, 556 U.S. 303, 321, 129 S. Ct. 1558, 1570, 173 L. Ed. 2d 443 (2009) (citing Drizin & Leo, *The Problem of False Confessions in the Post–DNA World*, 82 N.C. L. Rev. 891, 906-07 (2004)); *accord J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2401, 180 L. Ed. 2d 310 (U.S. 2011). Innocent individuals have falsely confessed in approximately 27% of 325 known DNA exonerations.[18] False confessions are the leading cause of wrongful conviction in homicide cases, "contributing to 71 (63%) of the 113 homicide cases among the DNA exonerations."[19]

Research concerning the psychological pressures of interrogations has revealed risk factors incumbent in current practices,[20] and, perhaps ironically, determined that innocent suspects are particularly vulnerable to the high-pressure interrogation tactics. *See* Saul M. Kassin et. al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 Law & Hum. Behav. 3 (2010). More troubling still is the startling number of false confessions that are "contaminated": that is, an innocent suspect "confessing" to crime details that "only the real perpetrator would know" because the details were withheld from the public by law enforcement. In

[18] Innocence Project, http://www.innocenceproject.org/causes-wrongful-conviction.

[19] Innocence Project, http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/dna-exonerations-nationwide.

[20] Steve A. Drizin & Richard A. Leo, *The Problem of False Confession in the Post DNA World,* NC L Rev 891, 915 (2004).

the follow up to Brandon Garrett's landmark study, *Contaminated Confessions Revisited*, he found such "non-public" facts in 59 of 63 false confessions, including facts that matched to crime details, including crime scene evidence or accounts by the victim. Brandon L. Garrett, *Contaminated Confessions Revisited*, 101 Va. L. Rev. 395, 396-97 (2015). In the original study, *The Substance of False Confessions*, Garrett noted that in 27 of the 38 false confessions cases, detectives testified that they had taken measures to avoid contaminating the confession, averring that the suspect volunteered the non-public facts. Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051, 1057 (2010). And in the updated study, detectives similarly did so in 13 out of 14 cases. Garrett, *Contaminated Confessions Revisited* at 410-411. The pronounced pattern of contamination again raises broader concerns about interrogations practices and the reliability of confession evidence.

Informant Testimony

Yet another area of evidence that renders convictions unsafe is informant testimony,[21] contributing to nearly 15% of DNA exonerations.[22] The statistics are

[21] The Supreme Court has observed, "[t]he use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility." *On Lee v. United States*, 343 U.S. 747, 757 (1952).

more stark in non-DNA exonerations, particularly in capital prosecutions. Incentivized testimony played a role in 45.9% of death row exonerations since 1970, making it the leading cause of wrongful convictions in capital cases.[23] Like false confessions, too, wrongful convictions on the basis of informant testimony may involve "contamination" by police. Brandon Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong*, at 118. That is, an incentivized witness testifies to evidence contained only in the state's file, yet attributes it to something the accused said. Such false, yet confirming, details lead the jurors to ignore indicia of untrustworthiness, undermining trial level innocence claims.

C. The Delay in Obtaining Habeas Counsel Creates Undue and Unfair Barriers to Post-Conviction Review.

DNA exonerations and scholarly research have identified systemic concerns leading to the conviction of innocent people. The post-conviction process has been established to protect innocent individuals from inherent human error in the

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[22] Innocence Project, http://www.innocenceproject.org/causes-wrongful-conviction.

[23] Northwestern University School of Law, Center on Wrongful Convictions, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row, available at* http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/documents/SnitchSystemBooklet.pdf ("Snitch System").

criminal justice system. The need for reliable convictions is even more apparent in the context of the death penalty:

> The penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."
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> *Woodson v. N. Carolina*, 428 U.S. 280, 305 (1976).

Yet, there is little room for doubt that the California death penalty system works to the substantial detriment of an innocent defendant seeking to overturn an incorrect and improper death penalty conviction. When the system does not provide fair, timely processes – as is the case in California – it cannot be said to adequately address innocence claims of death row petitioners.

Seventy-six inmates currently on death row in California have completed their direct appeal and await post-conviction counsel. They have waited an average of 15.8 years and yet have had no counsel assigned. In all, 352 inmates, at various stages of litigation, are without post-conviction counsel. Their average wait – already approximately a decade – will continue to rise. Order at 24. To be sure, the dysfunction renders arbitrary who is to be executed. *Id.* at 17-19. But it also renders arbitrary who receives the full procedural protections afforded to those sentenced to death. Some, as our cases demonstrate, likely have viable innocence

claims. By the time California has managed to appoint habeas counsel, physical evidence will likely no longer exist, and testimonial, exculpatory evidence will be lost to faded memory or be deemed less credible because of the sheer passage of time.

The importance of timely appointment of post-conviction death penalty counsel is well-understood. Despite the extreme dysfunction in its system, the California Supreme Court has itself noted that "[i]deally, the appointment of habeas corpus counsel should occur shortly after an indigent defendant's judgment of death" so as to "enable habeas corpus counsel to investigate potential claims for relief and to prepare a habeas corpus petition at roughly the same time that appellate counsel is preparing an opening brief on appeal." *In re Morgan*, 50 Cal. 4th 932, 937 (2010). Similarly, the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) ("ABA Guidelines")[24] provide specific duties for post-conviction counsel, many of which require timely appointment to be completed. Central among them is "continu[ing] an aggressive investigation of all aspects of the case."[25] "[C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough,

[24]http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/2003Guidelines.authcheckdam.pdf.

[25] ABA Guidelines 10.15.1 – Duties of Post-Conviction Counsel, p.1080 (rev. ed. 2003).

independent investigation."[26] Elements of an appropriate investigation include:[27] obtaining and examining all charging documents; seeking out and interviewing potential witnesses; making efforts to secure information in the possession of the prosecution or law enforcement authorities; making prompt requests to relevant government agencies for any physical evidence or expert reports relevant to the offense or sentencing, as well as the underlying materials; immediately viewing the scene of the alleged offense; and investigating mitigating circumstances.

Significantly, three of the most common post-conviction claims raised in California[28] – ineffective assistance of counsel, the failure to disclose evidence, and newly discovered evidence – require the complete re-evaluation of the case contemplated by *Morgan* and the guidelines. By its terms, then, the systemic dysfunction stalls basic post-conviction litigation, and evidence-based innocence claims will be harmed, some irreparably.

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[26] ABA Guidelines 10.15.1– Duties of Post-Conviction Counsel, comment, pp.1085–86 (rev. ed. 2003).

[27] *See* ABA Guidelines 10.7 – Investigation, commentary , pp.1018–1027 (rev. ed. 2003).

[28] According to commentators, the most common claims asserted in California state habeas petitions are: (1) ineffective assistance of counsel; (2) prosecution's failure to disclose discoverable evidence; (3) newly discovered evidence; (4) infringement of the right to trial by an impartial jury because of, for example, juror misconduct; (5) conflict of interest; (6) retroactive changes in law; (7) invalid guilty pleas; (8) cruel, unusual, or disportionate punishment; (9) conviction based on false evidence; (10) use of a constitutionally invalid prior conviction. (Cal. Crim. P. 26:34).

As to ineffective assistance claims, because deficient trial counsel will create a substantial risk of wrongful conviction, particularly in cases where the defendant is indigent,[29] effective post-conviction counsel is necessary for a litigant to establish – and for courts to assess – both deficiencies in trial counsel's performance and resulting prejudice, as required by *Strickland v. Washington*, 466 U.S. 668, 690 (1984). Moreover, claims of ineffective assistance of counsel typically require extensive post-trial investigation to supplement the trial record with evidence specific to a finding of ineffective assistance and resulting prejudice. *See Martinez v. Ryan*, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (U.S. 2012); *Massaro v. United States*, 538 U.S. 500, 504-05 (2003). While the scope and intensity of the re-investigation of such claims may vary, the danger posed by the California system for the 352 inmates without counsel is that no substantive approach can be developed on these claims in a timely, effective manner. This plainly increases the risk that innocent people will remain on death row.

[29] There is no question that ineffective assistance of counsel results in a substantial number of wrongful convictions. Criminal defendants brought 330 successful ineffective assistance of counsel claims in state court and an additional 122 successful claims in federal court between 2000 and 2006. *See* John H. Blume & Stacey D. Neumann, *"It's Like Deja Vu All Over Again": Williams v. Taylor, Wiggins v. Smith, Rompilla v. Beard and a (Partial) Return to the Guidelines Approach to Effective Assistance of Counsel*, 34 Am. J. Crim. L. 127, 156 (2007).

Fundamentally, discovery of "new evidence" has played a critical role in wrongful convictions that have been overturned by DNA and by traditional means of investigation. The passage of 15 years before counsel is assigned almost certainly means that such evidence will be lost to the passage of time—physical evidence, to destruction or loss; testimonial evidence, to faded memories or inability to locate witnesses. *See generally Herrerra v. Collins*, 506 U.S. 390, 404 (1993) (The passage of time can be fatal to such claims with "erosion of memory and dispersal of witnesses.") (internal citations omitted).[30] For Michael Morton, wrongfully convicted of the murder of his wife, exculpatory material was uncovered in his case when his lawyer – pursing DNA testing – pursued a comprehensive re-investigation of the case, which included a Public Information Act request that revealed the *Brady* documents. And in John Thompson's case, post-conviction counsel and a "serendipitous series of events" prevented his wrongful execution. *Connick v. Thompson*, 563 U.S. 2011 (2011) (Ginsburg, dissenting). Nine years after the Thompson's capital murder conviction, the prosecutor's own death-bed confession to suppressing exculpatory evidence and 11th hour defense investigation allowed Thompson to establish his innocence.

[30] Even if an inmate were otherwise able to prepare a credible *pro se* habeas petition while awaiting appointment of counsel, he would have no realistic chance, while incarcerated, of conducting an investigation sufficient to demonstrate the consequences of inadequate assistance or the resulting prejudice.

The passage of time has far too often left the discovery of new, exonerating evidence to luck: evidence state officials reported as lost or destroyed ultimately has turned up in such places as the back of a storage closet, a trial judge's locker, the space between a wall and a prosecutor's desk, or amongst boxes from unrelated cases. Alan Newton – exonerated after 22 years in prison – spent 12 years attempting to find the evidence that proved his innocence.[31] And, in a subsequent civil suit, the Second Circuit upheld a jury verdict finding government officials "acted with recklessness or deliberate indifference" for their duties in maintaining New York City's evidence storage system. *Newton v. City of New York*, 779 F.3d 140, 156-157 (2d Cir. 2015). Such indifference, however, was fatal to other New York City innocence claims and is reflective of our work across the country. Between 2004 and 2010, approximately 22% of the Innocence Project's cases were closed because the evidence was lost or destroyed.[32] Similarly, a Denver judge ordered DNA testing for Moses-El, who had "persuaded fellow inmates to pitch in $1,000 for the lab work." Susan Greene and Miles Moffeit, *Trashing the Truth*, Denver Post, July 7, 2007, http://www.denverpost.com/evidence/ci_6429277.

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[31] Innocence Project, http://www.innocenceproject.org/cases-false-imprisonment/alan-newton?searchterm=alan+newton.

[32] http://www.innocenceproject.org/faqs/what-are-your-largest-hurdles-in-bringing-about-an-exoneration

Though the police packaged and placed a "Do Not Destroy" label on the evidence, it was thrown away and the requested testing never took place. *Id.*

Finally, many wrongful convictions have more than one cause, requiring rather extensive re-investigation. The case of Roy Williamson and Dennis Fritz provides an instructive example of this dangerous confluence. In 1982, a 23 year-old waitress was found raped and murdered; hair, semen and fingerprints were all found at the scene. Despite the fact that none of the fingerprints matched either Mr. Williamson or Mr. Fritz, they were charged with the murder nearly five years later.[33] The prosecution bolstered its weak case with testimony from a jailhouse informant that Mr. Fritz had allegedly confessed to him – a confession which came one day before the prosecution would have been forced to drop the charges against Mr. Fritz. Another informant testified that she had heard Mr. Williamson threaten to harm his mother as he had the victim. In addition to this false informant testimony, the prosecution relied on the completely unvalidated and unreliable discipline of hair microscopy to "match" Mr. Fritz's hairs to some found at the crime scene. The state's experts also gave misleading testimony regarding the serological evidence. Both men were convicted, with Mr. Williamson sentenced to

[33] http://www.innocenceproject.org/cases-false-imprisonment/dennis-fritz?searchterm=fritz; http://www.innocenceproject.org/cases-false-imprisonment/ron-williamson?searchterm=williams.

death. After 11 years imprisonment, including Mr. Williamson coming within five days of execution, DNA exonerated both men. Testing not only exonerated Mr. Williamson and Mr. Fritz, but inculpated another man, who had actually served as a prosecution witness at trial.[34]

As there are likely to be many issues in capital cases requiring re-investigation, the concerns of delay may be more pronounced, especially in capital cases. Unlike Fritz and Williamson's case, however, most capital murder cases will not contain dispositive biological evidence. The re-investigation of those cases is necessarily more far-reaching and will necessarily depend on obtaining a confluence of information – an investigation very much in line with the ABA Guidelines.

In sum, DNA exonerations have shown systemic problems with trial evidence and that wrongful convictions occur. The dysfunctional state post-conviction system, then, creates an intolerable risk that an innocent person might be executed. The Justices in *Furman* overturned the death penalty out of concern of a risk of arbitrary sentencing practices. But the execution of innocent men and women reveals an arbitrariness deeper and more troubling than even sentencing practices, and one that cannot be tolerated in our criminal justice system.

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[34] *Id.*

Conclusion

The decision of the District Court should be affirmed.

April 20, 2015

Respectfully submitted,

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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 Brief for the Innocence Project, Inc. as Amicus Curiae in Support of Ernest Dewayne Jones, Petitioner-Appellee is proportionally spaced, uses 14-point Times New Roman type and contains 6,083 words.

DATED: April 20, 2015

/s/ David Loftis

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April, 2015, I caused the foregoing brief to be electronically filed with the United States Court of Appeals for the Ninth Circuit, and served to counsel, via ECF system.

s/David Loftis