No. 14-56373

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ERNEST DEWAYNE JONES,
Plaintiff-Appellee,

v.

KEVIN CHAPPELL, 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 OF LONI HANCOCK, MARK LENO, AND NANCY SKINNER AS *AMICI CURIAE* IN SUPPORT OF ERNEST DEWAYNE JONES

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AUTHORSHIP AND MONETARY CONTRIBUTION STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *Amici Curiae* Loni Hancock, Mark Leno, and Nancy Skinner state that no counsel for any party authored this brief in whole or in part; no party or counsel for any party contributed money that was intended to fund preparing or submitting this brief; and no person other than the *amici curiae* and their counsel contributed money that was intended to fund preparing or submitting the brief.

Respectfully submitted,

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STATEMENT OF INTEREST OF THE *AMICI CURIAE*[1]

Amici Curiae Loni Hancock, Mark Leno, and Nancy Skinner ("Legislators") submit this brief to describe real-world dynamics that may help inform the Court's resolution of the important questions presented. The Legislators are current and former members of the California Legislature who have served in positions of leadership, allowing them great involvement in efforts to reform the death penalty system. Senator Hancock first assumed office in 2008, having previously served in the Assembly since 2002, and is the current Chair of the Senate Public Safety Committee. This is the committee of jurisdiction for all bills related to the evidence code, penal code, and the Department of Corrections and Rehabilitation. Senator Hancock authored a bill to reform the death penalty that failed passage in 2011. Senator Leno assumed office in 2008, having previously served in the Assembly since 2002, and is the Chair of the Senate Budget Committee. Ms. Skinner served as an Assembly Member from 2008 to 2014. During her time in office, Ms. Skinner served as the Chair of the Assembly Budget Committee. As former and current Budget Committee chairs, both Senator Leno and Ms. Skinner have in-

[1] The parties have consented to the filing of this brief.

depth knowledge of the budgetary process, the inherent constraints on legislative spending discretion, and how ultimately many competing interests are negotiated and balanced in the California budget. As participants in the legislative process, The Legislators have unique insight into the policy, political, and procedural reasons contributing to the Legislature's inability to reach consensus on how to reform the death penalty. For these reasons, the Legislators have a deep interest in the issues central to this appeal.

In this brief, Amici Curiae explain how, since 1973, the scope of California's death penalty statutes has consistently expanded, resulting in a system that sentences an increasingly large number of individuals to the death penalty. The large number of individuals on Death Row, as well as the many important procedures in place to protect the constitutional rights of those defendants, in turn result in: (1) a severe backlog of death penalty cases in the courts; and (2) far more cases than the attorneys willing and qualified to handle death penalty cases can handle in a timely manner. As the lower court concluded, and as the brief of Respondent-Appellant explains in detail, these factors have created a process with such great systemic delays that very few of the hundreds of individuals sentenced to

death have been, or ever will be, executed by the State. These systemic delays are also reducing the possibility that these individuals will have their sentences reviewed and partly reversed or modified in a timely manner, if at all. Such a system serves no penological purpose, and it violates the Eighth Amendment's prohibition against cruel and unusual punishment.

Below we demonstrate that the Court needs to take action to protect the constitutional rights of the hundreds of prisoners on Death Row, because the system is so broken that the Legislature, despite its efforts, has been unable to fix it. This situation is unlikely to change in the foreseeable future. This brief catalogs the California Legislature's various unsuccessful attempts to "fix" California's death penalty system by legislative action. It then explains various legal, financial, budgetary, and political factors preventing the Legislature from implementing meaningful reform. For these reasons, Amici Curiae urge this Court to affirm the decision of the lower court finding that California's death penalty system is unconstitutional.

INTRODUCTION

The California death penalty process today is dysfunctional. Increasing numbers of crimes have been deemed death-eligible, resulting in more capital cases than the California courts can handle. The California Supreme Court suffers from significant backlogs in reviewing capital appeals and habeas petitions, and does not have the resources to catch up. As of 2008, the backlog was so severe that "California would have to execute five prisoners per month for the next twelve years just to carry out the sentences of those currently on death row." California Commission on the Fair Administration of Justice, Final Report (2008) at 114-15. It has only grown worse since then. On top of that, there exists a shortage of attorneys willing and qualified to represent capital defendants. These factors have combined to create the systemic delays described at length in the lower court's opinion.

Members of the Legislature are well aware that California's death penalty system is broken. Indeed, in 2004, the Senate convened the California Commission on the Fair Administration of Justice ("Commission") to evaluate the administration of California's death penalty system. In 2008, the Commission returned a scathing report on the system

and concluded that "if nothing is done, the backlogs in post conviction proceedings will continue to grow 'until the system falls of its own weight.'" Commission Final Report at 114-15.

In the years since the Commission issued its Final Report, California legislators have made at least six legislative proposals attempting to implement one or more of the Commission's recommendations. All have failed. While legislators agree that something must be done, they do not agree what. There are limits on what the Legislature can do absent a vote of the people, and, given California's current budget crisis, no one is willing to propose spending the amounts of money it would take to truly fix California's dysfunctional death penalty system.

The Legislators believe that this budgetary reality will not change in the foreseeable future. If California is to have a death penalty system, California needs to rebuild that system from the ground up, with its eyes open as to what it will cost to administer the system correctly. For these reasons, the Legislators urge this Court to affirm the decision of the lower court declaring that California's death penalty system, as currently

practiced, violates the Eighth Amendment's prohibition against cruel and unusual punishment.

ARGUMENT

I. SINCE 1973, CALIFORNIA'S DEATH PENALTY SYSTEM HAS GROWN INCREASINGLY COMPLEX AND EXPENSIVE.

A. The Number Of Death-Eligible Crimes Has Grown Over Time.

In 1973, the California Legislature adopted a mandatory death penalty that would be applied if: (1) the defendant was convicted of first degree murder; and (2) the fact-finder found one or more of ten enumerated "special circumstances" to be true beyond a reasonable doubt." Declaration of Gerald F. Uelmen ("Uelmen Decl.") ¶ 6 (filed at ECF No. 59-1, p. 222 in *Jones v. Cullen*, CV-09-2158-CJC (C.D. Cal. February 17, 2011)); *see* 1973 Cal. Stat., ch. 719, §§ 1-5 (codified as amended at Cal. Penal Code § 190.2). Among these "special circumstances" were: (1) kidnapping if the victim dies; (2) first-degree murder for hire; and (3) first-degree murder of a witness for the purpose of preventing testimony in a criminal proceeding. 1973 Cal. Stat., ch. 719, §§ 1-5. Since 1973, the "mandatory" aspects of California's death penalty have been modified in response to certain California and

federal court rulings. *See* Uelmen Decl. ¶¶ 6-7; *see also Woodson v. North Carolina*, 428 U.S. 280, 304 (1976); *Rockwell v. Superior Court*, 18 Cal. d 420, 444 (1976). However, the breadth of California's death penalty statute has grown increasingly since 1973. *See* Uelmen Decl. ¶¶ 6-42; *see also* Arthur 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, S131-58 (2011).

Since 1973, both the California Legislature and the California electorate have repeatedly added to the list of "special circumstances" that render a crime of first-degree murder death eligible, almost quadrupling that number since 1973. *See* Uelmen Decl. ¶¶ 6-42; *see also* Alarcón & Mitchell, *Executing the Will of the Voters?*, 44 Loy. L.A. L. Rev. at S131-58. At the same time, the Legislature and the electorate have expanded the application of the enumerated "special circumstances," thus further increasing the number of crimes to which the death penalty is applicable. *See, e.g.*, Uelmen Decl. ¶¶ 35-38. Additionally, the Legislature and the electorate have expanded the definition of first-degree murder, thus still further broadening the

application of the death penalty. *See, e.g.*, Uelmen Decl. ¶¶ 23-24, 28, 35, 42. In recent years, the California Legislature has acknowledged that "California's statute is so broad that a high percentage of all first-degree murders are death eligible, thereby eliminating the narrowing function that its special circumstances are supposed to provide." Uelmen Decl. ¶ 44 (citing California Assembly Committee on Public Safety, Analysis, April 13, 1999 Hearing, Assembly Bill No. 625 (1999-2000 Reg. Sess.), as amended April 7, 1999).

B. The California Courts Responsible For Administering The Death Penalty System Are Backlogged.

A defendant sentenced to death in California has a right to three stages of review of the conviction and sentence: an automatic appeal directly to the California Supreme Court; a petition for a writ of habeas corpus filed in the California Supreme Court; and a federal habeas corpus petition filed in the Federal District Courts of California. Commission Final Report at 121.

Given the large number of death-eligible crimes, and the attendant large number of death penalty cases, the California Supreme Court has become severely backlogged with respect to both automatic appeals of judgments of death and habeas petitions. As of October 26,

2010, there were 356 direct appeals from judgments of death pending before the Supreme Court. Alarcón & Mitchell, *Executing the Will of the Voters?*, 44 Loy. L.A. L. Rev. at S187. As of 2008, approximately 80 of those appeals had been fully briefed and were awaiting oral argument. Commission Final Report at 131, 147. Similarly, as of October 10, 2010, 89 fully briefed habeas corpus petitions were awaiting review by the California Supreme Court. Alarcón & Mitchell, *Executing the Will of the Voters?*, 44 Loy. L.A. L. Rev. at S189.

Despite its best efforts, there is no indication that the California Supreme Court will be able to end (or even meaningfully reduce) the backlog in automatic appeals and habeas petitions in the near future. For example, in 2010, the California Supreme Court decided 23 automatic appeals, while another 33 prisoners were sentenced to death. *Id.* at S187.

In 2008, then-Chief Justice Ronald George of the California Supreme Court told the Commission that:

> The basic statistics I have recited demonstrate that even if the Supreme Court were to become solely a death penalty court and were to completely put aside proceedings related to all civil and criminal matters other than capital

> appeals and related habeas corpus petitions, it probably would take a minimum of three to four years to process the existing backlog of death-penalty-related appeals and habeas corpus petitions. During that time, petitions for review in other types of cases would continue to be filed, and additional death penalty and other cases would become fully briefed. The backlog would continue to grow, and the systemic costs of this narrow focus on death penalty cases would be profound.

Id. at S188.

C. There Are More Capital Cases Than Attorneys Qualified And Willing To Defend Them.

At each of the three stages of post-conviction review available to a capital defendant, the defendant is entitled to the appointment of counsel if he or she is indigent. Commission Final Report at 121. But the dearth of counsel qualified and willing to take these cases has caused severe delays in fulfilling this entitlement. For example, the Commission reported that in 2008, there were 79 defendants on Death Row who had not yet had counsel appointed to handle their direct appeal to the California Supreme Court, and that there was an average wait of three to five years before appellate counsel could be appointed. Commission Final Report at 122. As another example, the Commission reported that in 2008 there were 291 inmates on California's Death Row

who did not have counsel appointed to handle their habeas corpus petitions, and that such appointments could take 8-10 years. *Id.* By June 2014, the number of Death Row inmates without habeas corpus counsel had increased to 352. *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1058 (C.D. Cal. 2014).

D. The System Is Failing Under Its Own Weight.

Based on the above information, the Commission concluded that the death penalty system in California is "dysfunctional":

> After careful study, the Commission finds itself in full agreement with California Chief Justice Ronald M. George in his conclusion that California's death penalty System is dysfunctional.
>
> The system is plagued with excessive delay in the appointments of counsel for appeals and habeas corpus petitions, and a severe backlog in the review of appeals and habeas petitions before the California Supreme Court. Ineffective assistance of counsel and other claims of constitutional violations are succeeding in federal courts at a very high rate. . . .
>
> The Chief Justice told the Commission that if nothing is done, the backlogs in post conviction proceedings will continue to grow "until the system falls of its own weight." While some opponents of the death penalty might welcome such a prospect, the members of this Commission believe that doing nothing would be the worst possible course. The failures in the

> administration of California's death penalty law create cynicism and disrespect for the rule of law, increase the duration and costs of confining death row inmates, weaken any possible deterrent benefits of capital punishment, increase the emotional trauma experienced by murder victims' families, and delay the resolution of meritorious capital appeals.

Id. at 114-15 (internal citations omitted).

As a result of this bloated and dysfunctional death penalty system, one study estimates that California spent $4 billion administering the death penalty between 1978 and 2010, divided between: (1) death penalty pre-trial and trial costs ($1.94 billion); (2) automatic appeals and state habeas corpus petitions ($925 million); (3) federal habeas corpus petitions ($775 million); and (4) costs of incarceration ($1 billion). Alarcón & Mitchell, *Executing the Will of the Voters?*, 44 Loy. L.A. L. Rev. at S41.

II. THE CALIFORNIA STATE LEGISLATURE HAS BEEN UNABLE TO FIX THE SYSTEM.

The Commission and other commentators have made numerous proposals to fix California's dysfunctional death penalty system, including: (1) increasing funding for capital appellate and habeas counsel, including the Office of the State Public Defender, the Habeas

Corpus Resource Center, the Offices of the Attorney General, and private defense counsel by at least $95 million per year, Commission Final Report at 116-17; (2) reducing the number of death penalty cases in the system by narrowing the number of "death-eligible" special circumstances, *id.* at 117; (3) reducing the burdens on the California Supreme Court by providing for review and habeas relief in lower courts, *id.* at 118; and (4) eliminating the death penalty, *id.*

Despite the Commission's various suggestions and strident calls for change, the Legislature has not implemented any of the proposals to fix the state's administration of the death penalty. In this section, we describe the Legislature's many failed attempts to implement reforms, as well as Constitutional and practical impediments to change.

A. The Legislature Cannot Change Important Aspects Of The Current Death Penalty System Without Approval By The Voters With Majority Support.

As a preliminary matter, the Legislature does not have the authority to rewrite certain statutes governing California's death penalty system; many significant aspects of California's current system, including the existence of the death penalty and the many "special circumstances" that allow imposition of the death penalty, were

imposed by voter initiative. *See* Uelmen Decl. ¶ 18. California's initiative process prohibits the Legislature from amending or repealing voter-initiated legislation without voter approval "unless the initiative statute permits amendment or repeal without their approval." CAL. CONST. art. II, § 10. Notably, the voter initiatives that gave rise to California's current death penalty system did not give the Legislature authority to amend those initiatives without voter approval. *See* Abbreviated Listing, Proposition 7, *California Ballot Propositions (1911-Present)*.

A recent Field Poll survey indicates that a majority of Californians support the death penalty. *See* Mark DiCamillo & Mervin Field, "Voter Support for the Death Penalty Declines in California," THE FIELD POLL, September 12, 2014 (reporting 56% of voters in favor of keeping the death penalty and 34% opposed). Thus, to the extent the Legislature succeeds in passing proposals that substantively affect the administration of the death penalty in California, the Legislature still faces an uphill battle getting the electorate to approve those changes.

B. Legislative Attempts To Fix The Death Penalty System Since 2008 Have Failed.

Since the Commission issued its Final Report in 2008, there have been six bills introduced in the California Legislature to fix California's broken death penalty system. All have failed.

1. Senate Bill 1471 (2008)

This bill, which was introduced on February 21, 2008 by Senator George Runner, would have amended the Penal Code to: (1) require habeas petitions in death penalty cases to be filed within one year; (2) loosen the standards for competent defense counsel; and (3) provide that habeas petitions in capital cases be filed in superior court, rather than the Supreme Court. *See* SB-1471 (2008) Text, *available at* http://leginfo.legislature.ca.gov/faces/billSearchClient.xhtml;jsessionid=6193d20bdfda899041a25087508d; *see also* SB-1471 (2008) Bill Analysis, Senate Committee on Public Safety (2007-2008).

Senator Runner, a Republican, argued in support of the bill that:

> Habeas petitions are commonly a source of delay in death penalty cases because of delays, the assignment of counsel, the Supreme Court calendar, or repetitive findings. . . . Additionally, the requirement that only the Supreme Court hear habeas petitions, which by their very nature are evidentiary hearings, is problematic as the

> Supreme Court is not well equipped to consider such presentations, especially in light of the Court's heavy caseload.

SB-1471 (2008) Bill Analysis, Senate Committee on Public Safety (2007-2008). By creating a timeline for the filing of habeas petitions, by allowing more people to qualify to represent death penalty defendants, and by allowing habeas petitions to be heard in the trial courts, Senator Runner hoped to streamline the state post-conviction review process and eliminate some sources of delay. *Id.* The California District Attorneys Association and Crime Victims United supported the bill. *Id.*

Opponents of the bill argued that the proposal was unrealistic. Among other things, they challenged the idea that the courts would be able to provide capital habeas counsel in a timely manner in order to satisfy the proposed one-year mandatory filing deadline: "While providing qualified representation immediately to persons sentenced to death is a laudable goal, this requirement simply ignores the reality that the pool of lawyers able and willing to accept appointment as capital habeas counsel in California is quite limited." *Id.*

Opponents further challenged the loosening of the standards required for capital habeas counsel. *Id.* They also challenged the

proposal allowing for habeas petitions to be filed in the trial courts, arguing that "[i]t is unlikely a person will get any real relief before the court that committed the bias or mistake or who tolerated prosecutorial misconduct or did not step in when a defense attorney was incompetent." *Id.* They further argued that the trial courts are "the most overburdened, understaffed courts in our system." *Id.*

On April 15, 2008, this bill failed in the Senate Public Safety Committee. SB-1471 (2008) Votes.

2. Senate Bill 1025 (2010)

Senator Tom Harman, another Republican, introduced Senate Bill 1025 on February 11, 2010. *See* SB-1025 (2010) History, *available at* http://leginfo.legislature.ca.gov/faces/billSearchClient.xhtml;jsessionid=6193d20bdfda899041a25087508d. This bill initially made two key proposals: (1) to remove the limitation on the number of attorneys who may be employed by the Habeas Corpus Resource Center; and (2) to require the Supreme Court to develop necessary rules and procedures for initiating habeas corpus proceedings in the trial courts. SB-1025 (2010) Text. However, before the bill was heard, the author amended it

to remove the provision relating to the number of attorneys employed by the Habeas Corpus Resource Center. *Id.*

Before the Senate Committee on Public Safety, Senator Harman argued that the bill would "develop procedures for habeas petitions to begin in superior courts, where claims can be processed quickly and efficiently by a tribunal more appropriately suited to investigate habeas claims." SB-1025 (2010) Bill Analysis. The California Judges Association and Crime Victims United of California supported the amended bill.

In its analysis of Senate Bill 1025, the Senate Committee on Public Safety noted that the Commission's 2008 Report "did recommend that rules and policies allowing habeas petitions in death penalty cases to be filed at the Superior Court to encourage more factual hearings and findings." *Id.* However, the committee further noted that the Commission made that recommendation "only after other recommendations regarding putting resources into the Habeas Corpus Resource Center, private defense attorneys, trial level attorneys and the Attorney General's Office were adopted." *Id.* Finally, the committee noted that "moving habeas petitions in death penalty cases to the over-

extended trial courts is not a simple proposition" because of current backlogs in the trial courts and the need for additional staff in the trial courts to hear complex habeas petitions. *Id.* The American Civil Liberties Union and the Friends Committee on Legislation opposed the bill.

Senate Bill 1025 failed passage in committee on April 20, 2010. SB-1025 (2010) Votes.

3. Senate Constitutional Amendment 27 (2010)

On the same day Senator Harman introduced Senate Bill 1025, he also introduced Senate Constitutional Amendment (SCA) 27. SCA 27 would have allowed the California Supreme Court to transfer appellate review of death penalty cases to a court of appeal, as long as the Supreme Court later reviewed the court of appeal's decision. SCA-27 (2010) Text, *available at* http://leginfo.legislature.ca.gov/faces/billSearchClient.xhtml;jsessionid=6193d20bdfda899041a25087508d. According to Senator Harman:

> "[g]ranting California's state appellate courts the jurisdiction to hear capital appeals with discretionary review by the California Supreme Court would streamline the capital appellate process to benefit litigants, protect the public,

> and allow the Supreme Court to fulfill its other important criminal and civil law responsibilities."

SCA-27 (2010) Bill Analysis. As mentioned above, the Commission recommended this solution, the concept for which originated with then-Chief Justice Ronald George, *id.*, but which the Justice subsequently withdrew for budgetary reasons. *See* Chief Justice Ronald George, State of the Judiciary Address to the Legislature (March 25, 2008) *available at* http://www.ccfaj.org/documents/reports/dp/expert/Chief's%20AddresstoLegislature.pdf.

Opponents of the proposed constitutional amendment argued that the proposal may not result in any time savings in appellate review of death penalty cases, because the Supreme Court would still have to review the death penalty case: (1) in order to transfer it to the court of appeal; and (2) to review the decision of the court of appeal. *Id.* Opponents also argued that a transfer of capital cases to the courts of appeal would require an increase in staffing at the courts of appeal, and questioned whether funding would be available for such staffing. *Id.* Finally, opponents raised concerns that transferring death penalty cases to the courts of appeal would reduce consistency in the holdings

on these cases. *Id.* Opponents to SCA 27 included the American Civil Liberties Union, Taxpayers for Improving Public Safety, the Friends Committee on Legislation of California and the California Public Defenders Association. *Id.*

On April 20, 2010, SCA 27 failed in the Committee on Public Safety. SCA-27 (2010) Votes.

4. Senate Bill 490 (2011)

On February 17, 2011, Democratic Senator Loni Hancock (one of the *amici* here) introduced Senate Bill 490, which called for a referendum on abolishing the death penalty. SB-490 (2011) Text, *available at* http://leginfo.legislature.ca.gov/faces/billSearchClient.xhtml;jsessionid=6193d20bdfda899041a25087508d. The proposed bill cited Alarcón & Mitchell, "Executing the Will of the Voters," referenced above, as finding that California spends $184 million a year administering the death penalty, and that California has spent more than $4 billion on capital punishment since 1978, for a total of approximately $308 million for each of the 13 executions carried out since 1978. *Id.* SB 490

provided that the bill would be placed on the ballot to be considered by the voters on November 6, 2012. *Id.*

In support of the bill, Senator Hancock argued that: (1) "[c]apital punishment is an expensive failure"; (2) "capital punishment as a penalty is not a deterrent"; and (3) that wrongful executions are possible and avoidable. SB-490 Bill Analysis, 07/06/2011 Assembly Public Safety. The American Civil Liberties Union, The California Public Defenders Association, the Friends Committee on Legislation of California, and the Conference of California Bar Associations supported the proposed bill. *Id.*

In response to the proposed bill, opponents—including Crime Victims United of California, the California District Attorneys Association, the Association of Orange County Deputy Sheriffs, the Association of Los Angeles Deputy Sheriffs, and the California Police Officers' Association—argued: (1) that the death penalty is a legally appropriate response to the most heinous crimes; (2) that it serves a deterrent effect on future criminality; and (3) that abolishing it is an insult to crime victims, especially with respect to death sentences already imposed. *Id.*

On May 3, 2011, SB 490 passed in the Committee on Public Safety. SB-490 (2011) Votes. The bill next passed the Senate Appropriations Committee and then the Senate floor. *Id.* The bill then passed to the Assembly, where it was passed to the Committee on Public Safety. SB-490 (2011) History. That Committee passed it and referred it to the Appropriations Committee.

On August 25, 2011, on the day the bill was scheduled for a vote before the Assembly Appropriations Committee, Senator Hancock announced that she had withdrawn it from consideration. Press Release from Senator Loni Hancock, "SB 490 (Death Penalty) Withdrawn From Consideration," Aug. 25, 2011, *available at* http://sd09.senate.ca.gov/news/2011-08-25-sb-490-death-penalty-withdrawn-consideration. Senator Hancock stated that "The votes were not there to support reforming California's expensive and dysfunctional death penalty system." *Id.*

5. Senate Bill 1514 (2012)

Republican Senator Joel Anderson introduced Senate Bill 1514 on February 24, 2012. SB-1514 (2012) Text, *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=20112

0120SB1514&search_keywords=. That bill, similar to Senate Constitutional Amendment 27 (2010), proposed that capital cases be reviewed by the courts of appeal rather than the Supreme Court. *Id.* It also proposed removing the requirement that appeals automatically be taken in cases where a judgment of death is rendered. *Id.*

The Senate Public Safety Committee rejected Senate Bill 1514 on April 17, 2012.

6. Senate Bill 779 (2013)

Finally, in 2013, Senator Anderson introduced another bill proposing changes to California's administration of the death penalty. In Senate Bill 779, Senator Anderson proposed numerous changes to the Penal Code that would have, among other things: (1) required that a person sentenced to death file habeas corpus petitions in the court that imposed the sentence, instead of in the Supreme Court; (2) reduced the standards for capital appellate and habeas counsel; (3) sped up the death penalty appeals process; and (4) allowed use of the gas chamber for executions. SB-779 (2013) Text, *available at* http://leginfo.legislature.ca.gov/faces/billSearchClient.xhtml.

Arguing in favor of the Bill, Senator Anderson stated:

> The review of California capital cases takes far longer than is needed for a fair adjudication of claims. This delay is contrary to the right of victims and their families to a prompt conclusion of the case, and impairs the deterrent effect of capital punishment, costing innocent lives. . . . Additionally, the administration of the death penalty is far too costly. Unnecessary expenses derive from the needlessly prolonged review of the sentence, methods of confinement, litigation of execution protocols, briefing of frivolous claims by defense counsel with the requisite response by the Attorney General and decision by the courts, and repetitive review of judgments on issues having no bearing on actual guilt of the offense.

SB-779 (2013) Bill Analysis. Opponents raised several objections to the proposed bill, including: (1) questioning whether the trial courts had the resources to deal with a sudden influx of habeas cases; (2) opposing lessening the standards for counsel; and (3) arguing that no other jurisdiction in the world allows "execution by suffocation." *Id.*

Senate Bill 779 failed to pass in the Senate Committee on Public Safety. SB-779 (2013) Votes.

III. THE LEGISLATURE WILL CONTINUE TO BE UNABLE TO FIX THE PROBLEMS WITH CALIFORNIA'S DEATH PENALTY SYSTEM.

A. The Legislature Lacks Consensus On How To Best Fix The Death Penalty System.

Despite urgent calls for change, the Legislature has consistently failed to implement any reforms to California's death penalty system. This is not because the Legislature is unaware of the problem. To the contrary, proposals from both Democrats and Republicans consistently cite the high cost, delay, and ineffectiveness of California's death penalty system in its current form. But the two parties disagree on how to fix it, with the further complication of disagreement within each party.

From the above description of the many failed proposals to fix the death penalty system since 2008, a rough pattern becomes clear. Republicans consistently propose legislation to streamline California's administration of the death penalty, but without including the financial provisions necessary to convince Democrats that there are resources available to ensure that necessary constitutional protections remain available and viable. The discussions in the California State Senate generated by the Republican-proposed reform bills seem to indicate that

Democrats in the California State Senate could be supportive of reform efforts that include significant financial terms providing, for example, for increased staffing in the courts and increased funding for capital defense counsel. However, no proposal has included such significant financial terms, and it is unlikely that one will be introduced in the near future. As the Commission concluded, to properly administer the death penalty by enacting the recommended reforms, the State will have to invest an additional $95 million per year. No one is proposing that that sort of money be allocated to the administration of the death penalty. And, as detailed below, given the current state of California's budget, no one will.

B. California's Current Budget Constraints Make It Very Difficult For The Legislature To Allocate Additional Funds To The Administration Of The Death Penalty.

As set forth above, the Commission recommended that California spend an additional $95 million per year to properly administer the death penalty system in this state. This is simply not feasible. There are inherent constraints in California's budget process that do not leave room for this type of spending on administration of the death penalty.

1. Spending On The Death Penalty Would Have To Come From California's General Fund.

The Governor's budget proposal for the 2015-16 period calls for $164.7 billion in spending. California Governor's Proposed Budget 2015-16 ["Governor's Proposed Budget"] *available at* www.ebudget.ca.gov/2015-16/agencies.html. Most of this spending is drawn from two funds: $113 billion will be drawn from the General Fund this year, while $45.5 billion will be drawn from special funds. *Id.*

The General Fund is California's principal fund for financing state government programs. California Department of Finance, Glossary of Budget Terms ["Budget Terms"], Appendix 4 *available at* http://www.dof.ca.gov/html/bud_docs/glossary.pdf. It is made up of revenues that are not designated by law to go to the special funds or any other fund. *Id.* Such sources of revenue include personal income taxes, sales taxes, and bank and corporation taxes. *Id.* The General Fund is the major funding source for education, health and human services, and youth and adult correctional programs. *Id.*

In contrast, the special funds are made up of over five hundred "governmental cost funds" that are set up to receive state revenues, such as taxes, licenses, and fees, that are designated by law for a

specific purpose. *Id.* at Appendix 6. The special funds are not available to fund administration of California's death penalty system.

2. The Legislature Will Not Divert An Additional $95 Million Per Year From The General Fund To Finance California's Death Penalty System.

a. Of The $113 Billion In The General Fund, Almost $50 Billion Is Mandated Spending.

Before the Governor and the Legislature can make discretionary determinations of how funds should be allocated for a given year, there are two significant mandatory expenditures that California's budget must account for: Proposition 98 (1988) and Proposition 2 (2014).

The first, Proposition 98 (1988), guarantees that a minimum percentage of the total state budget every year will be allocated to K-12 schools and community colleges. California Legislative Analyst's Office, Proposition 98 Primer (2005) ["Proposition 98 Primer"] *available at* http://www.lao.ca.gov/2005/prop_98_primer/prop_98_primer_020805.htm. In the Governor's proposed budget for 2015-16, $47.2 billion of the General Fund is allocated to K-12 education, and 99.7% of that allocation is required by Proposition 98.[2] Governor's Proposed Budget.

[2] While the Legislature *can* suspend the Proposition 98 guarantee for a single year by a two-thirds vote of each house, the state would later

The second significant mandatory expenditure is Proposition 2 (2014), which requires that the state set aside at least 1.5% of General Fund revenues each year to deposit in a Rainy Day Fund, as well as additional dollars in years when tax revenues from capital gains are particularly strong. Proposition 2 (2014). In the Governor's proposed budget, $2.8 billion is allocated to this fund for 2015-16. Governor's Proposed Budget.

b. The Remaining $63 Billion In The General Fund Is Spent On Important State Services.

The General Fund pays for a variety of state services that are both essential and important to California legislators and constituents. In the 2015-16 proposed budget, the $63 billion remaining in the general fund after payment of mandated expenses is dedicated to education, health and human services, higher education, corrections and rehabilitation, and the legislative, judicial, and executive branches of

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have to make up for any funds not allocated to Proposition 98 in that year. Proposition 98 Primer. Diverting funding in this way is not a solution to the death penalty system's long-term funding problems. Indeed, the state currently owes more than $1.5 billion in deferred funding of Proposition 98. California Governor's Proposed Budget Summary 2015-16, p. 4, *available at* http://www.ebudget.ca.gov/2015-16/pdf/BudgetSummary/FullBudgetSummary.pdf.

government. Specifically, the Governor's proposed budget allocates the remaining General Fund spending as follows:

i. $31.9 billion to Health and Human Services.
ii. $14.1 billion to Higher Education.
iii. $10.2 billion to Corrections and Rehabilitation.
iv. $3.1 billion to the Legislative, Judicial, and Executive Branches of Government.
v. $1.3 billion to Statewide Expenditures.
vi. $639 million to Business, Consumer Services and Housing
vii. $237 million to Transportation.
viii. $68 million to Environmental Protection.
ix. $265 million to Labor and Workforce Development.
x. $701 million to Government Operations.
xi. $676 million to Non-Agency Departments.
xii. $444 million to Tax Relief/Local Government.

Governor's Proposed Budget.

Legislators are unlikely to reallocate funding from one of the above priorities in order to give even more dollars (in addition to the $10.2 billion *already* budgeted to Corrections and Habilitation) to the California death penalty system. California has a volatile economy and legislators are wary of dedicating revenue from uncertain funding streams to ongoing expenses, including fixing California's death penalty system. Already, the commitments that the state made in the past two

years are straining the state's finances. Under a projection of current policies, the state would begin to spend more than it receives in annual revenues by 2018-19 (by about $1 billion). California Governor's Proposed Budget Summary 2015-16, p. 18, *available at* http://www.ebudget.ca.gov/2015-16/pdf/BudgetSummary/FullBudgetSummary.pdf. Given the current uncertain economic climate, legislators are unlikely to be able to convince each other or the electorate of the necessity of dedicating additional dollars to fixing California's death penalty system.

c. The State Is Currently Not Finding Room In The Budget For Several Important Expenses.

California currently has several very important financial obligations that it is not paying. In addition to deferred maintenance on roads and other infrastructure, the state General Fund owes a debt of over $3 billion dollars to the special funds, as well as a settle-up payment of over $1.5 billion for prior underfunding of Proposition 98. California Governor's Proposed Budget Summary 2015-16, p. 3, *available at* http://www.ebudget.ca.gov/2015-16/pdf/BudgetSummary/FullBudgetSummary.pdf. In addition, the

state has an unfunded liability of approximately $222 billion for future retiree health care benefits for state employees and various pension benefits. *Id.* If the state is unable to pay down these outstanding liabilities, it is unrealistic to assume that it will double—for the foreseeable future—the amount being spent to administer the death penalty.

3. Raising New Revenues To Fund Fixing The Death Penalty Through Taxes Is Also An Unrealistic Option.

Under the California Constitution, "[a]ny change in state statute which results in any taxpayer paying a higher tax" requires a two-thirds vote of each house of the Legislature. CAL. CONST. art. 13A, § 3(a). This standard was imposed by Proposition 26 (2010), which expanded the definition of a tax increase and thus the reach of the two-thirds vote requirement. California Legislative Analyst's Office, Proposition 26 (2010), *available at* http://www.lao.ca.gov/ballot/2010/26_11_2010.aspx. Garnering 26 senators and 54 assembly members to support a tax increase for the purpose of funding California's death penalty is a non-starter. Repeated legislative efforts to change the death penalty process have

been unsuccessful. There is no reason to believe that an effort to increase taxes for a similar purpose would succeed.

The Governor has been able to secure a tax increase by appealing directly to voters, but even this effort was not easy and is highly unlikely to be successful as a way to raise funds to fix the death penalty system. Specifically, Governor Brown was able to secure a *temporary* sales and income tax increase through a constitutional amendment enacted by Proposition 30 (2012). California Legislative Analyst's Office, Proposition 30 (2012), *available at* http://www.lao.ca.gov/ballot/2012/30_11_2012.aspx. Proposition 30, entitled "Temporary Taxes to Fund Education," passed with only 55.4% of the vote. And, as a result of Proposition 30, California currently has the highest sales tax in the nation. In the wake of this recent increase, the suggestion that the voters would pass another such tax increase—particularly one to permanently fund the death penalty—is fanciful.

CONCLUSION

The legislative deadlock and hurdles posed by the initiative process described above are actively depriving hundreds of individuals on Death Row of their constitutional rights. For individuals who have been convicted correctly, it is depriving them of their right to a punishment that is certain and applied in a non-arbitrary manner. For individuals who have been convicted incorrectly, it is delaying their right to review of their convictions. The legislative deadlock is also harming the citizens of California, who are investing significant resources in a system that simply is not working. And it is harming the crime victims and their families, for whom a working death penalty system might provide some sense of closure for their loss.

Fiscal and political realities make clear that the funding needed to fix the dysfunctional death penalty system will not be forthcoming. Absent such action, the existing system will continue to violate the constitutional rights of death row inmates. Amici Curiae urge this Court to affirm the decision of the lower court declaring that California's death penalty system, as currently practiced, violates the Eighth Amendment's prohibition against cruel and unusual punishment.

Dated: March 6, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,833 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 14 point Century Schoolbook font.

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CERTIFICATE OF SERVICE

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

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