No. 14-56373

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ERNEST DEWAYNE JONES,

Petitioner and Appellee,

v.

RON DAVIS, Warden,

Respondent and Appellant.

On Appeal From The United States District Court
For the Central District of California
Case No. 09-cv-02158 (CJC)
The Honorable Cormac J. Carney, Judge

LOYOLA LAW SCHOOL'S ALARCÓN ADVOCACY CENTER AND PROJECT FOR THE INNOCENT *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER

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I. STATEMENT OF CONSENT

All parties have consented to the filing of this brief.

II. STATEMENT OF AUTHORSHIP AND FUNDING

No party's counsel authored this brief in whole or in part. No party, counsel or person other than *amicus curiae*, or its counsel contributed money to fund this brief.

III. STATEMENT OF INTEREST OF *AMICUS CURIAE*

Loyola Law School's Project for the Innocent ("LPI" or "the Project") is a wrongful conviction clinic founded as part of Loyola Law School's Alarcón Advocacy Center. The Project's mission is to investigate claims of actual innocence and advocate on behalf of individuals who are incarcerated in California state prisons and have been sentenced to lengthy prison terms for crimes they did not commit. LPI's students work closely with attorneys and investigators and seek to exonerate their clients by raising their claims in a petition for a writ of habeas corpus.

In 2011, LPI helped secure the exoneration of Obie Anthony, who served 17 years in prison for a murder he did not commit. In 2013, LPI helped secure the exoneration of Kash Register, who served 34 years in prison for a 1979 murder he did not commit. The Anthony and Register

cases are not anomalous. In 2014, exonerations of wrongfully convicted individuals reached an annual record high of 125 nationwide. Since 1989, 111 men and women who were sentenced to death in the United States have been exonerated and released from prison; three in California.[1] A total of 1,559 known exonerations have been documented, with roughly half involving wrongful murder convictions.[2]

The Great Writ is thus as important and relevant today as it was when the founders guaranteed its permanence by writing it into Article 1, Section 9 of the Constitution. Meaningful review of claims of constitutional and other error raised on appeal and in petitions for a writ of habeas corpus is critical to LPI's mission. It is an essential safeguard that helps ensure the punishments imposed under our laws not only meet with constitutional requirements but also promote confidence and integrity in our judiciary and criminal justice system. LPI and its clients rely on access to habeas review to correct constitutional errors, which result in the wrongful convictions of individuals like Anthony and Register. Importantly, because the death penalty demands such a significant share of the California Supreme Court's docket, it makes it more difficult for countless other criminal cases to obtain

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[1] *See* The National Registry of Exonerations: A Project of the University of Michigan Law School, *available at* https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?SortField=Sentence&View={faf6eddb-5a68-4f8f-8a52-2c61f5bf9ea7}&FilterField1=Sentence&FilterValue1=Death&&SortField=ST&SortDir=Asc (last visited March 5, 2015).

[2] *See id.* This figure increases steadily as new wrongful convictions are discovered.

timely review, including those involving serious crimes and lengthy term sentences.

A large body of empirical data examining the delays in California's death penalty system has been compiled by judges, scholars, the California Commission on the Fair Administration of Justice, ("Commission"), appointed by the California State Senate, and others. These studies illustrate the severity and chronic nature of the dysfunction that has long been inherent in the system. One of the studies cited in the district court's decision on appeal here was co-authored by Senior Ninth Circuit Judge Arthur L. Alarcón and published in the *Loyola Law Review* in 2011. *See* Arthur L. Alarcón and 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 (2011), *available at* http://digitalcommons.lmu.edu/llr/vol44/iss0/1/. It chronicles the evolution of the unconscionable delays in California's death penalty system and predicts that without a significant course correction, the demise of the entire system looms on the horizon.

The district court relied on this and data from other credible sources to support its conclusion that California's system, which has sentenced over one thousand people to death by execution but has actually executed only thirteen, "offend[s] the most fundamental of constitutional protections—that government shall not be permitted to arbitrarily inflict the ultimate punishment of death." ER 20. LPI offers this *amicus curiae* brief

to assist this Court in its review of the district court's order by providing updates to some of the data and other research the district court appropriately considered in reaching its determination.

The Eighth Amendment question on appeal before this Court is critically important to Loyola's Project for the Innocent, Loyola Law School, and indeed, to the many thousands of stakeholders in California's criminal justice system who share concerns over ensuring fairness in the system; concerns which have, understandably, become acute.

IV. ARGUMENT

Congestion, backlogs, and delays in the administration of California's death penalty have compromised the system to such an extent that the system as a whole has broken down and can no longer satisfy constitutional demands or the "[f]undamental principles of due process and just punishment [which] demand that any punishment, let alone the ultimate one of execution, be timely and rationally carried out." ER 27. The system's well-documented delays not only constructively foreclose timely, meaningful review of direct appeals and habeas petitions, their net effect is to render California's death penalty into a sentence of decades on death row, with the slight possibility of death by execution. The determination as to which inmates the State will actually execute has been—and will continue to be—arbitrary; based entirely on events and criteria bereft of any legitimate penological purpose.

There is no real dispute about the accuracy of the data the district court relied on in its decision, or the inevitably uneven, unpredictable, and arbitrary results the system renders. The State offers no data of its own demonstrating that it can or will reduce the unconscionable delays in the system. Instead, the State insists that the delays are in place by design because they are necessary to protect individual and governmental interests. But ample evidence belies that contention, including the California Supreme Court's own acknowledgement that the long delays caused by its inability to appoint counsel in capital cases are not by design and do not further prompt and fair review. *In re Morgan*, 50 Cal.4th 932, 940-41 & n.7 (2010).

These death sentences, *as actually carried out by the State*, categorically violate the Eighth Amendment's Cruel and Unusual Punishments Clause because the system is so bloated that it now determines which inmates will actually be executed in a manner that is arbitrary and without any legitimate penological purpose. *See Furman v. Georgia*, 408 U.S. 238, 309 (1972) (per curiam) (Stewart, J., concurring); *Baze v. Rees*, 553 U.S. 35, 78 (2008) (Stevens, J., concurring). No other state imposes sentences of death by execution on hundreds of individuals, *knowing* that only a randomly selected few will ever actually be executed. Most importantly, no other state sentences hundreds to death row and then denies them their fundamental due process right to timely appellate review, such that most die while waiting the decades now required for the courts to review their direct appeals and habeas petitions.

This horrific reality is all the more unconscionable in view of the fact that the federal courts have granted habeas relief to California death row inmates in nearly seventy percent of the cases in which review has been completed. *Executing the Will of the Voters?*, at S55, n. 26 (noting that as of 2008, federal courts had granted "'[r]elief in the form of a new guilt trial or a new penalty hearing . . . in 38 of the cases, or 70%," and by 2011, habeas relief had been granted in five additional cases) (citing California Commission on the Fair Administration of Justice, *Final Report*, (Gerald Uelman ed., 2008) ("Final Report") at 114, *available at* http://www.ccfaj.org/.

A. The System's Delays Deprive Condemned Inmates Of Their Fundamental Due Process Right To Timely Appellate Review And The Delays Are Getting Worse

Ten years ago, Senior Circuit Judge Alarcón conducted research on the length of the delays common in the automatic appeals process for California death row inmates. Arthur L. Alarcón, *Remedies for California's Death Row Deadlock*, 80 S. Cal. L. Rev. 697, 731 (2007) ("*Remedies*"), *available at* http://lawreview.usc.edu/index.php/articles-remedies-for-californias-death-row-deadlock/. His study concluded that as of January 2006, automatic appeals took over twelve years to be decided, on average, from the entry of the judgment of death to the issuance of the California Supreme Court's opinion. *Id.* at 700 & n.4, 731. Based on the California Supreme Court's most recently issued opinions in the seventy appeals it

decided in 2012, 2013, and 2014, death penalty appeals now require 15.3 years to be resolved, on average—a 25% increase over the last ten years.[3]

[3] The California Supreme Court decided the following automatic appeals in death penalty cases in 2012, 2013, and 2014: **[2012]** Watkins (S026634); Homick (S044592); Valdez (S062180); Duenas (S077033); Houston (S035190); Gonzales (S067353); McKinzie (S081918); Tully (S030402); Thomas (S067519); Riccardi (S056842); Lightsey (S048440); McDowell (S085578); Streeter (S078027); Souza (S076999); Jones (S076721); Livingston (S090499); Myles (S097189);Weaver (S033149); Abel (S064733); Thomas (S048337); Enraca (S080947); Fuiava (S055652); Elliot (S027094); Brents (S093754); and, Pearson (S120750); **[2013]** Williams (S118629); Contreras (S058019); Manibusan (S094890); Jones (S042346); Harris (S081700); Mai (S089478); Edwards (S073316); Maciel(S070536); Rogers (S080840); DeHoyos (S034800); Nunez (S091915); Linton (S080054); Lopez (S073597); Rountree (S048543); Williams (S030553); Pearson (S058157); Williams (S093756); Whalen (S054569); and, Satele (S091915); **[2014]** Adams (S118045); Bryant (S049596);Wheeler (S049596); Smith (S049596); Merriman (S097363); McCurdy (S061026); Carrasco (S077009); Capistrano (S067394); Weatherton (S106489); Avila (S135855); Trinh (S115284); Brown (S052374); Hajek (S049626); Vo (S049626); Suff (S049741); Montes (S059912); Rodriguez (S122123); Duff (S105097); Lucas (S012279); Banks (S080477); Hensley (S050102); Boyce (S092240); Sattiewhite (S039894); Debose (S080837); Chism (S101984); and, Jackson (S086269). *See* California Supreme Court docket database *available at* http://appellatecases.courtinfo.ca.gov/.

A review of the dockets in these automatic appeals (AA) indicates that the California Supreme Court now requires an average of 15.3 years to issue opinions in death penalty appeals.

Opinions Issued	Appeals Decided	Yrs btw Conviction & AA Counsel Appt'd (avg)	Yrs AA Fully Briefed (avg)	Yrs btw Conviction & AA Opinion (avg)	Total Yrs on DR btw Conviction & AA Opinion
2012	26	4.5	3.5	15.8	410
2013	19	4.7	2.7	15.5	292
2014	25	5.4	2.8	14.86	372
Totals	**70**	**4.6**	**3**	**15.3**	**1,074**

This increase is consistent with the trend. For inmates convicted between 1978 and 1989, death penalty appeals were decided in 6.6 years, on average. *Remedies*, at 723. Death row inmates convicted between 1990 and 1996 experienced a longer average delay of approximately 10.7 years. *Id.* By January 2006, the average delay was more than 12 years. *Id.* at 731. The Court now requires 15.3 years, on average, to resolve each death penalty appeal. *See* n. 3, *supra*. A review of the dockets for the inmates whose death penalty appeals were decided in 2012, 2013, and 2014 illustrates that they waited a combined total of more than 1,000 years for their convictions and sentences to be reviewed *just on direct appeal*. *Id.* The State has no apparent ability to address these delays, nor has it indicated a willingness to do so. Despite ample warnings over the last ten years from various credible sources about the need for the State to repair its dysfunctional death penalty system, the State has failed to take action. *See, e.g., Executing the Will of the Voters?* at S48, S81, S102, S104, S109, S186.

In addition to the unpredictable and arbitrary executions that undeniably result from the delays in the system, inmates with meritorious claims of error must now wait for decades, in many cases, before they are granted relief. The six inmates whose convictions or sentences were reversed waited a total of eighty-two years before learning that they were entitled to a new trial or sentencing proceeding.[4] *See e.g., People v.*

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[4] *See,* California Supreme Court dockets for Case Nos.: Weatherton (S106489); Hensley (S050102); Riccardi (S056842); Lightsey (S048440);

Lightsey, 54 Cal. 4th 668 (2012) (reversing conviction and death sentence after seventeen-year long appeal on the ground that "defendant *might have been* incompetent [to stand trial] and was denied a fair opportunity to establish that fact").

The State denies that the system is dysfunctional and insists the delays are part of the accommodations "designed to protect individual and government interests . . . ." Appellant's Op. Br. ("AOB") at 44. It is hard to take seriously the State's contention that it is concerned about protecting the interests of those it condemns to death when more than 400 death row inmates await appointment of appellate and habeas counsel, and more than 300 death penalty appeals are pending before the California Supreme Court. *See,* SER 85. Despite the Court's best efforts—(death penalty cases make up roughly one-third of its docket)—the Court is able to decide no more than about twenty death penalty appeals each year, a figure predicted to *decrease* in the near future.[5] The backlog in the system is not only a tremendous

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Brents (S093754); and, Pearson (S120750), *available at* http://appellatecases.courtinfo.ca.gov/.

[5] Emily Green, *Vacancies, changed priorities lead to fewer state Supreme Court opinions*, Los Angeles Daily Journal, December 12, 2014, at 1 (noting that the state Supreme Court is issuing 25 percent fewer opinions each year than it was a decade ago). *See also,* Gerald F. Uelmen, *The CA Supreme Court Reviewed*, California Lawyer September 2012, *available at* http://callawyer.com/Clstory.cfm?eid=924435&wteid=924435 The CA Supreme Court Reviewed (noting that death penalty cases made up 34% of the Court's cases and accounted for more than 50% of the Court's written opinion pages); Gerald F. Uelman, *The End of an Era*, California Lawyer, September 2010, *available at* http://www.callawyer.com/Clstory.cfm?eid=911409&wteid=911409 (noting that, in 2010, despite devoting nearly half of all published opinion pages to death cases, "the crushing backlog on the death docket was barely

burden on the Court, it also impacts the Court's ability to grant discretionary review in many important civil cases of commercial and public importance, as well as other serious criminal cases.

The State argues that the inmates' lengthy appeal briefs are to blame for much of the delay. But fully *half* of the 15.3 years a direct appeal currently requires—7.6 years, on average—was time spent waiting for the State to act: 4.6 years, on average, waiting for appointment of appellate counsel; and, another 3 years, on average, waiting for the Court to decide the appeal once it has been fully briefed. *See* n. 3, *supra*. Thus, the inmates whose appeals were most recently decided in 2012-2014 spent a total of 529 years on death row waiting for the State to act on their appeals.

The State cannot deny that it is responsible for a significant portion of the delay, which should not be charged against inmates in any constitutional calculus. Moreover, errors *do* occur in capital murders cases in California, as evidence by the fact that the California Supreme Court has reversed capital convictions where the State has failed to apply constitutionally sufficient procedures at the time of arrest, trial, and initial sentencing. *See, e.g., People v. Weatherton*, 59 Cal. 4th 589, 598 (2014) (reversing conviction where defendant's "'constitutional right to a trial by unbiased, impartial jurors'" was violated); *People v. Riccardi*, 54 Cal. 4th 758, 778 (2012) (reversing conviction where defendant's constitutional rights

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diminished: Seventy-seven death appeals and 89 habeas petitions - all fully briefed - remain on the court's calendar, where a two-year wait still separates the filing of final briefs from oral argument.")

were compromised by the trial court's erroneous excusal for cause of a juror who expressed personal opposition to the death penalty but who was not asked whether her views would impair her performance of her duties as a juror); *People v. Pearson*, 53 Cal. 4th 306, 331-33 (2012) (reversing conviction where "the trial court denied defendant the impartial jury to which he was entitled under the Sixth and Fourteenth Amendments to the United States Constitution" by improperly excusing a juror who "had no strong views on the death penalty and was not sure where she stood on it," but who was "clear and unequivocal" that "she could follow her oath to conscientiously consider the death penalty"); *People v. Mattson*, 37 Cal.3d 85, 92 (1984) (reversing conviction where confessions were the direct result of interrogations that violate constitutional standards); *People v. Frierson*, 25 Cal.3d 142, 164 (1979) (reversing conviction where defendant was "deprived of his right to effective trial counsel").

Thus, death row inmates cannot reasonably be faulted for raising claims of trial error and constitutional error in their appeals, however lengthy. The blame for these unconscionable delays more reasonably lies at the feet of the State, which has been warned repeatedly over the last decade that the delays in its system are creating a dysfunctional process but has failed to take steps to remedy these problems.[6]

[6] Based on the trend that has developed over the last ten years, if nothing changes in the current system, by 2025 the average delay for deciding direct appeals in death penalty cases will be over 19 years, and by 2035 the average delay will be nearly 25 years. *See, Remedies,* at 731; and *see* fn. 3, *supra*.

1. The California Supreme Court Currently Requires Twenty To Twenty-Five Years To Issue Opinions In Many Death Penalty Appeals

While the average delay for deciding death penalty appeals is now 15.3 years, it is important to note that this figure is only an average. Some appeals take much longer. In twenty of the seventy direct appeals decided between 2012 and 2014, inmates waited 18 to 25 years for the Court to decide their claims.[7] *See e.g.,* Lucas (S012279), judgment entered on September 19, 1989 and *opinion issued* ***twenty-five years*** *later*, on August 21, 2014); Williams (S030553), judgment entered on December 17, 1992 and *opinion issued* ***twenty years*** *later*, on May 6, 2013); Watkins (S026634), judgment entered on May 11, 1992 and *opinion issued more than* ***twenty years*** *later*, on December 17, 2012).

Twenty years on death row is an inordinate period of time to wait for one's automatic appeal to be decided. Contrary to the oft repeated assertion that inmates who are forced to endure these unconscionable delays while their appeals are resolved "suffer[] no conceivable prejudice," *People v. Jones*, 29 Cal. 4th 1229, 1267 (2003) (quoting *People v. Anderson*, 25 Cal. 4th 543, 606 (2001)), such delays can be *highly* prejudicial to inmates in

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[7] *See* Bryant (S049596); Wheeler (S049596); Smith (S049596); Brown (S052374); Hajek (S049626); Vo (S049626); Suff (S049741); Lucas (S012279); Hensley (S050102); Sattiewhite (S039894); Jones (S042346); DeHoyos (S034800); Rountree (S048543); Williams (S030553); Watkins (S026634); Homick (S044592); Houston (S035190); Tully (S030402); Weaver (S033149); Elliot (S027094), dockets *available at* http://appellatecases.courtinfo.ca.gov/.

several important respects. First, the delays prejudice those whose convictions are set aside because, as Judge Alarcón has pointed out, "a prolonged delay in retrying a case can result in the death of potential witnesses, the loss or impairment of their memory, or the destruction of evidence that may support a defense theory." *Remedies*, at 733. For example, in *Thomas v. Chappell*, 678 F.3d 1086 (9th Circ. 2012), this Court affirmed the district court's order granting habeas relief from a 1985 murder conviction and death sentence based on its determination that but for trial counsel's constitutionally inadequate investigation, "[t]here is a reasonable probability that a conscientious jury . . . would find 'reasonable' the interpretation pointing to Petitioner's innocence." *Id.* at 1106.

Thomas died of natural causes on death row after his habeas petition was granted. Had he lived and been re-tried by the State more than twenty-five years after the crime in question was committed, he undoubtedly would have suffered the prejudice described by Judge Alarcón, *to wit* the death of witnesses, impaired memories, destruction of evidence supporting a defense theory, and the like. *Remedies*, at 733; *see also* Arthur L. Alarcón and Paula M. Mitchell, *Costs of Capital Punishment in California: Will Voters Choose Reform this November?*, 46 Loy. L.A. L. Rev. S1, S19-S20 (2012), *available at* http://digitalcommons.lmu.edu/llr/vol46/iss0/1.

2. California's Death Row Inmates Are Dying Of Natural Causes Before Their Direct Appeals Have Been Reviewed

All but one of the sixty-six inmates who have died of natural causes on California's death row since 1978 had a direct appeal or a habeas petition, or both, still pending at the time of their death.[8] A full one-third of those—22 inmates—died of natural causes *before the California Supreme Court was able to review their conviction or sentence on direct appeal*.[9] Paul Brown, for example, filed his direct appeal in November 1990 and died nearly fourteen years later in April 2004, while is fully briefed case was

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[8] This information was gathered by searching the California Supreme Court dockets, *available at* http://appellatecases.courtinfo.ca.gov/, and the federal court dockets (available on PACER) for the names of the death row inmates who have died of natural causes as stated by the Cal. Dept. of Corrections and Rehabilitation ("CDCR") (Dec. 8, 2014), *available at* http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmatesWhoHaveDiedSince1978.pdf. (Note that there are inconsistencies in the spelling of some inmates' names as they appear on the CDCR list, as compared to the courts' dockets). The state and federal court dockets indicate that 65 of the 66 inmates who have died of natural causes on death row had a direct appeal or habeas petition, or both, pending in state or federal court. The only exception is Eddie McDonald (listed by the CDCR as Robert McDonald), whose conviction and sentence were reversed by the California Supreme Court in 1984. *People v. McDonald*, 37 Cal. 3d 351 (1984). It appears that when McDonald died of natural causes on December 31, 1993, he was still waiting on death row for the State to retry him.

[9] *See,* California Supreme Court dockets for: Willis (S004459); Crain (S010995); Gonzalez (S004560); Comtois (S017116); Kolmetz (S010398); Poyner (S066622); Bailey (S016029); Carter (S053288); Bland (S033571); Johns (S044834); Brown (S018571); Young (S049743); Quartermain (S074429); Ihde (S058729); Alexander (S131621); Berman (S062770); Martinez (S075699); Arisman (S076334); Van Pelt (S109197); Karis (S152156); Rodriguez (S179354); and, Ruiz (S113280), *available at* http://appellatecases.courtinfo.ca.gov/.

pending before the Court. Similarly, Lawrence Bergman filed his direct appeal in June 1997 and died twelve years later in June 2009, while his fully briefed appeal was pending before the Court.[10] As these cases demonstrate, timely and meaningful appellate review of the death sentences the State imposes—review that is the right of every condemned inmate—is unavailable to many of those the State sentences to death by execution.

3. Forty-Four Death Row Inmates Have Died Of Natural Causes While Their State And Federal Habeas Petitions Were Still Pending Before The Courts

The delays surrounding the direct appeal process are only the beginning. Once inmates' direct appeals have concluded, they wait again for the appointment of habeas counsel to handle their state proceedings. "A petition for writ of habeas corpus is not a game the law affords incarcerated people. It is the sole means to allow one whose very liberty has been deprived to thoroughly challenge both the procedural and substantive process." *Williams v. Lockhart*, 862 F.2d 155, 161 (8th Cir. 1988) (Lay, C.J., concurring) (noting that '[t]he initial trial and appeal [have] proven in hundreds of cases not to have been infallible"). And yet, forty-four inmates have died of natural causes while their state and federal habeas petitions were still pending.[11]

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[10] *See,* California Supreme Court dockets for Brown (S018571) and Bergman (S062770), *available at* http://appellatecases.courtinfo.ca.gov/.

[11] The eleven inmates who have died on death row while their state habeas petitions were still pending are: Joseph Poggi, Bronte Wright, Raymond

The California Supreme Court has explicitly recognized that the delay in habeas proceedings is not by design but is due to the Court's obligation "to timely provide [death row] inmates with the legal representation that is theirs by right." *In re Morgan*, 50 Cal. 4th at 940-411 & n.7. There, after waiting thirteen years on death row without state habeas counsel to represent him, Morgan filed an initial one-page petition, without any supporting exhibits, and invoked his statutory right to appointment of habeas counsel. *Id*. at 934. He asked the Court "to defer a decision on his petition until [it] appoint[ed] habeas corpus counsel and until that attorney has had a reasonable opportunity to investigate various factual and legal matters that may lead to additional claims for relief, to be presented in an amended petition." *Id*. at 934-35.

The Attorney General filed an Order to Show Cause requesting the Court "to promptly consider the current [one-page] petition, to find it lacking in merit, and to summarily deny it." *Id*. at 936. The Court denied the request because it determined that the delay in appointing counsel, to which Morgan was statutorily entitled, was due to "a serious shortage of qualified counsel willing to accept an appointment on habeas corpus counsel

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Gurule, Richard Parson, David Murtishaw, Frank Abliez, Mario Gray, Richard Ramirez, Ralph Yeoman, Steven Homick, and Charles Richardson.

Thirty-two inmates who died of natural causes while their habeas petitions were still pending in federal court are listed in *Executing the Will of the Voters*?, at S50-60. Since that article was published, another inmate, Robert Diaz, also died of natural causes on death row while his federal habeas petition still pending.

in a death penalty case." *Id*. at 938 (citing Final Report, at 121; *Remedies*, at 739.)

It is difficult to square the State's position in *Morgan*—where it urged the Court to deny (*promptly* and *on the merits*) a one-page initial habeas petition filed by a death row inmate who had been waiting thirteen years for habeas counsel to be appointed—with its contention here that the State "recognizes the profound importance of providing careful judicial review before carrying out a capital sentence." AOB at 44.

B. The State Has Not Demonstrated, Or Even Suggested, That It Intends To Remedy The Unconscionable Delays, Which Result In The Arbitrary Selection of Inmates For Execution

The State refuses to acknowledge the dysfunction in the system and maintains that there is nothing "'arbitrary'" about a system that takes "whatever time is necessary" to protect the interests of the individuals and the government. *Id*. But that legal proposition is untenable for several reasons. First, under the State's reasoning, no period of delay—*not even delays that require an inmate to spend forty or fifty or sixty years on death row prior to his execution*—would *ever* trigger Eighth Amendment concerns, so long as those delays are "necessary" under the State's system. The fact that the State cited no authority supporting that argument is further evidence that it is not legally persuasive.

Second, the delays are only "necessary" because the State has refused to take the steps needed to address the problems in its system, like

the serious shortage of available and qualified counsel to represent death row inmate in post-conviction proceedings. *Morgan*, 50 Cal. 4th at 940-41 & n.7. Finally, the State's contention that the system should be permitted to take "whatever time is necessary" [AOB at 44], rests on the faulty premise that more time on death row can *never* be prejudicial to one who has been convicted and sentenced to death. But as we have already seen, decades on death row can be highly prejudicial to those whose convictions are eventually set aside or whose sentences are eventually reversed, as well as to those who die waiting for their appeals to be decided and who may have been wrongfully conviction or wrongfully sentenced to death row. *See, e.g., Thomas*, 678 F.3d 1086.

It is clear from the arguments the State has raised in this appeal that California has no intention of reforming the system. Given the rate at which the State imposes the death penalty, the California Supreme Court's current backlog and opinion issuance rate, the dearth of qualified counsel who are willing to handle capital cases, and the fact that there are currently 157 inmates on death row who are between the ages of 60 and 89, it is clear that many more inmates will die of natural causes waiting for their direct appeals and habeas petitions to be reviewed than the State will ever execute. *See,* http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateSummary.pdf. In addition to those who will die of natural causes before their appeals are ever exhausted, many death row inmates will commit suicide to escape the agony of their predicament; twenty-three have since 1980. *See,* http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmatesWhoH

aveDiedSince1978.pdf. The few inmates the State actually executes make their way to the death chamber not because they have been on death row the longest, or because they are guilty of the most heinous crimes, or because their conduct is considered to be the most morally reprehensible. Rather, the State will arbitrarily execute a "trivial few," who happen to live long enough to see their appeals and state and federal habeas proceedings completed. ER 18.

C. The United States Supreme Court Long Ago Clearly Established That The Eighth Amendment Prohibits Severe Punishments Arbitrarily Inflicted By The State

"The Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be." *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014). As the Supreme Court recently reminded us in *Hall*, "[t]he Eighth Amendment prohibits certain punishments as a categorical matter" *id.*, such as severe punishments arbitrarily inflicted by the State, because they do not comport with human dignity. *See Furman*, 408 U.S. at 274 (Brennan, J., concurring) ("In determining whether a punishment comports with human dignity, we are aided also by [the principle] that the State must not arbitrarily inflict a severe punishment."); *Baze*, 553 U.S. at 78 (Stevens, J., concurring) ("Unless a criminal sanction serves a legitimate penological function, it constitutes 'gratuitous infliction of suffering' in violation of the Eighth Amendment.") (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); *see also Spaziano v. Florida,* 468 U.S. 447, 460-61 & n.7 (1984) (holding that because the death sentence is unique

in its severity and in its irrevocability, there must be a valid penological reason for choosing from among the many criminal defendants the few who are sentenced to death).

The State has failed to articulate any legitimate penological purpose that is served by the arbitrary and unusual manner in which California administers the death sentences it *imposes* upon hundreds, but *carries out* against only a few. Its reasoning that any period of delay, no matter how long, is acceptable so long as it is "necessary" [AOB at 44], is untenable and unsupported by any authorities.

Justice Stewart, who was the principal architect of our death penalty jurisprudence during his tenure on the Court, observed in his separate opinion in *Furman* that death sentences imposed pursuant to Georgia's capital sentencing scheme were "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Furman*, 408 U.S. at 309 (Stewart, J., concurring). The Georgia statute in effect at that time resulted in the arbitrary, and often discriminatory, issuance of capital sentences because it placed unfettered discretion in the hands of juries. Justice Stewart concluded that the Eighth Amendment "cannot tolerate the infliction of a sentence of death under a legal system that permits this unique penalty to be wantonly and freakishly imposed." *Id*. at 310.

The manner in which California *actually carries out* the death sentences it imposes is, by any measure, wanton, freakish and not unlike

being struck by lightning. *Id.* at 309-310. The few inmates the State executes are selected from among the hundreds it has sentenced, after waiting an inordinate number of years—several decades—for their appeals to be reviewed, all the while enduring the suffering inherent in a prolonged wait for execution. As the Supreme Court established long ago in *Furman*, the Eighth Amendment prohibits the arbitrary infliction of such severe punishments by the State. *Id.* at 274 (Brennan, J., concurring).

D. The United States Supreme Court Relies On Empirical Data And Reviews Actual Sentencing Practices When Analyzing Categorical Challenges To Sentences Under The Eighth Amendment

The district court correctly rejected the State's argument that Petitioner's claim was an impermissible *Lackey* claim alleging unconstitutional delay, which are individual claims courts typically decide by asking whether a sentence is unconstitutionally excessive or disproportionate *for a particular defendant's crime*. *See Knight v. Florida,* 528 U.S. 990 (1999) (Breyer, J., dissenting from denial of certiorari and noting that the two petitions at issue ask the Court to consider whether the Eighth Amendment prohibits as unconstitutional delay the execution of two petitioners who have spent nearly 20 years or more on death row) (citing *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., respecting denial of certiorari (same)); *Elledge v. Florida*, 525 U.S. 944 (1998) (Breyer, J., dissenting from denial of certiorari (same)).

Here, Petitioner raised a categorical challenge to the death sentences California imposes on the ground that the State carries those

sentences out in a manner that violates the Eighth Amendment. Such categorical challenges are properly analyzed by reviewing the State's "sentencing practice itself." *Graham v. Florida*, 560 U.S. 48, 61 (2010). Because Petitioner argued in both his direct appeal and in his federal habeas petition that his Eighth Amendment claim is a categorical challenge to California's system and the sentences it actually imposes, his claim extends beyond his own individual sentence and applies to the sentences of all inmates on California's death row. ER 145 (Petitioner's claims asserts that the "extraordinary delay *in this and other cases* renders the imposition of the death penalty cruel and unusual within the meaning of the Eighth Amendment. . . ." [emphasis added].)

The district court therefore analyzed the Eighth Amendment issue using the same analytical framework adopted by the Supreme Court, which looks to actual sentencing practices and relies heavily on empirical data to determine whether a sentence or a sentencing scheme violates the Eighth Amendment's prohibition on cruel and unusual punishment as a categorical matter. *See, e.g., Graham*, 560 U.S. at 62.

E. The District Court Used The Same Analytical Framework To Determine Petitioner's Arbitrariness Claim That The Supreme Court Set Forth In Deciding The Eighth Amendment Categorical Challenges Raised In *Graham, Atkins, Roper,* And *Kennedy*

In *Graham*, the Supreme Court explained that in determining whether to adopt a categorical rule prohibiting a challenged sentence, "[t]he Court first considers 'objective indicia of society's standards, as expressed in

legislative enactments and state practice' to determine whether there is a national consensus against the sentencing practice at issue." *Id*. at 61 (quoting *Roper v. Simmons*, 543 U.S. 551, 563 (2005)). "[G]uided by 'the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose" [*id.* (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008)], the Court must determine "in the exercise of its own independent judgment whether the punishment in question violates the Constitution" [*id.* (citing *Roper*, at 564)].

In *Graham*, the Supreme Court considered for the first time a categorical challenge to a term-of-years sentence. *Graham,* 560 U.S. at 61. The Court was asked to determine whether a Florida law permitting a sentence of life without the possibility of parole (LWOP) for juveniles found guilty of nonhomicide crimes violated that Eighth Amendment's Cruel and Unusual Punishments Clause. *Id.* at 52-53. The Court explained that in a "case that implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes . . . the appropriate analysis is the one used in cases that involved the categorical approach, specifically *Atkins, Roper,* and *Kennedy*." *Id.* at 61-62; *see*, e.g., *Atkins v. Virginia*, 536 U.S. 304, 316 (2002) (Eighth Amendment prohibits capital punishment of mentally retarded persons and citing data on states' sentencing practices that show "[t]he practice . . . has become truly unusual"); *Roper*, 543 U.S. at 560, 570 (Eighth Amendment prohibits capital punishment of offenders younger than 18, affirming the Missouri Supreme Court's ruling

that "imposition of the juvenile death penalty has become truly unusual over the last decade," and citing data in studies showing that "'[o]nly a relatively small proportion of adolescents'" who engage in illegal activity "'develop entrenched patterns of problem behavior. . . .'" (citation omitted)); *Kennedy*, 554 U. S. 407, at 447 (Eighth Amendment prohibits capital punishment for nonhomicide crimes because "[d]ifficulties in administering the penalty to ensure against its arbitrary and capricious application require adherence to a rule reserving its use, at this stage of evolving standards and in cases of crimes against individuals, for crimes that take the life of the victim").

The Court in *Graham* began its analysis of the categorical challenge to Florida's law permitting LWOP for juveniles by looking to "objective indicia of national consensus." *Graham,* 560 U.S. at 62. Florida argued that there was a national consensus favoring the sentence, or at "no national consensus against the sentencing practice at issue," because thirty-seven states, the District of Columbia, and the federal government all had laws permitting that sentence in some circumstances. *Id.* But the Supreme Court rejected Florida's argument as "incomplete and unavailing" because, while legislation is "the 'clearest and most reliable objective evidence of contemporary values,'" *id.* (quoting *Atkins*, 536 U.S. at 312 (quoting *Penry v. Lynaugh*, 492 U. S. 302, 331 (1989)), "[t]here are measures of consensus other than legislation," *id.* (quoting *Kennedy,* 554 U.S. at 433). The Court explained that "[a]ctual sentencing practices are an important part of the Court's inquiry into consensus," *id.* (citing *Enmund v. Florida*, 458 U.S. 782, 794-796 (1982)), and explained that "*an examination of actual*

sentencing practices in jurisdictions where [LWOP for juvenile nonhomicide offenders] is permitted by statute *discloses a consensus against its use*." *Id.* (emphasis added).

The Court explained that in determining whether a sentence categorically violates the Eighth Amendment's prohibition on cruel and unusual punishment, it looks not to what sentences are on the books, or what the law proscribes or favors, but to *data that informs a state's "actual sentencing practices."* *Id*. (emphasis added). The Court therefore rejected data offered by Florida showing a "legislative consensus" favoring that sentence for juveniles and relied instead on its own independently compiled data concerning "actual sentencing practices in [those] jurisdictions . . . ." *Id.*; *see also Miller v. Alabama*, 132 S. Ct. 2455 (2012) (Eighth Amendment categorically bans mandatory life without parole for juvenile offenders and citing empirical data regarding homicides committed by minors).

Thus, the Supreme Court has made clear that in assessing the constitutionality of a sentence under the Eighth Amendment, courts should examine data regarding states' actual sentencing practices concerning the sentence in question, to determine whether there is a national consensus permitting or disfavoring the challenged sentence. Parties are expected to provide courts with the data it needs to reach such a determination. In *Graham*, for example, the Supreme Court criticized Florida for taking issue with one of the studies relied on by the petitioner without "provid[ing] any data of its own" to support its arguments. *Graham,* at 63. The Court

ultimately relied on the study offered by petitioner because, "[a]lthough in the first instance it is for the litigants to provide data to aid the Court, [the Court was] able to supplement the study's findings." *Id.*

Here, the district court was asked to determine whether the death sentences imposed by California are categorically prohibited under the Eighth Amendment, *as those sentences are actually carried out*. The district court largely followed the analytical steps the Supreme Court laid down in *Graham* to answer the question. Petitioner provided the district court with extensive data regarding California's actual sentencing practices, and how the delays in the system inevitably lead to random and "trivial few" executions. The data also showed that in those rare instances where an execution actually will be carried out by the State, it will take place only after an inmate has spent twenty-five or more years on death row. The district court confirmed through its own independent research the accuracy of the data Petitioner had provided. The State, by contrast, did not come forth with any evidence, or other data, demonstrating that the executions it carries out after decades of delay satisfy any legitimate penalogical purpose, or even that the State intends to address the delays and other problems in the system.

The district court noted that "the experience of other states across the country—which, on average, take substantially less than 20 years, let alone 25 or 30 years, to adjudicate their post-conviction review process—demonstrate that the inordinate delay in California's death penalty sentence is not reasonably necessary to protect an inmate's rights." ER 25. The district

court also observed that "there is no basis to conclude that inmates on California's Death Row are simply more dilatory, or have stronger incentives to needlessly delay the capital appeals process, than are those Death Row inmates in other states." *Id.* In sum, the district court found no "objective indicia of national consensus"[*Graham,* 560 U.S. at 61], among other death penalty states—or even in a single state—sanctioning or employing sentencing practices that involve carrying out executions after delays of twenty-five to thirty years, against a tiny fraction of those a state sentences to death, in the manner California has adopted.

Applying the standards set forth in the Supreme Court's Eighth Amendment cases to the extensive data that has been compiled on California's actual sentencing practices, the district court reached the only conclusion it could: the death sentences as carried out by the State of California violate the Eighth Amendment's prohibition on cruel and unusual punishment because they are arbitrarily carried out in a manner that is neither timely nor rational.

V. CONCLUSION

The reasoning in the district court's order is sound; it hewed closely to the analytical framework the Supreme Court has set forth in its Eighth Amendment cases addressing categorical challenges to sentences, considered the data surrounding California's actual sentencing practices, and

correctly concluded that the sentences the State imposes are arbitrarily carried out, under *Furman*. This Court should affirm.

DATED this the 6th day of March, 2015.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify as follows:

1. This *Amicus Curiae* Brief in Support of Petitioner complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,954 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This *Amicus Curiae* Brief in Support of Petitioner 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 it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14 point CG Times.

In preparing this Certificate, I have relied on the word count of Microsoft Office Word 2010, the word-processing system used to prepare this *Amicus Curiae* Brief in Support of Petitioner.

DATED this the 6th day of March, 2015.

s/ Paula M. Mitchell

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CERTIFICATE OF SERVICE

I hereby certify that, on March 6, 2015, I electronically filed this Amicus Curiae Brief in Support of Petitioner with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF System. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

DATED this the 6th day of March, 2015.

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