Case No. 14-56373

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERNEST DEWAYNE JONES,

Petitioner-Appellee,

v.

RON DAVIS,
Acting Warden of California State Prison at San Quentin,

Respondent-Appellant.

PETITIONER-APPELLEE'S ANSWERING BRIEF

Appeal from the United States District Court
for the Central District of California
U.S.D.C. No. 09-CV-02158-CJC

The Honorable Cormac J. Carney, Judge

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Table of Contents

Table of Authorities iii

Introduction 1

Statement of Jurisdiction 5

Statement of Issues 5

Statement of the Case 6

Summary of Argument 11

Argument 13

I. The District Court's Factual Findings Regarding the Extent and Causes of the Unconscionable Delays in California's Death Penalty System Are Undisputed and Govern This Court's Resolution of Mr. Jones's Claim. 13

A. Delay in the Appointment of Counsel. 15

B. Delay in Adjudication of Constitutional Challenges. 16

C. Failure to Ensure Full and Fair Adjudication of Constitutional Challenges. 17

D. The Import of the District Court's Factual Findings. 19

II. The District Court Correctly Determined That Mr. Jones Was Entitled to Relief. 22

A. The Eighth Amendment Prohibits the Infliction of Arbitrary Punishments and Punishments That Do Not Advance Legitimate Penological Purposes. 24

1. A State System That Permits Arbitrary Executions Violates the Eighth Amendment. 24

2. The Eighth Amendment Prohibits Punishments as Excessive When They Do Not Advance Legitimate State Interests. 26

B. California's Dysfunctional Death Penalty System Violates These Well-Established Eighth Amendment Principles. 28

1. California's System Guarantees Arbitrary Executions. 28

2. California's Process Does Not Advance Any Legitimate Penological Purposes. 30

III. The Exhaustion Doctrine Does Not Preclude the Granting of Relief. 32

A. The Warden Expressly Waived Exhaustion, and Is Judicially Estopped From Asserting Exhaustion in This Court. 32

B. Well-Established Exceptions Preclude the Application of the Exhaustion Doctrine. 40

1. California's Process Is Ineffective to Protect Mr. Jones's Rights. 40

2. Mr. Jones Is Without a State Remedy Because the State Court Will Consider Amended Claim 27 Premature Until an Execution Date Is Scheduled. 43

IV. 28 U.S.C. Section 2254(d) Does Not Apply.. 46

V. The District Court Properly Concluded That Mr. Jones's Claim Is Not Procedurally Barred Under *Teague v. Lane*. 49

A. The Warden Waived the *Teague* Defense. 49

B. The Rule Applied by the District Court Is Not a New Rule. 51

C. To the Extent the District Court Announced a New Rule, It Was a New Substantive Rule. 53

VI. Conclusion 58

Statement of Related Cases.. 59

Certificate of Compliance 60

Certificate of Service 61

TABLE OF AUTHORITIES

Cases

Allen v. Ornoski,
435 F.3d 946 (9th Cir. 2006) 52

Anderson v. City of Bessemer City, N.C.,
470 U.S. 564 (1985)..13

Atkins v. Virginia,
536 U.S. 304 (2002).. 27, 56

Banks v. Dretke,
540 U.S. 688 (2004)..37

Boardman v. Estelle,
957 F.2d 1523 (9th Cir. 1992) 50, 51

In re Bower,
38 Cal. 3d 865 (1985) 48

Carter v. Estelle,
677 F.2d 427 (5th Cir. 1982) 45

Chaker v. Crogan,
428 F.3d 1215 (9th Cir. 2005) 37

Cody v. Henderson,
936 F.2d 715 (2d Cir. 1991) 42

Coe v. Thurman,
922 F.2d 528 (9th Cir. 1990) 41, 42

Coker v. Georgia,
433 U.S. 584 (1977).. 2, 27

Cullen v. Pinholster,
131 S. Ct. 1388 (2011)... 46, 48

D'Ambrosio v. Bagley,
527 F.3d 489 (6th Cir. 2008) 33

Dickens v. Ryan,
740 F.3d 1302 (9th Cir. 2014) 47, 49

Duckett v. Godinez,
67 F.3d 734 (9th Cir. 1995) 50

Dyer v. Calderon,
151 F.3d 970 (9th Cir. 1998) 51

Enmund v. Florida,
458 U.S. 782 (1982)..30

Felder v. Estelle,
693 F.2d 549 (5th Cir. 1982) 40

Ford v. Pliler,
590 F.3d 782 (9th Cir. 2009) 13, 37

Ford v. Wainwright,
477 U.S. 399 (1986).. 56, 58

Furman v. Georgia,
408 U.S. 238 (1972)... *passim*

Gary v. Dormire,
256 F.3d 753 (8th Cir. 2001) 46

Godfrey v. Georgia,
446 U.S. 420 (1980)..24

Godinez v. Moran,
509 U.S. 389 (1993)..50

Goldstein v. City of Long Beach,
715 F.3d 750 (9th Cir. 2013) 13

Gonzales v. Thaler,
643 F.3d 425 (5th Cir. 2011) 13

Graham v. Collins,
506 U.S. 461 (1993)..52

Graham v. Florida,
560 U.S. 48 (2010)..55

Granberry v. Greer,
481 U.S. 129 (1987)..51

Green v. Thaler,
699 F.3d 404 (5th Cir. 2012)..47

Gregg v. Georgia,
428 U.S. 153 (1976).. *passim*

Hankins v. Fulcomer,
941 F.2d 246 (3d Cir. 1991)..42

Harris v. Champion,
15 F.3d 1538 (10th Cir. 1994)..42

Harris v. Reed,
489 U.S. 255 (1989)..43

Henderson v. Lockhart,
864 F.2d 1447 (8th Cir. 1989)..42

Horn v. Banks,
536 U.S. 266 (2002)..50

Horn v. Quarterman,
508 F.3d 306 (5th Cir. 2007)..56

In re Jan Wellert RV, Inc.,
315 F.3d 1192 (9th Cir. 2003)..23

In re Morgan,
50 Cal. 4th 932 (2010)..13

In re Reno,
55 Cal. 4th 428 (2012).. 44, 45

Jordan v. Ducharme,
983 F.2d 933 (9th Cir. 1993) 51

Kennedy v. Louisiana,
554 U.S. 407 (2008)..27

Lackey v. Texas,
514 U.S. 1045 (1995) .... *passim*

Lambert v. Blodgett,
393 F.3d 943 (9th Cir. 2004) 46

Lentini v. California Center for the Arts, Escondido,
370 F.3d 837 (9th Cir. 2004) 13

Leonard v. Clark,
12 F.3d 885 (9th Cir. 1993) 43

Linkletter v. Walker,
381 U.S. 618 (1965)..57

Lowenfield v. Phelps,
484 U.S. 231 (1988)..27

Mayle v. Felix,
545 U.S. 644 (2005)... 36, 38

McCleskey v. Kemp,
481 U.S. 279 (1987)..52

Michigan v. Payne,
412 U.S. 47 (1973)..56

Moore v. Biter,
725 F.3d 1184 (9th Cir. 2013) 56

Nguyen v. Curry,
736 F.3d 1287 (9th Cir. 2013) 38, 39

O'Neill v. Vermont,
144 U.S. 323 (1892)..26

Okot v. Callahan,
788 F.2d 631 (9th Cir. 1986) 41

Penry v. Lynaugh,
492 U.S. 302 (1989)... 54, 55, 56, 58

People v. Boyer,
38 Cal. 4th 412 (2006) 45

People v. Romero,
8 Cal. 4th 729 (1994) 36

Peyton v. Rowe,
391 U.S. 54 (1968)..45

Phillips v. Vasquez,
56 F.3d 1030 (9th Cir. 1995) 21, 41

Ring v. Arizona,
536 U.S. 584 (2002)...51

Robinson v. Neil,
409 U.S. 505 (1973)... 56, 57

Roper v. Simmons,
543 U.S. 551 (2005)... 27, 56

Russell v. Rolfs,
893 F.2d 1033 (9th Cir. 1990) 34, 35

Saffle v. Parks,
494 U.S. 484 (1990)...58

Schriro v. Summerlin,
542 U.S. 348 (2004)... 53, 54, 57, 58

In re Serrano,
10 Cal. 4th 447 (1995) 36

Smith v. Mahoney,
611 F.3d 978 (9th Cir. 2010) 52

Smith v. Richards,
569 F.3d 991 (9th Cir. 2009) 23

Swan v. Peterson,
6 F.3d 1373 (9th Cir. 1993) 37

Teague v. Lane,
489 U.S. 288 (1989).. 6, 49, 51

Thompson v. Runnels,
705 F.3d 1089 (9th Cir. 2013) 49, 50

United States v. Ibrahim,
522 F.3d 1003 (9th Cir. 2008) 34

Vail v. Estelle,
711 F.2d 630 (5th Cir. 1983) 42

Vasquez v. Hillery,
474 U.S. 254 (1986)...47

Walton v. Arizona,
497 U.S. 639 (1990)...25

Whaley v. Belleque,
520 F.3d 997 (9th Cir. 2008) 35, 36, 45

Wood v. Milyard,
132 S. Ct. 1826 (2012)...37

Zant v. Stephens,
462 U.S. 862 (1983)...24

Statutes

28 U.S.C. § 2254(b)(3) 33

28 U.S.C. § 2254(d) .... *passim*

Rules of Court

Fed. R. Civ. P. 15(b) 37

Fed. R. Civ. P. 15(c)(1) 36

Other Authorities

Judge Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 Loy. L.A. L. Rev. S41 (2011) 13

California Commission on the Fair Administration of Justice, Report and Recommendation on the Administration of the Death Penalty in California (Gerald Uelmen ed. 2008) .... *passim*

Habeas Corpus Resource Center, *Average Time Spent on Death Row Prior to Execution in Jurisdictions With the Death Penalty: June 30, 2008 – Present,* http://www.hcrc.ca.gov/time 20

Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L. Rev. 1, 4 (1995) 31

INTRODUCTION

In 1972, the Supreme Court resolved systemic challenges to Georgia's and Texas's "imposition and carrying out of the death penalty" in *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). The Court reviewed statistical information regarding the arbitrary, discriminatory, and infrequent application of the death penalty in assessing whether the Eighth Amendment prohibited the petitioners' execution.[1] In the landmark decision, the Majority held that infrequent and seemingly random imposition of the death penalty upon only a small percentage of those eligible to receive it violates the Eighth Amendment's prohibition against cruel and unusual punishment.[2] The Majority found that such infrequent application of capital punishment was unconstitutionally arbitrary and rendered the punishment "excessive" because

[1] *Furman*, 408 U.S. at 256-57 (Douglas, J., concurring); *id*. at 291-95 (Brennan, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 313-14 (White, J., concurring); *id.* at 363-66 (Marshall, J., concurring).

[2] The Court considered statistical data that death sentences were infrequently imposed at trial, *Furman*, 408 U.S. at 386 n.11 (Burger, C.J., dissenting) (noting that "from 15% to 20% of those convicted of murder are sentenced to death in States where it is authorized"), and infrequently carried out, *id*. at 293 (Douglas, J., concurring) (noting that a de facto moratorium was in effect since 1967 and executions were rarely performed in the past decade).

it failed to advance any legitimate governmental interest.[3] As a result, in light of the systemic nature of the constitutional violations, the Court invalidated the death sentences of the petitioners and all other death-row inmates.[4]

In the district court, Mr. Jones – as had the petitioners in *Furman* – presented a wealth of statistical evidence demonstrating that California's process for carrying out the death penalty violates the Eighth Amendment. The undisputed facts demonstrated that the California death penalty process is "dysfunctional" as described by former California Supreme Court Chief Justice Ronald M. George, a view endorsed by the bipartisan California Commission on the Fair Administration of Justice (Commission). ECF No. 109-1 at 128.[5] The Commission reached this conclusion because the

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[3] *Furman*, 408 U.S. at 249-57 (Douglas, J., concurring); *id.* at 306, 309 (Stewart, J., concurring); *id.* at 311 (White, J., concurring); *id.* at 342-59 (Marshall, J., concurring); *see also Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion).

[4] *Coker v. Georgia*, 433 U.S. 584, 593 (1977) ("*Furman* then invalidated most of the capital punishment statutes in this country, including the rape statutes, because, among other reasons, of the manner in which the death penalty was imposed and utilized under those laws.").

[5] The Commission, created by California State Senate Resolution No. 44 of the 2003-04 Session, extensively studied the capital punishment system and addressed many of the issues implicated in this appeal. Chaired by former Attorney General John Van de Kamp, the Commission was composed of a judge, prosecutors, criminal defense lawyers, elected officials, law enforcement officials, academicians, representatives of victims' organizations, and other concerned individuals. After conducting three public hearings at

California system has a chronic and substantial backlog of cases without counsel, produces inordinate delays in processing cases, and fails to permit full and timely development and resolution of legal challenges. To remedy these structural defects, the Commission unanimously proposed several recommendations, including significantly increasing funding for attorneys willing and qualified to accept appointments in capital cases, providing adequate resources for the adjudication of capital cases at the trial and post-conviction stages, and instituting measures designed to reduce and correct instances of constitutional errors. *Id*. at 126-48.[6]

Since the Commission's 2008 Report, the dysfunction of the California system has become even more pernicious. The number of death-row inmates without state habeas corpus counsel has increased to 352, almost half of death

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which seventy-two individuals testified and considering voluminous documentation, the Commission issued extensive recommendations to repair the flaws in California's death penalty system. California Commission on the Fair Administration of Justice, Report and Recommendation on the Administration of the Death Penalty in California, ECF No. 109-1 at 4-200 (Commission Report).

[6] The Commission concluded, using "conservative figures," that $232.7 million annually must be allocated to remedy the current dysfunctional process, with a several-year phase-in plan. ECF No. 109-1 at 161. As the district court found, despite the publication of the Commission's findings in 2008, the Governor and the Legislature have failed to allocate any additional funding. Excerpts of Record (ER) 9, 11, 26. Most importantly, the court concluded that such funding was critical to the reduction of delays in the California system. ER 26.

row. Critically, the delay in appointment of habeas corpus counsel for the most advanced cases – the 76 cases without such counsel in which the state court has affirmed the capital judgment on appeal – is an average of 16 years from the date the death sentence was imposed. As a result, despite the over 900 death sentences imposed in California since 1978, only 13 executions have been carried out, while the vast majority of those sentenced to death will die in prison or spend three decades or more challenging their convictions. ER 3-4.

Ignoring Mr. Jones's challenge to the systemic dysfunction in the California system, the Warden seeks to characterize his claim as one seeking individual relief based on the unique circumstances of the process that Mr. Jones experienced. Appellant's Opening Brief (AOB) 19-23 (mischaracterizing the claim as one emanating from *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., joined by Breyer, J., respecting the denial of certiorari)). Rather, as the district court recognized, Mr. Jones's constitutional claim is governed by the well-established Eighth Amendment jurisprudence recognized in *Furman*. As the district court concluded, the dysfunctional nature of California's death penalty process has ceased to provide any semblance of a rational and constitutional punishment. When, as here, state authorities have failed to act to remedy such an intolerable situation, it is

incumbent upon the federal courts to protect "'the dignity of man'" and assure that the state's power to punish is "'exercised within the limits of civilized standards.'" *Furman*, 408 U.S. at 291-95 (Brennan, J., concurring) (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958)).

STATEMENT OF JURISDICTION

Petitioner agrees with the Warden's statement of jurisdiction.

STATEMENT OF ISSUES

1. Whether the Warden's express waiver of the exhaustion requirement and failure to challenge the facts, argue the merits of the claim, or raise procedural defenses in the district court precludes the Warden from raising these issues in this Court?

2. Whether a claim premised upon a state's systemic application and results of its death penalty procedures is governed by: (1) the Eighth Amendment standards set forth in *Furman*, 408 U.S. 238, or (2) *Lackey*, 514 U.S. 1045, and its progeny?

3. Whether a state capital process that routinely produces delays of three decades prior to the resolution of capital judgments and results in few and random executions violates the Eighth Amendment?

4. Whether Mr. Jones is required to exhaust his claim when the California Supreme Court repeatedly has held that such claims are premature

until an execution date has been scheduled, exhaustion would exacerbate the constitutional violation, and the Warden has expressly waived the exhaustion requirement?

5. Whether 28 U.S.C. section 2254(d) applies to a constitutional claim that the state court has not considered?

6. Whether the non-retroactivity doctrine announced in *Teague v. Lane*, 489 U.S. 288 (1989) – a defense the Warden failed to raise below – applies to a ruling that (1) is grounded in the Eighth Amendment's prohibition against excessive and arbitrary punishments recognized at least since *Furman* and (2) places a substantive constitutional limitation on a state's power to punish a class of individuals?

STATEMENT OF THE CASE

On direct appeal, Mr. Jones presented an individual claim contending that his execution after a substantial period of delay would violate his constitutional rights. ER 144-58. Specifically, Mr. Jones argued "first, that delay in itself constitutes cruel and unusual punishment; and second, that the actual carrying out of [his] execution would serve no legitimate penological ends." ER 155-56; *see also* ER 152. The constitutional basis for the claim explicitly relied upon Justice Stevens's recognition in *Lackey*, 514 U.S. 1045,

that the Eighth Amendment may apply in an individual case to prohibit an execution after an inordinate delay. ER 144.

In Claim 27 of the petition filed in the district court, Mr. Jones presented a claim incorporating the direct appeal claim but also one arising out of the systemic dysfunction inherent to California's application of the death penalty. Citing several constitutional provisions, Mr. Jones alleged that (1) California failed to provide "a constitutionally full, fair, and timely review of his conviction and sentence"; (2) California's excessive "delay in" the "final resolution" of cases "far exceeds that of any other state with capital punishment" and, in this case, was not attributable to Mr. Jones's actions; (3) death row's deplorable conditions constitute torture; (4) there are a significant number of deaths by suicide or other causes on death row compared to the few executions that have occurred; and (5) several of the executions that have occurred have been botched. ER 138-42. Mr. Jones also included additional, extra-record factual allegations to support his claims, including (1) the uncertainty of execution inflicts "psychological suffering"; (2) execution after excessive delays negates any legitimate purpose – including retribution and deterrence – to be served by capital punishment; and (3) executing Mr. Jones after the excessive delay that already has occurred and the "several more years likely" to pass and under the conditions at San Quentin "would involve

the needless infliction of avoidable mental anguish and psychological pain and suffering were it to occur." ER 138-42.

Mr. Jones presented this claim – which, unlike the direct appeal claim, contained factual allegations regarding the dysfunction of California system – to the state court in a successor state petition identical to, and filed contemporaneously with, the federal petition. Supplemental Excerpts of Record (SER) 220-26. Prior to the state court ordering informal briefing, however, the Warden expressly waived the exhaustion defense as to all claims in the federal petition. SER 198 n.3 (noting that "Respondent is not asserting that any claims in the instant federal Petition are unexhausted"); SER 210 (stating "respondent has examined the federal petition and has determined that all claims therein appear to be exhausted.... Respondent will therefore .... not be asserting that any claims are unexhausted."). In reliance on the Warden's position, Mr. Jones withdrew the state petition, without the parties submitting informal briefing or additional exhibits or the state court resolving the merits of the petition. SER 195.

In April 2014, the district court ordered the parties to brief issues and present any relevant factual materials relating to Claim 27. ER 132-36. The court later ordered Mr. Jones to file an amended petition, addressing how the "long delay in execution of sentence in his case, coupled with the grave

uncertainty of not knowing whether his execution will ever, in fact, be carried out, renders his death sentence unconstitutional." ER 131. Mr. Jones filed the Amended Petition on April 28, 2014, with the revised Claim 27. ER 115-29.

The Warden did not answer the amended petition. Instead, in his opening brief on Claim 27 in the district court, the Warden asserted only that: Mr. Jones must exhaust portions of the claim; a portion of the claim was not ripe for review; and relief is barred by 28 U.S.C. section 2254(d). SER 128-37. Although Mr. Jones's opening brief extensively addressed the merits of Amended Claim 27 and was accompanied by numerous exhibits, in his responsive brief, the Warden again argued only that the exhaustion doctrine and section 2254(d) barred relief. SER 55-72. Thus, the Warden failed to challenge the merits of Amended Claim 27 or submit any factual materials – apart from certain lethal injection pleadings – rebutting the facts supporting the claim.

In contrast, Mr. Jones submitted factual material regarding the nature and causes of the delays in the California process, the inadequacy of the state's process for reviewing capital cases, and the deplorable conditions on death row. ECF Nos. 109, 116. Mr. Jones also reviewed and submitted corrections to the district court's compilation of the status of California cases in which a death sentence was imposed between 1978 and 1997. SER 33-54.

Following argument, the district court issued its order granting relief on Amended Claim 27. ER 2-48. Relying on the undisputed facts before it, including the Commission Report, the updated statistics provided by Mr. Jones, and its independent analysis of the capital review process, the court found that, for Mr. Jones and the other inmates on death row, the "systemic delay has made their execution ... unlikely ... [and] for the random few for whom execution does become a reality, they will have languished for so long on Death Row that their execution will serve no retributive or deterrent purpose and will be arbitrary." ER 2-3. The court concluded that "[a]llowing this system to continue to threaten Mr. Jones with the slight possibility of death, almost a generation after he was first sentenced, violates the Eighth Amendment's prohibition against cruel and unusual punishment" as his death sentence was both an arbitrary and excessive punishment. ER 3. In so holding, the district court recognized that Mr. Jones's claim challenged the application of California's death penalty procedures to all death-row inmates and thus is governed by the Eighth Amendment standards recognized in *Furman*, 408 U.S. 238, rather than by *Lackey*, 514 U.S. 1045, and subsequent case law addressing the lawfulness of executing a particular individual death-row inmate. ER 24 n.19; *see also* ER 3, 16-27.

SUMMARY OF ARGUMENT

The district court's order is firmly grounded in undisputed factual findings and well-established Eighth Amendment jurisprudence that has governed systemic challenges to a state death penalty system since *Furman*, as evidenced by the Warden's utter failure to contest the merits of Mr. Jones's claim below. California's dysfunctional system of capital punishment results in the arbitrary execution of a random few such that those who are selected experience a punishment that is "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Furman,* 408 U.S. at 309-10 (Stewart, J., concurring). As the district court found, the execution of a death sentence in California is so infrequent, and the delays preceding it so extraordinary, that California's death penalty has ceased to serve any legitimate penological purpose.

The Warden unambiguously waived exhaustion in the state and district courts. In reliance on the Warden's waiver, Mr. Jones withdrew his state petition containing Claim 27. The Warden is judicially estopped from asserting the exhaustion defense – precisely the action he assured the state court he would not take. And because the usual considerations of comity and federalism are inapplicable where the state has expressly chosen to litigate in federal court, the Warden may not invoke them here.

Moreover, as the district court correctly held, Mr. Jones meets the exceptions to exhaustion. Mr. Jones faces inordinate and unjustifiable delay were he to return to state court and he has no available state remedy as the state court will consider the presentation of Amended Claim 27 to be premature; the state system thus is ineffective to protect his rights. Exhaustion is therefore excused. Similarly, as the parties agree that Mr. Jones did not present Amended Claim 27 to the state court, 28 U.S.C. section 2254(d) is inapplicable.

Mr. Jones's claim is not barred by *Teague* – a defense the Warden waived by failing to raise it in the district court – because the prohibition against arbitrariness in capital punishment is a well-established principle dictated by *Furman* and therefore not a new rule. Further, the Supreme Court's cases declaring certain individuals to be in a category beyond the state's power to punish – as the district court did here – have universally been applied retroactively.

ARGUMENT

I. THE DISTRICT COURT'S FACTUAL FINDINGS REGARDING THE EXTENT AND CAUSES OF THE UNCONSCIONABLE DELAYS IN CALIFORNIA'S DEATH PENALTY SYSTEM ARE UNDISPUTED AND GOVERN THIS COURT'S RESOLUTION OF MR. JONES'S CLAIM.

This Court must review the district court's factual findings under the highly deferential clearly-erroneous standard. *See, e.g.*, *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985); *Lentini v. California Center for the Arts, Escondido*, 370 F.3d 837, 848-49 (9th Cir. 2004). Particularly in light of the Warden's failure to dispute any of the facts Mr. Jones presented in the district court, there is no basis upon which to conclude that the factual findings were clearly erroneous. *See, e.g.*, *Ford v. Pliler*, 590 F.3d 782, 790 (9th Cir. 2009) (concluding that where a habeas petitioner failed to object to the district court's factual findings, "he has waived any challenge to that finding, and we must take it as true.").[7]

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[7] The Brief Amicus Curiae of the Criminal Justice Legal Foundation (CJLF) asserts that the Commission Report is an "advocacy piece" and is not "a neutral or authoritative evaluation." Br. for CJLF as Amicus Curiae Supporting Appellant (CJLF Br.) at 10 n.4. No such argument was made in the district court. Moreover, CJLF's views are not shared by the numerous courts and commentators who have cited the Commission's reports with approval. *See, e.g., Goldstein v. City of Long Beach*, 715 F.3d 750, 758-59 (9th Cir. 2013); *Gonzales v. Thaler*, 643 F.3d 425, 432 (5th Cir. 2011); *In re*

The district court found that of the more than 900 individuals who have been sentenced to death in California since 1978,[8] only 13 have been executed by the state. ER 3; *see also* ECF No. 109-3 at 246-47. "Of the remainder, 94 have died of [other] causes …, 39 were granted relief from their death sentence by the federal courts and have not been resentenced to death, and 748 are currently on Death Row, having their death sentence evaluated by the courts or awaiting their execution." ER 3-4. The district court concluded that for those on California's death row:

> [T]he dysfunctional administration of California's death penalty system has resulted, and will continue to result, in an inordinate and unpredictable period of delay preceding their actual execution. Indeed, for most, systemic delay has made their

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Morgan, 50 Cal. 4th 932, 938 (2010); Judge Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 Loy. L.A. L. Rev. S41 (2011).

[8] In 1978, California voters amended by initiative the 1977 death penalty statute to expand its scope drastically. The acknowledged intent of the initiative drafters was to broaden death eligibility to encompass as many first-degree murders as possible. The resultant statute made virtually all defendants chargeable for first-degree murder eligible for the death penalty. ER 3 n.1; *see also* ECF No. 109-1 at 134; ECF No. 84 at 145-57 (describing Mr. Jones's challenge to the California statute contained in Claim 24, including statistical analysis demonstrating that between 87 and 95 percent of first-degree murders are capitally eligible); ECF No. 100 at 275-81 (same). This broad discretion stands in sharp contrast to other states' statutes, *see, e.g.*, ECF No. 84 at 145-57 and, as the Commission found, "has opened the floodgates beyond the capacity of [California's] judicial system to absorb," ECF No. 109-1 at 152.

> execution so unlikely that the death sentence carefully and deliberately imposed by the jury has been quietly transformed into one no rational jury or legislature could ever impose: *life in prison, with the remote possibility of death*. As for the random few whose execution does become a reality, they will have languished for so long on Death Row that their execution will serve no retributive or deterrent purpose and will be arbitrary.

ER 2-3. The court reached these conclusions after reviewing data and facts detailing the dysfunction inherent in California's death penalty system.

A. Delay in the Appointment of Counsel.

The district court found that California inmates must wait on average three to five years for the appointment of appellate counsel. As of June 2014, there were 71 inmates awaiting the appointment of appellate counsel, and "until such counsel is appointed, there is effectively no activity on the inmate's case." ER 8. The court further noted that there was not a general dearth of lawyers able to meet the qualifications for appointment; instead, "the State's underfunding of its death penalty system ... [is] a key source of the problem." ER 9 (citing Commission Report at 132).

Similarly, as of June 2014, there were 352 inmates awaiting appointment of state habeas counsel[9] – a number that the court observed had significantly increased from the 291 inmates awaiting appointment of habeas

[9] Of these inmates, 159 had been waiting for the appointment of state habeas corpus counsel for over ten years. ER 11.

counsel at the time of the Commission Report. ER 11. Among the 352 inmates without habeas counsel are 76 inmates whose direct appeals have been completed. ER 11-12. As of July 2014, they had "already waited an average of 15.8 years after the imposition of their death sentence for habeas counsel to be appointed, and are still waiting." ER 11-12.

B. Delay in Adjudication of Constitutional Challenges.

The district court further found that the state court's extreme delay in resolving direct appeals and state habeas corpus petitions exacerbates the arbitrary nature of executions in California. Following the completion of briefing on appeal, capital defendants must wait on average two to three years before argument is scheduled and the direct appeal is subsequently decided. ER 9. Consequently, between 11.7 and 13.7 years passes from the death judgment to the state court's decision on direct appeal. ER 9-10.

The district court also noted the steadily increasing length of time capital inmates must wait to have their habeas corpus petitions decided by the state court. ER 12-13. In 2008, the Commission estimated that the state court took an average of 22 months to decide habeas corpus petitions after those petitions were filed. ER 12. The court found that, since the Commission's report was issued, "that delay has more than doubled." ER 13. More specifically, "[o]f the 176 capital habeas petitions currently pending before

the California Supreme Court, the average amount of time that has elapsed since each petition was filed is 49 months." ER 13. The court further found that "of the 68 capital habeas petitions the court has decided since 2008, it has taken an average of 47.8 months for the California Supreme Court to issue a decision once each petition was fully briefed." ER 13. As the court observed, the briefing process adds to the time a petitioner must wait for the resolution of his or her case, so in total, "by the time the inmate's state habeas petition is decided, he likely will have spent a combined 17 years or more litigating his direct appeal and petition for state habeas review before the California Supreme Court." ER 13.

C. Failure to Ensure Full and Fair Adjudication of Constitutional Challenges.

"When the California Supreme Court does rule on a capital habeas petition, it usually does so by way of a summary unpublished opinion." ER 13 n.14. The district court found that this practice causes significant delay in resolving claims in federal courts because "'[o]ften, the federal courts cannot ascertain why state relief was denied.'" *Id.* (quoting Commission Report at 123). Although federal review of California cases took an average of 10.4 years at the time of the Commission Report, much of this delay is not attributable to the federal courts. ER 14. Rather, it is the result of

California's underfunding of state habeas proceedings, which requires necessary investigation of potential claims to be conducted in federal court. *See* ER 14. This, in turn, results in approximately 74% of petitioners returning to the state court to exhaust state remedies, a process that takes an average of 3.2 years. ER 14. As the district court explained, this dysfunction which exists in all levels of review and is directly attributable to the unique aspects of California's death penalty system, has meant that since 1978, only 81 inmates – fewer than 10% of the individuals sentenced to death – have obtained a final merits determination of their federal habeas petitions. ER 14.[10]

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[10] Discussing Attachment A to the district court's order, the Warden asserts that "[s]ome of the data cited by the court are open to question." AOB 54. Although the district court requested that the parties review the data and proffer any corrections or objections, the Warden waived his right to do so. Moreover, the assertion that the district court failed to consider all death sentences imposed in California is incorrect. *Id.* The court considered all California death sentences and concluded that neither the small number of reversals nor the outcome of post-1997 cases undermined its conclusions. *See* ER 48 (frequent reversals from 1979-86 are not representative of the current system); ER 4 n.5 ("state proceedings are ongoing for all but a small handful [of post-1997 death sentences], and none have completed the federal habeas process"); ER 5 (for inmates whose state habeas petitions were decided between 2008 and 2014, the average delay was 17.2 years).

D. The Import of the District Court's Factual Findings.

The district court's findings – undisputed by the Warden below – lead to the inevitable conclusion that the dysfunction inherent in California's system "has resulted, and will continue to result, in an inordinate and unpredictable period of delay preceding ... actual execution." ER 2. The dysfunction in California's system has only worsened since the Commission published its report and has continued to worsen since the district court's order. It also is unique to California because it is a direct consequence of the state's failure to fund its death penalty system and ensure timely and effective review of capital judgments.

Since the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA), California has maintained the nation's largest death row and has been among the slowest to execute individuals, making the executions of those select few random and arbitrary. *See* ER 3. Since 2006, California has been "without a protocol to execute the 17 Death Row inmates who have finally been denied relief by both the state and federal courts, or to execute any other inmates who may similarly be denied relief in the future." ER 6. Consequently, and because virtually all persons sentenced to death in California have not completed the legal review process, *see* ER 4, 31-47 – and are unlikely to do so for decades after their judgment was imposed –

examining the delay in execution for those inmates who have been executed grossly underestimates the true extent of the delay. Since the date of the Commission Report, no one has been executed in California, but 17 individuals have completed one round of state and federal habeas corpus review. Assuming the date of the filing of this brief as a hypothetical execution date for these individuals, the average time they will have spent on California's death row awaiting execution is 29.74 years, a rate 2.5 times longer than individuals on Texas's death row and 7.7 years longer than those in Arizona. HCRC, *Average Time Spent on Death Row Prior to Execution in Jurisdictions With the Death Penalty: June 30, 2008 – Present,* http://www.hcrc.ca.gov/time. California's dysfunction has worsened over time, making it a clear outlier among jurisdictions with the death penalty.

Consistent with this data, the district court found that "[f]or those whose challenge to the State's death sentence is ultimately denied at each level of review, the process will likely take 25 years or more." ER 5. The district court noted that the majority of this time would be spent litigating in state court, and "[t]here is no evidence to suggest that the trend is reversing." ER 5. Indeed, were the state court to appoint counsel today for each of the 76 individuals who have completed their direct appeals but are awaiting appointment of state habeas counsel – individuals who have already waited on

average 15.8 years for the appointment of habeas counsel, *see* ER 12 – they would have to wait an additional 3 years for their state habeas petition to be filed, and likely 4 years before the state court resolved their state habeas petitions. Given the court's low reversal rate, only between 2 and 7 of these 76 individuals are likely to obtain some form of relief in state court. *See* ER 4-5 n.5 (finding the state court has reversed fewer than 10% of death judgments since 1986); *see also* ECF No. 109-3 at 259 (noting that state court has granted some form of relief in capital habeas proceedings in 2.5% of the cases it has resolved). The remaining individuals will proceed into federal court, where their cases likely will take an average of 10.4 years to resolve, ER 14, making the total time from judgment to relief or execution an average of 33.8 years.[11] Critically, as the district court found, 60% of California inmates obtain relief in federal court, the forum in which petitioners often obtain additional funding to adequately investigate their claims. ER 6, 14. But the system's lack of funding precludes the immediate appointment of

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[11] The lack of evidentiary hearings in state court and the delay in federal adjudication further prejudices inmates attempting to prove their constitutional claims. As this Court recognized, "during so long a delay, there is a substantial likelihood that witnesses will die or disappear, memories will fade, and evidence will become unavailable. In short, the opportunity for a fair retrial diminishes as each day passes." *Phillips v. Vasquez*, 56 F.3d 1030, 1036 (9th Cir. 1995).

habeas counsel for all these individuals. At current appointment rates, nearly 8 years will pass before each of these 76 individuals are appointed counsel. ECF No. 109-3 at 257; *see also* ER 11. Thus, by the time their case is resolved, many of these 76 individuals will have waited nearly 40 years. Moreover, these averages likely underestimate the delay; as the district court found, as the size of California's death row continues to increase, "so too do the delays associated with it." ER 4.

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT MR. JONES WAS ENTITLED TO RELIEF.

As the district court recognized, the claim that Mr. Jones presented, and the court decided, was whether the Eighth Amendment prohibits executions when, "as a result of systemic and inordinate delay in California's post-conviction review process, only a random few of the hundreds of individuals sentenced to death will be executed, and for those that are, execution will serve no penological purpose." ER 16. The court grounded its decision in well-established Eighth Amendment jurisprudence emanating from *Furman*, and expressly held that a systemic challenge to California's death penalty process differs fundamentally from claims premised upon individual instances of delay. ER 16-23 & 24 n. 19 (distinguishing *Lackey*, 514 U.S. 1045).

Although the Warden seeks to contest the merits of Mr. Jones's claim before this Court, he forfeited the right to do so by failing to raise these

arguments below.[12] Even if considered, the criticisms are unsupportable. First, the Warden attempts to recast the claim into one challenging an execution based solely upon the delay in the individual's case, AOB 38-39, which, as the district court found, is not Mr. Jones's claim. Second, the Warden relies on the untenable contention that *Furman* and its progeny apply solely to trial procedures. AOB 40-41. Finally, the Warden contends that California's inordinate delays are necessary to ensure accuracy, AOB 43-57, without addressing the district court's contrary findings that such delay results

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[12] In the district court, the Warden declined to address the merits of Mr. Jones's claim. In its three separate orders, the court encouraged the parties to address the argument that "executing those essentially random few who outlive the dysfunctional post-conviction review process [in California] serves no penological purpose and is arbitrary in violation of well-established constitutional principles." ER 97; *see also* ER 130-36. The Warden, nonetheless, chose to argue only that Mr. Jones's claim is unexhausted, it is not ripe, and it is barred by 28 U.S.C. section 2254(d). *See* SER 128-37; SER 55-72; *see also* ER 49-80. Having failed to argue below that Mr. Jones's sentence of death does not violate the Constitution, the Warden may not now raise these arguments for the first time on appeal. *See In re Jan Wellert RV, Inc.*, 315 F.3d 1192, 1199 (9th Cir. 2003) ("Absent exceptional circumstances, this court generally will not consider arguments raised for the first time on appeal."); *Smith v. Richards*, 569 F.3d 991, 995 (9th Cir. 2009) (in habeas case, declining to reach argument because "'it is actually raised for the first time on this appeal.'") (quoting *Lopez v. Schriro*, 491 F.3d 1029, 1039 (9th Cir. 2007)). When committed by death-sentenced habeas petitioners, similar and less willful waivers have had deadly consequences; the Warden's refusal to present his arguments to the district court cannot be excused.

instead from chronic underfunding of the system and that, rather than ensuring accuracy, the delay produces arbitrary executions.[13] ER 18-20.

A. The Eighth Amendment Prohibits the Infliction of Arbitrary Punishments and Punishments That Do Not Advance Legitimate Penological Purposes.

1. A State System That Permits Arbitrary Executions Violates the Eighth Amendment.

Since *Furman*, the Supreme Court consistently has held that the Eighth Amendment forbids imposition of the death penalty "under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (plurality opinion); *see also Zant v. Stephens*, 462 U.S. 862, 876-77 (1983); *Gregg*, 428 U.S. at 189 (plurality opinion); *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring); *id.* at 312-13 (White, J., concurring). Justices Stewart and White, and the other Justices concurring in *Furman*, held that infrequent and seemingly random imposition of the death penalty upon only a small percentage of those eligible to receive it violates the Eighth Amendment's prohibition against cruel and unusual punishment. *See Gregg*,

[13] Without additional funding to cure the system's dysfunction, any speculation about hypothetical measures to speed up the state system, including those proffered by CJLF and the Warden, CJLF Br. at 17-21; AOB 45-46, is unavailing.

428 U.S. at 188 (plurality opinion) (citing *Furman*, 408 U.S. at 313 (White, J., concurring), *id.* at 309-10 (Stewart, J., concurring)).[14] Justices Stewart and White "focused on the infrequency and seeming randomness with which, under the discretionary state systems, the death penalty was imposed." *Walton*, 497 U.S. at 658 (Scalia, J., concurring). Similarly, the relatively infrequent and arbitrary imposition and carrying out of the death penalty was of concern to other Justices who concurred in the judgments. *See Furman*, 408 U.S. at 255-57 (Douglas, J., concurring); *id.* at 291-95 (Brennan, J., concurring); *see also Gregg*, 428 U.S. at 188 n.36. Indeed, the touchstone of *Furman* is that the Eighth Amendment requires that states adopt procedures to "minimize the risk of wholly arbitrary and capricious action." *Gregg*, 428 U.S. at 189 (plurality opinion). As the district court noted, in "the 40 years since *Furman*, the Supreme Court has never retreated from that fundamental principle." ER 17.[15]

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[14] The Court subsequently recognized that the opinions of Justices Stewart and White are the "critical opinions" of *Furman*. *Walton v. Arizona*, 497 U.S. 639, 658-59 (1990) (Scalia, J., concurring), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002); *Gregg*, 428 U.S. at 188 (plurality opinion).

[15] The Warden asserts, without citation, that "*Furman* ... addressed a fundamentally different issue: arbitrariness in the selection of who is sentenced to death." AOB 40. The Warden is incorrect. As the per curium opinion expressly stated, the Court's Majority held "that the imposition and

2. The Eighth Amendment Prohibits Punishments as Excessive When They Do Not Advance Legitimate State Interests.

In order to respect "'the dignity of man,'" "'the basic concept underlying the Eighth Amendment,'" a "punishment [must] not be 'excessive.'" *Gregg*, 428 U.S. at 173 (plurality opinion) (citations omitted); *see also O'Neill v. Vermont*, 144 U.S. 323, 340 (1892) ("The whole inhibition is against that which is excessive either in the bail required, or fine imposed, or punishment inflicted."). Punishment offends the Eighth Amendment when it is inflicted in excess of what is necessary to achieve legitimate penological goals. *See, e.g.*, *Gregg*, 428 U.S. at 183 (plurality opinion) ("the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering").[16] Thus, the Eighth Amendment requires that states "'must reasonably justify the imposition of a more severe

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carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Furman*, 408 U.S. at 239-40 (per curiam) (emphasis added).

[16] *See also Furman*, 408 U.S. at 280 (Brennan, J., concurring) (stating punishment is excessive within meaning of the Cruel and Unusual Punishments Clause if it "serves no penal purpose more effectively than a less severe punishment"); *Furman*, 408 U.S. at 312 (White, J., concurring) (finding that when death penalty ceases realistically to further social ends it was enacted to serve, it violates the Eighth Amendment, results in "pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes," and is a "patently excessive and cruel and unusual punishment violative of the Eighth Amendment").

sentence on the defendant compared to others found guilty of murder.'" *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant*, 462 U.S. at 877).

The Supreme Court consistently has held that, to be constitutional, the imposition of the death penalty must further the penological goals of "retribution and deterrence of capital crimes by prospective offenders." *Gregg*, 428 U.S. at 183 (plurality opinion); *see also Kennedy v. Louisiana*, 554 U.S. 407, 441 (2008) ("capital punishment is excessive when it is grossly out of proportion to the crime or it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes."); *Roper v. Simmons*, 543 U.S. 551, 571 (2005); *Atkins v. Virginia*, 536 U.S. 304, 318-19 (2002). To pass constitutional muster, the penalty must advance these goals significantly or measurably and the failure to satisfy either ground may suffice to render it unconstitutional. *See Simmons*, 543 U.S. at 571 (finding execution violative of Eighth Amendment where "it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles"); *Atkins*, 536 U.S. at 318-19 (condemning execution as unconstitutional punishment unless it "measurably contributes" to one or both of the "recognized" goals of capital punishment); *Coker*, 433 U.S. at 592 (punishment is excessive if it makes no measurable contribution

to acceptable goals of punishment – retribution and deterrence – and "might fail the test on either ground").

B. California's Dysfunctional Death Penalty System Violates These Well-Established Eighth Amendment Principles.

1. California's System Guarantees Arbitrary Executions.

As the district court found, California carries out death sentences in an arbitrary manner devoid of any principled standards, let alone a standard consistent with the requirements of the Eighth Amendment. ER 18-20. As a result of the "dysfunctional" state system, only 13 of 900 death-sentenced inmates have been executed since 1978. ER 2, 18. "For every one inmate executed by California, seven have died on Death Row, most from natural causes." ER 18. Those who are executed are not selected based on any penological criteria, such as "whether their crime was one of passion or of premeditation, on whether they killed one person or ten, or on any other proxy for the relative penological value that will be achieved by executing that inmate over any other," nor on any neutral criteria, such as "the order in which they arrived on Death Row." ER 18-19. Instead, whether or not a death-sentenced inmate is executed "depend[s] upon a factor largely outside an inmate's control, and wholly divorced from the penological purposes the State sought to achieve by sentencing him to death in the first instance: how

quickly the inmate proceeds through the State's dysfunctional post-conviction review process." ER 19.[17]

Such arbitrariness unquestionably violates the Eighth Amendment. *See Furman*, 408 U.S. at 293 (Brennan, J., concurring) ("When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system."). Given the infrequency of executions and the randomness by which the executed are chosen, those who are "selected" experience a punishment that is "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Id.* at 309-10 (Stewart, J., concurring). Indeed, as the district court found, there is "no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id.* at 313 (White, J., concurring); *see also Gregg*, 428 U.S. at 188 (plurality opinion) (citing *Furman*, 408 U.S. at 313 (White, J., concurring)); ER 20.

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[17] The arbitrariness in the system amply is demonstrated by Mr. Jones's case. Unlike virtually all other persons sentenced to death in California in 1995, Mr. Jones has advanced this far in the legal process only because the California Supreme Court appointed the Habeas Corpus Resource Center (HCRC) for his state habeas corpus proceedings five and a half years after his sentencing, a fraction of the delay that all other inmates endure. ER 11; *see also* ER 10 n.11; ER 62, 75-76.

2. California's Process Does Not Advance Any Legitimate Penological Purposes.

The "completely dysfunctional" system in California, in which only 1.4% of the total death sentences imposed since 1978 have been carried out, cannot plausibly be said to produce any deterrent effect. ER 22. "The reasonable expectation of an individual contemplating a capital crime in California then is that if he is caught, it does not matter whether he is sentenced to death – he realistically faces only life imprisonment." ER 22. Such a miniscule possibility of execution is insufficient to render execution a meaningful deterrent. *See, e.g.*, *Enmund v. Florida*, 458 U.S. 782, 800 (1982) (holding that the rare imposition of the death penalty on a class of individuals "attenuates its possible utility as an effective deterrence"). As was evident in *Furman*, the death penalty is so seldom imposed in California that it has ceased "to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system." *Furman*, 408 U.S. at 311 (White, J., concurring).

The arbitrary execution of only a small number of inmates similarly vitiates the purpose of retribution. As the district court found, the extraordinary delay between the time of sentencing and the time of execution in California renders any retributive purpose of the death penalty a nullity. ER 22-23. "The asserted public belief that murderers ... deserve to die is

flatly inconsistent with the execution of a random few." *Furman*, 408 U.S. at 304-05 (Brennan, J., concurring); *see also id.* at 311 (White, J., concurring) ("[W]hen imposition of the [death] penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied."); ER 23 ("Whereas few have been or will eventually be executed by California, the vast majority of individuals sentenced to death – each of whom, in the State's view, committed crimes sufficiently reprehensible to warrant death – will effectively serve out terms of life imprisonment. ... This reality of delay and dysfunction created by the State simply cannot be reconciled with the asserted purpose of retribution.").

Because Mr. Jones's execution does not realistically further the goals of retribution or deterrence, it will amount to "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purpose[]." *Furman*, 408 U.S. at 312. It therefore constitutes "a penalty with such negligible returns to the State" as to be "patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Furman*, 408 U.S. at 312; *see also* Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L. Rev. 1, 4 (1995) ("Whatever purposes the death penalty is said to serve – deterrence,

retribution, assuaging the pain suffered by victims' families – these purposes are not served by the system as it now operates.").

III. THE EXHAUSTION DOCTRINE DOES NOT PRECLUDE THE GRANTING OF RELIEF.

A. The Warden Expressly Waived Exhaustion, and Is Judicially Estopped From Asserting Exhaustion in This Court.

The Warden's Opening Brief omits a crucial portion of the procedural history of the case. On March 11, 2010, Mr. Jones filed a state habeas corpus petition containing a claim that was identical to Claim 27 in his federal petition. *See* ER 115-29; ER 137-42. Mr. Jones contemporaneously requested that the court delay briefing on his state petition to permit the parties and the federal court to resolve whether any claims contained in the federal petition were unexhausted. SER 214-19. In response, the Warden informed the state court that he would not raise an exhaustion defense in federal court:

> Petitioner has apparently assumed that respondent would be asserting that the federal petition is unexhausted. However, respondent has examined the federal petition and has determined that all claims therein appear to be exhausted. ... *Respondent will therefore be filing an answer to the federal petition and will not be asserting that any claims are unexhausted.*

SER 210 (emphasis added). At the same time, in his answer to the federal petition, the Warden expressly waived exhaustion:

> Petitioner indicated that he would withdraw the state petition if it were determined that all claims in the instant federal Petition are exhausted. Since Respondent is not asserting that any claims in the instant federal Petition are unexhausted, Respondent anticipates that Petitioner will be withdrawing the [state] habeas petition.

SER 199 n.3. Consequently, noting that "Respondent's determination that all claims within the Federal Petition have been properly exhausted, and its assertion that it 'will therefore be filing an answer to the federal petition and will not be asserting that any claims are unexhausted'" rendered the state petition moot, Mr. Jones requested that the state court order withdrawal of the petition. SER 207. The state court accordingly ordered the state petition withdrawn on April 22, 2010. SER 195.

The Warden's unambiguous statement that he would not raise exhaustion as a defense in federal court plainly constitutes a waiver of exhaustion. 28 U.S.C. § 2254(b)(3). "The touchstone for determining whether a waiver is express is the clarity of the intent to waive." *D'Ambrosio v. Bagley,* 527 F.3d 489, 497 (6th Cir. 2008). The Warden's intent to bypass state court consideration of the claim and instead to litigate it in federal court could not be clearer given his explicit representations to both the state court and the district court.

Moreover, the Warden is judicially estopped from raising an exhaustion defense. "The doctrine of judicial estoppel, ... is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process. ... Judicial estoppel is 'intended to protect against a litigant playing fast and loose with the courts.'" *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990) (internal citations and quotations omitted). "In determining whether to apply the [judicial estoppel] doctrine, [this Court] typically consider[s] (1) whether a party's later position is 'clearly inconsistent' with its original position; (2) whether the party has successfully persuaded the court of the earlier position, and (3) whether allowing the inconsistent position would allow the party to 'derive an unfair advantage or impose an unfair detriment on the opposing party.'" *United States v. Ibrahim,* 522 F.3d 1003, 1009 (9th Cir. 2008) (quoting *New Hampshire v. Maine,* 532 U.S. 742, 750-51 (2001)). Here, the Warden elected to litigate Claim 27 in federal court rather than state court, expressly declining to raise an exhaustion defense; obtained the withdrawal of Mr. Jones's state petition (containing Claim 27) on that basis; and then apparently regretted the decision after the district court ordered briefing on Claim 27. He now takes the "clearly inconsistent" (and factually incorrect)

position that Mr. Jones never presented Claim 27 to the state court, to preclude this Court's consideration of its merits.

This Court has repeatedly disapproved of the state's effort to advance inconsistent positions in state and federal court in order to obtain dismissal of a habeas petition. In *Rolfs*, the state argued during the petitioner's first federal habeas proceeding that he had an "adequate and available state court remedy" under the state court's appellate rules of procedure. The federal court dismissed the petition on that basis, but in state court, the state subsequently argued that the petition was procedurally barred because the claims were not raised on direct appeal. 893 F.2d at 1037. This Court stated that the state's position was "flatly inconsistent with the state's previous representation ... in federal court that [petitioner's] remedy in the state courts through the [court's appellate] procedure was presently 'adequate and available.'" *Id.* at 1038. Because "the state prevailed by telling the state court the opposite of what it told the federal court," the state was estopped from relying on the advantage it gained by doing so. *Id.*

Similarly, in *Whaley v. Belleque*, 520 F.3d 997, 1003 (9th Cir. 2008), this Court rejected the state's position in federal court that petitioner had procedurally defaulted his claims by not appealing their dismissal to the Oregon Supreme Court, when it had taken the position in state court that the

claims were moot and the Oregon Supreme Court could not hear them. The Court held that it would "not allow the state to represent in federal court the opposite of what it represented to the state court when it succeeded in defeating [petitioner's] claim." *Id.* at 1002.

Furthermore, by withdrawing his state petition in reliance on the Warden's waiver of exhaustion, Mr. Jones lost his opportunity to fully litigate Claim 27 in the state court, including his ability to fully brief, develop additional facts and arguments in support of, and supplement the claim in the state petition.[18] The Warden's waiver, then, must encompass any valid amendment to Mr. Jones's federal petition. Thus, the Warden's attempt to cast Amended Claim 27 as a wholly new claim never raised before, including in the original federal petition, is unavailing. Mr. Jones is entitled to amend his federal petition to add or modify claims when the amendments rely on a "common core of operative facts" alleged in the original petition. *Mayle v. Felix*, 545 U.S. 644, 664 (2005); Fed. R. Civ. P. 15(c)(1). Mr. Jones's

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[18] *See, e.g.*, *People v. Romero*, 8 Cal. 4th 729, 742 (1994) (acknowledging that the informal response performs a "screening function" and that a petitioner may successfully controvert factual disputes raised in it); *see also In re Serrano*, 10 Cal. 4th 447, 456 (1995) (explaining that the issuance of an order to show cause after informal briefing "both sets into motion the process by which the issues are framed for judicial determination ... and affords the petitioner the opportunity to present additional evidence in support of the truth of the allegations in the petition").

amendment of Claim 27 – to which the Warden did not object in the district court[19] – was entirely permissible under *Mayle* and well-settled Ninth Circuit precedent.[20] The *Mayle* Court held that an "amended habeas petition ... does

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[19] As in *Chaker v. Crogan*, CJLF raises an issue not raised by the Warden in the district court or in this Court: the timeliness of Mr. Jones's amendment to Claim 27. *Compare* CJLF Br. at 11-13, *with* SER 128-37; SER 55-72; *see also Chaker*, 428 F.3d 1215, 1220 (9th Cir. 2005). Mr. Jones and the Warden agree that Amended Claim 27 is not a new ground for relief, but rather an appropriate amendment to Federal Petition Claim 27. *See, e.g.*, AOB 10, 20. This Court must therefore conclude that the Warden waived the statute-of-limitations defense. *Chaker*, 428 F.3d at 1220 (concluding that because the state failed to raise the limitations defense in district court and in its briefing before this Court, "we decline to consider an argument raised only by CJLF on appeal."); *see also Swan v. Peterson*, 6 F.3d 1373, 1383 (9th Cir. 1993) ("Generally, we do not consider on appeal an issue raised only by an amicus.").

The Warden's decision not to raise the statute-of-limitations defense was also unquestionably strategic and intended to permit him to argue that 28 U.S.C. section 2254(d) bars relief. *See, e.g.*, AOB 19 (arguing section 2254(d) bars relief because, "Amended Claim 27 presented the same underlying Eighth Amendment claim that Jones previously advanced on direct appeal in state court, and that the California Supreme Court rejected."); CJLF Br. at 12 (acknowledging that the Warden's failure to "raise a statute of limitations defense" "was apparently based on the consistent position that Claim 27 is not a new ground for relief but merely a variation on the original *Lackey* claim"). This strategic decision precludes this Court from addressing it *sua sponte*. *Wood v. Milyard*, 132 S. Ct. 1826, 1833-34 (2012) (holding that the state's decision to strategically withhold a statute-of-limitations defense precludes a district court from considering the defense on its own initiative).

[20] Throughout the Warden's brief, he argues that Amended Claim 27 did not contain the arbitrariness theory upon which the district court ruled. AOB 1. This argument is untenable for two reasons. First, Amended Claim 27 does contain the legal theory and the factual allegations upon which the

not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading sets forth." *Id.* at 650. This Court has clarified that the "'time and type' language in *Mayle* refers not to the claims, or grounds for relief. Rather, it refers to *the facts that support those grounds*." *Nguyen v. Curry*, 736 F.3d 1287, 1297 (9th Cir. 2013). Thus, in *Nguyen*:

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district court based its ruling. *See, e.g.*, ER 117-22 (alleging facts regarding the dysfunctionality of California's death penalty system); ER 124-27 (alleging that carrying out Mr. Jones's sentence after such extraordinary delay, caused by California's dysfunctional system, serves no legitimate penological purpose). Indeed, the district court found that it was ruling precisely on the claim that Mr. Jones presented. ER 15-16. The issues presented in the pleadings on Claim 27 were tried by the implied consent of the parties, regardless of whether they were presented in Claim 27 or in the Answer to Claim 27. *See* Fed. R. Civ. P. 15(b); *Banks v. Dretke*, 540 U.S. 688, 687 & n.8 (2004) (applying Rule 15(b) to capital habeas claim not pled but ruled on by the district court after petitioner raised the claim in his proposed findings of fact and conclusions of law). Indeed, had this not been the case, the Warden's failure to file an Answer to Amended Claim 27 would have precluded any further briefing and would have been fatal to his appeal. Second, the Warden's failure to present this argument to the district court waives any argument that relief was not proper. Mr. Jones's briefing and exhibits filed in support of Amended Claim 27 unquestionably addressed the theory upon which the district court ruled. *Compare, e.g.*, SER 73-127, *with* ER 2-30. The district court thereafter made factual findings on the dysfunctional California process without any objection that the characterization of the claim or the exhibits exceeded the scope of Amended Claim 27. The Warden's failure to object to the scope and manner of the district court's fact-finding process or even to proffer contrary evidence precludes any argument on appeal. *See Ford*, 590 F.3d at 790.

> All of Nguyen's asserted grounds for relief—cruel and unusual punishment, double jeopardy, and appellate-counsel IAC for failing to raise double jeopardy—are supported by a common core of facts. Those facts are simple, straightforward, and uncontroverted. And they were clearly alleged in the original pleading. They are, first, that Nguyen fully served the sentence originally imposed for Count One; and, second, that the court thereafter resentenced Nguyen to imprisonment for twenty-five-years-to-life on the same count.

Id. Because the facts that support Claim 27 in the original federal petition are the same as those that support the Amended Claim 27,[21] the latter relates back to the original claim. The Warden's waiver of exhaustion thus applies to Amended Claim 27, and he is judicially estopped from raising exhaustion as a defense.

Finally, the considerations of comity and federalism raised by the Warden, AOB 31-33, and that normally apply in habeas proceedings, are not present in this case. The Warden's appeal to comity and deference to the "structure of federal-state habeas relations," AOB 31-33, rings hollow in light

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[21] The facts that are common to both original Claim 27 and Amended Claim 27 include the description of the dysfunction inherent in California's capital system, which results in unconscionable delay due to no fault of the petitioners; the facts surrounding the likelihood of death by natural causes or suicide as compared to death by execution, which reinforce the arbitrariness of the system; and the ways in which delay and arbitrariness, combined with the psychological harms caused by the conditions on Death Row, fail to serve the deterrent and retributive purposes of capital punishment. *See* ER 115-29; ER 138-42.

of his choice to litigate Claim 27 in federal court when presented with the opportunity to litigate it in state court. In a habeas proceeding where "the State has chosen a federal forum because it explicitly wishes to avoid lengthy and protracted state judicial proceedings," there is "no reason why a federal court, in the name of comity, should refuse to abide by the State's wishes." *Felder v. Estelle*, 693 F.2d 549, 554 (5th Cir. 1982).

B. Well-Established Exceptions Preclude the Application of the Exhaustion Doctrine.

In addition to the Warden's waiver, Mr. Jones is not obligated to exhaust Amended Claim 27 as well-recognized exceptions to the exhaustion requirement apply.

1. California's Process Is Ineffective to Protect Mr. Jones's Rights.

As the district court found, "[r]equiring Mr. Jones to return to the California Supreme Court to exhaust his claim would only compound the delay that has already plagued his post-conviction review process." ER 27-28. Moreover, "it would require Mr. Jones to have his claim resolved by the very system he has established is dysfunctional and incapable of protecting his constitutional rights." ER 28. It is well-settled that the inordinate and unjustified delay that Mr. Jones would suffer were he to return to state court –

particularly given that delay is itself one of the key elements of his claim – relieves him of the obligation to exhaust.

This Court, for example, has held that excessive delay in obtaining an appeal excuses a prisoner from exhausting his state remedies "if the root of his complaint is his inability to do so." *Coe v. Thurman*, 922 F.2d 528, 531 (9th Cir. 1990); *see also Okot v. Callahan*, 788 F.2d 631, 633 (9th Cir. 1986) (observing that if a prisoner "receives ineffective relief in state court because of unreasonable delay, he may file a habeas proceeding in federal court. In such circumstances, federal habeas relief may well be available despite failure to exhaust state remedies.") (internal citation omitted). Similarly, in *Phillips*, 56 F.3d at 1034-35, pointing to the extraordinary delay a petitioner faced in the state court resolution of his case, this Court permitted him to file a federal habeas petition challenging his conviction although his sentence was not yet final.

The Warden attempts to distinguish *Phillips* by arguing that exhaustion was excused only because the state courts had a full and fair opportunity to review the petitioner's conviction. AOB 30. This is a distinction without a difference, as illustrated by the numerous cases establishing that delay excuses exhaustion even when the state courts have not had the "opportunity" to adjudicate the claim. Notably, in *Coe*, the state court had not even received

the opening briefs in Mr. Coe's appeal by the time his reply brief was filed in his Ninth Circuit case. 922 F.2d at 529. Similarly, in excusing the exhaustion requirement, other Circuit courts have examined only the length of the delay and not whether the state court had the "opportunity" to review the claims. *See, e.g.*, *Harris v. Champion*, 15 F.3d 1538, 1546 (10th Cir. 1994) (holding "there is a rebuttable presumption that the State's process is not effective and, therefore, need not be exhausted, if a direct criminal appeal has been pending for more than two years without final action by the State"); *Cody v. Henderson*, 936 F.2d 715, 718 (2d Cir. 1991) (holding "substantial delay in the state criminal appeal process is a sufficient ground to justify the exercise of federal habeas jurisdiction"); *Hankins v. Fulcomer*, 941 F.2d 246, 252 (3d Cir. 1991) (holding state trial court's delay in deciding a motion to withdraw a guilty plea excused exhaustion, and observing that "further deference to the state courts would be inappropriate and would deny fundamental rights guaranteed to all defendants"). *Accord Henderson v. Lockhart*, 864 F.2d 1447, 1450 (8th Cir. 1989); *Vail v. Estelle*, 711 F.2d 630, 632 (5th Cir. 1983). These cases stand for the proposition that a petitioner alleging that the state court violated his constitutional rights should not be forced to return to that court and endure the violation that is the gravamen of his complaint. On average, 3.19 years elapse before an exhaustion petition in a capital habeas

case is decided by the California Supreme Court. ER 28. The district court was correct that requiring Mr. Jones to exhaust now would only perpetuate the constitutional wrong.

2. Mr. Jones Is Without a State Remedy Because the State Court Will Consider Amended Claim 27 Premature Until an Execution Date Is Scheduled.

Amended Claim 27 alleges that the delay and arbitrariness inherent in California's dysfunctional capital system render Mr. Jones's execution unconstitutional. As the state court will consider the claim premature prior to the setting of an execution date, Mr. Jones currently has no available remedy in state court.[22] Thus, exhaustion is excused.

"[I]n determining whether a remedy for a particular constitutional claim is 'available,'" for the purposes of the exhaustion requirement, "the federal courts are authorized, indeed required, to assess the likelihood that a state court will accord the habeas petitioner a hearing on the merits of his claim." *Harris v. Reed*, 489 U.S. 255, 268 (1989) (O'Connor, J., concurring). Where state law precludes hearing of a claim on the merits, there is no available state remedy and exhaustion is excused.

[22] Though the district court did not address this exhaustion exception, this Court may nonetheless consider it, as it may affirm the district court's decision on any basis supported by the record. *See, e.g.*, *Leonard v. Clark*, 12 F.3d 885, 889 (9th Cir. 1993).

The California Supreme Court treats claims similar to Amended Claim 27 as prematurely presented and thus incapable of adjudication until an execution date has been set. In *In re Reno*, the court prescribed procedures for filing exhaustion petitions, which have created "a problem that, over time, has threatened to undermine the efficacy of the system." 55 Cal. 4th 428, 442 (2012). To address this problem, the court imposed page limitations on successor petitions and additional pleading requirements to assist the court in identifying potential procedurally defaulted claims. *Id*. at 443. The court held that Mr. Reno's claim that execution after a prolonged confinement is unconstitutional was not subject to a procedural default for being untimely because it was "premature" and thus could be presented at a future date. *Id*. at 462 n.17. The court previously had explained in unpublished orders that it denies such claims as premature because no execution date has been set. *See In re Arias*, Cal. Sup. Ct. Case No. S114347 (Order filed Sept. 17, 2008) (denying habeas petitioner's claim that his execution after prolonged confinement is unconstitutional "without prejudice to renewal after an execution date has been set"), *In re Jurado*, Cal. Sup. Ct. Case No. S136327 (Order filed July 23, 2008) (same).[23] The court applies similar analysis to

[23] The dockets and orders may be found by searching: http://appellatecases.courtinfo.ca.gov/search.cfm?dist=0.

claims challenging execution by lethal injection. *Reno*, 55 Cal. 4th at 463 n.17 (holding "challenge to lethal injection is premature"); *People v. Boyer*, 38 Cal. 4th 412, 485 (2006) ("Defendant's attack on illegalities in the execution process that may or may not exist when his death sentence is carried out is premature."). In accordance with this reasoning, the state court will deny Amended Claim 27 not because it lacks constitutional merit, but rather because the California Supreme Court believes it is prematurely presented until an execution date has been set.

That the state court would treat Amended Claim 27 as premature excuses exhaustion, as it deprives Mr. Jones of a state remedy. In *Whalley*, this Court concluded that because the state court would have treated petitioner's claim as moot, the petitioner "no longer has any available state remedy" under section 2254(b). 520 F.3d at 1003. The same analysis applies to premature claims: "the fact that a state remedy may be theoretically available at some distant point in the future does not require a petitioner to languish incarcerated until state procedures are complied with." *Carter v. Estelle*, 677 F.2d 427, 449 (5th Cir. 1982) (noting that *Peyton v. Rowe*, 391 U.S. 54, 56-58 & n.2 (1968)) rejected the view that exhaustion required a petitioner to comport with a state's prematurity rule before seeking federal relief)).

IV. 28 U.S.C. SECTION 2254(D) DOES NOT APPLY.

"For subsection (d) to apply, the federal habeas claim must, at a bare minimum, have been presented in State court." *Gary v. Dormire*, 256 F.3d 753, 756 n.1 (8th Cir. 2001); *accord Lambert v. Blodgett*, 393 F.3d 943, 968 (9th Cir. 2004). As the Warden acknowledged in briefing in the district court and before this Court, the state court did not adjudicate Amended Claim 27 on the merits; consequently, the limitations contained within section 2254(d) are inapplicable.

"[N]ot all federal habeas claims by state prisoners fall within the scope of § 2254(d), which applies only to claims 'adjudicated on the merits in State court proceedings.'" *Cullen v. Pinholster*, 131 S. Ct. 1388, 1401 (2011) (holding the restrictions of section 2254(e)(2) applicable when "federal habeas courts ... decid[e] claims that were not adjudicated on the merits in state court"). Claims outside the scope of section 2254(d) may include claims with factual support developed after the conclusion of state court proceedings, but related in some way to a claim adjudicated on the merits in state court. *Pinholster*, 131 S. Ct. at 1401 n.10 (declining to "draw the line between new claims and claims adjudicated on the merits" but noting that a hypothetical situation in which new evidence arises after the state court has adjudicated a claim on the merits may well give rise to a new claim). Although the

Supreme Court did not "draw the line" between new claims and previously adjudicated claims in *Pinholster*, it previously has held that a claim involving evidence that "fundamentally alter[s] the legal claim already considered by the state courts" is a claim that requires exhaustion. *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986).

This Court, therefore, has held that that a federal habeas claim is sufficiently distinct from a claim previously presented to the state court "if new factual allegations either fundamentally alter the legal claim already considered by the state courts, or place the case in a significantly different and stronger evidentiary posture than it was when the state courts considered it." *Dickens v. Ryan*, 740 F.3d 1302, 1317 (9th Cir. 2014) (internal quotations omitted). A claim that has not been fairly presented to a state court according to these guidelines has not been "adjudicated on the merits" for purposes of section 2254(d). *Id.* at 1320; *see also, e.g., Green v. Thaler*, 699 F.3d 404, 420 (5th Cir. 2012).

The Warden misstates the law in his Opening Brief, asserting that "federal courts 'are precluded from considering' additional facts alleged for the first time in federal court," and arguing that the deferential standard of section 2254(d)(1) must be applied based on the record that was before the state court. AOB 23 (quoting and citing *Pinholster*, 131 S. Ct. at 1398, 1402

n.11). The *Pinholster* Court made clear that it was barred from considering new facts in support of an already-existing claim that *was* adjudicated on the merits by the state court in evaluating whether section 2254(d) applied. *Pinholster*, 131 S. Ct. at 1411 n.20. Such is not the case here: Amended Claim 27 was not adjudicated on the merits by the state court, nor was the original Claim 27. Both are habeas claims that are distinct from Mr. Jones's *Lackey* claim on direct appeal. Under state law, claims of this nature that rely on non-record evidence can only be raised in a habeas corpus petition. *See In re Bower*, 38 Cal. 3d 865, 872 (1985) ("It is ... well established ... that when reference to matters outside the record is necessary to establish that a defendant has been denied a fundamental constitutional right resort to habeas corpus is not only appropriate, but required."). Mr. Jones's claim relies on extra-record indicia of the conditions and arbitrariness inherent in California's capital system. Thus, habeas corpus was the appropriate state forum in which to raise this claim. *Id*. For this reason, Claim 27 differed significantly from the claim raised on Mr. Jones's direct appeal, but it was never adjudicated on the merits by the state court because the Warden waived exhaustion. *See* section VI.C, *supra*.

These well-established principles preclude any application of section 2254(d) to Amended Claim 27, as it presented substantially different factual

and legal bases than the claim presented on direct appeal. Thus, the limitations contained in section 2254(d) are inapplicable and this Court must review the merits of the claim de novo. *See, e.g.*, *Dickens*, 740 F.3d at 1320.

V. THE DISTRICT COURT PROPERLY CONCLUDED THAT MR. JONES'S CLAIM IS NOT PROCEDURALLY BARRED UNDER *TEAGUE V. LANE*.

The Warden incorrectly contends that Mr. Jones's claim is barred by *Teague*, 489 U.S. 288, because it announces a new rule. AOB 34. *Teague* does not apply where the new rule is one that (1) "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" or (2) "requires the observance of those procedures that ... are implicit in the concept of ordered liberty." *Id.* at 307 (internal quotations omitted). The prohibition against arbitrariness in capital punishment is a well-established principle dictated by existing precedent and therefore not barred by *Teague.* To the extent that this Court finds that the order below creates a new rule, that rule is substantive under the first *Teague* exception and therefore should be applied retroactively.

A. The Warden Waived the *Teague* Defense.

"[T]he *Teague* non-retroactivity principle is ... an affirmative defense that must be raised by the state." *Thompson v. Runnels*, 705 F.3d 1089, 1099 (9th Cir. 2013). The Warden bore the burden of proving its applicability in

district court, *id.*, and failed to do so, *see* SER 128-94; SER 55-72.[24] This Court should not "save the state from such a gaffe." *Boardman v. Estelle*, 957 F.2d 1523, 1537 (9th Cir. 1992) (per curiam).

This Court is only obligated to conduct a *Teague* analysis in cases in which "the issue is properly raised by the state." *Horn v. Banks*, 536 U.S. 266, 272 (2002) (per curiam). When the state has failed to properly raise the issue, this Court may deem it waived. *See, e.g.*, *Godinez v. Moran*, 509 U.S. 389, 397 n.8 (1993) (refusing to apply *Teague* "because [the state] did not raise a *Teague* defense in the lower courts or in [its] petition for certiorari"); *Duckett v. Godinez*, 67 F.3d 734, 746 n.6 (9th Cir. 1995) (declining to consider *Teague* argument because the state did not raise it in the district court); *Jordan v. Ducharme*, 983 F.2d 933, 936 (9th Cir. 1993) (same).

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[24] The Warden's Answer to the original federal habeas petition asserted the *Teague* defense to Claim 27. SER 202. Claim 27 did not, however, contain the arbitrariness theory that the Warden now – for the first time – asserts is *Teague*-barred. *See* section IV, *supra*; *see also* AOB 33-37 (arguing the *Teague* bar applies to the arbitrariness theory). That portion of the claim was introduced into the case in Amended Claim 27. *Compare* ER 116-29, *with* ER 138-42. Consequently, the Warden's Answer cannot reasonably be construed to have preserved any *Teague* defense to Amended Claim 27, and the Warden's failure to assert the *Teague* defense in the district court briefing should be construed as waiver. Such a result is appropriate because there is no question that the Warden was aware of the availability of the *Teague* defense, *see* SER 202, at the time that the district court requested briefing on "whether petitioner's new claim states a viable basis for granting habeas corpus relief," *see* ER 131; *see also* ER 132.

Where, as here, "the state has not adequately justified its failure to raise the issue at that time," concluding that the *Teague* defense is waived is the most appropriate course. *Boardman*, 957 F.2d at 1537 (internal citations and quotations omitted); *cf. Granberry v. Greer*, 481 U.S. 129 (1987) (reaching the same conclusion as to exhaustion).

B. The Rule Applied by the District Court Is Not a New Rule.

A rule that is "dictated" by precedent existing at the time Mr. Jones's conviction became final is not new. *Teague*, 489 U.S. at 301. As noted by the district court, "[t]he rule Mr. Jones seeks to have applied here – that a state may not arbitrarily inflict the death penalty – is not new." ER 28; *see also* section VI.B, *supra*. The right to be free from arbitrary punishment is recognized as "inherent in the [Cruel and Unusual Punishment] Clause" of the Eighth Amendment. *Furman,* 408 U.S. at 274-77 (Brennan, J., concurring); *see also id.* at 309 (Stewart, J., concurring); *id.* at 312-13 (White, J., concurring). A rule "so deeply embedded in the fabric of due process that everyone takes it for granted" cannot be a new rule for the purposes of *Teague*. *Dyer v. Calderon,* 151 F.3d 970, 984 (9th Cir. 1998) (en banc).

Furman has consistently been interpreted as prohibiting arbitrary punishments. *See, e.g.*, *Ring v. Arizona*, 536 U.S. 584, 606 (2002) (noting that states have constructed capital sentencing procedures to minimize the risk

of wholly arbitrary and capricious action prohibited in *Furman.*); *Graham v. Collins*, 506 U.S. 461, 468 (1993) (noting that *Furman* requires that states prevent death sentences from being meted out "wantonly" or "freakishly"); *McCleskey v. Kemp*, 481 U.S. 279, 301 (1987) ("In *Furman* ..., the Court concluded that the death penalty was so irrationally imposed that any particular death sentence could be presumed excessive.").

The Warden contends that the district court's ruling is *Teague*-barred based on his assertion that not all reasonable jurists would have been compelled to rule as the district court did. AOB 34-35. To support this argument, the Warden relies on opinions rejecting individual petitioners' *Lackey* claims.[25] AOB 34. However, as the district court made clear, the basis for the constitutional violation is not delay in an individual case as in *Lackey*, but instead the systemic dysfunction that violates the well-established prohibition against arbitrariness in punishment. ER 18-20, 28-29. Grounded

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[25] Although this Court has rejected *Lackey* claims, it generally has done so pursuant to the AEDPA, without reaching the merits. *See Smith v. Mahoney,* 611 F.3d 978, 997-99 (9th Cir. 2010); *Allen v. Ornoski*, 435 F.3d 946, 955 (9th Cir. 2006). The cases in which this Court has addressed the applicability of the *Teague* bar to *Lackey* claims are limited in their applicability to this case not only for the reasons described above, but also because they do not address either of the exceptions to *Teague* and consequently do not offer guidance in interpreting the applicability of the "substantive rule" exception. *See Smith*, 611 F.3d at 998; *Allen*, 435 F.3d at 955.

firmly in principles inherent to the Eighth Amendment and the prohibition against arbitrariness in punishment, the district court found:

> For Mr. Jones to be executed in such a system, where so many are sentenced to death but only a random few are actually executed, would offend the most fundamental of constitutional protections – that the government shall not be permitted to arbitrarily inflict the ultimate punishment of death.

ER 20. Mr. Jones's systemic claim is thus distinct from an individual *Lackey* claim and therefore distinguishable from the precedent the Warden cites. *See* section VI.B., *supra*.

C. To the Extent the District Court Announced a New Rule, It Was a New Substantive Rule.

Even if this Court concludes that the district court announced a new rule, that rule is substantive and therefore should be applied retroactively. New substantive rules "apply retroactively because they 'necessarily carry a significant risk that a defendant stands convicted of "an act that the law does not make criminal"' or faces a punishment that the law cannot impose upon him." *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (quoting *Bousley v. United States*, 523 U.S. 614, 620 (1998)). New substantive rules include "decisions that narrow the scope of a criminal statute by interpreting its terms, as well as *constitutional determinations that place particular* conduct or *persons covered by the statute beyond the State's power to punish*." *Id.* at

351-52 (2004) (internal citations omitted and emphasis added). Finality and comity concerns "have little force" where a new rule places a certain class of individuals beyond a state's power to punish because of their status or offense, because "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Penry v. Lynaugh*, 492 U.S. 302, 329-30 (1989) (quoting in part *Mackey v. United States*, 401 U.S. 667, 693 (Harlan, J., concurring)).

The rule relied upon by the district court is clearly substantive within this framework. The court's holding prohibited the imposition of punishment on a particular class of persons because of their status as individuals whose sentence "has been quietly transformed" from one of death to one of grave uncertainty and torture and one that "no rational jury or legislature could ever impose: *life in prison, with the remote possibility of death*." ER 2-3. The district court did not hold that the delay in Mr. Jones's case was unique to him or uniquely made his death sentence cruel and unusual. Rather, it held that the inordinate and unpredictable delay that pervades California's death penalty system has resulted in a system in which arbitrary factors determine whether an individual will be executed and that such a system violates the Eighth Amendment. ER 29-30. The court declared California's current system of capital punishment – and therefore the death sentences of those

sentenced to death under it – unconstitutional because its systemic dysfunction subjects death-sentenced persons to arbitrary and excessive punishment.[26] ER 16-20, 28-29. By depriving California of the power to mandate a sentence of life in prison with the remote possibility of death, the district court placed a substantive limitation on the state's power to punish individuals in the same manner that *Penry* explained the execution of individuals with intellectual disability (mental retardation) was a substantive limitation exempt from the *Teague* bar. *See Penry*, 492 U.S. at 329-30.

Indeed, the Supreme Court's Eighth Amendment cases declaring a punishment unconstitutional for a certain class of offenders or declaring certain individuals to be in a category beyond the state's power to punish have universally been applied retroactively. *See, e.g.*, *Graham v. Florida*, 560 U.S. 48 (2010) (prohibiting life-without-parole sentences for juveniles convicted of

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[26] In so holding, the court permitted the possibility that California may repair its broken system and be able to sentence individuals to death in a manner that does not transform their sentence into an unconstitutional one. *See, e.g.*, ER 20 ("For Mr. Jones to be executed *in such a system*, where so many are sentenced to death but only a random few are actually executed, would offend the most fundamental of constitutional protections[.]" (emphasis added)).

non-homicide offenses);[27] *Simmons*, 543 U.S. 551 (prohibiting capital punishment for juveniles);[28] *Atkins*, 536 U.S. 304 (prohibiting capital punishment for intellectually disabled offenders);[29] *see also Ford v. Wainwright*, 477 U.S. 399 (1986) (holding that the Eighth Amendment prohibits the execution of an individual who is insane).[30]

Moreover, the rule announced by the district court was based on *Furman*, which was unquestionably retroactive. *See, e.g.*, *Michigan v. Payne*, 412 U.S. 47, 57 n.14 (1973); *Robinson v. Neil*, 409 U.S. 505, 508 (1973). The Supreme Court "ha[s] not hesitated to apply [*Furman*] retroactively without

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[27] *See Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013) (holding that *Graham* is retroactive under *Teague* because it prohibits a class of defendants from enduring a particular punishment).

[28] *See Simmons*, 543 U.S. 551 (applying the rule announced therein retroactively to Mr. Simmons, whose case was on collateral review); *see also Horn v. Quarterman*, 508 F.3d 306, 307-08 (5th Cir. 2007) (noting retroactive application of *Simmons*).

[29] *See Penry*, 492 U.S. at 329-30 (concluding that holding that the Eighth Amendment prohibits the execution of intellectually disabled individuals would be announcing a new substantive rule applicable to petitioners on collateral review).

[30] *See Penry*, 492 U.S. at 329-30 (explaining that in *Ford* and *Coker* – two cases that pre-dated *Teague* – the Supreme Court "held that the Eighth Amendment, as a substantive matter, prohibits imposing the death penalty on a certain class of offenders because of their status").

regard to whether the rule meets the ... criteria [for determining whether the rule is one that should apply retroactively]." *Robinson*, 409 U.S. at 508.[31]

The Warden misconstrues the distinction between substantive and procedural rules, suggesting that the district court's rule is procedural because it "turns entirely on criticism of the *procedures* by which California offers post-conviction review to [Mr.] Jones and other prisoners who have been sentenced to death." AOB 37. In *Summerlin*, the Supreme Court explained that "rules that regulate only the *manner of determining* the defendant's culpability are procedural," and that "prototypical procedural rules" are rules "that allocate decisionmaking authority." *Summerlin*, 542 U.S. at 353. The Warden does not and cannot proffer a viable theory under which the district court's rule regulates the manner of determining Mr. Jones's culpability, allocates decisionmaking authority, or is otherwise a new rule of criminal procedure. Rather, as the Warden himself acknowledges, the rule exempts an entire class of individuals from execution. *See* AOB 11-14 (describing the district court's order); *see also* AOB 34 (describing the rule as holding that the delay and arbitrariness in California's post-conviction review process

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[31] Although *Furman* pre-dated *Teague*, it was subject to the retroactivity principle set forth in *Linkletter v. Walker*, 381 U.S. 618 (1965).

violates the Eighth Amendment). It is, therefore, retroactive.[32] *See Summerlin*, 542 U.S. at 351-52; *Penry*, 492 U.S. at 329-30.

VI. CONCLUSION

For the reasons stated above, Mr. Jones respectfully requests that this Court affirm the district court's judgment granting him relief.

Dated: February 27, 2015

Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

By: */s/ Michael Laurence*
Michael Laurence
Attorneys for Petitioner-Appellee
Ernest DeWayne Jones

[32] The amicus curiae brief filed by CJLF asserts that the rule relied on by the district court is not a substantive rule because, "As a matter of substantive Eighth Amendment law, a person like [Mr.] Jones who commits the crime he committed can be executed, and hence the first [*Teague*] exception does not apply." CJLF Br. at 16. This assertion, however, conflicts with the Court's holding in *Ford*, which explicitly recognized that a defendant who was properly sentenced to death may not be executed because of post-sentencing circumstances. 477 U.S. at 409-10. Moreover, this circular argument conflates the merits of the claim – an issue the Warden did not contest in the lower court – with the inquiry of whether the rule is substantive or procedural in nature. As described above, the proper inquiry is whether the rule prohibits the imposition of punishment on a particular class of persons. *Summerlin*, 542 U.S. at 353; *see also Saffle v. Parks*, 494 U.S. 484, 495 (1990).

STATEMENT OF RELATED CASES

Counsel is not aware of any related cases pending before this Court.

Dated: February 27, 2015

/s/ Michael Laurence

Michael Laurence

CERTIFICATE OF COMPLIANCE

I certify that this brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-1. The brief is proportionately spaced, has a typeface of 14 points or more, and contains 13,994 words.

Dated: February 27, 2015

/s/ Michael Laurence
Michael Laurence

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 27, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Michael Laurence
Michael Laurence
Attorney for Petitioner-Appellee