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# THE DEATH KNELL FOR THE DEATH PENALTY: JUDGE CARNEY’S ORDER TO KILL CAPITAL PUNISHMENT RINGS LOUD ENOUGH TO REACH THE SUPREME COURT

*Alyssa Hughes\**

## I. INTRODUCTION

District Judge Cormac J. Carney’s Order in *Jones v. Chappell*,<sup>1</sup> declaring California’s death penalty system unconstitutional and vacating the petitioner’s death sentence, may ring loud enough for the Supreme Court to hear.<sup>2</sup> Judge Carney based his decision on the premise that the systemic delay and arbitrary administration of executions creates a dysfunctional system that strips the “ultimate sanction”<sup>3</sup> of the purposes of punishment.<sup>4</sup> Without the life-saving deterrent and retributive justifications, Carney wrote, the penalty is reduced to the cruel and unusual punishment forbidden by the United States Constitution.<sup>5</sup>

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1. 31 F. Supp. 3d 1050 (C.D. Cal. 2014).

2. See Brent E. Newton, *Justice Kennedy, the Purposes of Capital Punishment, and the Future of Lackey Claims*, 62 BUFF. L. REV. 979, 999 (2014) (commenting that *Jones v. Chappell* “may well be the vehicle for the Supreme Court to finally address the Lackey issue”).

3. *Furman v. Georgia*, 408 U.S. 238, 286 (1972).

4. *Jones*, 31 F. Supp. 3d at 1050–51. Since 1978, 13 out of 900 inmates sentenced to death have been executed. Further, costs associated with the death penalty system are estimated at over \$4 billion since 1978. Arthur L. Alarcon & 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, S65 (2011).

5. The Eighth Amendment proscribes: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII. The provision is incorporated through the Fourteenth Amendment and made applicable to the states. *Robinson v. California*, 370 U.S. 660, 675 (1962). “The death penalty can be justified, when it can be justified, only to the extent that it is necessary to serve vital and legitimate penological goals.” *Ceja v. Stewart*, 134 F.3d 1368, 1375 (9th Cir. 1998) (Fletcher, J., dissenting).

Attorney General Kamala Harris appealed the decision, stating that it is “not supported by the law.”<sup>6</sup> The Eighth Amendment claim the Attorney General disputes encompasses two issues related to the administration of capital punishment: “inordinate delay” and “arbitrary execution.”<sup>7</sup> Mr. Jones is not the first to raise the claim, Judge Carney is not the first to recognize it, and this particular state entity is not the first to refute it.

The inordinate delay aspect of the challenge made its way to the doors of the Supreme Court twenty years ago in *Lackey v. Texas*.<sup>8</sup> Justice Stevens, dissenting from the denial of certiorari, acknowledged the “importance and novelty” and potential viability<sup>9</sup> of the petitioner’s claim that inflicting death after seventeen years on death row violated the Eighth Amendment because “the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted.”<sup>10</sup> This claim came to be known as a “*Lackey* claim.”<sup>11</sup> No lower court has ever granted relief on a *Lackey* claim,<sup>12</sup> and the Supreme Court has repeatedly denied certiorari on the issue.<sup>13</sup>

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6. See Maura Dolan, *California AG Kamala Harris to Appeal Ruling Against Death Penalty*, L.A. TIMES (Aug. 21, 2014, 2:41 PM), <http://www.latimes.com/local/lanow/la-me-ln-death-penalty-appeal-20140821-story.html>.

7. See *id.*

8. (*Lackey II*), 514 U.S. 1045 (1995). Lackey was arrested and charged with capital murder in mid-1977. Due to two mandatory appeals, his conviction was not finalized until fifteen years later. At that time, Lackey began state and federal habeas corpus proceedings. The state courts issued four death warrants for him, and in 1995 the Supreme Court twice stayed his execution. See *Lackey v. Scott (Lackey III)*, 514 U.S. 1093, 1093 (1995) (granting second stay application); *Lackey v. Texas (Lackey I)*, 514 U.S. 1001, 1001 (1995) (granting first stay application). He was executed in 1997 after the Supreme Court denied his third stay. See *In re Lackey*, 520 U.S. 1227, 1227 (1997) (denying third stay application and denying certiorari).

9. *Lackey II*, 514 U.S. at 1045 (“Though novel, petitioner’s claim is not without foundation.”).

10. *Id.*

11. See *LaGrand v. Stewart*, 170 F.3d 1158, 1160 (9th Cir. 1999) (“Claims that the Eighth Amendment would be violated by the execution of an inmate after many years [on death row] are called *Lackey* claims . . .”). See generally Newton, *supra* note 2, at 986–87 (discussing the development of *Lackey* claims and considering several Supreme Court decisions on the issue).

12. See, e.g., *People v. Frye*, 959 P.2d 183 (Cal. 1998); *People v. Ochoa*, 28 P.3d 78 (Cal. 2001); *People v. Brown*, 93 P.3d 244 (Cal. 2004).

13. See Newton, *supra* note 2, at 987. A few years after *Lackey*, the Ninth Circuit denied a stay of execution on the inordinate delay issue in *Ceja v. Stewart*, 134 F.3d 1368 (9th Cir. 1998). At the time, Judge Fletcher dissented from the denial and urged the court to address the merits of the claim on the basis that the loss of penological purposes resulting from twenty-three years waiting on death row renders an execution cruel and unusual punishment. See *id.* at 1369 (Fletcher, J., dissenting).

Mr. Jones's claim, which challenged the inordinate delay not only in his case but statewide, is referred to as a systemic *Lackey* claim.<sup>14</sup> Judge Carney's decision to grant habeas relief on this ground vacated Mr. Jones's death sentence. The district court decision, however, has no precedential effect; indeed, the Ninth Circuit has since reversed it.<sup>15</sup> Nevertheless, this case is an ideal vehicle through which the Supreme Court can address the unconstitutional manner in which California applies its death penalty law.<sup>16</sup>

This Comment contends that the timing is right for the Supreme Court to hear the bell toll. Part II presents a statement of the case, including a description of the crime and Mr. Jones's original conviction and subsequent appeals. Part III discusses a small portion of the relevant historical framework, both constitutional law and California legislation. Part IV examines Judge Carney's reasoning, and Part V addresses the criticisms of his reasoning. This Comment concludes that the time has come for the Supreme Court to do away with capital punishment.

## II. STATEMENT OF THE CASE

On April 7, 1995, a jury convicted Ernest Dewayne Jones of the first-degree murder and rape of his live-in girlfriend's mother.<sup>17</sup> But Mr. Jones's courtroom issues started long before the jury deliberated.

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14. See, e.g., Newton, *supra* note 2, at 989. Commentators assert that a systemic *Lackey* claim should carry more constitutional weight because it addresses the broader effects on the purposes of punishment. *Id.* at 988–89.

15. Jones v. Davis, 806 F.3d 538 (2015). Although the court dismissed on the procedural ground that Supreme Court precedent prevents federal courts from “recogniz[ing] constitutional rights that create new procedural rules,” its “reasoning was flawed on many levels.” Erwin Chemerinsky, *Appeals Court Gets It Wrong on Death Penalty*, ORANGE COUNTY REG. (Nov. 19, 2015, 12:00 AM), <http://www.ocregister.com/articles/court-692674-death-federal.html>. Rather:

[T]he Supreme Court repeatedly has said that changes in substantive constitutional rights, as opposed to procedural ones, always can be the basis for habeas corpus relief. That is exactly what Judge Carney found in holding the death penalty unconstitutional: its application in California is so arbitrary that the state cannot apply it in a constitutional manner.

*Id.* The Ninth Circuit also denied Mr. Jones's petitions for rehearing and rehearing en banc. Order, Jones v. Davis, 806 F.3d 538 (2015) (No. 14-56373), ECF No. 97.

16. See Chemerinsky, *supra* note 15 (“The decision of the 9th Circuit in *Jones v. Davis* is just the most recent example of justice being denied on habeas corpus.”).

17. See Jones v. Chappell, 31 F. Supp. 3d 1050, 1052–53 (C.D. Cal. 2014); People v. Jones, 64 P.3d 762 (Cal. 2003).

First, the trial court denied his pre-trial motion for a new attorney.<sup>18</sup> Then, it allowed the prosecutor to remove two prospective jurors on the basis that they “would be unable to faithfully and impartially apply the case before the jur[y].”<sup>19</sup> The first juror indicated he could vote for the death penalty “in the right case,”<sup>20</sup> but also gave conflicting statements suggesting that he was “against capital punishment.”<sup>21</sup> The second juror suggested that he would require the prosecution to prove the defendant’s guilt to an absolute certainty before voting for a death sentence.<sup>22</sup> Both jurors were excused, and the case proceeded to trial.

#### A. *The Crime*

The crime took place on August 24, 1992—a day Mr. Jones spent buying and using marijuana and cocaine,<sup>23</sup> purportedly for the first time in seven years.<sup>24</sup> Mr. Jones was involved with a woman named Pamela Miller, and that evening he traveled a few blocks to her parents’ house to get some more money for some more drugs.<sup>25</sup> At this point, the prosecution and defense stories diverge, but the ending is the same: Pamela’s mother, Mrs. Miller, was tragically raped and murdered at the hands of Mr. Jones.<sup>26</sup>

The defense did not contest that Mr. Jones raped and killed Mrs. Miller; Mr. Jones only challenged the circumstances and the requisite intent to commit the crimes.<sup>27</sup> According to the defense, Mrs. Miller threatened and attacked Mr. Jones with a knife after he disclosed a domestic dispute with her daughter.<sup>28</sup> Mr. Jones blacked out, heard voices, and “came to” after raping and fatally stabbing Mrs. Miller.<sup>29</sup> He fled the apartment in the Millers’ station wagon, ran from police, and attempted suicide before he was caught.<sup>30</sup>

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18. *People v. Jones*, 64 P.3d at 771–72.

19. *Id.* at 773.

20. *Id.*

21. *Id.* n.2.

22. *Id.* at 774.

23. *Id.* at 768.

24. *Id.* at 769.

25. *Id.* at 770.

26. *Id.*

27. *See id.*

28. *Id.*

29. *See id.*

30. *Id.* Mr. Jones shot himself in the chest with a rifle taken from the Millers’ house. *Id.* He was unconscious and on a respirator for one week and spent two weeks recovering. *Id.*

### B. The Penalty

The jury found Mr. Jones guilty of first-degree murder and rape under the special circumstance allegation that the murder was committed in the commission of the rape.<sup>31</sup> During the penalty phase, the prosecution presented evidence that the defendant lacked remorse and that he did not hear voices for the year leading up to the murder.<sup>32</sup> The prosecution also noted that he had committed two previous sexual assaults.<sup>33</sup>

The defense painted a picture of the “living hell” in which the defendant grew up.<sup>34</sup> Both of his parents were alcoholics, used marijuana in front of him and his siblings, and had physical altercations, including one occasion when his mother stabbed his father.<sup>35</sup> His mother repeatedly cheated on his father, and she once told his father, in the defendant’s presence, that he was not the defendant’s father.<sup>36</sup> After Mr. Jones’ father left the family, his mother constantly beat him and his siblings with “[w]hatever she had in her hands.”<sup>37</sup>

At the time of the crime, Mr. Jones reportedly “‘slipped back into [his] childhood’ and had a vision of walking into a room where his mother was with a man ‘who wasn’t [his] father.’”<sup>38</sup> Based on prior reports and interviews with Mr. Jones, a court-appointed psychiatrist diagnosed him with schizoaffective schizophrenia.<sup>39</sup> Despite the extensive mitigating evidence, the jury set the penalty at death. The trial court denied the defendant’s motion for a new trial and his motion for modification of the sentence.<sup>40</sup>

On appeal, Mr. Jones challenged California’s death penalty statute on several grounds.<sup>41</sup> One of the challenges was that an

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31. *Id.* at 767.

32. *Id.* at 771.

33. *Id.* at 769, 771.

34. *Id.* at 771.

35. *Id.* (internal quotation marks omitted).

36. *Id.*

37. *Id.*

38. *Id.* at 770 (quoting another source).

39. *Id.* at 771. Notably, defense counsel failed to call the psychiatrist during the guilt phase to testify as to the defendant’s ability to form the specific intent to commit rape. Defendant later alleged ineffective assistance of counsel on this ground. *Id.* at 777–78.

40. *Id.* at 767.

41. *Id.* at 786. The challenges were that: (1) it does not require the jury to make specific written findings as to aggravating factors; (2) it does not require that the jury return unanimous

inmate suffers cruel and unusual punishment due to the inherent delays in resolving his appeal.<sup>42</sup> The court responded unflinchingly: “If the appeal results in reversal of the death judgment, he has suffered no conceivable prejudice, while if the judgment is affirmed, the delay has prolonged his life.”<sup>43</sup>

Mr. Jones sat on death row for eight years before the California Supreme Court affirmed his conviction.<sup>44</sup> The judgment became final on October 21, 2003, when the United States Supreme Court denied certiorari.<sup>45</sup> Mr. Jones’s habeas counsel filed his state habeas petition in October 2002.<sup>46</sup> In 2009, the California Supreme Court denied that petition in an unpublished order.<sup>47</sup>

One year later, Mr. Jones’s habeas counsel filed his petition for federal habeas relief.<sup>48</sup> In 2014, his counsel amended that petition to include allegations that the systemic and inordinate delay in California’s post-conviction review process creates an arbitrary system in which only a random handful of the hundreds sentenced to death will be executed.<sup>49</sup> Under these circumstances, execution serves no penological purpose and violates the constitutional proscription against cruel and unusual punishment.<sup>50</sup>

### III. HISTORICAL FRAMEWORK

“The meaning of ‘cruel and unusual punishment’ under the Eighth Amendment must be interpreted in a ‘flexible and dynamic manner,’ and measured against the ‘evolving standards of decency that mark the progress of a maturing society.’”<sup>51</sup> The provision developed from English common law “with the intention of placing

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written findings as to the aggravating factors; (3) it does not require that the jury be instructed on the presumption of life; and (4) it does not provide for intercase proportionality review. *Id.*

42. *Id.* at 787.

43. *Id.*

44. *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1060 (C.D. Cal. 2014); *see People v. Jones*, 64 P.3d 762, 762 (Cal. 2003).

45. *Jones*, 31 F. Supp. 3d at 1060; *see Jones v. California*, 540 U.S. 952 (2003).

46. *Jones*, 31 F. Supp. 3d at 1060.

47. *Id.*

48. *Id.*

49. *Id.*; *see First Amended Petition for Writ of Habeas Corpus, Jones v. Chappell*, 31 F. Supp. 3d 1050 (C.D. Cal. 2014) (No. CV 09-02158-CJC).

50. *See Jones*, 31 F. Supp. 3d at 1061.

51. *Fierro v. Gomez*, 77 F.3d 301, 306 (9th Cir. 1996), *vacated*, 519 U.S. 918 (1996), *remanded sub nom. Fierro v. Terhune*, 147 F.3d 1158 (9th Cir. 1998) (quoting *Gregg v. Georgia*, 428 U.S. 153, 171 (1976); *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

limits on the government and the potential abuse of this power against persons convicted of crimes.”<sup>52</sup> Specifically, it “was concerned primarily with selective or irregular application of harsh penalties.”<sup>53</sup> Notably, members of the First Congress, while debating the Bill of Rights, “objected to the words ‘cruel and unusual punishments’” as “being too indefinite” and “hav[ing] no meaning.”<sup>54</sup> That concern, expressed 226 years ago, proved prophetic, anticipating the labyrinth and resulting uncertainty that our death penalty jurisprudence has created.

### A. Constitutional Law

In 1972, the California Supreme Court determined that the death penalty violated the California Constitution’s prohibition against cruel *or* unusual punishment, in part due to the extreme delays between sentencing and execution.<sup>55</sup> That same year, the United States Supreme Court heard *Furman v. Georgia*,<sup>56</sup> a consolidation of three cases in which petitioners challenged their death sentences under the Eighth and Fourteenth Amendments.<sup>57</sup> In a 5-4 decision, the Court’s one-paragraph *per curiam* opinion held that capital punishment as applied in Texas and Georgia constituted cruel and unusual punishment.<sup>58</sup> Although *Furman* involved individual claims challenging the death penalty as applied in Georgia and Texas, the resulting decision, comprising five separate opinions, abolished the entire system of capital punishment throughout the United States.<sup>59</sup>

The opinion was sweeping, but its reasoning was not clear. The majority in *Furman* could not agree on a rationale and issued five

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52. *Risdal v. Martin*, 810 F. Supp. 1049, 1052–53 (S.D. Iowa 1993) (citing *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266 (1989)).

53. *Furman v. Georgia*, 408 U.S. 238, 242 (1972) (Douglas, J., concurring).

54. *Id.* at 244 (citing 1 *Annals of Cong.* 754 (1789)).

55. *See People v. Anderson*, 493 P.2d 880, 894 (Cal. 1972) (en banc), *superseded by constitutional amendment*, CAL. CONST. art. I, § 27. The full extent of the decision is beyond the scope of this Comment. *See* CAL. CONST. art. I, § 17 (“Cruel or unusual punishment may not be inflicted or excessive fines imposed.”).

56. 408 U.S. 238 (1972).

57. *Id.* at 239–40. The Fourteenth Amendment incorporates the Eighth Amendment and applies it to the States. *See Robinson v. California*, 370 U.S. 660 (1962).

58. *Furman*, 408 U.S. at 239 (per curiam).

59. *See id.* at 411 (Blackmun, J., dissenting) (“Not only are the capital punishment laws of 39 States and the District of Columbia struck down, but also all those provisions of the federal statutory structure . . .”); Brent E. Newton, *The Slow Wheels of Furman’s Machinery of Death*, 13 J. APP. PRAC. & PROCESS 41, 47 (2012).

separate opinions.<sup>60</sup> Four of the opinions focused, at least in part, on the arbitrary selection of who receives a death sentence.<sup>61</sup> Justice Stewart articulated the issue most vividly: “These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . [T]he petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.”<sup>62</sup>

Beyond the mere arbitrariness rendering capital punishment cruel and unusual, Justice Brennan cited the California Supreme Court, recognizing the psychological toll on an inmate awaiting execution.<sup>63</sup> Perhaps foreshadowing the future *Lackey* claim, he acknowledged this mental anguish and factored it into his equation for calculating the unstated definition of “cruel.”<sup>64</sup> All of the opinions—even the dissents—made reference to the purposes of punishment, indicating that a punishment inflicted by the State must serve a purpose to pass constitutional muster.

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60. *Furman*, 408 U.S. at 414–15 (Powell, J., dissenting) (summarizing the distinct reasoning of the five majority opinions).

61. “Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied . . .” *Id.* at 255 (Douglas, J., concurring). Justice Brennan expounded on the history of the Eighth Amendment, then cited “four principles by which we may determine whether a particular punishment is ‘cruel and unusual,’” *id.* at 281 (Brennan, J., concurring), including “that the State must not arbitrarily inflict a severe punishment,” *id.* at 291. “I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed.” *Id.* at 310 (Stewart, J., concurring). And Justice White stated, “the death penalty is exacted with great infrequency even for the most atrocious crimes and that 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). Justice Marshall did not specifically reference its arbitrary imposition, but “engage[d] in a long and tedious journey,” *id.* at 370 (Marshall, J., concurring), to arrive at the conclusion that “the death penalty is an excessive and unnecessary punishment that violates the Eighth Amendment,” *id.* at 358–59.

62. *Id.* at 309–10 (Stewart, J., concurring).

63. *Id.* at 288 (Brennan, J., concurring) (citing *People v. Anderson*, 493 P.2d 880, 894 (Cal. 1972) (en banc), *superseded by constitutional amendment*, CAL. CONST. art. I, § 27 (“As the California Supreme Court pointed out, ‘the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.’”); *see, e.g.*, Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1168–69 (2009) (“But it is not just the physical pain associated with death that may make it different in kind from other punishments, for ‘mental pain is an inseparable part of our practice of punishing criminals by death.’” (quoting *Furman*, 408 U.S. at 288)).

64. *Furman*, 408 U.S. at 288 (Brennan, J., concurring) (“In addition, we know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death.”).

The death penalty moratorium was short-lived. Four years later, in 1976, the Supreme Court heard five death penalty cases, including the often-cited *Gregg v. Georgia*.<sup>65</sup> The Court upheld statutory schemes in three of the cases, but rejected mandatory death-penalty statutes in Louisiana and North Carolina. The Court based its decisions on the premise that the Eighth Amendment does not prohibit capital punishment so long as “two principal social purposes” are served: retribution and deterrence.<sup>66</sup> Since *Furman* emphasized the “death is different”<sup>67</sup> premise, many post-*Furman* statutes require “meaningful appellate review”<sup>68</sup> and mandate that a defendant take advantage of this process.<sup>69</sup>

Ironically, the inordinate delay prevalent not just in California but throughout the country is attributed to the post-*Furman* statutory regimes that require States to painstakingly ensure that capital punishment is constitutionally administered.<sup>70</sup> But it is a problem of relatively recent origin. As many scholars have noted, the 1976 cases upholding post-*Furman* death-penalty statutes were decided at “a time when delays in the administration of the death penalty obviously did not exist.”<sup>71</sup> So perhaps it was not too surprising when the Court saw the “*Lackey* claim” raised for the first time nearly twenty years later.<sup>72</sup>

Justice Stevens, often joined by Justice Breyer, has repeatedly expressed his opinion that execution after such lengthy delays is “unacceptably cruel.”<sup>73</sup> He bases this belief on the “especially

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65. 428 U.S. 153, 207 (1976) (upholding post-*Furman* death-penalty statute); see also *Proffitt v. Florida*, 428 U.S. 242, 260 (1976) (same); *Jurek v. Texas*, 428 U.S. 262 (1976) (same); *Roberts v. Louisiana*, 428 U.S. 325, 360 (1976) (invalidating mandatory death-penalty statute); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (same).

66. *Gregg*, 428 U.S. at 183.

67. See *Furman*, 408 U.S. at 287 (Brennan, J., concurring) (“Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity.”). But see *Atkins v. Virginia*, 536 U.S. 304, 337–44 (2002) (Scalia, J., dissenting) (explaining that “death is different” jurisprudence lacks historical support).

68. *Parker v. Dugger*, 498 U.S. 308, 321 (1991).

69. See, e.g., Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-on Sentence*, 46 CASE W. RES. L. REV. 1, 6 n.21 (1995) (citations omitted).

70. See, e.g., Newton, *supra* note 59, at 45–49 (describing the system of rules that developed after *Furman*).

71. Newton, *supra* note 2, at 986. The delays “obviously did not exist” because the system was still in its infancy stage four years after being dismantled by *Furman*. *Id.*

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

73. See, e.g., *Johnson v. Bredesen*, 558 U.S. 1067 (2009) (Stevens, J.) (expressing his view in a memorandum respecting the denial of certiorari and stay of execution for a petitioner who

severe, dehumanizing conditions of confinement” and the inability of a delayed execution to further the public purposes of retribution and deterrence.<sup>74</sup>

Every punishment administered throughout this country’s criminal justice system purportedly depends on a stated purpose,<sup>75</sup> and it is no different, and arguably more critical, in the case of capital punishment.<sup>76</sup> Supreme Court death-penalty jurisprudence repeatedly reflects on the role of deterrence and retribution in capital punishment, emphasizing that these are critical justifications for the existence of the death penalty.<sup>77</sup> Of course, scholars have always debated the death sentence’s ability to serve these purposes, even in the absence of inordinate delays. But the states’ attempts to rationalize the ultimate punishment lose force when that punishment is infrequently administered and follows decades of delay when it is administered.<sup>78</sup>

### 1. Defining and Finding Deterrent Effects<sup>79</sup>

The argument against any deterrence resulting from capital punishment begins with reason because a person contemplating a

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had been confined to a solitary cell awaiting his execution for nearly 29 years). Justice Stevens found Johnson’s case particularly compelling for four reasons: (1) the lack of physical evidence, (2) the petitioner maintaining his innocence, (3) the delays resulting from the state’s failure to disclose certain evidence, and (4) the procedural vehicle—42 U.S.C. § 1983—used to raise the *Lackey* claim. *Id.* at 1068.

74. *Id.* at 1069 (citations omitted).

75. See, e.g., Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1315 (2000).

76. “Within the capital punishment context [deterrence and retribution] hold special importance.” Sara Colón, *Capital Crime: How California’s Administration of the Death Penalty Violates the Eighth Amendment*, 97 CAL. L. REV. 1377, 1381 (2009).

77. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (finding that a death sentence for the rape of a child does not serve the purposes of punishment); *Roper v. Simmons*, 543 U.S. 551 (2005) (deeming the death penalty of juveniles “disproportionate” under the Eighth Amendment); *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the purposes of punishment are not served by executing the mentally retarded); *Enmund v. Florida*, 458 U.S. 782 (1982) (invalidating capital punishment for a non-triggerman conspirator).

78. “Proponents of this argument [that the death penalty can be justified by its deterrent effect] necessarily admit that its validity depends upon the existence of a system in which the punishment of death is invariably and swiftly imposed.” *Furman v. Georgia*, 408 U.S. 238, 302 (1972) (Brennan, J., concurring).

79. Deterrence is the principal utilitarian justification for capital punishment. See, e.g., Paul Robinson & John Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 454–55 (1997) (noting that Bentham developed “the classic formulation of the deterrence rationale for punishment”). In this context, deterrence is general, meaning that an offender’s punishment deters others from committing the same crime.

capital crime must distinguish between death and life in prison.<sup>80</sup> Capital punishment's purported deterrent effect can only be measured from a very small population: those criminals that would choose not to commit a crime that they would otherwise commit if their sole punishment was life in prison without the possibility of parole.<sup>81</sup> Under the modern capital punishment regime, these potential criminals must also consider a "risk of death [that] is remote and improbable" as opposed to "the risk of long-term imprisonment [that] is near and great." As Justice Brennan outlined in *Furman*:

The concern, then, is with a particular type of potential criminal, the rational person who will commit a capital crime knowing that the punishment is long-term imprisonment, which may well be for the rest of his life, but will not commit the crime knowing that the punishment is death. On the face of it, the assumption that such persons exist is implausible.<sup>82</sup>

Given the decades that regularly transpire between sentencing and death in our current system, the assumption that this hypothetical criminal and his ability to distinguish between two forms of punishment is not just implausible, it is preposterous. And so a critical issue emerges: How does one measure the deterrent effect solely from capital punishment when decades elapse between sentencing and execution? This issue becomes especially important when one considers the widely accepted premise that the effectiveness of a punishment depends on how soon the punishment follows the punishable behavior.<sup>83</sup>

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80. See, e.g., *Furman*, 408 U.S. at 301 (Brennan, J., concurring) ("Particularly is that true when the potential criminal . . . must not only consider the risk of punishment, but also distinguish between two possible punishments . . . . [T]he rational person who will commit a capital crime knowing that the punishment is long-term imprisonment . . . but will not commit the crime knowing that the punishment is death.").

81. The analysis must only consider this theoretical population because "[i]f there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary and therefore excessive." *Id.*

82. *Id.* at 301.

83. "All economists and criminologists accept that deterrence is a function not merely of the severity of a sanction, but also of its certainty and speed." Brief of Amici Curiae Empirical Scholars Concerning Deterrence and the Death Penalty in Support of Petitioner/Appellee, *Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015) (No. 14-56373) [hereinafter Empirical Scholars' Amicus Brief].

Delay in execution is not the only factor affecting a punishment's deterrent effect. When the punishment is infrequently imposed, as with the death penalty, deterrence is diminished even more because "common sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct and that the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring those crimes for which it may be exacted."<sup>84</sup> Measuring the deterrent effect of any punishment, even without the complications of extreme delays and arbitrariness, is an exercise in futility. In *Gregg*, the Supreme Court recognized the impossible task of determining a punishment's deterrent effect with any degree of certainty: "Although some of the studies [we have reviewed] suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view."<sup>85</sup> In the absence of "convincing empirical evidence," the Court deferred to the state.<sup>86</sup> As noted by subsequent opinions, the Court left open the question of whether it would even be possible to develop "convincing empirical evidence" refuting the justification for the death penalty.<sup>87</sup> In spite of the overwhelming support finding that the current system has no deterrent effect, the goal of "proving" this with "convincing empirical evidence" becomes seemingly impossible.

## 2. Is Retribution Reasonable After Decades of Waiting?

Retribution, the principal moral—as opposed to utilitarian—justification for capital punishment, stands for the premise: "you get what you deserve." But retribution is more than mere blood vengeance; it is the "expression of society's moral outrage at particularly offensive conduct."<sup>88</sup> As such, it provides a community with closure and seeks to ameliorate vigilante justice.<sup>89</sup> But

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84. *Furman*, 408 U.S. at 312 (White, J., concurring).

85. *Gregg v. Georgia*, 428 U.S. 153, 185 (1976).

86. *Id.*

87. "The question that the Court deliberately left open in *Gregg* was what might constitute 'more convincing evidence' that a particular application of the death penalty is, in fact, 'without [penological] justification.'" *Ceja v. Stewart*, 134 F.3d 1368, 1375 (9th Cir. 1998) (citations omitted).

88. *Gregg*, 428 U.S. at 183.

89. "When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of

retribution is falling out of favor as a legitimate justification to capital punishment—why?<sup>90</sup> And the plausibility of providing closure to a community thirty years after sentencing is remote at best given the fluidity of communities. So, is the prospect of retribution even reasonable given the inordinate delays?

### B. California's Legislative History

Nine months after the California Supreme Court ruled capital punishment violated the state Constitution in 1972,<sup>91</sup> the California electorate amended the state Constitution and superseded the decision.<sup>92</sup> Five years later, in 1977, the California legislature enacted a statute that followed the constitutional guidelines outlined in *Gregg*. In 1978, California voters passed Proposition 7, superseding the 1977 statute. Proposition 7 is the death penalty statute currently in force.

In 2012, a ballot initiative to replace the death penalty with life without parole was narrowly defeated by a vote of 52-48 percent.<sup>93</sup> Despite evidence that death penalty support is at an all-time low since voters approved Proposition 7, opponents of capital punishment have not solidified plans for another ballot initiative.<sup>94</sup> Under the California Constitution, “legislative amendment or repeal by statute, initiative, or referendum” is necessary to remove the death penalty as a sentencing option.<sup>95</sup> Judge Carney, however, was not willing to wait for the voters to change the fate of Ernest Dewayne Jones.

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anarchy—of self-help, vigilante justice, and lynch law.” *Furman*, 408 U.S. at 308 (Stewart, J., concurring).

90. “Retaliation, vengeance, and retribution have been roundly condemned as intolerable aspirations for a government in a free society.” *Id.* at 343 (Marshall, J., concurring).

91. *See* *People v. Anderson*, 493 P.2d 880, 880 (Cal. 1972) (en banc), *superseded by constitutional amendment*, CAL. CONST. art. I, § 27.

92. *History of Capital Punishment in California*, CAL. DEP’T OF CORR. & REHAB., [http://www.cdcr.ca.gov/Capital\\_Punishment/history\\_of\\_capital\\_punishment.html](http://www.cdcr.ca.gov/Capital_Punishment/history_of_capital_punishment.html) (last visited Aug. 22, 2015).

93. Howard Mintz, *Death Penalty Support Slipping in California, Poll Says*, SAN JOSE MERCURY NEWS (Sept. 12, 2014), [http://mercurynews.com/California/ci\\_26519875/field-poll-support-death-penalty-california-slipping](http://mercurynews.com/California/ci_26519875/field-poll-support-death-penalty-california-slipping).

94. *Id.*

95. CAL. CONST. art. I, § 27.

## IV. JUDGE CARNEY'S REASONING

Judge Carney began his analysis with the unequivocal assertion that “no rational person can question that the execution of an individual carries with it the solemn obligation of the government to ensure that the punishment is not arbitrarily imposed and that it furthers the interests of society.”<sup>96</sup> Then he reminded the reader of the finality of death.<sup>97</sup> Mortality—a reality ignored by most people as they live their everyday lives—needs the help of numbers to fathom its severity; “the punishment of death ‘differs more from life imprisonment than a one-hundred-year prison term differs from one of only a year or two.’”<sup>98</sup> By quantifying the unimaginable, Judge Carney set the tone for his analysis.

He focused his reasoning on *Furman*<sup>99</sup> to reinforce his conclusion that the arbitrary imposition of the death penalty is “abhorrent to the Constitution.”<sup>100</sup> He relied on *Furman* and its progeny to reestablish the premise that when the execution of death row inmates is randomly imposed, the sentence cannot possibly serve the penological purposes of deterrence and retribution.<sup>101</sup> He moved on to quickly dispose of the state’s arguments, and then concluded that in the absence of social objectives justifying the state-sanctioned murder of inmates, a death sentence equates to cruel and unusual punishment forbidden by the Constitution.<sup>102</sup>

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96. *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1061 (C.D. Cal. 2014).

97. *Id.* “As the American tradition of law has long recognized, death is a punishment different in kind from any other.” *Id.*

98. *Id.* at 1061 (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)).

99. *See infra* Section V.A.

100. *Jones*, 31 F. Supp. 3d at 1061.

101. *Id.* “[I]n *Gregg v. Georgia*, when the Supreme Court lifted what had become *Furman*’s de facto moratorium on the death penalty, it did so with the understanding that such punishment should serve these ‘two principal social purposes.’” *Id.* at 1062 (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)). He continued, “[s]ince that time, the Supreme Court has harkened back to these twin purposes to guide its evaluation of challenges to the death penalty under the Eighth Amendment.” *Id.* (citing *Kennedy v. Louisiana*, 554 U.S. 407, 441 (2008)); *see also* Newton, *supra* note 2, at 999 (collecting cases analyzing the purposes of capital punishment).

102. *Jones*, 31 F. Supp. 3d at 1061; *see also* Colón, *supra* note 76, at 1384–85 (contending that “California’s capital punishment system is unconstitutional both because its delays and low execution rate mean that it in many ways is not retributive or deterrent at all, and because it is never more retributive or deterrent than life without parole.”).

*A. Questioning California's "Death Lottery"*

Judge Carney first attacked the arbitrariness of California's death penalty system with some alarming statistics. In the thirty-seven years since the California legislature reinstated the death penalty, thirteen of the more than 900 individuals sentenced to death have been executed.<sup>103</sup> That equates to an execution rate of 1.4 percent. Of the remainder, ninety-four have died of other causes, thirty-nine were granted relief and have not been resentenced, and 748 are currently on death row, 40 percent of whom have been there longer than nineteen years.<sup>104</sup> The average wait for an inmate to go through the mandatory review process to execution is twenty-five years.<sup>105</sup> Further, due to the ever-increasing number of inmates sentenced to death and the veritable halt in executions due to federal and state court decisions invalidating the capital punishment for different reasons, this number is likely to increase.<sup>106</sup> Even if California never again sentenced another convict to death, "the State would have to conduct more than one execution a week for the next fourteen years" just to carry out the sentences already imposed.<sup>107</sup>

The proposition of carrying out this vast number of executions in a timely manner is unrealistic. This is especially true considering "only 17 inmates currently on Death Row have even completed the post-conviction review process and are awaiting their execution."<sup>108</sup> With this recognition, Judge Carney rang the bell: "[f]or all practical purposes then, a sentence of death in California is a sentence of life imprisonment with the remote possibility of death—a sentence no rational legislature or jury could ever impose."<sup>109</sup>

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103. *Jones*, 31 F. Supp. 3d at 1062.

104. *Id.* at 1053–54.

105. *Id.* at 1054. "Typically, the lapse of time between sentence and execution is twenty-five years, twice the national average, and is growing wider each year." *Id.* (citing Gerald Uelmen, *Death Penalty Appeals and Habeas Proceedings: The California Experience*, 93 MARQ. L. REV. 495, 496 (2009)).

106. *Id.* at 1062. "[N]o inmate has been executed since 2006, and there is no evidence to suggest that executions will resume in the reasonably near future." *Id.* Executions halted in 2006 were due to challenges of the lethal injection system utilized by California. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

Judge Carney then made the assumption that executions will one day resume in California, and a random selection of inmates will be put to death.<sup>110</sup>

Yet their selection for execution will not depend on 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 will it either depend on the perhaps neutral criterion of executing inmates in the order in which they arrived on Death Row.<sup>111</sup>

Rather, whether an inmate will walk down death row depends solely on “how quickly the inmate proceeds through the State’s dysfunctional post-conviction review process.”<sup>112</sup>

And for Mr. Jones, this post-conviction process is on its way to progressing *more quickly* than average. Judge Carney projected it would likely equate to about twenty-three years after Mr. Jones received his initial sentence.<sup>113</sup> At the time of Judge Carney’s order, 285 out of the 380 inmates on Death Row had been there longer than Mr. Jones.<sup>114</sup> Given the delays, “most of them will never face execution as a realistic possibility, unlike Mr. Jones.”<sup>115</sup> In Judge Carney’s view, a system “where so many are sentenced to death but only a random few are actually executed” violates “the most fundamental of constitutional protections—that the government shall not be permitted to arbitrarily inflict the ultimate punishment of death.”<sup>116</sup>

### *B. Negating the Purposes of Punishment*

After establishing the infrequency of actual executions, Judge Carney emphasized the veritable depletion of deterrent and retributive justifications that results from the extraordinary delay inherent in the post-conviction review process. These requisite

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110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 1063. Compare to the average of twenty-five years. *Id.* at 1054; see Uelmen, *supra* note 105.

114. *Jones*, 31 F. Supp. 3d at 1063.

115. *Id.*

116. *Id.*

rationales are the substance that renders a punishment just, and their absence challenges the very notion of a civilized society.<sup>117</sup>

Judge Carney cited “the law[] and common sense itself” to support the claim that “the deterrent effect of *any* punishment is contingent upon the certainty and timeliness of its imposition.”<sup>118</sup> He emphasized that this condition is no different in the context of the death penalty.<sup>119</sup> Independent of the penalty’s arbitrary imposition, Judge Carney reasoned the extraordinary delay “seriously undermines the continued deterrent effect of the State’s death penalty.”<sup>120</sup> He followed this assertion with a reminder that “delay is not the only problem,” and reemphasized the miniscule possibility that someone sentenced to death will actually be executed.<sup>121</sup> He summarized: “Under such a system, the death penalty is about as effective a deterrent to capital crime as the possibility of a lightning strike is to going outside in the rain.”<sup>122</sup>

The Order continued with a discussion concerning the ways in which “inordinate delay and unpredictability of executions . . . defeat the death penalty’s retributive objective.”<sup>123</sup> Judge Carney countered the Supreme Court’s recognition of retribution as a “constitutionally permissible aim” with the contention that “inordinate delay frustrates that aim.”<sup>124</sup> He then, once again, cited *Furman* to support his theory.<sup>125</sup>

### C. Addressing the State’s Arguments

Buried in the middle of Judge Carney’s analysis is the recognition that “courts have thus far generally not accepted the theory that extraordinary delay between sentencing and execution violates the Eighth Amendment.”<sup>126</sup> Rather, courts rationalize the delay by first attributing it to a “constitutional safeguard”—i.e., the state’s attempt to ensure the accuracy of the conviction, and next,

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117. *Id.* (“Such an outcome is antithetical to any civilized notion of just punishment.”).

118. *Id.* at 1064 (emphasis added).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* Notably, “[t]here have been fewer executions in California than deaths by lightning strike.” Colón, *supra* note 76, at 1377.

123. *Jones*, 31 F. Supp. 3d at 1064.

124. *Id.* at 1064–65 (citing *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)).

125. *Id.* at 1065.

126. *Id.*

assigning its cause to the petitioner.<sup>127</sup> But in the case of California's death penalty system, "such assumptions are simply incorrect."<sup>128</sup>

In California, the evidence indicates that much of the delay is caused by the state itself. Extreme delay is not an isolated problem, and in the majority of cases, it is not due to an individual petitioner's frivolous filings. The systemic and inordinate delay, averaging twenty-five years, results from the post-conviction review process. Judge Carney cited a report by the California Commission on the Fair Administration of Justice,<sup>129</sup> which proposed reforms estimated to reduce the time between sentencing and execution to between eleven and fourteen years—on par with the national average. He quickly followed the Commission's recommended changes with a warning that the "process should not be curtailed in favor of speed over accuracy."<sup>130</sup>

Under federal statute, a petitioner must exhaust his available state remedies prior to a federal court granting relief.<sup>131</sup> Mr. Jones did not complete this state review process before Judge Carney decided to hear the case, and so the state argued that Mr. Jones's claim was procedurally barred. Judge Carney rebutted this contention by pointing out that requiring the petitioner to return to the California Supreme Court would force him to return to the system that "he has established is dysfunctional and incapable of protecting his constitutional rights."<sup>132</sup>

Judge Carney concluded his analysis with a recitation of the state's broken promise. A promise made to the citizens of the state, the jurors who impose the penalty, the victims and their loved ones, and the hundreds of death row inmates. These death row inmates suffer through inordinate delays before their time runs up. But there

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127. *Id.* (citing *Thompson v. McNeil*, 556 U.S. 1114 (2009); *People v. Anderson*, 25 Cal.4th 543, 606 (2001)).

128. *Id.* at 1066.

129. The California State Legislature established the Commission in 2004. The Commission issued its final report in 2008. *Id.* at 1055. The report is available at <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf>.

130. *Id.* at 1067. Judge Carney reminds the reader that federal habeas relief has been granted in over half of the cases that have reached this stage. *Id.*

131. See Anti-Terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(b) (2012). AEDPA has proved a monumental hurdle for death row inmates seeking habeas corpus review. Rightly so, as Congress's stated purpose for enacting AEDPA was to decrease abuse of the habeas corpus process.

132. *Jones*, 31 F. Supp. 3d at 1068.

is no way for them to know when or if they will face execution. Judge Carney declared that such a system lacks a penological purpose, and is therefore, unconstitutional.

## V. ANALYSIS

Judge Carney's Order may ring true for abolitionists and discordant for supporters of the death penalty, but is Attorney General Harris correct in her assertion that his reasoning is "not supported by the law?"<sup>133</sup>

### A. *This Is Not Furman*

The opinion returns to *Furman* like a song leans on its chorus for support. So any analysis must begin with the recognition that the "arbitrariness" that Judge Carney referenced is qualitatively different from the arbitrary sentencing recognized by the *Furman* Court.<sup>134</sup> He acknowledged that the *Furman* Court faced "state sentencing schemes by which judges and juries were afforded virtually untrammelled discretion to decide whether to impose the ultimate sanction."<sup>135</sup> The petitioners in *Furman* challenged the death penalty "as applied" because evidence tended to establish that minorities were disproportionately sentenced to death.<sup>136</sup> This disparity may persist to this day, but without the blatant discrimination that previously permeated the system, it is difficult, if not impossible, to prove.<sup>137</sup>

But the disproportionate condemnation of minorities—quantifiable or not—was not ultimately relevant to Judge Carney's

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133. Dolan, *supra* note 6.

134. *Furman v. Georgia*, 408 U.S. 238, 242 (1972) (Douglas, J., concurring) ("It would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.").

135. *Jones*, 31 F. Supp. 3d at 1061.

136. *Furman*, 408 U.S. at 257 (Douglas, J., concurring) ("[These discretionary statutes] are pregnant with discrimination."); *id.* at 364 (Marshall, J., concurring) ("Indeed, a look at the bare statistics regarding executions is enough to betray much of the discrimination."). Justice Stewart noted, however, that "racial discrimination has not been proved." *Id.* at 310 (Stewart, J., concurring).

137. *See McClesky v. Kemp*, 481 U.S. 279 (1987) (rejecting defendant's constitutional challenge to the death penalty, which was based on statistical evidence of racial discrimination in sentencing); *see generally* LINDA E. CARTER ET AL., UNDERSTANDING CAPITAL PUNISHMENT § 20 (3d ed. 2012) (discussing various race issues that factor into the death penalty discussion, including: prosecutorial discretion, the race of the victim, jury selection, and unconscious bias).

decision. It was the “arbitrary” *execution* of those already sentenced to death that warranted the application of the same principles on which *Furman* turned: “The Eighth Amendment simply cannot be read to proscribe a state from randomly selecting which few members of its criminal population it will sentence to death, but to allow that same state to randomly select which trivial few of those condemned it will actually execute.”<sup>138</sup> He concluded: “Arbitrariness in execution is still arbitrary, regardless of when in the process the arbitrariness arises.”<sup>139</sup>

Judge Carney’s point is well taken, and the fractured *Furman* concurrences support his contention.<sup>140</sup> The opinions don’t distinguish between arbitrariness in sentencing and arbitrariness in execution because the absence of inordinate delays negated the possibility that the condemned would be arbitrarily selected to face death. But there is a fundamental difference between the intent to *sentence* an arbitrary few to death, and the constitutionally mandated, unintentionally-random churn through the “machinery of death.”<sup>141</sup> It is much easier to conclude that the latter is simply an unfortunate but necessary consequence of the legal system established to protect the inmate.<sup>142</sup> It is easier, but it is not right. The focus of the analysis must be on the purposes of punishment. When these purposes are lost in the cloud of arbitrariness, a punishment can no longer pass constitutional muster.

Justice Thomas, in response to Justice Brennan, has repeatedly argued against the conclusion that inordinate delays violate the Eighth Amendment.<sup>143</sup> And Justice Thomas is not alone. It may be difficult for the average American to conclude that forcing our vilest

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138. *Jones*, 31 F. Supp. 3d at 1063.

139. *Id.*

140. See *Furman*, 408 U.S. at 397 (Burger, J., dissenting) (“The critical factor in the concurring opinions . . . is the infrequency with which the penalty is imposed.”).

141. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting); see *Newton*, *supra* note 59, at 45.

142. In fact, the Ninth Circuit has relied on this reasoning to deny a stay of execution. See, e.g., *McKenzie v. Day*, 57 F.3d 1461 (9th Cir.), *opinion adopted on reh’g en banc*, 57 F.3d 1493 (9th Cir. 1995) (suggesting that delays caused by satisfying the Eighth Amendment cannot themselves violate it).

143. See, e.g., *Knight v. Florida*, 528 U.S. 990 (1999) (Thomas, J., concurring) (“I am unaware of any support in the American constitutional tradition or in this Court’s precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed.”). But note that under many statutory schemes, an inmate’s post-conviction appeal process is obligatory.

criminals<sup>144</sup> to wait for death somehow violates the Constitution. Assuming they committed the crimes of which they are accused<sup>145</sup> and they received a fair trial,<sup>146</sup> critics could easily argue that *waiting* for death is better than being dead, so these inmates have no grounds for complaint. But these critics must change their perspective. Death row inmates are not merely waiting for death; they are waiting to be heard. One need only consider that 60 percent of those inmates that have made it through the post-conviction relief process have had their sentences vacated.<sup>147</sup> That powerful statistic should be sufficient to give Justice Thomas and his adherents pause.

Neither of the elements—inordinate delay and arbitrary selection—can be viewed in isolation. The extremely long wait diminishes the legitimizing purposes to nearly nothing. The random selection constitutes cruel and unusual punishment under *Furman* and cannot be justified. Further, as noted above, the “life in prison, with the remote possibility of death”<sup>148</sup> is excessive because it is qualitatively more severe than life without parole,<sup>149</sup> and yet in application the distinction is blurred by the lengthy waits and high likelihood that execution will never take place. And so we turn back to *Furman*, and the relationship between the arbitrariness and the deterioration of penological purposes. For no matter the cause of the arbitrariness, the result is the same.<sup>150</sup>

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144. At various times throughout our jurisprudence, those sentenced to death have included: a non-triggerman with no intent to kill (*Enmund v. Florida*, 458 U.S. 782 (1982)); the mentally retarded (*Atkins v. Virginia*, 536 U.S. 304 (2002)); juvenile offenders (*Roper v. Simmons*, 543 U.S. 551 (2005)); and child rapists (*Kennedy v. Louisiana*, 554 U.S. 407 (2008)); see Newton, *supra* note 2, at 997.

145. According to the Death Penalty Information Center, 155 death row inmates have been exonerated since 1973. *Innocence: List of Those Freed from Death Row*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last visited Aug. 20, 2015). To be included on the Innocence List, a defendant must have been convicted, sentenced to death, and subsequently have either (1) been acquitted of all charges related to the particular crime, (2) had all charges dismissed by the prosecution, or (3) been granted a pardon based on evidence of innocence. *Id.*

146. This assumption is even more tenuous than the last. See *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1055 (C.D. Cal. 2014).

147. *Id.*

148. *Id.* at 1053.

149. The waiting is psychologically more severe in two respects. First, an inmate must wait more than ten years for a sentence to become final. And second, an inmate must live with the cloud of impending death. Additionally, the waiting is physically more severe due to the conditions of confinement.

150. “Certainly concern for arbitrariness would extend to execution, which is the actual implementation of the death sentence. In fact, perhaps subconsciously, some federal courts,

*B. The Place for Purpose*

If one accepts that capital punishment's penological purposes exist at all, then both the deterioration of those purposes over the decades inmates sit on death row and the increased chance that many of those inmates will never be executed are, hypothetically, trivial concerns so long as the threat of execution looms overhead.<sup>151</sup> And yet it is this very possibility that produces the mental anguish to which Justice Brennan so presciently referred. Although the Supreme Court relies on a purported purpose to constitutionalize a State's punishment, the equation should not be so definitive. A punishment may serve a purpose, however slight, and still be characterized as cruel and unusual.<sup>152</sup> The distinguishing factor is whether a punishment serves a purpose *more effectively* than a less severe form of punishment.<sup>153</sup> In the absence of this element, a punishment is excessive, and an excessive punishment is necessarily cruel.

This postulate is especially important when considering the "death is different" premise. Many opponents of Carney's reasoning, and supporters of the death penalty, rationalize that a "life with the remote chance of death" sentence is equivalent to a life sentence without the possibility of parole. But, as Judge Carney pointed out, these sentences are as different as a one year versus one hundred year sentence.<sup>154</sup> Although all living beings will pass, and humans possess the requisite consciousness to live with this realization every day, most of us do not face our days with the impending threat of execution hanging over our heads like an omnipresent storm cloud waiting to strike us with lightning.<sup>155</sup> The international community has accepted the contention that this double sentence—an unknown

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including the Supreme Court, since *Furman* have referred to arbitrary execution as opposed to arbitrary sentencing—though without reference to the ratio." Colón, *supra* note 76, at 1403.

151. The purported deterrent effect of capital punishment is one of the most debated aspects of the death penalty. The studies attempting to prove, or disprove, deterrence have been, and continue to be, inconclusive. *See, e.g.*, Empirical Scholars Amicus Brief, *supra* note 83, at 16.

152. It may also serve no purpose yet still pass constitutional muster. In his *Furman* dissent, Justice Blackmun noted, "capital punishment serves no useful purpose that can be demonstrated." *Furman v. Georgia*, 408 U.S. 238, 405 (1972) (Blackmun, J., dissenting).

153. *Id.* at 303 (Brennan, J., concurring) ("The question, however, is not whether death serves these supposed purposes of punishment, but whether death serves them more effectively than imprisonment.").

154. *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1061 (C.D. Cal. 2014).

155. "You can't condemn a person to death and not have them anticipate their death, imagine their death, and vicariously experience their death many, many times before they die." Colón, *supra* note 76, at 1395.

term of years in solitary confinement on death row, followed by execution—is akin to torture.<sup>156</sup> It is time for the Supreme Court to come to this realization as well.

To understand just how “death is different,” it is important to return to the statistics and consider what constitutes a final sentence. The majority of death row inmates currently awaiting execution have not even completed their *direct* appeal process. These defendants are forced to wait an average of three to five years just to be appointed counsel to represent them.<sup>157</sup> Add to that four years for the briefing process and two to three years to get on the California Supreme Court’s calendar, and “between 11.7 and 13.7 years will have elapsed” before a court has even heard a defendant’s direct appeal.<sup>158</sup> The years a defendant spends waiting to appeal his sentence are equivalent to years spent in purgatory—a no man’s land in between life and death. And this is how death is different. It is not the inevitability, for we all face that reality. And it is not attributable to an inmate’s death at the hands of the government. Rather, in the context of a system that will likely fail to execute its death row inmates, the vital distinguishing factor is that a death sentence sends a defendant down a different path, one where his voice is immediately muted for almost twelve years.

Some scholars suggest that this punishment, somewhere in between life and death, is the result of a deliberate effort in California to have the penalty serve no more than a symbolic purpose: a system that threatens to inflict the penalty, whether or not it would be imposed.<sup>159</sup> This “symbolic use of the death penalty” is a political compromise between anti and pro-death penalty advocates.<sup>160</sup> One can only hope that California’s dysfunctional system is not the result of a deliberate effort. The state cannot afford to play political games with people’s lives, when the cost could mean

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156. See, e.g., *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989), <http://hudoc.echr.coe.int/fre?i=001-57619>.

157. *Jones*, 31 F. Supp. 3d at 1056. Once sentenced to death, California law mandates an appeal to the California Supreme Court. CAL. PENAL CODE § 1239 (West 2004).

158. *Jones*, 31 F. Supp. 3d at 1057.

159. Colón, *supra* note 76, at 1402.

160. *Id.* at 1401 (citing William S. Lofquist, *Putting Them There, Keeping Them There, and Killing Them: An Analysis of State-Level Variations in Death Penalty Intensity*, 87 IOWA L. REV. 1505, 1520 (2002)).

the opportunity for the wrongfully convicted to be heard. So maybe Judge Carney forced the Legislature's hand.

*C. Judicial Activism: Removing the Role of the California Voters*

In November 2012, California voters rejected a referendum to repeal the death penalty. In California, the legislature cannot amend or repeal voter-initiated legislation without voter approval.<sup>161</sup> Further, the most recent poll suggests that California voters still support the death penalty,<sup>162</sup> despite its clutch-hold on the pockets of California voters.<sup>163</sup> In addition, six bills designed to improve the death penalty system have failed to make it through the California legislature since the Commission issued its report in 2008.<sup>164</sup> In that report, the Commission concluded that it would cost the State an additional \$95 million a year to properly administer the death

161. CAL. CONST. art. II, § 10.

162. See Mark DiCamillo & Mervin Field, *Voter Support for the Death Penalty Declines in California*, THE FIELD POLL (Sept. 12, 2014), <http://field.com/fieldpollonline/subscribers/RIs2486.pdf> (reporting 56 percent of voters in favor of keeping the death penalty and 34 percent opposed).

163. California spends \$184 million annually administering the death penalty, for a total of \$4 billion spent on capital punishment since 1978. See Arthur L. Alarcon & Paula M. Mitchell, *supra* note 4, at S41.

164. Those six bills are:

- (1) Senate Bill 1471 (2008), which attempted to streamline the post-conviction process by: (a) setting a one-year deadline for the filing of habeas petitions; (b) loosening the standards to allow more attorneys to qualify as defense counsel for capital defendants; and (c) allowing habeas petitions to be heard in trial court, S.B. 1471, 2007–2008 Leg., Reg. Sess. (Cal. 2008);
- (2) Senate Bill 1025 (2010), which sought to require the Supreme Court to develop procedures for initiating habeas corpus proceedings in trial courts, S.B. 1025, 2009–2010 Leg., Reg. Sess. (Cal. 2010);
- (3) Senate Constitutional Amendment 27 (2010), which would have allowed the California Supreme Court to transfer appellate review of death penalty cases to a court of appeals, with subsequent Supreme Court review, S. Const. Am. 27, 2009–2010 Leg., Reg. Sess. (Cal. 2010);
- (4) Senate Bill 490 (2011), which called for a referendum abolishing the death penalty, S.B. 490, 2011–2012 Leg., Reg. Sess. (Cal. 2011);
- (5) Senate Bill 1514 (2012), which proposed to remove the mandatory appeal following a death sentence and to allow a court of appeals to hear capital cases in place of the California Supreme Court, S.B. 1514, 2011–2012 Leg., Reg. Sess. (Cal. 2012); and
- (6) Senate Bill 779 (2013), which would have required a petitioner to file a habeas corpus in the court that imposed the sentence, reduced the standards for capital appellate and habeas counsel, sped up the appeals process, and allowed the use of the gas chamber for executions, S.B. 779, 2013–2014 Leg., Reg. Sess. (Cal. 2013).

penalty. The legislature is reluctant to reallocate funding in an already scant budget, and is unwilling to support a tax increase, simply for the purpose of addressing California's capital punishment system. And so it appears the deadlocked system is stuck spinning its wheels, burning fuel at a cost of \$184 million dollars a year, and yet going nowhere.

#### VI. THE FUTURE OF THE DEATH PENALTY IN CALIFORNIA AND IN THE UNITED STATES

Given the state of affairs, Judge Carney's Order sounds all the more desirable. Considering that it is built on *Furman*'s foundation, however amorphous, it should stand. The Ninth Circuit should affirm the district court decision, and the Supreme Court should hear the case.<sup>165</sup> It is time for the Court to outline the contours of cruel and unusual punishment, not just for the death row inmates, but also for the sake of civility in our society.

The statistics are staggering. And this Comment has not even focused on the most baffling figure—the \$4 billion price tag associated with California's current death penalty system. Members of the Supreme Court have repeatedly acknowledged that the length of time an inmate must wait on death row factors into the Eighth Amendment analysis. In prior decisions, the wait wasn't quite long enough for the Court to qualify the punishment as cruel and unusual. But now, California's twenty-five year average is twice the national average, and one and a half times the wait argued under the original *Lackey* claim. But those individual voices recognizing the potential legitimacy of a *Lackey* claim do not comprise clearly established Supreme Court precedent, which is required for an analysis to survive. For this reason, the Carney Order and subsequent amicus briefs to the Ninth Circuit shift the focus away from *Lackey* and squarely on *Furman*.

A punishment can only be justified if it serves a purpose, and it can only serve a purpose if it contributes something more than a less

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165. As another court noted, although the “[d]efendant may be correct that the current federal death penalty is so ‘hopelessly and irremediably arbitrary, capricious and inconsistent’ that it is unconstitutional, such a finding is not ours to make. Only the Supreme Court can overrule its conclusion in *Gregg* to find that the FDPA, even though it satisfies *Gregg*, it is unconstitutional.” *United States v. Barnes*, 532 F. Supp. 2d 625, 632 (S.D.N.Y. 2008) (citing *Gregg v. Georgia*, 428 U.S. 153 (1976)).

severe punishment. The evidence indicates that the death penalty, as administered, has no greater deterrent effect than a life sentence and serves no retribution twenty-five years after the crime. If anything, its brutalizing effect may increase crime by validating the idea that killing is acceptable under certain circumstances. Further, the unfulfilled promise to the victims' families shatters the community's faith in the system, ultimately leading to an increase in vigilante justice.

Currently, eighteen states and the District of Columbia have abolished the death penalty completely.<sup>166</sup> An additional eight states are under a moratorium.<sup>167</sup> Of these, half are official moratoriums declared by state governors, and the other half are de facto moratoriums due to judicial decree.<sup>168</sup> Another twelve state statuses are unclear due to specific challenges to lethal injection protocol.<sup>169</sup> According to the Death Penalty Information Center, this year, representatives in eleven state legislatures have introduced or plan to introduce bills to abolish the death penalty.<sup>170</sup> It is evident that the country is slowly but steadily progressing towards abolishing the death penalty. Unfortunately, California needs the help of the Court. When confronted with the facts, the truth is evident: the time has come for the death penalty to die.

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166. *States with and Without the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Aug. 22, 2015).

167. *Death Penalty in Flux*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-penalty-flux> (last visited Feb. 20, 2015).

168. *Id.*

169. *Id.*

170. *Recent Legislative Activity*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/recent-legislative-activity> (last visited Feb. 20, 2015).