14-56373

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERNEST DEWAYNE JONES,

Petitioner-Appellee,

v.

RON DAVIS, Acting Warden,

Respondent-Appellant.

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

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The district court vacated Jones's death sentence based on its own theory that system-wide "arbitrariness" in the pace of post-conviction review in California makes it unconstitutional for the State to execute Jones. As Jones acknowledges, this theory "differs fundamentally" from the claim he presented in state court. AAB 22. The district court's order is improper for two threshold reasons. First, Jones never exhausted this issue in state court. Second, the district court's arbitrariness theory may not be adopted or applied retroactively on federal collateral review because it would create a new constitutional rule. Jones argues that the State forfeited both objections, but the State repeatedly raised them during the rushed and unorthodox process conducted by the district court.

Even if this Court looks past these threshold defects, the district court's Eighth Amendment analysis is unsound. The court reasoned that the length of California's process for reviewing capital cases and variations in the pace of review across cases were evidence of arbitrariness, but the opposite is true. A deliberate and individualized process reflects California's recognition that post-conviction review is "an important additional safeguard *against* arbitrariness and caprice." *Gregg v. Georgia*, 428 U.S. 153, 198 (1976) (plurality opinion) (emphasis added). Everyone involved in this

process—counsel for the State, counsel for capital defendants, and the courts themselves—works carefully and methodically to ensure that death sentences are lawfully imposed and carried out only in appropriate cases. This is not a system "devoid of any principled standards." AAB 28. It is a system where principled standards are paramount. Those standards include strict qualification criteria for appointed counsel and the State's refusal to seek to execute any inmate until he has had a full and fair opportunity to challenge his conviction and sentence in state and federal court.

No doubt the State's post-conviction review system could be designed differently. California might achieve a swifter pace of review by modeling its system on those of States such as Texas or Arizona, as Jones suggests. *See* AAB 20. It might induce more defense attorneys to represent capital defendants by shifting resources away from other competing priorities to increase payment for appointed counsel above the current rate of $145 per hour. *See* AAB 15-16. Or state voters might revisit their 2012 rejection of Proposition 34 and abolish the death penalty altogether. All of these are policy options that will no doubt continue to be debated. But the existence of room for policy debate does not call into question the constitutionality of the State's current policy balance, which preserves the option of capital

punishment in some especially serious cases while also providing for careful judicial review.

ARGUMENT

I. SECTION 2254(d)(1) BARS RELIEF ON THE EIGHTH AMENDMENT CLAIM ACTUALLY PRESENTED IN JONES'S AMENDED HABEAS PETITION

Like the district court, Jones recognizes that the theory on which the district court granted relief "differs fundamentally" from the "*Lackey*" claim that Jones presented in state court. AAB 22; *see* ER 24 n.19 (distinguishing claims); *Lackey v. Texas*, 514 U.S. 1045, 1045 (Stevens, J., respecting denial of certiorari). Jones acknowledges that a *Lackey* claim is based on "delay in an individual case" (AAB 52), whereas the district court's ruling is premised on perceived "arbitrariness" across the entire range of capital cases, resulting from alleged systemic "dysfunction[]" (AAB 29, 52). On appeal, Jones relies exclusively on this arbitrariness theory. *E.g.*, AAB 23. Indeed, far from arguing that he deserves relief based on delay in his own case, Jones complains that the review in his case proceeded *faster* than in a typical case. AAB 29 n.17.

But the Eighth Amendment claim presented in Jones's amended habeas petition was a *Lackey* claim, like the claim in his original petition and the claim he raised on direct appeal. All three claims cited *Lackey* and

employed essentially identical language: they focused on alleged delay in Jones's individual case; argued that this delay caused Jones to experience anguish and uncertainty about his execution; and contended that, because of the delay in Jones's case, his eventual execution would serve no legitimate penological purpose. ER 116, 126-128 (Claim 27 in amended federal habeas petition); ER 139, 141-142 (Claim 27 in original federal habeas petition); ER 145, 154-156 (claim on direct appeal).

Jones did add new factual allegations in support of this *Lackey* claim when he amended his petition. His amended Claim 27 alleged that "California's death penalty system is dysfunctional" and noted that California does not currently have an approved method of execution. ER 116, 123-124. But those allegations were made in service of Jones's individual-delay claim. They asserted that the "delay" *Jones himself* would experience "between the imposition of sentence and the final review of the legality of his convictions and death sentence . . . is a direct consequence of inadequacies in California's death penalty system and the state's inability to implement capital punishment." ER 117 (emphasis added); *see* ER 119-120 ("As a consequence of California's inadequate review process, federal litigation of Mr. Jones's challenges to his convictions and death sentence will be protracted.").

Because the amended petition presented the same *Lackey* claim Jones raised before the California Supreme Court, the district court's analysis should have been straightforward. The state court rejected the claim on the merits. *People v. Jones*, 29 Cal. 4th 1229, 1267 (2003). That decision was not contrary to or an unreasonable application of any United States Supreme Court precedent. *See* AOB 21-22. Therefore, 28 U.S.C. § 2254(d)(1) barred the district court from granting relief on amended Claim 27.[1]

To avoid this result (and AEDPA's exhaustion requirement, *see infra* at 9-11) Jones offers a revisionist history of his claims. He contends that the original Claim 27 "differed significantly from the claim raised on Mr. Jones's direct appeal" (AAB 48), although it also "incorporat[ed] the direct appeal claim" (AAB 7). He concedes that the original Claim 27 "did not . . . contain the arbitrariness theory" (AAB 50 n.24), but argues that "the arbitrariness theory . . . was introduced into the case in Amended Claim 27"

[1] Notwithstanding the new factual allegations in the amended petition, "review under § 2254(d)(1) is limited to the record that was before the state court." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011). Jones accuses the State of "misstat[ing] the law" by quoting *Pinholster* on this point, but in the next breath he recognizes the same principle: a court is "barred from considering new facts in support of an already-existing claim that *was* adjudicated on the merits by the state court." AAB 48. If Jones wanted to allege new facts in service of his *Lackey* claim, he should have first filed a new state habeas petition.

(*id.*). And he insists that amended Claim 27 must have presented the arbitrariness theory, because "the district court found that it was ruling precisely on the claim that Mr. Jones presented." AAB 38 n.20 (citing ER 15-16).

The district court did make that last assertion, but both Jones and the court are wrong. Nowhere in amended Claim 27 did Jones advance the theory on which he now relies: that dysfunction in California's post-conviction review system renders any execution arbitrary, and thus a violation of the Eighth Amendment, regardless of how long the review process takes in a particular case. The word "arbitrary" does not appear anywhere in the amended Claim. ER 116-129. And the citations in amended Claim 27 to *Furman*—the case the district court cited for the arbitrariness principle that Jones now endorses—are offered for a different general proposition. ER 125-127 (citing *Furman* for the constitutional requirement that punishments must serve a legitimate penological purpose).[2]

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[2] Jones also argues that the brief he filed in support of amended Claim 27 "unquestionably" raised the arbitrariness theory. AAB 38 n.20. That brief did characterize California's death penalty system as "dysfunctional," but the principal legal argument presented in the brief was that Jones suffered an Eighth Amendment violation based on delay in his individual case, which allegedly resulted from system-wide defects. *See, e.g.*, SER 82 ("The resolution of Mr. Jones's case has been, and will be, unconscionably delayed because the California death penalty system is dysfunctional."). In

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Although the district court attributed the arbitrariness theory to amended Claim 27, it never pointed to any language in the amended petition that actually presents that theory. ER 15-16; *see id.* at 24 n.19. Similarly, although Jones asserts that amended Claim 27 "contain[s]" the arbitrariness theory, he never quotes any language from the Claim to substantiate that assertion. AAB 37 n.20; *see id.* at 50 n.24. The actual text of the amended Claim shows that Jones presented to the district court the same *Lackey* claim that the California Supreme Court had already rejected. Section 2254(d)(1) bars relief on that claim.

II. THE EXHAUSTION REQUIREMENT BARRED THE DISTRICT COURT FROM GRANTING RELIEF BASED ON ITS ARBITRARINESS THEORY

It is undisputed that Jones never advanced the district court's arbitrariness theory in state court. ER 27-28, 55. That omission bars federal habeas relief based on the theory. *See* 28 U.S.C. § 2254(b)(1). Jones seeks to avoid this exhaustion requirement, but his arguments fail. The State did not waive the requirement, and the statutory exceptions to it do not apply.

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any event, "[i]t is not the brief which controls the issues" in a habeas proceeding; rather, the "petition governs the claims" that are properly before the court. *E.g.*, *Neal v. Grammer*, 769 F. Supp. 1523, 1526 (D. Neb. 1991).

A. The State Did Not Waive the Exhaustion Requirement

Unlike the district court (*see* ER 27-28), Jones takes the position that the exhaustion requirement does not apply here because the State "expressly waived exhaustion." AAB 32; *see id.* at 32-40. But Jones's elaborate waiver argument cannot be squared with the actual procedural history of this case.

As discussed above, Jones's original federal habeas petition presented a *Lackey* claim. The State reviewed that claim, concluded that it was materially identical to the *Lackey* claim Jones raised in state court, and therefore did not raise any exhaustion defense. *See* SER 210. When Jones amended his federal habeas petition, the State reviewed the amended Claim 27 and concluded that it did not satisfy AEDPA's exhaustion requirement, because it raised new factual allegations in service of the *Lackey* claim. The State twice raised this exhaustion argument with the district court. SER 61-63, 131-133. The court then granted relief based on its own arbitrariness theory, which it described as fundamentally different from a *Lackey* claim. ER 24 n.19. The court excused the exhaustion requirement on the premise that California's review process was "ineffective"—not based on any finding of waiver. ER 27-28. At the same hearing at which the district court handed the parties the signed order

articulating the court's theory, the State raised an exhaustion objection immediately after reviewing the order. *See* ER 53, 55-57.

The State "shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." 28 U.S.C. § 2254(b)(3). As the district court recognized, its order relies on a legal theory for relief, and a host of factual allegations, that were never presented in state court. *See* ER 55. There is no basis for any contention that the State expressly waived exhaustion as to that theory. The State's prior representation that the claims at issue in Jones's *original* petition were exhausted "is merely a statement that was true at the time it was made." *Bell v. Lewis*, 462 F. App'x 692, 693 (9th Cir. 2011). In light of the district court's order introducing the arbitrariness theory, and Jones's present reliance on that new theory, the State's prior representation "is not a waiver" as to Jones's obligation to exhaust the theory. *Id.*[3]

Jones argues that because the State did not raise an exhaustion defense after Jones renewed his *Lackey* claim in his original federal habeas petition,

[3] Jones complains that he has "lost his opportunity to fully litigate" the arbitrariness theory in state court. AAB 36. If that is correct, it is only because Jones failed to present the claim there when he had the opportunity.

it forfeited any such defense either to the new factual allegations introduced in amended Claim 27 or to the distinct arbitrariness theory later embraced by the district court. AAB 32-39 & nn.18-21. This argument lacks any support in precedent, for good reason. If Jones's position were the law, any concession that a federal habeas claim as originally stated is exhausted would forever preclude the exhaustion defense, no matter how dramatically the habeas petitioner later changed the claim by amendment, or how novel a theory a court later purported to find within the amended claim.

Jones also cites precedent regarding when an amended habeas petition "relates back" to the original petition for statute-of-limitations purposes. AAB 36-39 (discussing *Mayle v. Felix*, 545 U.S. 644 (2005), and *Nguyen v. Curry*, 736 F.3d 1287 (2013)). But the relation-back doctrine is different from the exhaustion doctrine. Even if a new claim relates back to the original petition, making the claim timely, that does not mean that the claim has been exhausted. *Cf. Pliler v. Ford*, 542 U.S. 225, 230-231 (2004) (recognizing that certain "unexhausted claims" may nonetheless "relate back to the original petition," and may therefore be included in an amended petition after they have been exhausted in state court). Thus, it is entirely consistent for the State not to have raised a statute-of-limitations defense regarding amended Claim 27 (*see* AAB 37 n.19), while arguing that the

exhaustion requirement bars federal habeas relief based either on the new factual allegations contained in that Claim or on the new theory that the district court eventually attributed to the Claim.[4]

B. Exhaustion Is Not Excused Under § 2254(b)(1)(B)

This case also does not qualify for either of the exceptions to the exhaustion requirement. First, this is not a case where the State's process is "ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(B)(ii); *see* AAB 40-43. The California Supreme Court adjudicated to finality every claim that Jones raised in that court. To date, the district court has found no substantive fault in the state court's resolution of those claims.[5] Even now, Jones could file another state habeas petition

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[4] Jones argues that "[t]his 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." AAB 35. The two examples he offers did not involve the State of California. *See Russell v. Rolfs*, 893 F.2d 1033 (9th Cir. 1990) (Washington); *Whaley v. Belleque*, 520 F.3d 997 (9th Cir. 2008) (Oregon). In any event, California has not taken any inconsistent position regarding exhaustion in this case.

[5] Although the district court indicated that it could render a decision by the end of 2014 regarding the exhausted claims that were actually presented in Jones's petition (ER 19), it has taken no further action on those claims as of the filing date of this brief.

seeking to raise the arbitrariness theory. *See* AOB 27.[6] California's process is effective.

Jones counters that the State's process involves "excessive delay." AAB 41. But the cases he cites demonstrate only that federal habeas petitioners whose state cases have not yet concluded may sometimes avoid the exhaustion requirement based on allegedly unreasonable delay in the state proceeding.[7] None of these cases supports Jones's argument that a

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[6] As noted in the opening brief, the State might well oppose any such petition by arguing, for example, that it is procedurally barred in the circumstances of Jones's case. But that does not "nullif[y] the fact that [Jones] had an adequate state remedy that has not been exhausted." *Tamalani v. Stewart*, 249 F.3d 895, 899 n.2 (9th Cir. 2001).

[7] *See Phillips v. Vasquez*, 56 F.3d 1030 (9th Cir. 1995) (state appeal of penalty-phase retrial still pending when this Court addressed habeas petition regarding guilt-phase issues); *Coe v. Thurman*, 922 F.2d 528 (9th Cir. 1990) (state direct appeal still pending when this Court directed state court to resolve the appeal within 90 days); *Okot v. Callahan*, 788 F.2d 631 (9th Cir. 1986) (observing that exhaustion could be excused if prisoner's pending state habeas proceeding were delayed unreasonably); *Harris v. Champion*, 15 F.3d 1538 (10th Cir. 1994) (exhaustion may be excused based on unreasonable delay after notice of direct appeal was filed in state court); *Hankins v. Fulcomer*, 941 F.2d 246 (3d Cir. 1991) (motion to withdraw guilty plea still pending in state court when Third Circuit excused exhaustion); *Henderson v. Lockhart*, 864 F.2d 1447 (8th Cir. 1989) (motion for new trial still pending in state court when Eighth Circuit excused exhaustion); *Vail v. Estelle*, 711 F.2d 630 (5th Cir. 1983) (direct appeal still pending in state court when Fifth Circuit excused exhaustion). The final case Jones cites, *Cody v. Henderson*, 936 F.2d 715 (2d Cir. 1991), involved a federal habeas petition filed while the petitioner's direct appeal was still pending in state court. Six months later, the state appellate court affirmed

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petitioner may avoid exhaustion of a new claim, raised for the first time after the end of state proceedings, based only on speculation that if the petitioner now sought to raise the new claim in the state courts it would take those courts too long to address it.

Second, Jones is not correct that there is "no available remedy in state court"—an argument the district court did not address. AAB 43; *see* 28 U.S.C. § 2254(b)(1)(B)(i). Jones predicts that it would be futile for him to present a "systemic arbitrariness" claim in state court because the California Supreme Court would "consider the claim premature prior to the setting of an execution date." AAB 43. But there is no basis for this prediction, because the California Supreme Court has not yet ruled on a claim raising the arbitrariness theory, or indicated whether it would consider such a claim to be timely.[8]

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the petitioner's conviction. The Second Circuit held that the appropriate remedy for alleged delay in the state proceeding would be an action for damages under 42 U.S.C. § 1983. *Id.* at 722-723.

[8] In *People v. Seumanu*, Cal. S. Ct. No. S093803, currently pending before the California Supreme Court, the parties filed supplemental briefs addressing the district court's arbitrariness theory. Several capital defendants have also sought to invoke the district court's order in their state habeas proceedings. *See, e.g.*, *In re Fuiava*, Cal. S. Ct. No. S220339.

Jones argues that the California Supreme Court has previously found traditional *Lackey* claims to be "premature." AAB 44. As Jones himself insists, however, the systemic arbitrariness theory "differs fundamentally" from a traditional *Lackey* claim. AAB 22. In any event, the California Supreme Court has not uniformly treated *Lackey* claims as premature—as evidenced by Jones's case, where the court considered the claim and rejected it on the merits. *See Jones*, 29 Cal. 4th at 1267.[9]

Jones and the district court ignore the fundamental purpose of the exhaustion doctrine: to give "state courts the first opportunity to review the claim, and to correct any constitutional violation in the first instance." *Carey v. Saffold*, 536 U.S. 214, 220 (2002) (internal quotation marks, alterations, and citations omitted). Instead of respecting state courts as the central actors in reviewing collateral attacks on state convictions and

[9] An *amicus* brief submitted but not yet filed as of this writing argues that this Court "should dispense with exhaustion and directly address the merits." Br. of Habeas Scholars at 7. The exhaustion cases cited in support of that argument, however, affirmed the *denial* of habeas relief. *Id.* at 6-7; *see, e.g.*, *Brock v. Seling*, 390 F.3d 1088, 1089 & n.1 (9th Cir. 2004); *Gutierrez v. Griggs*, 695 F.2d 1195, 1196, 1197-1199 (9th Cir. 1983). Those cases are consistent with the rule, which Congress codified in AEDPA, that courts may deny relief on the merits even if a claim is unexhausted. 28 U.S.C. § 2254(b)(2). They provide no support for affirming the district court's judgment *granting* habeas relief on an unexhausted claim.

sentences, the district court granted federal habeas relief on a constitutional ground that Jones never even sought to present in state court. The district court's failure to apply the exhaustion doctrine is especially troubling in this case, where the unexhausted claim rests on a novel theory attacking the structure and performance of California's entire system for reviewing capital convictions.

III. *TEAGUE*'S ANTI-RETROACTIVITY DOCTRINE BARS RELIEF BASED ON THE ARBITRARINESS THEORY

The anti-retroactivity doctrine in *Teague v. Lane*, 489 U.S. 288 (1989), also bars Jones from obtaining relief based on the district court's arbitrariness theory. *Teague* directs that a "new rule" may not apply retroactively in a collateral proceeding unless it is either (1) a rule of substantive law or (2) a "watershed" rule of criminal procedure. *Whorton v. Bockting*, 549 U.S. 406, 416 (2007).

The arbitrariness theory would create a "new rule" for *Teague* purposes because it is not "*dictated* by precedent." *See Graham v. Collins*, 506 U.S. 461, 467 (1993) (internal quotation marks omitted). Indeed, it is a novel theory that has never before been adopted by any United States court. The theory is not substantive, because it does not "place particular conduct or persons . . . beyond the State's power to punish." *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004). Instead, it concerns the procedures used for post-

conviction review in California. And while certainly sweeping in its implications, the theory is not a "watershed" rule for purposes of *Teague*, because it does not alter any "bedrock procedural element[]" designed to protect the fairness of criminal proceedings. *Bockting*, 549 U.S. at 418.

Jones tenders three arguments for why *Teague* should not apply here, but none is persuasive. First, the State never waived the *Teague* bar. *See* AAB 49-51. From the start, the State argued that the "non-retroactivity doctrine foreclose[d]" the individual-delay claim in Jones's habeas petition. SER 202 (citing *Teague*); *see also* ECF 91 at 161 (State's brief arguing that Jones's "*Lackey* claim is barred by *Teague*"). At the hearing where the district court presented the parties with a signed order that unveiled the court's own arbitrariness theory, the State again raised *Teague*. The State argued that the order implicated "the *Teague* issue fairly squarely," because "the court is saying . . . that there is a new rule that I'm going to apply to this case." ER 58-59. Counsel continued: "I think it would be very difficult to survey the legal landscape, as *Teague* instructs us to do, and find that the rule that the court is applying in this case was compelled by existing precedent." ER 59. So this is not a case where the State "did not raise a *Teague* defense in the lower court[]," *Godinez v. Moran*, 509 U.S. 389, 397 n.8 (1993), or where *Teague* was "raised for the first time on appeal,"

Duckett v. Godinez, 67 F.3d 734, 746 n.6 (9th Cir. 1995). *See* AAB 50. The State raised the *Teague* bar at its earliest opportunities with respect to both the *Lackey* claim advanced by Jones and the arbitrariness theory announced by the district court.

Second, Jones argues that the arbitrariness theory would not create a new rule because he says it is rooted in the Supreme Court's decision in *Furman*. AAB 51-53. But the test for whether a rule is new does not consider whether an existing precedent might arguably support the rule. It asks whether "all reasonable jurists would have deemed themselves compelled to accept" the rule based on existing precedent. *Graham*, 506 U.S. at 477. The arbitrariness theory is a new rule under that test. At the time that Jones's conviction became final—and at the time of the district court's order—no United States court had ever held that the Eighth Amendment prohibits perceived systemic arbitrariness arising from the absolute or relative pace of state post-conviction review in capital cases.[10]

[10] Even where existing precedent might "be thought to support" a rule if the precedent were "conceived of at a high level of generality," it is still a "new rule" unless the precedent "mandate[s]" its adoption. *Beard v. Banks*, 542 U.S. 406, 414, 416 (2004); *see Sawyer v. Smith*, 497 U.S. 227, 236 (1990); AOB 36. Jones does not address these cases.

Third, Jones insists that even if the arbitrariness theory would create a new rule, that rule should apply retroactively because it is substantive. AAB 53-58. That argument misunderstands both the standard for determining whether a rule is substantive and the district court's order. A substantive rule must make it unlawful for the State to punish a particular class of persons or a particular type of conduct. *See Summerlin*, 542 U.S. at 351-352. An example of a "class of persons" rule is the Supreme Court's decision holding that States may not execute certain individuals with mental disabilities. *See Atkins v. Virginia*, 536 U.S. 304 (2002). An example of a "type of conduct" rule is the decision prohibiting the death penalty for rape of a child that did not result (and was not intended to result) in death. *See Kennedy v. Louisiana*, 554 U.S. 407 (2008). The district court's arbitrariness theory does not fall into either category. The court concluded that because of the dysfunction it perceived in the State's process for post-conviction review in capital cases, "the State's *process* violates the Eighth Amendment." ER 27 (emphasis added). The court did not hold that the State is powerless to impose the death penalty on a particular category of persons or in response to a particular type of conduct.

Jones characterizes the arbitrariness theory as a substantive rule prohibiting "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.” AAB 54. He contends that this places a “substantive limitation on the state’s power to punish” equivalent to barring the execution of mentally disabled defendants. AAB 55. But that logic flies in the face of *Teague* doctrine. It would convert every procedural rule into a substantive rule, because one can always say that a procedural rule prohibits the state from punishing the class of persons who suffered the particular procedural violation. For example, the Supreme Court’s decision in *Ring v. Arizona*, 536 U.S. 584 (2002), might be described as prohibiting Arizona from executing the class of persons who were sentenced to death based on aggravating factors proven to a judge instead of a jury. By Jones’s logic, then, *Ring* created a substantive rule. That is not the law. *See Summerlin*, 542 U.S. at 353-355.

IV. CALIFORNIA’S SYSTEM FOR REVIEWING DEATH JUDGMENTS IS CONSISTENT WITH THE EIGHTH AMENDMENT

This Court may reverse the district court’s judgment based on AEDPA or *Teague* without addressing the underlying Eighth Amendment issue. In addition, however, the district court’s Eighth Amendment analysis is unsustainable.

A. The State Did Not Forfeit the Eighth Amendment Issue

Jones is not correct that the State "forfeited the right" to contest the Eighth Amendment issue. AAB 22. The district court's order resulted from an unorthodox process, orchestrated by the court itself. Rather than ruling on the claims before it, the court ordered Jones to amend his petition, and then ordered the State to brief whether Jones's "new claim states a viable basis for granting habeas corpus relief." ER 131; *see id.* at 135. After Jones amended his petition to add new factual allegations in service of his *Lackey* claim, the State explained that granting relief based on these new factual allegations would violate the exhaustion requirement, and, in any event, that the claim was barred by 28 U.S.C. § 2254(d). SER 131-136. When the court later "suggest[ed] that executing those essentially random few who outlive the dysfunctional post-conviction review process serves no penological purpose and is arbitrary" (ER 97), the State filed a responsive brief explaining why it "respectfully disagree[d]" (SER 68). The State never failed to challenge either Jones's *Lackey* claim or the court's arbitrariness theory.

Jones's argument that the State "waived" any challenge to the factual assertions in the district court's order (AAB 19 n.10) is also meritless. The district court conducted no evidentiary hearing before issuing its order and

did not authorize discovery. So the court's factual statements were not the result of any normal adversarial testing process.[11] Insofar as the court's order merely recited judicially noticeable facts, such as the number of inmates on death row and the amount of time they have been there (ER 2-3), the State does not challenge those factual statements. To the extent the court endorsed the factual conclusions of an independent commission, however, or reached conclusions on factual issues that were not the subject of any adversarial fact-finding process, the State does not accept as factual "findings" adverse assertions that it never had a fair opportunity to contest. *See, e.g.*, ER 8-10 (reciting factual conclusions of independent commission); ER 19 (asserting that executions in California are "random"); ER 21-23 (assessing the efficacy of capital punishment as a penological tool); ER 25 ("[T]he Court finds that much of the delay in California's post-conviction review process is created by the State itself."). The State cannot be faulted for failing to anticipate and respond to factual assertions that the district court made on its own initiative in support of its novel legal theory.

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[11] The court attached to its order a chart of the case status of selected death-row inmates that the court created from extra-record sources. The court had attached an earlier version of this chart to a prior order, and "encouraged" the parties to comment on it (ER 97), which the State did in a subsequent brief (SER 68).

B. The District Court's Eighth Amendment Analysis Is Incorrect

According to Jones and the district court, the legal basis for the arbitrariness theory is *Furman v. Georgia*, 408 U.S. 238 (1972). Jones's argument in support of the theory relies exclusively on *Furman* and decisions describing the holding in that case. *See* AAB 24-25. But the arbitrariness theory is an unprecedented extension of *Furman*, and indeed would undermine the constitutional interests recognized by that decision.

As the Supreme Court has explained, "*Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant." *Gregg*, 428 U.S. at 199 (plurality opinion). This "basic concern of *Furman*" arose because the "sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the character or record of the defendant." *Id.* at 206 (plurality opinion); *see, e.g.*, *Furman*, 408 U.S. at 314 (White, J., concurring) (criticizing the practice of "delegating sentencing authority to the jury" without statutory limitations). Thus, the decision in *Furman* "mandates that where discretion is afforded a sentencing body" regarding the death penalty, "that discretion must be suitably directed

and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg*, 428 U.S. at 189 (plurality opinion). The "concerns expressed in *Furman* . . . are best met by a system that provides for a bifurcated proceeding at which the sentencing authority" is provided with information and standards to guide its decision. *Id.* at 195.

But *Furman* did not hold that a validly imposed, non-arbitrary death sentence may become unconstitutional after the fact because of the absolute or relative pace of post-conviction review. No court had ever interpreted *Furman* to support such a rule until the district court did so in this case. And that rule would undercut the constitutional interests identified in *Furman*, not serve them. Careful review after a defendant is sentenced to death provides "an important additional safeguard against arbitrariness and caprice." *Gregg*, 428 U.S. at 198 (plurality opinion). It allows capital defendants to claim, among other things, that they were sentenced under procedures that created an intolerable risk of arbitrary outcomes. Jones himself advanced that type of claim in his habeas petition. *See, e.g.*, ECF 105 at 396. Post-conviction review enables state and federal courts to consider such claims, to guard against unconstitutional procedures in particular cases, and to set precedent that will guide future sentencing proceedings. *See, e.g.*, *Smith v. McCormick*, 914 F.2d 1153, 1163-1169 (9th

Cir. 1990) (capital defendant entitled to habeas relief because Montana improperly limited consideration of mitigating evidence). This review process takes time, and the amount of time will vary depending on the circumstances of the case. A suitably deliberate pace simply recognizes that a "practice of imposing swift and certain executions could result in arbitrariness and error in carrying out the death penalty." *McKenzie v. Day*, 57 F.3d 1461, 1467 (9th Cir. 1995), *opinion adopted*, 57 F.3d 1493 (9th Cir. 1995) (*en banc*).[12]

The factual predicate of Jones's argument—that California's post-conviction review system "guarantees arbitrary executions"—is also incorrect. AAB 28. As Justice White explained in *Furman*, a death sentence is arbitrary if "there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." 408 U.S. at 313. Even if this concept of arbitrariness applies to post-conviction review, there is a meaningful basis for distinguishing cases in which California has executed capital defendants from the cases of defendants who remain on death row. California will not execute a prisoner

[12] *See also People v. Anderson*, 25 Cal. 4th 543, 606 (2001) ("[T]he automatic appeal process following judgments of death is a constitutional safeguard, not a constitutional defect.").

unless he has had an opportunity—with the assistance of qualified counsel—to raise available legal challenges to his conviction and sentence in the California Supreme Court and an opportunity to pursue federal habeas relief, and has either exhausted those opportunities without success or decided not to pursue further review. And California will not carry out an execution if the intended method of execution has been held to violate the Eighth Amendment or other applicable law. These preconditions were satisfied in the thirteen cases since 1978 in which California carried out executions. They have not yet been satisfied for the remaining defendants on death row. California's system is not "devoid of any principled standards." AAB 28. It is a system that refrains from carrying out the ultimate punishment in any specific case until the legality of doing so is clear.

Moreover, the delay that exists in California's post-conviction review process, and differences in the pace of that process across different cases, are not the result of arbitrary actions by the State. Jones highlights the delay in appointment of counsel for direct appeal and state habeas proceedings. AAB 15-16. That delay has been attributed to the State's strict qualification requirements for capital counsel and a shortage of qualified counsel willing to accept appointment under the existing payment structure. *See, e.g.*, *In re Morgan*, 50 Cal. 4th 932, 937-938 (2010); ER 8-9, 11. No one is happy

about it. But there is nothing arbitrary about the State insisting on qualified counsel, while at the same time dividing its scarce resources between death penalty litigation and other important priorities. Nor is it arbitrary for the California Supreme Court to take the time necessary to render careful decisions in capital cases, or to allocate *its* resources by issuing detailed, published opinions for capital cases on direct appeal, while issuing summary opinions in those capital habeas cases where the petitioner has not raised any meritorious claim. *See* AAB 16-18.

Jones also asserts that the pace of post-conviction review in California robs the death penalty of any deterrent or retributive value. AAB 30-32. As to deterrence, when confronted with this type of categorical argument in the past, the Supreme Court has acknowledged that deterrence "is a complex factual issue the resolution of which properly rests with the legislatures." *Gregg*, 428 U.S. at 186.[13] The proper answer is no different here. It would be inappropriate to upend the legislative judgments made by the people of

[13] The Supreme Court has occasionally entertained arguments that capital punishment would not deter particular types of murderers, as opposed to the categorical argument presented here. *See Roper v. Simmons*, 543 U.S. 551, 571-572 (2005) (juveniles); *Atkins v. Virginia*, 536 U.S. 304, 319-320 (2002) (mentally disabled). It has continued to recognize, however, the general rule that "we leave to legislatures the assessment of the efficacy of various criminal penalty schemes." *Simmons*, 543 U.S. at 571.

California and their elected representatives based on abstract arguments advanced by Jones and the district court. *See* AAB 30; ER 21-22.[14]

As to retribution, the death penalty serves, in part, as "an expression of society's moral outrage at particularly offensive conduct." *Gregg*, 428 U.S. at 183 (plurality opinion). The Supreme Court has recognized that this "instinct for retribution" can be "essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs." *Id.* Reasonable people may disagree about the value of the death penalty. But the recent decision by a majority of California voters to retain the penalty, and prior decisions to make the penalty available for additional crimes, indicate that much of our society continues to approve of capital punishment as an expression of outrage against unusually heinous conduct. That societal judgment does not change merely because it takes time to carry out a death sentence in California. Indeed, when the voters retained the death penalty in 2012, they did so despite a ballot argument specifically

[14] One *amicus* brief addresses the deterrent value of the death penalty, arguing broadly that "capital punishment as administered anywhere in the United States" does not "provide[] any added deterrent beyond that afforded by a sentence of life imprisonment." Br. of Empirical Scholars at 10; *see id.* at 13-25. That argument should be made to the Legislature or the voters. Moreover, it does not support the district court's different and narrower contention, which is that procedural delays deprive California's death penalty of any deterrent effect that it otherwise would have.

noting that "[o]nly 13 people have been executed since 1967—no one since 2006. Most death row inmates die of old age."[15]

Finally, Jones and several of his *amici* argue that California's post-conviction review process prejudices capital defendants because of the possibility that "witnesses will die or disappear, memories will fade, and evidence will become unavailable" by the time their habeas petitions are adjudicated. *E.g.*, AAB 21 n.11. The same considerations can work to the disadvantage of the State in cases where review reveals the need for a retrial. Again, no one maintains that long delays in the judicial process are desirable. Whether delay has produced some identifiable and substantial prejudice to a specific defendant is, however, a question that can be raised and answered only on the facts of a particular case. The fact that review takes time does not make the system "arbitrary" as a whole.

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[15] Arguments in Favor of Proposition 34, *available at* http://vig.cdn.sos.ca.gov/2012/general/pdf/34-arg-rebuttals.pdf. While some people may oppose using the death penalty for retribution as a policy matter, *see, e.g.*, Br. of Murder Victims' Families *et al.* at 1, others take a different view, *see, e.g.*, Arguments Against Proposition 34, *available at* http://vig.cdn.sos.ca.gov/2012/general/pdf/34-arg-rebuttals.pdf.

C. The Active Debate over the Death Penalty as a Matter of Policy Is No Basis for Affirmance

Jones's brief and those of his *amici* illustrate the depth of the policy debate surrounding the death penalty. Some *amici* complain that California spends too much money on the death penalty.[16] Jones and others fault California for not spending enough.[17] Jones suggests that California should hasten its post-conviction review process to be more like Texas. *See* AAB 20. But some of his own *amici* have elsewhere criticized problems associated with the brisk pace of review in that State.[18] One *amicus* brief criticizes the backlog of capital cases at the California Supreme Court, while simultaneously lamenting that the Court does not grant discretionary review in more non-capital cases.[19]

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[16] *See* Br. of Marshall Thompson at 8-15; Br. of Empirical Scholars at 21-22.

[17] *See* AAB 15-16; Br. of NACDL *et al.* at 6-18.

[18] In 2010, for example, *amicus* NACDL filed a complaint against a judge of the Texas Court of Criminal Appeals for alleged misconduct in refusing to accept filing of a stay application after 5:00 p.m. on the afternoon before Texas executed Michael Richard. *See* https://www.nacdl.org/NewsReleases.aspx?id=19540 (last visited Apr. 10, 2015). The same organization recently honored a Texas attorney for her "record of exposing flaws in Texas's application of the death penalty." *See* http://www.nacdl.org/NewsReleases.aspx?id=33007 (last visited Apr. 10, 2015).

[19] *See* Br. of Loyola Project for the Innocent at 2, 9-10.

These briefs confirm that the death penalty and its implementation raise significant and difficult issues of public policy.[20] That is something the State has never denied. *See, e.g.*, AOB 56-57. But Jones and his *amici* identify no precedent supporting the district court's "arbitrariness" theory. They simply join the court in offering policy critiques of the current system. Those critiques are properly directed to the Legislature and the voters. They provide no basis for federal collateral relief.

[20] The fact that California's Legislature has repeatedly considered controversial proposals to modify the State's death penalty system also confirms this conclusion. *See* Br. of Lori Hancock et al. at 12-27.

CONCLUSION

The judgment of the district court should be reversed.

Dated: April 13, 2015

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April 13, 2015	*s/ James William Bilderback II*
Dated	James William Bilderback II Supervising Deputy Attorney General

CERTIFICATE OF SERVICE

Case Name: **Ernest Dewayne Jones v. Ron Davis, Acting Warden** No. **14-56373**

I hereby certify that on April 13, 2015, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 13, 2015, at Los Angeles, California.

Sandra Fan	*s/ Sandra Fan*
Declarant	Signature