No. 14-56373

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERNEST DEWAYNE JONES,

Petitioner-Appellee,

vs.

RON DAVIS, Warden,

Respondent-Appellant.

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

BRIEF AMICUS CURIAE OF
CRIMINAL JUSTICE LEGAL FOUNDATION IN
SUPPORT OF APPELLANT AND SUPPORTING REVERSAL

KENT S. SCHEIDEGGER
Criminal Justice Legal Foundation
2131 L Street
Sacramento, California 95816
(916) 446-0345
Attorney for Amicus Curiae

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(Rule 26.1)

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INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, the Federal District Court set aside the thoroughly deserved sentence of a rapist and murderer on the ground that there is excessive delay in the execution of death sentences in California. While the delay is

excessive and should be remedied—for the benefit of victims and the law-abiding public, not the murderers—permanent reduction of deserved sentences to inadequate ones is not the answer. The order in this case is contrary to the interests of victims and the public that CJLF was formed to protect.

Both parties have consented to the filing of this brief.

This brief was written entirely by counsel for amicus and not by counsel for any party. No party or party's counsel contributed money to prepare or submit this brief. No other person contributed money to prepare or submit this brief.

SUMMARY OF ARGUMENT

The District Court's assertion that execution of a death sentence serves no retributive purpose given the lengthy delays is incorrect. For crimes where anything less than death is inadequate punishment, society and families of the victims retain an interest in carrying out the sentences. The people's recent rejection of a death penalty repeal initiative despite the arguments of proponents that the system was ineffective and dysfunctional confirm society's interest in continued enforcement.

If the amended Claim 27 is deemed different from the claim presented to the California Supreme Court for the purpose of 28 U.S.C. § 2254(d), then it is both unexhausted and untimely. The District Court's assumption that the California Supreme Court would not fairly adjudicate the claim so as to

qualify for an exception to the exhaustion rule is a gross violation of the requirement of federal-state comity in habeas corpus.

The rule decided by the District Court is a "new rule" for the purpose of *Teague v. Lane*. The District Court's evasion of that limitation by stating the "rule" at an excessive level of generality is flatly contrary to decades of Supreme Court precedent.

Setting aside an otherwise valid sentence on the speculation that the delay issues in California will not be fixed is unwarranted. Several reform efforts are in progress, and it cannot be assumed they will fail.

California would be able to carry out many more of its capital judgments, despite the delays in state court, if the federal courts did their job properly. The failure of federal courts to properly implement the reforms of AEDPA, to limit the abuse of stay-and-abeyance orders, and to move their own cases along are a principal cause of the problem, beyond the ability of the State of California to change. The federal courts should put their own house in order before pointing fingers at the state courts.

ARGUMENT

I. Execution of a death sentence serves an interest in retribution, even if delayed.

The District Court held in this case that California murderers who are executed "will have languished so long on Death Row that their execution will serve no retributive or deterrent purpose . . . ." Deterrence is a hotly debated topic, and although amicus believes that a deterrent effect remains

even after a long delay, that case cannot be made in the limited space allowed for an amicus brief. The retribution argument is simpler.

Gregg v. Georgia, 428 U.S. 153 (1976) eliminated any doubt as to the legitimacy of retribution as a purpose of punishment generally and of capital punishment in particular. The retribution interest is simply the interest in seeing that criminals do not get off with less than they deserve. Letting criminals off too easy undermines the confidence of people in the government and erodes the very " 'stability of a society governed by law.' " *Id*. at 183 (lead opinion) (quoting *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring)).

> "Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." *Id*. at 184.

Neither the affront nor the response diminishes with time.

The District Court opinion quotes Justice Rehnquist saying that delay *frustrates* the retribution interest and Justice Powell saying that delay *diminishes* the interest. ER 21-22. Those statements are undoubtedly true, and that is why everyone involved in the system should be working to reduce the present extreme delays. But to frustrate or to diminish an interest is not to extinguish the interest. A murderer who lives out much of his life span before being executed for a crime committed decades earlier has gotten off easier than he should, but society retains an important retributive interest in seeing that he is executed nonetheless.

The lead opinion in *Gregg* said, "we cannot say that the judgment of the Georgia Legislature that capital punishment may be necessary in some cases is clearly wrong." 428 U.S. at 186. The same is true with the decision of the people of California just two years ago to retain capital punishment. The people were presented with the argument that the current obstruction of its enforcement was a reason to abolish it, and they rejected that argument. That vote alone is compelling evidence, if not conclusive proof, that capital punishment is not contrary to contemporary values, even in its present obstructed state.

A powerful indication of the remaining retribution interest in long-delayed death sentences is the continuing interest and dedication of the victims' families. Although family members have traditionally depended on the government to vindicate their interests, in recent years they have increasingly sought the assistance of public interest and pro bono lawyers, including amicus CJLF, to independently represent them, and we have been honored to do so. Victims' families were also the most dedicated, passionate, and effective opponents of the death penalty repeal initiative on the 2012 ballot. These efforts are not easy for the family members. Indeed, they are intensely painful, as they involve retelling and reliving the stories of horrific crimes committed against their loved ones. But they do it because justice demands it, and they continue for many years, even though it would be easier to let it go.

The victims that CJLF has represented, worked with, or both include: Kermit Alexander, whose mother, sister, and two nephews were murdered by

death row inmate Tiequon Cox in 1984; Bradley Winchell, whose sister was murdered by death row inmate Michael Morales in 1981; Marc Klaas, whose daughter was murdered by death row inmate Richard Allen Davis in 1993; and Sandy Friend, whose son was murdered by death row inmate Robert Rhoades in 1996. All of them remain dedicated to justice in these cases despite the lapse of time and all have a special interest in seeing these judgments carried out.

The prime example of the travesty of justice that results from abolition of the death penalty can be seen vividly in the person of Charles Manson. His thoroughly deserved sentence was overturned along with all the other sentences rendered before 1972. *See People v. Manson*, 61 Cal. App. 3d 102, 217, 132 Cal. Rptr. 265, 336 (1976). As a result, Manson lives out his natural life, grossly inadequately punished for his crimes, networking with his fan base on his smuggled cell phones, *see* Winter, *Charles Manson Caught Again with Cellphone in Prison*, USA Today, Feb. 3, 2011,[1] and even allowed to marry. *See* Rowlands, '*I am Charles Manson's wife*,' CNN, Nov. 17, 2014.[2]

The people of California, and particularly the families of the victims of capital murder, have a powerful and legitimate retributive interest in seeing the properly imposed sentences of death carried out. That interest is impaired

1. http://content.usatoday.com/communities/ondeadline/post/2011/02/hello-satan-charles-manson-caught-again-with-cellphone-in-prison/1#.VH_hOmeiZPI

2. http://www.cnn.com/2014/08/09/justice/charles-manson-wife/

by the long delays, but it is not eliminated. To say that executing these sentences would serve no purpose is an insult to the memories of the victims and to the dedication of the survivors.

II. If different from the original *Lackey* claim, the new claim is barred by the exhaustion/procedural default rules and the statute of limitations.

Claim 27 in the original habeas petition was what is known as a *Lackey* claim after *Lackey v. Texas*, 514 U.S. 1045 (1995). The Attorney General's first argument in the present case is that Claim 27 is the same claim presented to the California Supreme Court and therefore barred by 28 U.S.C. § 2254(d). AOB 19.

If this Court accepts the premise, the conclusion is so clearly correct as to require no further argument. If the Court rejects the premise, though, the claim must still be rejected. If the claim is a new claim and not just a variation on the *Lackey* claim,[3] then it is necessarily both (1) either unexhausted or defaulted, and (2) barred by the statute of limitations.

A. Exhaustion and Procedural Default.

The exhaustion rule is one of the most important limitations on federal habeas corpus. It is a principle of federalism reaching back over a century and fortified by Congress in modern times. State prisoners seeking relief on a federal claim must, except in rare circumstances, present those claims to the

3. Further guidance on what is a "claim" may or may not be forthcoming from the United States Supreme Court in *Jennings* v. *Stephens*, No. 13-7211, argued October 15, 2014. CJLF's brief in the case is available at http://www.cjlf.org/briefs/JenningsR.pdf.

state courts first. When Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), it considered the exhaustion rule important enough to shield it from being inadvertently defaulted, although the State can expressly waive it. *See* 28 U.S.C. § 2254(b)(3).

There are three exceptions in the statute, set forth in paragraphs (b)(1)(B) and (b)(2). The (b)(1)(B)(ii) exception is "circumstances exist that render such process ineffective to protect the rights of the applicant." The District Court's stated reasons for invoking this exception do not withstand examination. The first reason is an assumption that Jones would not receive timely resolution of a claim based on delay, based on the average time for processing "exhaustion" petitions in the California Supreme Court. *See* ER 27-28. This reason is fatally flawed both legally and factually.

Factually, there is no basis for assuming that a "clean" successive habeas petition raising this claim only would take as long as a "typical" exhaustion petition. As explained in Part V, *infra*, typical exhaustion petitions in California capital cases are blunderbuss documents, hundreds of pages long, stuffed with many dozens of claims, nearly all of which turn out upon examination to be defaulted, meritless, or both. *See infra* at 23. A targeted petition actually making a serious argument on a single claim is a different breed of cat. Comparison with the processing time for a typical exhaustion petition is irrelevant.

Even if the California Supreme Court did take three years to resolve the claim, though, that would not be a legally sufficient reason for bypassing the exhaustion requirement. Congress was well aware that exhaustion takes time

when it rejected proposals to scrap the rule, *see* 142 Cong. Rec. 7797, col. 3 (1996) (statement of Sen. Specter), and instead fortified it in AEDPA. A delay of a few more years is not substantial from the petitioner's viewpoint. After all, the District Court has already allowed the present case to drag on for four years, three times as long as Congress deems necessary for a capital habeas petition in a state which provides qualified and adequately funded state habeas counsel, as California does. *See* 28 U.S.C. § 2266(b)(1)(A); AOB 45.

The second reason given by the District Court is even worse.

> "More importantly, it would require Mr. Jones to have his claim resolved by the very system he has established is dysfunctional and incapable of protecting his constitutional rights." ER 28.

No need to mince words here. This is a gross and unsubstantiated insult to the California Supreme Court and its Justices. There is no monolithic "system" involved here. The delays in execution of California death sentences are the result of dereliction of duty by many actors, including the California Legislature, the California Department of Corrections and Rehabilitation (CDCR), and the federal courts, as discussed further in Parts IV and V. There is no basis whatever for assuming that Jones's federal claim would not receive a fair hearing from the California Supreme Court.

The United States Supreme Court has many times referred to the importance of comity in the handling of federal habeas corpus cases. *See*, *e.g.*, *Ryan v. Schad*, 570 U.S. __, 133 S. Ct. 2548, 2551, 186 L. Ed. 2d 644, 648 (2013) (per curiam). The District Court's unsubstantiated, unwarranted,

insulting insinuation that the California Supreme Court would not fairly address this claim is among the worst violations of that principle on record.

This case, particularly, involves a compelling reason to give the state court "first crack at it." Addressing a *Lackey* claim in *McKenzie v. Day*, 57 F.3d 1461, 1467 (9th Cir. 1995), this Court said,

> "When prisoners complain about the conditions in prison, we do not commute their sentence; we order the conditions ameliorated. If inordinate delay in carrying out an execution is adjudged to be a problem of constitutional dimension, there may be other remedies that are more appropriate in addressing the harm done."

There are a number of steps that could be taken to speed up executions in California without appropriating additional money.[4] State habeas petitions could be routinely referred to the trial court judge as a special master, as is done in other states where petitions are filed directly in the high court, rather than processing them within the California Supreme Court. CDCR could be ordered to adopt the barbiturate-only protocol approved by the Federal District Court almost nine years ago. The dubious decision of the California Court of Appeal that execution protocols are subject to the Administrative

4. The majority report of a commission stacked with an anti-death-penalty majority, which regurgitated uncritically the complaints of death penalty opponents and ignored the submissions of supporters, should be treated as the advocacy piece for one side of the debate that it is and not as a neutral or authoritative evaluation. *Cf.* ER 9. The commission was *not* established by an act of the state legislature, *cf.* ER 7, but rather by a resolution of one house, S. Res. 44 of 2004, to ensure that its composition remained under the control of Senate leaders implacably opposed to the death penalty.

Procedure Act, *Morales v. California Dept. of Corrections and Rehab.*, 168 Cal. App. 4th 729, 85 Cal. Rptr. 3d 724 (2008), could be reversed. The California Supreme Court has not yet seen fit to take these steps or others that could be taken, but a substantial claim of a federal constitutional violation might convince the court to make needed changes.

There is an exception to the exhaustion rule that is arguably applicable. Habeas corpus is unique among bodies of law with exhaustion rules in that when a petitioner had a state-court remedy at one time but defaulted it, the claim is considered "exhausted." *See Gray v. Netherland*, 518 U.S. 152, 161-162 (1996). As the Attorney General notes, AOB 27, n.14, federal courts can proceed to the question of whether a defaulted claim qualifies for an exception without a return to state court if the claim is clearly defaulted under state law. While amicus CJLF believes that federal courts in California should take this route considerably more often than they do at present, this is not the case to do so, given the compelling considerations noted above.

The final exception to exhaustion, added by Congress in AEDPA, is also available in this case. Meritless claims can be denied on the merits without a return to state court. *See* 28 U.S.C. § 2254(b)(2).

B. Statute of Limitations.

> "An amended habeas petition . . . does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Mayle v. Felix*, 545 U.S. 644, 650 (2005).

In its opinion on Claim 27, the District Court relied on many facts regarding delay in California's capital cases generally, *see* ER 3-14, far different from the original "straight" *Lackey* claim of delay in the petitioner's case alone. *See* ER 138-142.

The Attorney General did not raise a statute of limitations defense in the District Court. This was apparently based on the consistent position that Claim 27 is not a new ground for relief but merely a variation on the original *Lackey* claim and therefore subject to the limitation of 28 U.S.C. § 2254(d). As noted in Part I, if the Attorney General is correct the case is over. If this court should find that the Attorney General's position is in error, however, then it is presented with the situation in *Day v. McDonough*, 547 U.S. 198, 202 (2006), in which the federal court has discretion to raise the limitations issue *sua sponte*. That discretion is not limited to district courts. Courts of appeals may also raise a statute of limitations issue not argued or decided in the district court, although "appellate courts should reserve that authority for use in exceptional cases." *Wood v. Milyard*, 566 U.S. __, 132 S. Ct. 1826, 1834, 182 L. Ed. 2d 733, 743 (2012).

This case would become an exceptional case in the unlikely event that this court finds that the claim is not barred by § 2254(d), the exhaustion rule, the procedural default rule, or the rule of *Teague* v. *Lane*, 489 U.S. 288 (1989); and in the even more unlikely event that it actually finds merit in the claim. In that event, the statute of limitations would surely be raised in the district courts in every case where a death row inmate makes the same claim more than a year after the standard due date. Unlike *Wood*, 132 S. Ct. at 1834, 182

L. Ed. 2d at 743, the loss of the District Court's time in the present case pales in comparison with the confusion that would occur in hundreds of cases if this issue had not been resolved at the outset. Also unlike *Wood*, *see id*., the State has not expressly renounced reliance on the statute of limitations.

On the merits, the issue is an easy one. The clock began running under 28 U.S.C. § 2244(d)(1)(A) long ago, and the tolling under subdivision (d)(2) ended over five years before the amendment of the petition. *See* AOB 7-8. There has been no impediment to filing imposed by the State, *see* § 2244(d)(1)(B), or new rights recognized by the Supreme Court. *See* § 2244(d)(1)(C). The facts are all public record and well known to counsel for the petitioner, and no material change occurred in the year preceding the amendment. *See* § 2244(d)(1)(D).

This amendment should have been barred under the rule of *Mayle v. Felix*.

III. The claim is barred by the nonretroactivity rule of *Teague v. Lane*.

Addressing the "new rule" limitation of *Teague v. Lane*, 489 U.S. 288 (1989),[5] the District Court found that the rule was not new by stating the "rule" at the highest possible level of generality—"a state may not arbitrarily inflict the death penalty." ER 28. The *Teague* rule is a mature body of jurisprudence with numerous Supreme Court precedents over a span of a

5. The relevant portion of *Teague* was a plurality opinion, but it was quickly endorsed by a majority the same term, *see Penry v. Lynaugh*, 492 U.S. 302, 313 (1989), and the plurality opinion has been treated as authoritative ever since.

quarter century. This late in that development, it is nothing short of astonishing to see a federal district court making such an elementary error.

From the beginning of the *Teague* line of cases decades ago through the most recent decisions, the Supreme Court has repeatedly and emphatically rejected the argument that a decision can be exempted from the "new rule" limitation merely by citing a broad principle that the new rule is deemed to support. The very next year after *Teague*, the high court noted in *Sawyer v. Smith*, 497 U.S. 227, 236 (1990), "the test would be meaningless if applied at this level of generality." The high court has repeated this holding many times since. See, *e.g.*, *Gray v. Netherland*, 518 U.S. at 169. "We have repeatedly told courts . . . not to define clearly established law at high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. __, 131 S. Ct. 2074, 2084, 179 L. Ed. 2d 1149, 1159-1160 (2011) (citing *Sawyer*).

Teague cases diminished in number after AEDPA as the statutory rule of 28 U.S.C. § 2254(d) provided a basis of decision that made *Teague* analysis unnecessary in most state-prisoner federal habeas corpus cases. Yet when *Teague* does arise, the Supreme Court continues to reject arguments that extensions of existing rules and principles into new territory are anything other than "new rules."

Chaidez v. United States, 568 U.S. __, 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013) involved a collateral challenge to a federal conviction, where § 2254(d) does not apply. The case involved the retroactivity of *Padilla v. Kentucky*, 559 U.S. 356 (2010) which extended the right of effective assistance of counsel to advice on the immigration consequences of a

conviction. The Court rejected the argument that *Padilla* simply applied established law on ineffective assistance to a different factual circumstance. Extension of the right of effective assistance into new territory, a collateral consequence of conviction, was different in kind, answering a question of law about the reach of the right that was not dictated by precedent. *See id*., 133 S. Ct. at 1107-1100, 185 L. Ed. 2d at 156-159.

In the present case, the District Court extended the anti-arbitrariness rule of *Furman v. Georgia*, 408 U.S. 238 (1972) beyond the sentencing of murderers to death into the completely new territory of ultimately carrying out those judgments. "If that does not count as 'break[ing] new ground' or 'impos[ing] a new obligation,' we are hard pressed to know what would." *Chaidez*, 133 S. Ct. at 1100, 185 L. Ed. 2d at 159 (quoting *Teague*, 489 U.S. at 301).

Neither exception to *Teague* applies. The Supreme Court explained the first exception in *Schriro v. Summerlin*, 542 U.S. 348, 351-352 (2004) (citations and footnote omitted):[6]

> "New *substantive* rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, . . . , as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's

6. In *Summerlin v. Stewart*, 341 F.3d 1082, 1108 (9th Cir. 2003) (en banc), this court had given the first exception an expansive interpretation. Not only did the Supreme Court majority make short work of that holding, but the four dissenting justices who agreed with the result on another theory did not even think it worth mentioning. This mistake ought not be repeated.

> power to punish. . . . Such rules apply retroactively because they 'necessarily carry a significant risk that a defendant stands convicted of "an act that the law does not make criminal" ' or faces a punishment that the law cannot impose upon him."

No risk of this character exists in the present case. The proposed rule does not legalize murder or rape. It does not exempt murder in the commission of a rape, personally committed by the defendant, from the death penalty. *Cf. Enmund v. Florida*, 458 U. S. 782, 788 (1982) (minor accomplice in robbery-murder case). There is no finding that the defendant falls in a category of persons categorically excluded from the death penalty. *Cf. Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (intellectually disabled, then called mentally retarded); *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989) (rule later made in *Atkins* would qualify for first exception). As a matter of substantive Eighth Amendment law, a person like Jones who commits the crime he committed can be executed, and hence the first exception does not apply. The Constitution itself does not deprive the state of the power to impose the penalty. Cf. *Penry*, *supra*, at 330. Whatever one may think of executing Jones when others "escape" by dying of natural causes while their petitions are pending, that situation does not approach the injustice of punishing a person for a legal act or punishing him beyond the limits the law allows.

The second exception is a dead letter for practical purposes. Justice Harlan noted in one of the two separate opinions that eventually became the *Teague* rule that he would make an exception for certain essential rules such as *Gideon v. Wainwright*, 372 U.S. 335 (1963), then only eight years old. See *Mackey v. United States*, 401 U.S. 667, 694 (1971) (opinion of Harlan,

J.). In the years since the adoption of *Teague*, the Supreme Court has given little concrete guidance but has said that a new rule must have the "primacy and centrality of the rule adopted in *Gideon*" to qualify, *see Saffle v. Parks*, 494 U.S. 484, 495 (1990), and none has. The reason none has is obvious. There are not any rules of *Gideon* magnitude remaining to be made, and there have not been for a very long time. *See Summerlin*, 542 U.S. at 352 (quoting *Tyler v. Cain*, 533 U.S. 656, 667, n.7 (2001)).

The rule that the District Court would establish in this case cannot apply retroactively on federal habeas corpus. Therefore, the rule itself cannot be made on federal habeas corpus. *See Teague*, 489 U.S. at 316.

IV. The assertion that existing delays will never be fixed is speculation.

In this case, for the first time that amicus is aware of, a federal district court has set aside a state criminal judgment based not on any wrong committed against the petitioner in obtaining that judgment but instead on the court's speculation about what will or will not happen in the future. *See* ER 29. The assumption that problems will not be fixed is speculative, and indeed many of the fixes are already under construction.

The most easily fixed problem is the injunction against the three-drug execution protocol. The District Court issuing that injunction has already held that California could go ahead if it only adopted a barbiturate-only method, as many other states since have. *See Morales v. Hickman*, 415 F. Supp. 2d 1037, 1047 (N.D. Cal. 2006), *aff'd on other grounds*, 438 F.3d 926 (9th Cir. 2006). Although the state's Administrative Procedure Act

process is lengthy, the California Department of Corrections and Rehabilitation (CDCR) has leave of the Legislature to bypass that process for a period of over five months upon stating that an "operational need" of the CDCR requires it. *See* Cal. Penal Code § 5058.3.

A protocol meeting the *Morales* court's requirements could be promulgated tomorrow, and the 17 judgments awaiting execution could be carried out as soon as dates can be set. If CDCR will not carry out its duties voluntarily, the California Constitution has a broad standing rule for victims of crime to require it. *See* Cal. Const. art. I, § 28(c)(1). Although one attempt to obtain judicial relief was unsuccessful when the Court of Appeal exercised its discretion not to entertain a petition filed directly there without going to the Superior Court first, *Winchell v. Cate*, No. C070851 (Cal. App. 3d Dist. 2012), there is no reason to assume that the longer path of going through the Superior Court will not ultimately be successful.

In 1996, Congress enacted reforms of the federal habeas corpus process intended to reduce delay in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See Rhines v. Weber*, 544 U.S. 269, 276 (2005). These reforms have met with massive resistance and as a result have not yet been effective in reducing delay, but the issues are being resolved one by one, and the implicit assumption that the federal courts will never implement this act in a manner that carries out its purpose is not justified. For example, as should have been obvious from the day of enactment, the determination of whether a state court decision is unreasonable within the meaning of 28 U.S.C. § 2254(d) should be made on the state court record and can therefore

be made promptly after filing the federal petition with no discovery required. Yet it was only in 2011 that the Supreme Court overturned an erroneous precedent of this Court to the contrary. *See Cullen v. Pinholster*, 563 U.S. __, 131 S. Ct. 1388, 1399-1400, 179 L. Ed. 2d 557, 570-571 (2011). Also, it was only in 2011 that the high court corrected the error of declaring California's procedural default rules "inadequate," an error that had required federal courts in California habeas cases to adjudicate on the merits a plethora of claims that should have been dismissed at the threshold. *See Walker v. Martin*, 562 U.S. __, 131 S. Ct. 1120, 1131, 179 L. Ed. 2d 62, 74 (2011).

Appendix A of the District Court's opinion, ER 31-48, indicates that in 39 cases relief was granted by the federal courts. However, an examination of the dates on which federal habeas proceedings were initiated in these cases, the fifth column of the chart, reveals that only two of those cases were initiated after the effective date of AEDPA: Richard Raymond Ramirez[7] and Armenia Cudjo. In a sample of 13 districts from around the country, the AEDPA reforms cut the grant rate to a third of its pre-AEDPA level. *See* N. King, F. Cheesman, & B. Ostrom, Final Technical Report: Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996, p. 61 (2007). It may not have had that effect in California because a large number of defaulted claims were being improperly

7. Not to be confused with the "Night Stalker" Richard Ramirez, who died on Death Row.

considered, but the Supreme Court corrected that error in *Walker v. Martin*, *supra*.

Pinholster, *Martin*, and § 2254(d), if properly implemented by this court and the four California federal district courts, would reduce both the delay and the number of improper grants of relief. It is speculation to assume they will not.

Perhaps most importantly, though, is an entire chapter of the reform that has never been implemented, one that promises to dramatically reduce the delay in federal courts. In return for appointing qualified counsel and providing adequate funding for capital collateral review, which California has for many years,[8] *see* AOB 45, Congress has promised the states expedited processing in federal court in a fraction of the time now taken in California. *See* 28 U.S.C. § 2266. Implementation of this vital reform is presently blocked by an erroneous injunction of a district court, presently before this

8. Congress amended Chapter 154 in 2006 to abrogate unduly narrow judicial interpretations of the law's qualifications requirements. The former requirement that the state's qualifying standards be in statutes or rules of court is repealed. *Cf. Ashmus v. Woodford*, 202 F.3d 1160, 1165-1167 (9th Cir. 2000). A directive that there are no requirements beyond those expressly stated in the statute, 28 U.S.C. § 2265(a)(3), was inserted for the specific purpose of abrogating *Spears v. Stewart*, 283 F.3d 992 (9th Cir. 2002), to the extent that case denies a state the benefits of qualification based on timeliness of appointment. *See* 151 Cong. Rec. S1624-1625 (daily ed. Mar. 2, 2006) (statement of Sen. Kyl).

court in *Habeas Corpus Resource Center v. U.S. Department of Justice*, No. 14-16928.[9]

It is also premature to assume that the needed fixes will never be adopted in California. While it may not be a bad assumption that the current California Legislature will continue to kill every meaningful reform proposed to it,[10] the state does have an initiative process. Supporters of capital punishment filed a well-considered and carefully drafted initiative in December 2013. Although they were not able to raise the large sum of money needed to qualify a constitutional amendment in the short time available to meet the deadline for the 2014 ballot, an assumption that this effective reform will not make the 2016 ballot is not justified.

The decision in this case would take the drastic action of permanently reducing the sentence in this case to an unjust sentence, inadequate for the crime committed. If affirmed, it would have the same effect for every murderer on death row in California. There would be a new class of inadequately punished murderers grinning at us from their prison cells for the rest of their lives, just as Charles Manson and the rest of the Class of '72 do

9. The permanent injunction presently on appeal is erroneous for the same reasons the now-moot preliminary injunction was erroneous, as described in the Brief Amicus Curiae of Marc Klaas and Edward G. Hardesty in an earlier appeal in the same case, No. 14-15205.

10. The most recent attempt was April 17, 2012, when a carefully crafted set of reforms was summarily killed in the Senate Public Safety Committee.

now. Such a drastic miscarriage of justice should not be committed at all, but it should most certainly not be committed on the basis of speculation.

V. The State of California has not arbitrarily selected murderers for execution or nonexecution, because unnecessary and unconscionable delays by the federal courts constitute a critical part of the problem.

The delays in California's state courts are too long, to be sure, and, unlike the Attorney General, amicus CJLF does not contend they are necessary. By themselves, though, the delays in state courts would not produce the result the District Court found offensive—the likelihood that the judgments will never be carried out in most cases. Unwarranted and unnecessary delays in the federal courts themselves or in the state courts caused by the federal courts provide the additional delay that raise that possibility.

The District Court noted the large number of "exhaustion petitions" and the length of time they take to process before federal proceedings can resume. The court utterly failed to comprehend the complicity of the federal courts in causing this situation. The Supreme Court approved the "stay and abeyance" procedure in *Rhines v. Weber*, 544 U.S. 269 (2005), but it definitely did not write a blank check for condemned murderers to exploit this procedure for the purpose of delay. Quite the contrary, the high court noted the potential of stay and abeyance to defeat the core purposes of AEDPA and directed that measures be taken against that possibility.

> "For these reasons, stay and abeyance should be available only in limited circumstances. Because granting a stay effectively excuses a petitioner's failure to present his claims first to the state courts, stay and abeyance is only appropriate when the district court determines

> there was good cause for the petitioner's failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless. Cf. 28 U.S.C. § 2254(b)(2) ('An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State').
>
> "Even where stay and abeyance is appropriate, the district court's discretion in structuring the stay is limited by the timeliness concerns reflected in AEDPA. A mixed petition should not be stayed indefinitely. Though, generally, a prisoner's 'principal interest . . . is in obtaining speedy federal relief on his claims,' *Lundy*, *supra*, at 520 (plurality opinion), not all petitioners have an incentive to obtain federal relief as quickly as possible. In particular, capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death. Without time limits, petitioners could frustrate AEDPA's goal of finality by dragging out indefinitely their federal habeas review. Thus, district courts should place reasonable time limits on a petitioner's trip to state court and back. . . . And if a petitioner engages in abusive litigation tactics or intentional delay, the district court should not grant him a stay at all. See *id*., at 380-381." *Id*. at 277-278.

To say that the spirit of this passage has not been observed in California would be an understatement. As the California Supreme Court described in *In re Reno*, 55 Cal. 4th 428, 458, 514-515, 283 P.3d 1181, 1206, 1246 (2012), the standard practice in this state is for condemned murderers to return to that court and file a blunderbuss petition of hundreds of pages and a plethora of claims, and in nearly all cases every claim turns out to be defaulted, meritless, or both. Except in unusual circumstances, "such successive petitions rarely raise an issue even remotely plausible, let alone

state a prima facie case for actual relief." *Id*. at 457-458, 283 P.3d at 1206. Not only does this abusive tactic cause delay, but it drains resources that could be used on other cases. Defense lawyers must write these pointless tomes, the Attorney General must answer them, and the California Supreme Court's staff and justices must pick through them, looking for a needle in the haystack. *See id*. at 515, 283 P.3d at 1246-1247.

The Supreme Court did not address this particular abuse in *Rhines* because the issue was not before it, but from the spirit of the passage quoted above it is clearly within the authority *and duty* of the federal district court to prevent it. Stay-and-abeyance orders should be the exception and not the rule. When they are issued, they should be crafted to limit the petitioner to claims where he has made a showing of potential merit, which includes both a showing of a substantial argument on the merits of the underlying claim and a showing that the claim is not barred by procedural default. *Cf. Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (standard for certificate of appealability). This is not being done, as *Reno* vividly illustrates, and thus the federal courts are partly responsible for the backlog in state courts.

We have already noted in Part IV the problems of federal courts not dismissing § 2254(d)-barred claims at the threshold and improperly proceeding to full litigation on the merits of procedurally defaulted claims prior to *Walker v. Martin*. A final problem worth noting is the simple failure of many federal district judges to give these cases the attention and priority they deserve, in violation of the victims' rights under 18 U.S.C. § 3771, subdivisions (a)(7) and (b)(2)(A).

A prime example is the case of Lawrence Bittaker. Although opinions on capital punishment vary sharply, any reasonable person would have to agree that if we are going to have capital punishment at all (as the people of California have decided), then Bittaker's string of kidnapping, rape, torture, and murder of five teenage girls is the kind of crime that warrants the punishment. *See People v. Bittaker*, 48 Cal. 3d 1046, 1061-1062, 774 P.2d 659, 664-665 (1989). Other than blanket opposition to capital punishment, there can be no doubt of the justice of the judgment. One would think that the federal district judge assigned to the case would do everything possible to push this case along. One would be wrong.

According to the Attorney General's most recent status report, *Bittaker v. Woodford*, C.D. Cal. CV 91-1643-TJH, Doc. 553, Sept. 8, 2014, cross-motions for summary judgment have been fully briefed and awaiting court action for *nine years*. This is an atrocity.

It would be gross hypocrisy for the federal judiciary to take the State of California to task for failing to move its cases along when federal judges have failed to implement the delay-reducing reforms enacted by Congress, failed to take elementary steps to move the cases in federal court, failed to take measures against abuse of their stay-and-abeyance orders as admonished by the Supreme Court, and sometimes simply sit on cases for years without any semblance of justification. The failure to enforce the death penalty in California is very largely the fault of the federal courts, and they should get their own house in order before pointing the finger at the state courts.

CONCLUSION

The decision of the District Court should be reversed.

December 8, 2014

Respectfully submitted,

s/KENT S. SCHEIDEGGER
Attorney for Amicus Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(5), (6), (7)(B) and (C) and Ninth Circuit Rule 32, I certify that the attached Brief Amicus Curiae for the Criminal Justice Legal Foundation is proportionally spaced, uses 15-point Times New Roman type and contains 6835 words.

December 8, 2014 s/KENT S. SCHEIDEGGER

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December 2014 I caused the foregoing brief to be electronically filed with the United States Court of Appeals for the Ninth Circuit, and served to counsel, via ECF system.

December 8, 2014 s/KENT S. SCHEIDEGGER