Case No. 14-56373

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**IN THE**
**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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**ERNEST DEWAYNE JONES**,
*Petitioner-Appellee*,

v.

**RON DAVIS**,
Acting Warden of California State Prison at San Quentin,
*Respondent-Appellant*

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# BRIEF OF HABEAS CORPUS SCHOLARS AND PROFESSORS AS *AMICI CURIAE* SUPPORTING PETITIONER-APPELLEE ERNEST DEWAYNE JONES AND SUPPORTING AFFIRMATION OF JUDGMENT BELOW

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

The Honorable Cormac J. Carney, Judge

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## INTEREST OF *AMICI CURIAE*

*Amici* are scholars and professors with expertise in habeas corpus and capital punishment law[1]. *Amici* submit this brief to address procedural issues the State asserts should have barred the District Court for the Central District of California ("District Court") from upholding Petitioner's claim that California's capital punishment system is unconstitutional under the Cruel and Unusual Punishments Clause of the Eighth Amendment ("Petitioner's Claim"). These issues are: exhaustion of state remedies ("exhaustion") and the non-retroactivity principle in *Teague v. Lane*, 489 U.S. 288 (1989) ("*Teague* non-retroactivity"). *Amici* have an interest in ensuring the appropriate application of these doctrines.

Both parties have consented to the filing of this brief (although Appellant has not consented to an extension of time for its filing[2]). No counsel for either party drafted any portion of this brief. No party, party's counsel, or other person contributed money to prepare or submit this brief.

## SUMMARY OF ARGUMENT

Neither exhaustion nor *Teague* appropriately barred the District Court from upholding Petitioner's Claim. Although Petitioner's Claim was not exhausted, this Court should dispense with the exhaustion requirement because requiring exhaustion would only aggravate and extend the constitutional

[1] A list of all signatories is presented in Appendix A.

[2] On March 6, 2015, Prof. James Liebman filed a motion requesting an extension of time to file the instant brief. (ECF No. 42.)

violation. In any event, exhaustion is excused because it would be "ineffective" under the exhaustion statute, 28 U.S.C. § 2254(b). Petitioner's Claim is not barred by *Teague* non-retroactivity because the rule Petitioner is seeking to be announced is substantive.

## ARGUMENT

### I. THIS COURT SHOULD DISPENSE WITH THE EXHAUSTION REQUIREMENT AND REACH THE MERITS. ALTERNATIVELY, EXHAUSTION IS EXCUSED.

#### A. Petitioner Did Not Exhaust His State Remedies Because Petitioner's Claim Was Not Fairly Presented.

Exhaustion requires petitioners to "fairly present" their federal claims to the state courts. *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (*per curiam*). A claim is not fairly presented if it is not the "substantial equivalent" of the claim raised in state court. *Lopez v. Schriro*, 491 F.3d 1029, 1040 (9th Cir. 2007). A claim is not "substantially equivalent" if it is "conceptually distinct from the claims raised before the state courts despite raising the same federal constitutional provisions." *Lueck v. Curry*, 2008 U.S. Dist. LEXIS 89483, at *11 (E.D. Cal. Oct. 20, 2008) (citing *Gray v. Netherland*, 518 U.S. 152, 164–65 (1996). A claim also is not fairly presented if it is in a "significantly different and stronger evidentiary posture." *Aiken v. Spalding*, 841 F.2d 881, 883 (9th Cir. 1988).

In 2001, on direct appeal in the California Supreme Court, Petitioner presented a *Lackey* claim, which alleges that an inordinately delayed execution violates the Eighth Amendment because it is psychologically torturous and it undermines the penological purposes of the death penalty.[3] In 2010, he subsequently presented an enhanced *Lackey* claim to the District Court in Claim 27 of his federal habeas petition. The State explicitly waived exhaustion of all claims in that petition in its answer. *See* SER 199 n.3. In 2014, the District Court requested that the parties brief a "potential" claim that California's death penalty was unconstitutional because "both petitioner and the State must labor under the grave uncertainty of not knowing whether petitioner's execution will ever, in fact, be carried out." ER 134–35. Pursuant to the court's order, Petitioner presented the claim now before this Court in his subsequent brief ("Petitioner's Claim"). The State raised exhaustion in its subsequent brief. The District Court ultimately granted relief on Petitioner's Claim.

Petitioner's Claim and the claim Petitioner raised in his state appellate brief are not "substantially equivalent" because they rely on different lines of reasoning. Underlying Petitioner's *Lackey* claim on direct appeal is the following theory: Petitioner's death sentence violates the Eighth Amendment because a delayed execution is psychologically torturous and undermines the

[3] *See, e.g.*, *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., respecting denial of certiorari); *Smith v. Mahoney*, 611 F.3d 978 (9th Cir. 2010); *Allen v. Ornoski*, 435 F.3d 946 (9th Cir. 2006).

penological purposes of the death penalty announced in *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion).[4] Petitioner's Claim presents the following theory: When the State is aware of inordinate, systemic delays in its capital punishment system that result, *de facto*, in a punishment of "life imprisonment with no possibility of parole but slight possibility of execution,"[5] but the State fails to address the causes of these delays, its death penalty violates the Eighth Amendment. This is not a *Lackey* claim. Under this theory, which formed the basis for the District Court's holding,[6] the cruelty lies not in the death penalty itself or in the subjective experience of waiting for it. The cruelty lies in the objective fact that the State is advertently imposing a substantively different penalty on Petitioner that was not bargained for by the people of California, the legislators of California, or the jury that sentenced Petitioner to death almost twenty years ago. Delay is only relevant insofar as it was a major factor in causing the punitive regime that Petitioner now alleges is unconstitutional on its face, much as a law that authorizes a 25-year pre-execution period and an arbitrarily timed execution thereafter would be unconstitutional on its face.

Petitioner's Claim is also not fairly presented because the evidence presented in support of Petitioner's Claim places Petitioner's case in a significantly different and stronger evidentiary posture. The factual basis for the

[4] *See* ER 144–58.

[5] SER 96.

[6] *See* ER 3.

*Lackey* claim in Petitioner's state appellate brief consisted of evidence of the psychological "death row phenomenon" and citations to international opinions. ER 148–54. In contrast, the factual basis for Petitioner's Claim consists of evidence of California's systemic delays, the causes of them, and the State's knowledge of those causes and their effects. SER 85–95.

### B. This Court Should Dispense With the Exhaustion Requirement and Consider the Merits of Petitioner's Claim.

The Supreme Court has cautioned that "[t]he very nature of the writ [of habeas corpus] demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Hensley v. Municipal Court, San Jose-Milpitas Judicial Dist.*, 411 U.S. 345, 349–50 (1973) (citations and internal quotation marks omitted). The exhaustion requirement is not jurisdictional. *See Granberry v. Greer*, 481 U.S. 129, 130 (1987); *see also Lambrix v. Singletary*, 520 U.S. 518 (1997); *Fay v. Noia*, 372 U.S. 391, 420 (1963). An appellate court should "exercise discretion in each case to decide whether the administration of justice would be better served by insisting on exhaustion or by reaching the merits of the petition forthwith." *Granberry*, 481 U.S. at 123. "The exhaustion doctrine . . . reflects a careful balance between . . . federalism and the need to preserve the writ of habeas corpus as a swift and imperative remedy in all cases of illegal restraint or confinement." *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 490 (1973).

Carefully considering whether enforcing exhaustion would achieve the purposes of exhaustion is even more crucial after the passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214. AEDPA gave the federal courts more prudential factors to consider. One of the goals of AEDPA is to "streamlin[e] federal proceedings." *Burton v. Stewart*, 549 U.S. 147, 154 (2007). AEDPA's other purposes are "to eliminate delays in the federal habeas review process" and "promote[] judicial efficiency." *Holland v. Florida*, 560 U.S. 631, 648 (2010); *Day v. McDonough*, 547 U.S. 198, 205 (2006). The Supreme Court has refused to enforce exhaustion in cases where exhaustion would frustrate these goals. *See, e.g., Panetti v. Quarterman*, 551 U.S. 930, 946 (2007) (stating "requiring prisoners to [exhaust] unripe . . . claims . . . neither respects the limited legal resources available to the States nor encourages" exhaustion).

This Court recognizes exhaustion is not jurisdictional. *See, e.g., Simmons v. Blodgett*, 110 F.3d 39, 41 (1997). Although *Simmons* was not governed by AEDPA, it has been cited favorably by this Court in post-AEDPA cases. *See, e.g., Menendez v. Terhune*, 422 F.3d 1012 (2005); *Valerio v. Dir. of the Dep't of Prisons*, 306 F.3d 742 (2002). This Court has exercised its discretion to reach the merits of a habeas petition when "the interests of comity and judicial efficiency are better served" by doing so. *See, e.g., Walters v. Maass*, 45 F.3d 1355, 1360 n.6 (1995). For example, this Court reached the merits of an unexhausted claim when a petitioner "consistently challenged" certain

procedures on a due process basis, even though the precise legal ground for his claim had changed due to an "evolving background of law." *Brock v. Selig*, 390 F.3d 1088, 1089 n.1 (9th Cir. 2004). This Court has also acknowledged that "[p]rocedural bar issues are not infrequently more complex than the merits issues . . . , so it may well make sense in some instances to proceed to the merits if the result will be the same." *Franklin v. Johnson*, 290 F.3d 1223 (9th Cir. 2002); *see also Gutierrez v. Griggs*, 695 F.2d 1195, 1198 (9th Cir. 1983).

This Court should dispense with exhaustion and directly address the merits for several reasons. First, the District Court ruled correctly on the merits so requiring exhaustion would aggravate the constitutional violation and irreparably harm Petitioner's constitutional rights thereby. Second, this Court will inevitably reach the merits in the process of deciding whether Petitioner's Claim was exhausted. Analyzing exhaustion would therefore be a waste of this Court's time, exhaustion would be futile, and exhaustion would not further "orderly state procedure" or "streamline federal habeas proceedings." Third, nonexhaustion of Petitioner's Claim was due not to Petitioner's actions but to unique procedural developments in the District Court, so excusing exhaustion would prolong his constitutional deprivation unnecessarily. Fourth, Petitioner consistently challenged California's death penalty under the Eighth Amendment in his state appellate brief and his habeas petitions. Through no fault of his own, the law as well as the facts surrounding the issue evolved considerably after

Petitioner ended postconviction litigation in state court, leading to the formulation of the claim before this Court.

### 1. Requiring Exhaustion Would Aggravate the Constitutional Violation Petitioner Endures.

The District Court ruled correctly in holding that Petitioner is currently suffering from a grave constitutional violation. That violation, to be exact, is "[a]llowing [California's capital punishment] system to continue to threaten Mr. Jones with the slight possibility of death, almost a generation after he was first sentenced." ER 3. The District Court's factual findings corroborate its conclusion that Petitioner is not being subjected to death penalty, but to "*life in prison, with the remote possibility of death.*" *Id.* Justice outweighs the state's interest in comity in this case because postponing federal review of the merits of Petitioner's Claim would only extend and aggravate the constitutional violation found by the District Court and would defeat habeas corpus's central purpose of serving as a "swift and imperative remedy."

Petitioner has already spent nineteen years on death row. Returning to the California Supreme Court to exhaust state remedies currently takes an average of 3.2 years. ER 14. Requiring Petitioner to exhaust state remedies would subject him to California's unconstitutional system of capital punishment for at least another three to four years, aggravating the constitutional violation and diminishing the value of any ensuing remedy.

### 2. Exhaustion Is Futile Because This Court Cannot Avoid Adjudicating the Merits of Petitioner's Claim.

This Court cannot avoid adjudicating the merits of Petitioner's Claim in the process of deciding exhaustion. Although Petitioner's Claim does not locate the constitutional violation in the effects of pre-execution delay per se,[7] the District Court found California's capital punishment system unconstitutional on the basis of a factual record replete with evidence of the unparalleled pre-execution delays in California. These snowballing delays caused the constitutional violation. The longer they continue, both over the course of each individual case and across the capital punishment system as a whole, the worse the constitutional violation becomes. Most of the delays in the processing of capital cases in California occur as the case proceeds through the state court system. *See* ER 13 (noting that on average capital inmates spend 17 years litigating their direct appeals and habeas petitions before the California Supreme Court).

To send Petitioner's case back to state court would obviously lengthen his appellate process, and in doing so aggravate the constitutional harm that the District Court found. Even worse, as the District Court stated, it would force him to raise his constitutional rights in the very system whose inadequacies

[7] Time, like psychological anguish or the lessening of the death penalty's penological value, is only a symptom of the violation Petitioner endures. The root of the violation lies in the uncontroverted fact that Petitioner's punishment has been transformed into a species of punishment much more cruel and unusual than the death penalty enacted into the California Penal Code.

gave rise to his claim. When it is logically certain that the alleged constitutional harm will worsen as a direct result of exhaustion, and when the District Court has found that protracted delays in the state court system critically promote the constitutional harm, enforcing exhaustion is equivalent to finding that delays in California's capital punishment system do *not* rise to the level of constitutional harm.[8] That finding leads to the necessary conclusion that the constitutional harm that Petitioner's Claim identifies is invalid.

Another reason this Court would inevitably decide the merits of Petitioner's Claim is that, if this Court sought to analyze the applicability of the statutory exceptions to exhaustion in 28 U.S.C. § 2254(b)(1)(A) rather than waiving exhaustion via judicial discretion, this Court would be required to examine the applicability of "extraordinary delay" precedent excusing exhaustion under 28 U.S.C. § 2254(b)(1)(A)(ii). Although there is no reason why exhaustion should not be excused due to the "extraordinary delay" in this case, as this Court stated in *Coe v. Thurman*, attempting to analyze a claim under the rubric of exhaustion "is a risible solution . . . when the essence of [the claim] arises directly out of [an] inability to [exhaust state remedies]." 922 F.2d 528, 530 (9th Cir. 1991). If this Court were to assume the task of assessing whether "extraordinary delay" excuses a claim that is analytically based on the

[8] It would make little sense for this Court to distinguish harm that is caused by the delays in state court proceedings from harm that is caused by other causes of delay in California's capital punishment system, for example.

harms of extraordinary delay, it would blur the line between procedural and substantive analysis, which could cause confusion in the lower courts and obfuscate the actual merits.

Given that this Court will inevitably reach the merits of Petitioner's Claim, exhaustion itself is futile. If this Court finds that there is no violation, there will be no reason for Petitioner to exhaust because the State will have secured the judgment it seeks. If this Court agrees with the District Court's finding that there has been a constitutional violation, exhaustion should be dispensed with because requiring Petitioner to return to the state courts would extend and aggravate the violation found, and in any event this Court's decision would be entitled to "substantial deference" by the California Supreme Court, *see Yee v. City of Escondido*, 274 Cal. Rptr. 551, 553 (1990).

Applying or analyzing exhaustion instead of waiving exhaustion will not "streamline federal proceedings," "eliminate delays in the federal habeas review process," or "promote[] judicial efficiency," because this Court will reach the merits anyway. If this Court ultimately requires exhaustion, it will instigate another round of litigation in the California Supreme Court and the District Court, hurting judicial efficiency by further depleting the California Supreme Court of its staggeringly limited judicial resources and adding to the federal courts' increasing caseload. In fact, the most likely result of requiring Petitioner to exhaust is that, years later, his claim will end up right back in this Court, saddled with even more procedural complications.

### 3. The Fact That Petitioner's Claim Is Unexhausted Is Not Due to His Own Actions.

In *Granberry*, the Supreme Court considered whether exhaustion should be enforced when the State had failed to raise exhaustion in the district court. The Court reasoned that "[i]f the habeas petition is meritorious, such a rule would prolong the prisoner's confinement for no . . . reason," and "if . . . the petition has no merit, a belated application of the exhaustion rule might simply require useless litigation in the state courts." 481 U.S. at 132–33. The Court concluded, "The court [of appeals] should determine whether the interests of comity and federalism will be better served by addressing the merits forthwith or by requiring a series of additional state and district court proceedings." Although AEDPA's express waiver requirement no longer precludes parties from raising exhaustion unless they have expressly waived the defense, the *Granberry* Court's rationale may be applicable in other circumstances in which a claim is unexhausted through no fault of the petitioner.

One federal court in this Circuit appears to have implicitly adopted the *Granberry* Court's reasoning, reaching the merits when "it [did] not appear that [petitioner] could have fully exhausted his claims at [that] time under the unusual procedural posture of this case." *Leonard v. King*, 2014 U.S. Dist. LEXIS 174459, at *18–19 (E.D. Cal. Dec. 16, 2014). In *Leonard*, the court considered the merits of a claim that had not been presented to the California Supreme Court because the California Court of Appeal remanded that claim to

the trial court while the other claims proceeded to be decided by the California Supreme Court.

As in *Leonard*, the procedural posture of this case is unusual. Petitioner's Claim is unexhausted only because it was reformulated last year after the District Court ordered briefing on a claim with a different legal basis. ER 134–35. Petitioner did not intentionally withhold his claim from the state courts. Thus, the rationale that the *Granberry* Court gave for waiving exhaustion applies here as well: If Petitioner's Claim is meritorious, requiring exhaustion would prolong his confinement for no good reason, and if the claim is plainly without merit, further litigation in state court is useless. As in *Leonard*, this Court should reach the merits.

#### 4. The Relevant Body of Law Has Evolved Considerably Since Petitioner Withdrew His State Habeas Petition Five Years Ago.

In *Selig*, *supra*, this Court exercised its discretion to reach the merits when the petitioner raised an unexhausted claim arguing that the jury instructions supporting his civil commitment failed to satisfy certain due process requirements. The court did so because the due process requirements had become law only a couple of months prior and the petitioner had consistently challenged the jury instructions on a due process basis previously. 390 F.3d at 1089 n.1.

Petitioner raised an Eighth Amendment *Lackey* challenge in his state appellate brief, his state habeas petition, and his original federal habeas petition (before the District Court's briefing order). Thus, Petitioner made continuous efforts to challenge his death sentence on Eighth Amendment grounds. In 2010, Petitioner withdrew his state petition because the State explicitly conceded exhaustion as to all claims in his federal petition. Otherwise, Petitioner could have litigated his claims more fully in state court. Prior to 2010, even legal scholars had not yet begun to theorize a claim premised on systemic delay.[9] The study by the California Commission on the Fair Administration of Justice, extensively cited in the District Court's opinion, was not published until 2008.

In light of his continuous efforts to challenge his penalty on Eighth Amendment grounds and later legal developments, Petitioner should not be faulted for not exhausting this precise claim in the state courts and this Court should exercise its discretion to hear the claim on the merits.

### C. Exhaustion Is Excused Under 28 U.S.C. § 2254(b)(1)(B)(ii).

Exhaustion is excused whenever "(i) there is an absence of available State corrective process . . . or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(B)(i)–

[9] *See generally* Angela April Sun, Note, "'Killing Time' in the Valley of the Shadow of Death: Why Systematic Preexecution Delays on Death Row Are Cruel and Unusual, 113 Colum. L. Rev. 1585 (2013); Brent E. Newton, "The Slow Wheels of Furman's Machinery of Death, 13 J. App. Prac. & Process 41 (2012).

(ii) (2012). Beyond reprising that exhaustion is excused if "there is no opportunity to obtain redress in state court or if the process is so clearly deficient as to render futile any effort to obtain relief," *see Duckworth v. Serrano*, 454 U.S. 1, 3 (1981), the Supreme Court has not shed much light on circumstances triggering § 2254(b)(1)(B)(ii).[10] Considering the legislative history of this exception and how the lower federal courts have applied it is therefore imperative and leads to the conclusion that Petitioner's Claim should be excused from exhaustion under § 2254(b)(1)(B)(ii).[11]

### 1. Congress Enacted § 2254(b)(1)(A)(ii) to Protect Petitioners' Federal Rights from Being Improperly Adjudicated By Inadequate State Processes.

As codified in 1948, § 2254(b) contained the same exceptions that it does today. *See* 28 U.S.C. § 2254(b) (1952). These exceptions derived from *Ex Parte Hawk*, a case Congress cited "as correctly stating the principle of exhaustion" when it codified § 2254. *Rose v. Lundy*, 455 U.S. 509, 516 (1982) (citing H.R. Rep. No. 308, at A180 (1947)).

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[10] The Supreme Court has largely left the interpretation of § 2254(b)(1)(B)(ii) to the lower federal courts. *See, e.g., Frisbie v. Collins*, 342 U.S. 519, 520–21 (1952) ("Whether such circumstances exist calls for a factual appraisal by the [district] court in each special situation.").

[11] Excusing Petitioner's Claim from exhaustion under § 2254(b)(1)(A)(ii) would not "sidestep[] the basic structure of federal habeas jurisdiction" created by AEDPA, *cf.* AOB 31–33. It is disingenuous for the State to argue that granting relief under an explicit statutory exception is contrary to that same statute's spirit or intent. Despite AEDPA's overhaul of federal habeas jurisdiction, the exceptions to § 2254(b)(1)(B) remained intact. *Compare* 28 U.S.C. § 2254(b) (1952) *with* 28 U.S.C. § 2254(b) (2012).

In *Hawk*, the Court held:

> [W]here resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy, or because . . . the remedy . . . proves in practice unavailable or seriously inadequate, a federal court should entertain his petition for habeas corpus, else he would be remediless.

321 U.S. 114, 118 (1944). As can be seen by the plain language of § 2254(b), Congress wrote these exceptions into the statute as exemptions from exhaustion in the first instance. The Court itself acknowledged this in *Darr v. Buford*. *See* 339 U.S. 200, 210 (1950) ("Congress has now made statutory allowance for exceptions [to exhaustion] . . . when there exist 'circumstances rendering [the state corrective] process ineffective to protect the rights of the prisoner.'").

Congress made these exceptions explicit in § 2254(b) because certain states' postconviction review procedures were complicated, unstandardized, and lacking conformity with federal standards.[12] *See, e.g.*, *Darr*, 339 U.S. at 213 (citing S. Rep. No. 1559, at 9) (stating § 2254(b) exceptions "provide for particular situations in the states"); William F. Swindler, "State Post-Conviction Remedies and Federal Habeas Corpus," 12 Wm. & Mary L. Rev. 147, 153 (1970) (revealing Congress enacted § 2254(b) exceptions because it "accept[ed] the realities of contemporary criminal procedure in most states"); *id.* at 156

[12] One example was the State of Illinois, which required defendants to choose from a "merry-go-round" of postconviction writs before securing a federal hearing. *Marino v. Ragen*, 332 U.S. 561, 570 (1947). Even before the enactment of § 2254(b), Justice Rutledge declared that exhaustion should not be pursued when the state remedy is "a procedural morass offering no substantial hope of relief." *Id.* at 565.

(recounting National Conference of Commissioners on Uniform State Laws' observation that exhausting state remedies in 1966 was "costly, time-consuming, and uncertain").

Around the time of § 2254(b)'s enactment, a "basic two part problem . . . was emerging: The need for a reviewing procedure better adapted to the protection of [constitutional] rights than [federal] habeas corpus, and the need for such a procedure to be developed and administered within the state courts not the federal court system." Swindler, *supra*, at 152. The exhaustion requirement was in part an attempt by the federal courts and Congress to "encourage states to assume this responsibility." *Id.* *Hawk* "represented an effort by [the] Court to clear the way for prompt and orderly consideration of habeas corpus petitions from state prisoners." *Darr*, 339 U.S. at 211. However, "[*Hawk*] recognized . . . once it could be shown, as it could more often than not, that state post-conviction remedies were lacking or inadequate, the petitioner would still pursue a course into the federal courts." Swindler, *supra*, at 152–53.[13]

[13] Herbert Wechsler believed that § 2254(b) exceptions should be the rule rather than the exception in order to encourage states to rapidly clarify state remedies, stating "[federal habeas] jurisdiction should be open not when it is plain that the state courts provide no remedy, but rather unless the availability of such a remedy is clear." Herbert Wechsler, "Federal Jurisdiction and the Revision of the Judicial Code," 13 Law & Contemp. Probs. 216, 231 (Winter 1948).

Amid the postconviction reform efforts that ensued, the California state courts struggled with many of the same issues they struggle with today. As the letter below reveals:

> [T]he California courts . . . simply do not have or take the time to deal . . . with the many applications for post-conviction relief that they receive . . . . [N]ot more than 2% or 3% [of state habeas petitioners] received any evidentiary hearing and not more than 10% received any statement of the reasons their relief was being denied. In the Federal court . . . perhaps 5% to 10% received evidentiary hearings and almost 100% of the cases resulted in individualized opinions or short orders . . . .

Swindler, *supra*, at 187 (quoting Letter from Steven M. Kipperman (Sept. 25, 1969)).

This letter still resonates today. The California Supreme Court has granted relief in only 2.5% of the capital habeas petitions that it has resolved. Federal courts have granted relief in 60% of this same category of cases. When the California Supreme Court does rule on a capital habeas petition, it usually does so via unpublished opinion. Of 729 habeas petitions resolved on the merits since 1978, the court issued orders to show cause in 99 cases and held evidentiary hearings 45 times.

Congress's attempt to encourage more expeditious resolution of habeas petitions has utterly failed in California. California's atavistic state corrective process is clearly inadequate under a historical reading of § 2254(b)(1)(A)(ii). The system has not evolved in such a way as to ameliorate Congress's concerns

about making certain states' courts responsible for adjudicating prisoners' federal constitutional rights.

### 2. Delay Renders California's State Corrective Process "Ineffective" Under § 2254(b)(1)(A)(ii).

Although the Supreme Court has never considered whether delay in state corrective proceedings excuses exhaustion under § 2254(b)(1)(A)(ii), the Court regards systemic delay with disfavor. *See, e.g.*, *Bartone v. United States*, 375 U.S. 52, 54 (1963) ("Where state procedural snarls or obstacles preclude an effective state remedy . . . federal courts have no other choice but to grant relief . . . ."); *Marino v. Ragen*, 332 U.S. 561, 565, 568 n.7, 570 (1947) (Rutledge, J., concurring) (finding state postconviction remedies "inadequate" due in part to delays); *cf. Boumediene v. Bush*, 549 U.S. 1328, 1329 (2007) (Stevens and Kennedy, JJ., respecting denial of certiorari), *vacated by* 551 U.S. 1160 (2007) (stating Court would consider ways to exercise habeas jurisdiction over enemy-combatant petitioners if they claimed "unreasonably delayed proceedings" under congressionally enacted habeas substitute).

This Court has held in a capital case that "extraordinary delay" by the state courts renders state corrective processes "ineffective" within the meaning of § 2254(b)(1). *Phillips v. Vasquez*, 56 F.3d 1030, 1033, 1036 (9th Cir. 1995), *aff'd*, 110 F.3d 39 (1997). The court explained its rationale thus:

> [I]f we refuse to consider [petitioner's] habeas petition now, he might be forced to wait a further indeterminate period of time before he could raise any federal challenge to the constitutionality

> of his conviction. The prejudice inherent in such a delay is quite evident. For fifteen years, [petitioner] has been compelled to remain in prison under a possible sentence of death while being denied the opportunity to establish the unconstitutionality of his conviction.

*Id.* at 1035.

It is notable that the court found the prejudice in the fifteen years of delay to be "quite evident" and did not require the petitioner to make any specific showing of prejudice. *Phillips*, 56 F.3d at 1035. The only findings necessary to this holding were (1) the length of the delay since the petitioner's conviction and (2) the petitioner's "right to reasonably prompt constitutional scrutiny of his conviction." *Id.* at 1033.

The State argues *Phillips* is not controlling because the petitioner presented his claims arising from his conviction to the state court on appeal before filing his federal habeas petition, sidestepping comity concerns.[14] AOB 30. The State suggests extraordinary delay can only excuse exhaustion when comity concerns are nonexistent. *Id.* This is misleading. The court stated unequivocally, "[W]e believe . . . [petitioner's] right to reasonably prompt constitutional scrutiny of his conviction *outweighs any* prudential concerns that might exist." *Phillips*, 56 F.3d at 1035. The court did not conduct a threshold test of whether comity was at issue. It weighed "the significant harms that may

[14] The petitioner filed a habeas petition in district court including only claims arising from his conviction; the California Supreme Court had not yet made a final ruling on his sentence. *Id.* at 1032. The district court dismissed the petitioner's habeas petition because his sentencing appeal was still pending. *Id.*

arise from further delay" against prudential concerns *including* comity. *Id.* at 1036.

In addition, the court conducted this balancing test only after discussing earlier precedents excusing exhaustion "despite" prudential concerns, *id.* at 1035 (citing *Coe v. Thurman*, 922 F.2d 528 (9th Cir. 1991)), and only after assessing the significance of extraordinary delay. *Id.* at 1035. As stated above, the court found the prejudice "inherent" in a fifteen-year delay "quite evident" not because there was anything special about the fact that petitioner challenged only his conviction, not his sentence. *Id.* In fact, although petitioner's sentence was still uncertain, the court heavily implied that petitioner's posture of being imprisoned "under a possible sentence of death" was one of the main components of this prejudice. *Id.* The prejudice was "evident" because delay practically "denied" the petitioner his "right to raise [a] federal challenge to the constitutionality of his conviction." *Id.* at 1035–36. This right is shared by all petitioners who pursue federal habeas relief. It would be anomalous for the court to lay so much emphasis on the federal nature of the right if the court were referring to the petitioner's right to review of his conviction, because capital defendants do not possess a right to federal review of a state conviction independent of federal habeas corpus.

Although the *Phillips* court provided independent reasoning for its "extraordinary delay" holding and the facts in *Phillips* distinguish it as the foremost authority on the implications of extraordinary delay for exhaustion,

*Phillips* cites *Coe* as ancillary support for its holding. In *Coe*, this Court held that "a prisoner need not fully exhaust his state remedies if the root of his complaint is his inability to do so" due to excessive appellate delay. *Id.* at 531. The petitioner in *Coe* claimed that excessive appellate delay violated his rights to due process. Although *Coe* did not look to any specific factors outside of the nature of the claim itself in order to excuse exhaustion, this Court subsequently applied the factors that *Coe* used to analyze the due process claim on the merits to determine § 2254(b)(1)(B)(ii)'s applicability. *Gay v. Ayers*, 262 Fed. App'x 826, 828 (9th Cir. 2008). These factors are: "(1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant." *Id.*

District courts in this Circuit have adopted *Phillips*' holding in cases not presenting *Phillips*' unique facts. In *Simmons v. Blodgett*, the district court cited *Phillips* for the proposition that "'extraordinary delay' in the state courts can render state corrective processes 'ineffective' within the meaning of § 2254(b)." 910 F. Supp. 1519, 1523 (W.D. Wash. 1996). The court applied *Phillips*'s holding to its case after finding that the petitioner had been "imprisoned for over eleven years," "the final resolution of this matter by the state courts is at least a year away," and a key witness was dying. *Id.* at 1524. A very recent case, *Majors v. Warden*, has also cited *Phillips* as expressing a general rule that extraordinary delay renders the state corrective process ineffective. 2010 U.S. Dist. LEXIS 39840, at *6 (E.D. Cal. Mar. 26, 2010).

Petitioner has experienced "extraordinary delay." He has been on death row for nineteen years—four years longer than the petitioner in *Phillips*—due to delays in California's postconviction process. As in *Phillips*, there is no "end in sight" to this delay because postconviction delays are ballooning, caseloads are expanding, and legal and judicial resources are dwindling. ER 5; ER 7. If Petitioner's Claim is not excused from exhaustion, Petitioner must return to the California Supreme Court, which the District Court has found to be an integral component of California's dysfunctional postconviction process. Because that court's backlog of cases is actually growing, current estimates about how long it will take to exhaust this claim are definitely "at least a year away." *See* ER 7; ER 25.

As in *Coe*, Petitioner's Claim is premised on delay and Petitioner's inability to exhaust state remedies without tapering his constitutional rights. Lastly, the *Coe*/*Gay* factors—of which the only one in realistic dispute is the "prejudice" prong—are met in this case. The delay is prejudicial because Petitioner, as in *Phillips*, will be forced to remain in prison under a possible sentence of death for an "indeterminate period of time" before he can raise his claims in federal court again if he is not excused from exhaustion.

## II. PETITIONER'S CLAIM IS NOT BARRED BY *TEAGUE V. LANE* BECAUSE THE RULE PETITIONER SEEKS TO APPLY IS SUBSTANTIVE.

Under *Teague v. Lane*, 489 U.S. 288 (1989), new rules may not be announced in cases on collateral review unless they fall under one of two exceptions. *Penry v. Lynaugh*, 492 U.S. 302 (1989). Even if a rule is new, it can still apply retroactively in a collateral proceeding if "(1) the rule is substantive or (2) the rule is a watershed rul[e] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Whorton v. Bockting*, 549 U.S. 406, 416 (2007). The exception for substantive rules has often been referred to by the Supreme Court as not being subject to *Teague* nonretroactivity in the first place. *See, e.g., Schriro v. Summerlin*, 542 U.S. 348, 352 n.4 (2004) (stating such rules are "more accurately characterized as substantive rules not subject to the bar"). Unlike "a watershed rule of criminal procedure," which has yet to find a real-world analogue, the "substantive rule" exception is so deeply embedded in *Teague* doctrine that whether a rule is substantive has often been treated as a threshold question by this Court. *See, e.g., Hayes v. Brown*, 399 F.3d 972, 982 (9th Cir. 2002) (stating only "[i]f the rule is procedural, [does] the court" apply *Teague*).

The difficult question is what constitutes a "substantive" rule. One way to answer this is to consider who is affected by the rule. "A rule is substantive . . . if it alters the . . . class of persons that the law punishes." *Summerlin*, 542 U.S. at 353. Procedural rules "merely raise the possibility that someone convicted

with use of the invalidated procedure might have been acquitted otherwise." *Id.* at 352.

Another approach is to consider the kind of law affected by the rule. Substantive rules prohibit "a certain category of punishment for a class of defendants because of their status or offense." *Penry*, 492 U.S. at 330. Procedural rules "regulate only the manner of determining the defendant's culpability." *Summerlin*, 542 U.S. at 353. The effect of a rule can also guide the differentiation. Substantive rules produce a "single invariable result," *People v. Carp*, 496 Mich. 440, 465 (2014), and "entirely remove[] a particular punishment from the list of punishments that may be constitutionally imposed on a class of defendants," *Ex parte Maxwell*, 424 S.W.3d 66, 74 (Tex. Crim. App. 2014).

A final approach is to weigh the government's interest in finality against the defendant's interest in suffering from constitutionally unsanctioned punishment. *See Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring) (finding state's finality interest yields when rules are substantive because society should not "permit[] the criminal process to rest at a point where it ought properly never to repose").

Petitioner's Claim seeks to announce that the death penalty is unconstitutional as applied to a certain class of defendants: capital inmates in California. Regardless of the procedures followed at trial or postconviction, the death penalty cannot constitutionally be imposed on defendants in California

because, as currently administered by the State, it is cruel and unusual. There is a single, invariable outcome of the rule when applied to any member of this class: their death sentence must be vacated. Last, the state's interest in finality lacks force when over 700 people would be deprived of their constitutional rights without retroactive application. For these reasons, Petitioner's Claim seeks to announce a substantive rule.

It is well established that categorical prohibitions are substantive rules that may be retroactively applied. Lower courts have unanimously concluded that *Atkins v. Virginia*, 536 U.S. 304 (2002), which prohibits execution of the intellectually disabled, and *Roper v. Simmons*, 543 U.S. 551 (2005), which prohibits execution of juveniles, are substantive rulings. *See* Steven W. Allen, "Toward a Unified Theory of Retroactivity," 54 N.Y.L.S. L. Rev. 106, 125 & n.108–10 (2009). This Court is no exception. In *Moore v. Biter*, this Court held that *Graham v. Florida*, 560 U.S. 48 (2010), which prohibited life without parole for juveniles convicted of nonhomicide offenses, announced a substantive rule. 725 F.3d 1184, 1190 (9th Cir. 2013). The rule announced in *Graham* satisfied the *Penry* test because "[i]t applies to a class of defendants . . . defined by: (1) the status of the defendants (juveniles) . . . and (2) the type of offense (nonhomicide crimes)[, and it] prohibits the punishment of life without parole [as] to this class of defendants." *Id.*

The rule that Petitioner's Claim seeks to announce is a substantive one. Like *Graham*, it seeks to categorically prohibit a discrete punishment from

being imposed on a defined class of defendants: the punishment is life without parole with the possibility of death, and the class is "capital" inmates in California. As Petitioner stated in his Opening Brief on Claim 27:

> Mr. Jones's decades-long confinement . . . renders his protracted warehousing as a condemned man a punishment *materially different* from either the punishment of death or the punishment of life in prison without possibility of parole. . . . [A] California death sentence [has been transmuted] into *a sentence of life imprisonment with no possibility of parole but slight possibility of execution.* California has never enacted such a Damoclean penalty, neither could it do so.

SER 96 (emphases added). According to Petitioner's Claim, the death penalty is unconstitutional in California because the substance of this punishment is such a freakish departure from a regular execution that the State could not constitutionally enact such a punishment.

Suppose that the State does adopt, by statute, this "Damoclean penalty": "Following conviction and sentence, defendant shall be placed on death row for twenty-five years.[15] After twenty-five years has passed, defendant shall be told that whether he will be executed or not depends on a selection process whose results will be known only by the prison warden and other state officials.[16]" Such punishment would be unconstitutional because the punishment itself is cruel and unusual. There is no procedure that the State could adopt in carrying

[15] In reality, this is the average amount of time it takes for a capital case to complete postconviction review in California.

[16] In reality, this is as comforting a message as any, since the State cannot guarantee that an inmate will be executed or that he will not be executed.

out this punishment that would render it constitutional. There is also no procedure that courts, juries, and corrections officials could carry out under such a regime that would render this punishment more or less constitutional.

The District Court has now found that the State of California has been silently administering the very punishment posed in the hypothetical for a number of decades:

> [F]or most [capital inmates], systemic delay has made their execution so unlikely that the death sentence carefully and deliberately imposed by the jury has been quietly transformed into one no rational jury or legislature could ever impose: *life in prison, with the remote possibility of death.*

ER 3. California's death penalty has become a collective action problem, and the only ones who are paying for it are the hundreds of inmates whose constitutional rights are withering away day by day. There is no way to turn back the clock and no existing procedure that any state actor can follow or pursue more correctly to mitigate the problem. Petitioner's Claim thus seeks to announce a substantive rule.

## CONCLUSION

The decision of the District Court should be affirmed.

March 20, 2015

Respectfully submitted,

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# APPENDIX A:

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Dated: March 20, 2015

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9th Circuit Case Number(s) 14-56373

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