14-56373

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERNEST DEWAYNE JONES,

Petitioner-Appellee,

v.

RON DAVIS, 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 SUPPLEMENTAL BRIEF REGARDING *ANDREWS V. DAVIS*

KAMALA D. HARRIS
Attorney General of California
EDWARD C. DUMONT
Solicitor General
GERALD A. ENGLER
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
JAMES WILLIAM BILDERBACK II
Supervising Deputy Attorney General
MICHAEL J. MONGAN
Deputy Solicitor General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2049
Email: DocketingLAAWT@doj.ca.gov
Attorneys for Respondent-Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

The State submits this supplemental brief in response to the Court's order directing the parties to address "the effect, if any, of *Andrews v. Davis*, No. 09-99012, 2015 WL 4636957, *19-23 (9th Cir. Aug. 5, 2015) (Part IV(A) of the opinion), on this case."

INTRODUCTION

The district court vacated Jones's death sentence based on an Eighth Amendment theory never before adopted by any other court. There are two possible ways to view that theory for federal habeas purposes. *First*, it may be seen as essentially the same claim Jones presented in state court, which posited that executing Jones following a lengthy period of confinement would violate the Eighth Amendment. As explained below, this Court's decision in *Andrews v. Davis* appears to adopt that view. *Second*, the theory may be seen as a new and distinct claim, based not on delay in Jones's own case, but instead on the allegation that systemic dysfunction in California's post-conviction review process would render *any* execution arbitrary. That is how the district court described its theory, and how both parties characterized the theory in their briefs filed prior to the *Andrews* decision. Under either view, the district court's theory does not provide a proper basis for federal habeas relief and the district court's judgment should be reversed.

BACKGROUND

Andrews involved a California capital defendant. In both his state and federal habeas petitions, Andrews presented a claim alleging that it would violate the Eighth Amendment for the State to execute him after a long delay from the date of his sentencing. *Andrews*, slip op. 47-48. That type of claim is known as a "*Lackey*" claim. *Id.* at 50; *see Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (Stevens, J., respecting the denial of certiorari). The California Supreme Court and the district court both rejected that claim. *Andrews*, slip op. 48. The district court granted sentencing relief based on a separate claim alleging ineffective assistance of counsel at the penalty phase of Andrews's trial and denied the remaining claims. *Id.* at 17-18.

Andrews appealed the district court's denial of certain claims, but did not seek a certificate of appealability regarding his Eighth Amendment delay claim. *Id.* at 18. The State cross-appealed regarding the ineffective assistance claim. *Id.* After appellate briefing was complete, Andrews moved for permission to file a supplemental brief. *Andrews*, Dkt. 118-1 at 1. In support of that motion, Andrews referenced the Eighth Amendment delay claim that he had raised in state court, noted the recent district court order granting relief in this case (*Jones*), and asserted that Andrews "fits squarely within the reasoning of *Jones*, the holding of which would provide the Court

… with an additional reason to affirm the district court's grant of penalty relief." *Id.* at 2-4. The Court granted Andrews's motion. *Andrews*, slip op. 18.

The supplemental brief filed by Andrews argued that California's death penalty is "unconstitutional both on its face and as applied." *Andrews*, Dkt. 118-2 at 1. Andrews again referenced the Eighth Amendment delay claim that he presented before the California Supreme Court and the district court, contending that the district court's "erroneous denial" of that claim offered an alternative ground for affirming the grant of penalty relief. *Id.* at 1-2, 13. He also argued that "the unlikelihood that the death penalty will actually be imposed against Mr. Andrews, or any particular state death row inmate, renders those rare times when it is imposed so arbitrary as to violate the Eighth Amendment." *Id.* at 1; *see also id.* at 4 ("Inordinate and unpredictable delay in California's death penalty system leads to the arbitrary imposition of the death penalty.") (capitalization omitted). The brief quoted at length from the district court's order in this case. *See id.* at 3-4, 7-10, 12-13.

The Court ordered the State to respond to Andrews's supplemental brief. *Andrews*, Dkt. 121. The State acknowledged that Andrews had raised an Eighth Amendment claim in the California Supreme Court and the district

court based on delay in his individual case, and argued that 28 U.S.C. § 2254(d)(1) barred relief on that claim. *Andrews*, Dkt. 128 at 3-5. The State also noted that Andrews "never presented those courts with the separate Eighth Amendment claim on which the district court in *Jones* ultimately granted relief." *Id.* at 7. The State explained its reasons for viewing the two claims as distinct:

> As *Jones* itself recognized, the two claims involve different legal theories…. [A] *Lackey* claim contends that the Eighth Amendment has been violated because "the delay was extraordinary" in an inmate's "*individual* case[]." In contrast, the claim on which the district court in *Jones* granted relief is that Jones's "execution would be arbitrary and serve no penological purpose because of *system-wide* dysfunction in the post-conviction review process."

Id. (citations omitted). Because Andrews never presented the state court with a claim based on the arbitrariness theory, the State argued that the exhaustion requirement of 28 U.S.C. § 2254(b)(1)(A) barred him from obtaining federal habeas relief based on that theory. *Id.* at 6. In addition, the State argued that the anti-retroactivity doctrine of *Teague v. Lane* barred federal habeas relief based on the theory, and that the theory lacked merit. *See id.* at 10-14.

ARGUMENT

1. *Andrews* appears to hold that the arbitrariness theory adopted by the district court in this case is the same constitutional claim, for federal

habeas purposes, as a delay-based *Lackey* claim. The question before the Court in *Andrews* was whether to grant a certificate of appealability for "Andrews's uncertified claim, as briefed on appeal." Slip op. 51. The Court understood that claim to allege that "delay in carrying out the death sentence makes California's death penalty unconstitutional both on its face and as applied to [Andrews]," and noted that Andrews "discuss[ed] in detail *Jones*'s reasoning and conclusion that the California death penalty system is unconstitutional." *Id.* at 48.

As a threshold matter, the Court considered the State's argument "that Andrews's claim was not fairly presented to the California Supreme Court or the district court, and so is both unexhausted and waived." *Id.* at 49. Under controlling precedent, "[t]wo claims are distinct and must be separately exhausted if the claims are … supported by distinct constitutional theories," even if they are based on the same or similar facts. *Id.* at 50 (citing *Gray v. Netherland*, 518 U.S. 152, 163-165 (1996)).

The Court acknowledged the State's position

> that there is a distinction between the sort of Eighth Amendment claim that Andrews raised to the California Supreme Court and in district court (sometimes referred to as a *Lackey* claim), and the Eighth Amendment claim based on *Jones* he is raising here, such that the state courts lacked an opportunity to consider it.

Andrews, slip op. 51. But the Court "disagree[d]" with that position. *Id.*

The Court reasoned instead that "Andrews's claim before the state court, the district court, *and on appeal here* is essentially the same constitutional claim: that his right to be free from cruel and unusual punishment under the Eighth Amendment is violated by his lengthy incarceration while under a sentence of death." *Id.* (emphasis added). In the Court's view, "Andrews's uncertified claim, as briefed on appeal, is sufficiently related and intertwined with Claim 26 [*i.e.*, the *Lackey* claim] such that Andrews's exhaustion of Claim 26 likewise exhausted his current challenge." *Id.*

Next, the Court denied Andrews's request for a certificate of appealability because he had "not made a 'substantial showing' that his Eighth Amendment rights were violated." *Id.* at 52. In light of circuit precedent concluding that "no clearly established Supreme Court precedent holds that inordinate delay in the execution of a capital defendant constitutes cruel and unusual punishment in violation of the Eighth Amendment," the Court reasoned that "[n]o reasonable jurist would find the district court's ruling [denying the *Lackey* claim] debatable or wrong." *Id.* at 51-52 (citing *Allen v. Ornoski*, 435 F.3d 946, 958-960 (9th Cir. 2006)).

Andrews appears to hold that the systemic arbitrariness theory adopted by the district court in this case is "essentially the same constitutional claim" as a *Lackey* claim. Slip op. 51. The claim considered in *Andrews* invoked

the district court's theory of unconstitutional arbitrariness based on "systemic delay," challenged California's death penalty "on its face," and argued that Andrews "fits squarely within the reasoning of *Jones*." *Andrews*, Dkt. 118-2 at 1, 4. The *Andrews* Court was aware that the district court here viewed its systemic arbitrariness theory as distinct from a *Lackey* claim based on delay in an "*individual* case[]." ER 24 n.19; *see Andrews*, Dkt. 128 at 7. But the panel "disagree[d]" with that view. *Andrews*, slip op. 51.

2. If *Andrews* holds that the district court's arbitrariness theory is essentially the same as a *Lackey* claim for federal habeas purposes, then 28 U.S.C. § 2254(d)(1) bars relief on that theory. *See* AOB 25 n.11. Jones raised a *Lackey* claim in his direct appeal to the California Supreme Court. The claim is subject to § 2254(d)(1) because the state court denied the claim on the merits. *See People v. Jones*, 29 Cal. 4th 1229, 1267 (2003). As this Court recognized in *Allen*, "[t]he Supreme Court has never held that execution after a long tenure on death row is cruel and unusual punishment." 435 F.3d at 958. Thus, in applying § 2254(d)(1), this Court "would necessarily conclude" that the state court's denial of a *Lackey* claim "was not 'contrary to,' and did not involve 'an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United

States.'" *Id.*; *see Andrews*, slip op. 51-52.

The anti-retroactivity doctrine of *Teague v. Lane* also bars federal habeas relief based on a *Lackey* claim. *See Smith v. Mahoney*, 611 F.3d 978, 998-999 (9th Cir. 2010); AOB 34 n.17. Because a state court considering that claim at the time Jones's conviction became final "would not have felt compelled by existing precedent to conclude that the rule sought was required by the Constitution," the rule may not be announced or applied on federal habeas under *Teague*. *Smith*, 611 F.3d at 998-999. Furthermore, the claim fails on the merits. *See* AOB 38-39; *cf. McKenzie v. Day*, 57 F.3d 1461, 1467 (9th Cir. 1995) ("[I]t is highly unlikely that McKenzie's *Lackey* claim would be successful if litigated to its conclusion."), *opinion aff'd and adopted*, 57 F.3d 1493, 1494 (9th Cir. 1995) (*en banc*).

3. It may be possible to read *Andrews* as instead holding that the Eighth Amendment claim in Andrews's supplemental appellate brief did not advance the arbitrariness theory adopted by the district court in this case. That interpretation finds some support from the following statements in the Court's opinion:

> Andrews's supplemental brief points to *Jones*'s conclusion that there are systemic delays in imposing the death penalty throughout the California system, but uses this conclusion to support his *Lackey* claim that "inherent delay in capital cases" renders executions unconstitutional. Accordingly, Andrews's references to *Jones* do not "fundamentally alter the legal claim

already considered by the state courts."

Andrews, slip op. 51. In light of the balance of the opinion and the arguments made in Andrews's supplemental brief, this does not appear to be the best reading of *Andrews*. *See supra* 4-7. If the Court disagrees, however, then it remains an open question whether the arbitrariness theory at issue on this appeal is distinct from a *Lackey* claim for federal habeas purposes.

In that event, the State would adhere to its position that the arbitrariness theory currently under review is analytically distinct from a *Lackey* claim. *E.g.*, AOB 24. The premise of a *Lackey* claim is that the Eighth Amendment entitles a capital defendant to relief from his sentence because of extraordinary delay in his individual case.[1] The theory advanced by the district court is that Jones's "execution would be arbitrary and serve no penological purpose because of system-wide dysfunction in the post-conviction review process." ER 24 n.19. Under that theory, alleged dysfunction in California's post-conviction review system renders any execution arbitrary, and thus a violation of the Eighth Amendment,

[1] *See, e.g.*, ER 24 n.19; *Lackey*, 514 U.S. at 1045 (Stevens, J., respecting the denial of certiorari) ("Petitioner raises the question whether executing a prisoner who has already spent some 17 years on death row violates the Eighth Amendment[]."); *Smith*, 611 F.3d at 997 ("Smith argues that his continued incarceration violates the Eighth Amendment.").

regardless of how long the review process takes in a particular case.[2]

If viewed as a distinct claim, the arbitrariness theory also cannot provide a basis for federal habeas relief. First, Jones never exhausted this theory in the California Supreme Court, as required by 28 U.S.C. § 2254(b)(1)(A). *See* AOB 24-26. The State did not waive this exhaustion requirement and the statutory exceptions to the requirement do not apply here. *See* AOB 26-31; Reply 7-15. Second, the arbitrariness theory would amount to a new rule for *Teague* purposes because it is not dictated by existing precedent, and the theory does not qualify for either of the exceptions to *Teague*'s anti-retroactivity principle. *See* AOB 33-37; Reply 15-19. Although the district court supported its conclusion that the theory "is not new" by referencing *Furman v. Georgia*, 408 U.S. 238 (1972) (ER 27), as *Andrews* recognized, it "would require a significant extension of the rationale of *Furman* and *Gregg* to apply in this particular context." *Andrews*, slip op. 52. Finally, the district court's theory fails on the merits. *See* AOB 38-57; Reply 19-30.

CONCLUSION

The judgment of the district court should be reversed.

---

[2] The California Supreme Court addressed this issue today and likewise held that "*Lackey* and *Jones* claims … are distinct." *People v. Seumanu*, No. S093803, ___ Cal. 4th ____, slip op. 95 (Aug. 24, 2015).

Dated: August 24, 2015

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
EDWARD C. DUMONT
Solicitor General
GERALD A. ENGLER
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
JAMES WILLIAM BILDERBACK II
Supervising Deputy Attorney General

s/ Michael J. Mongan

MICHAEL J. MONGAN
Deputy Solicitor General
Attorneys for Respondent-Appellant

CERTIFICATE OF COMPLIANCE

I certify that the attached supplemental brief uses a proportionally spaced, 14-point typeface, is double-spaced, and does not exceed 10 pages.

August 24, 2015
Dated

s/ Michael J. Mongan
Michael J. Mongan
Deputy Solicitor General

CERTIFICATE OF SERVICE

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

I hereby certify that on August 24, 2015, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

APPELLANT'S SUPPLEMENTAL BRIEF REGARDING *ANDREWS V. DAVIS*

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

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 August 24, 2015, at San Francisco, California.

Michael J. Mongan	*s/ Michael J. Mongan*
Declarant	Signature