Case No. 14-56373

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERNEST DEWAYNE JONES,

Petitioner-Appellee,

v.

RON DAVIS,
Warden of California State Prison at San Quentin,

Respondent-Appellant.

PETITIONER-APPELLEE'S SUPPLEMENTAL BRIEF

Appeal from the United States District Court
for the Central District of California
U.S.D.C. No. 2:09-cv-02158-CJC

The Honorable Cormac J. Carney, Judge

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INTRODUCTION

Petitioner Ernest DeWayne Jones received federal habeas relief on an Eighth Amendment claim fundamentally different from the narrow "*Lackey*" claim he presented in state court. Unlike the state claim – and any other "*Lackey*" claim this Court has resolved – Mr. Jones's systemic challenge to California's capital punishment scheme emanates from a system-wide dysfunction and arbitrariness that renders the death penalty devoid of any legitimate penological purpose. Persuaded by the additional factual and legal dimensions of Mr. Jones's claim, the district court excused the need for exhaustion on futility grounds and granted habeas relief.

Given the substantive and procedural distinctiveness of Mr. Jones's claim, the recent panel decision in *Andrews v. Davis*, 2015 WL 4636957 (9th Cir. 2015), does not control the issues raised in this appeal. *Andrews* addressed whether to grant a certificate of appealability (COA), under AEDPA's deferential standard of review, on a traditional *Lackey* claim, which lacked the factual support and legal theory of Mr. Jones's claim. Thus, *Andrews* does not preclude relief for Mr. Jones. Indeed, *Andrews* provides further support for Mr. Jones's legal positions by highlighting the distinctions between a traditional *Lackey* claim and Mr. Jones's claim.

PROCEDURAL HISTORY

Fourteen years ago, Mr. Jones filed a claim on direct appeal alleging that his execution at some future date, after the passage of some uncertain amount of time,

would constitute cruel and unusual punishment. ER 143-58. The claim explicitly relied on Justice Stevens's dissent from denial of certiorari in *Lackey v. Texas*, 514 U.S. 1045 (1995), which provided that the Eighth Amendment may bar execution in an individual case, if there is an inordinate delay in carrying out the inmate's execution. ER 144. In 2010, Mr. Jones pled a *Lackey* claim as Claim 27 of his federal habeas petition, SER 196-203, and amended it in 2014. ER 115-31. It was upon Amended Claim 27 that the district court granted relief, in a ruling that found California's dysfunctional death penalty system violated the Eighth Amendment bar on arbitrary punishment that lacks legitimate penological purpose. ER 2-48.

Legally and factually, Amended Claim 27 was fundamentally distinct from the *Lackey* claim presented to the California Supreme Court. Throughout the proceedings in this Court, the parties have agreed that the district court relied on a legal theory of arbitrariness and system-wide dysfunction distinct from the individual-delay theory raised in the state appeal. *See, e.g.*, ARB at 1 (respondent noting that the district court's order was based on a theory that "differs fundamentally" from the one presented in state court); *see also* AOB at 7, 11-14, 25-26, 33; AAB at 6-10, 22; ARB at 3, 13.

In sharp contrast, Mr. Andrews presented nothing more than a traditional *Lackey* claim to the state and federal courts. When the district court rejected Andrews's *Lackey* claim, it did so without ever having been presented with any

allegations of system-wide dysfunction and arbitrariness in California's capital punishment scheme. *Andrews*, 2015 WL 4636957, at *6. The first time Andrews mentioned such systemic dysfunction and arbitrariness was in his November 12, 2014 supplemental brief, filed after the district court had issued its order in *Jones* and after Andrews had filed his opening and reply briefs in this Court. *Andrews v. Davis*, Case Nos. 09-99012 & 09-99013, ECF Nos. 118-1, 118-2. Andrews filed this supplemental brief to re-assert the individual *Lackey* claim presented to the state and district courts and to demand a COA. *Andrews*, 2015 WL 4636957, at *22. In evaluating whether Andrews was entitled to a COA, the *Andrews* panel concluded that this uncertified claim, as briefed on appeal, was "sufficiently related and intertwined with" Andrews's original *Lackey* claim as to be exhausted. *Id.* The *Andrews* panel further held that a COA was inappropriate because the district court correctly found that the state court's rejection of the *Lackey* claim was not an unreasonable application of clearly established federal law. *Id.*

ARGUMENT

The *Andrews* panel conducted a very different analysis from the one required of this Court. It did not decide the substantive Eighth Amendment issues; instead, in order to assess whether to grant a COA, it "look[ed] to the District Court's application of AEDPA to petitioner's constitutional claims . . . in light of a fair interpretation of the record . . . and ask[ed] whether reasonable jurists would find the

district court's assessment of the constitutional claims debatable or wrong." *Id.* at *19 (internal citations and quotations omitted). As the panel acknowledged:

> Because the statute [governing COA's] is jurisdictional, it does not permit "full consideration of the factual or legal bases adduced in support of the claims"; rather, courts may make only a "threshold inquiry" to determine whether the statutory standard is met.

Id. (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)).

Because the *Andrews* panel did not rule on the merits of Andrews's *Lackey* claim, much less on the merits of the claim Mr. Jones presented in district court, *Andrews* did not resolve the Eighth Amendment issue presented here. Where *Andrews* could have been relevant was in evaluating the exhaustion and "clearly established law" requirements of AEDPA. *See* 28 U.S.C. §§ 2254(b), (d). *Andrews*, however, does not control this Court's analysis of these issues because of the vastly different substantive issues and procedural postures of these two cases.

I. *ANDREWS*'S EXHAUSTION AND 28 U.S.C. § 2254(D) ANALYSES DO NOT APPLY TO MR. JONES'S CASE.

For two primary reasons, *Andrews*'s exhaustion and § 2254(d) analyses do not apply here. First, Mr. Jones's Amended Claim 27 was excused from exhaustion, as the district court explained, because exhaustion would have been futile. Second, because Mr. Jones's claim was not presented in state court, there was no state-court adjudication on the merits, and AEDPA's plain language provides that § 2254(d) does not apply to claims the state courts did not adjudicate on the merits. This

unusual procedural posture, coupled with Mr. Jones's distinctive substantive arguments, makes Mr. Jones's Eighth Amendment claim fundamentally different from the claim in *Andrews*.

Andrews raised a traditional *Lackey* argument; Mr. Jones raises an entirely different claim. Andrews's claim was exhausted; Mr. Jones's was not. These differences make *Andrews*'s exhaustion analysis inapplicable. In district court, Mr. Jones introduced a wealth of new facts and a different legal theory – one grounded in the principles articulated in *Furman v. Georgia*, 408 U.S. 238 (1972) – to support his Eighth Amendment claim. The state has conceded this point by arguing that the claim before this Court "differs fundamentally" from the one raised in state court, *see supra*, and that "the California Supreme Court has not yet ruled on a claim raising the arbitrariness theory," ARB 13.[1] By contrast, Andrews merely repeated the *Lackey* claim he raised in state court. Although Andrews cited the *Jones* decision, he did so not to amend his *Lackey* claim – which could not be amended on appeal[2]

[1] Today's opinion in *People v. Seumanu* does not alter the accuracy of this statement. *People v. Seumanu*, No. S093803, slip. op. at 92 (Cal. Aug. 24, 2015) ("[W]e do not in this case pass on the viability or legitimacy of what we will here call a '*Jones* claim,' i.e., a claim that systemic delay in resolving postconviction challenges to death penalty judgments has led to a constitutionally intolerable level of arbitrariness in the implementation of the penalty.").

[2] *See, e.g.*, *Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994) ("Habeas claims that are not raised before the district court in the petition are not cognizable on appeal."); *Kirshner v. Uniden Corp. of America*, 842 F.2d 1074, 1077

– but rather to present a new authority. As the panel acknowledged, Andrews "point[ed] to *Jones*'s conclusion . . . *but use[d] this conclusion to support* his *Lackey* claim." *Andrews*, 2015 WL 4636957, at *22 (emphasis added); *see also id.* ("Andrews raised this same claim to the district court."). *Andrews*'s analysis thus has no bearing on Mr. Jones's case, because Andrews's claim – unlike Mr. Jones's – had already been presented in state court.[3]

Nor could *Andrews* have held that a "*Jones*" claim is sufficiently similar to a *Lackey* claim as to demand § 2254(d) deference, because the *Andrews* panel never had a *Jones* claim before it. Andrews's supplemental brief did not amend his *Lackey* claim or add the legal and factual bases for the Eighth Amendment claim Mr. Jones raised in district court. As the panel explained, Andrews did not "introduce[] any new facts or evidence since he raised this argument to the state court." *Andrews*,

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(9th Cir. 1988) (holding that evidence not presented below cannot be part of the record on appeal); *see also* Fed. R. App. P. 10(a).

[3] The California Supreme Court opinion in *Seumanu* further demonstrates why *Andrews*'s conclusion regarding exhaustion cannot apply to Mr. Jones. The *Seumanu* Court held that it considers a *Jones* claim to be "different from a *Lackey* claim," and that, under its own rules, it will not pass upon a *Jones* claim when all that is before it is a traditional *Lackey* claim. *Seumanu*, slip. op. at 95; *see also id.* at 97 (describing claims as "distinct"). Thus, this Court cannot conclude that Mr. Jones exhausted available state court remedies under 28 U.S.C. § 2254(b)(1)(A). *Cf. Duckworth v. Serrano*, 454 U.S. 1, 2 (1981) (per curiam) (holding exhaustion requirement serves to "allow the State [court] an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights"); *Lounsbury v. Thompson*, 374 F.3d 785, 789 (9th Cir. 2004) (finding petitioner adequately exhausted claim where state court, "under its own rules, could have reached the substantive . . . issue").

2015 WL 4636957, at *22. Without the facts and legal theory undergirding Mr. Jones's claim, Andrews did not present the panel with anything more than the *Lackey* claim he raised in state court. *Andrews*'s assessment of this claim, therefore, was "limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 131 S. Ct. 1388, 1398 (2011); *accord Harrington v. Richter*, 562 U.S. 86, 100 (2011). As a result of the limited record before it, the full import of *Andrews* is merely that a COA was unwarranted because "the state court's rejection of this [*Lackey*] claim was not an unreasonable application of Supreme Court precedent." *Andrews*, 2015 WL 4636957, at *22.

II. DIFFERENT STATE PROCEDURAL HISTORIES PREVENT *ANDREWS*'S § 2254(D) ANALYSIS FROM APPLYING HERE.

Even if this Court were to conclude (1) that Andrews amended his petition, on appeal, to include a systematic-dysfunction-and-arbitrariness claim, and (2) that the *Andrews* panel resolved whether *Jones* and *Lackey* claims are sufficiently similar to apply AEDPA deference, *Andrews* still does not control because Mr. Jones's state-court procedural history is so distinct from Andrews's as to make the 28 U.S.C. § 2254(d) theories and analyses in the two cases entirely different.

Andrews claimed the state-court decision rejecting his *Lackey* claim was an unreasonable application of clearly established federal law and thus § 2254(d) was satisfied. *Id.* at *22. By contrast, Mr. Jones argues – and the district court held – that § 2254(d) is inapplicable to his case because his claim was not adjudicated on

the merits. The critical difference between the cases derives from the fact that Andrews raised his *Lackey* claim in *state habeas proceedings*, in which the California Supreme Court considers extra-record facts, whereas Mr. Jones raised his *Lackey* claim on *direct appeal*, in which the California Supreme Court is barred by its own rules from considering facts not in the appellate record. *Compare id.* at *3, *20, *and People v. Andrews*, 49 Cal. 3d 200 (1989), *with* ER 143-48 (Jones).[4]

The difference in procedural posture has important implications for determining whether a claim was adjudicated on the merits. Although the United States Supreme Court has recognized a presumption that a state-court denial is on the merits "in the absence of any indication or state-law procedural principles to the contrary," it has held that this presumption "may be overcome when there is reason to think some other explanation for the state court's decision is more likely." *Richter*, 562 U.S. at 99-100. In Mr. Jones's case, the presumption of a merits adjudication is overcome because, under state-law procedural principles, the state court had to decide Mr. Jones's *Lackey* claim – as with all other direct-appeal claims

[4] The state court's adjudication of Mr. Jones's direct appeal claim consisted of the following: "Defendant's argument that 'one under judgment of death suffers cruel and unusual punishment by the inherent delays in resolving his appeal is untenable. If the appeal results in reversal of the death judgment, he has suffered no conceivable prejudice, while if the judgment is affirmed, the delay has prolonged his life.'" *People v. Jones*, 29 Cal. 4th 1229, 1267 (2003) (quoting *People v. Anderson*, 25 Cal. 4th 543, 606 (2001)).

– solely on the appellate record, without the critical, additional facts Mr. Jones cited in support of his claim. *See Seumanu*, slip. op. at 97-99 (holding that state law procedural principles prevent the California Supreme Court from considering on direct appeal the "key facts" presented to the district court in *Jones*).[5] This adjudication on such an incomplete record could not be an adjudication on the merits. *See, e.g.*, *Winston v. Kelly*, 592 F.3d 535, 555-56 (4th Cir. 2010) ("[J]udgment on a materially incomplete record is not an adjudication on the merits for purposes of § 2254(d)."), *aff'd* 683 F.3d 489, 498-99 (4th Cir. 2012); *Wilson v. Workman*, 577 F.3d 1284, 1287-88, 1291-93, 1300 (10th Cir. 2009) (en banc) (no merits adjudication where procedural rules prevented court's consideration of critical facts), *overruled on other grounds as stated in Lott v. Trammell*, 705 F.3d 1167, 1213 (10th Cir. 2013); *id.* at 1291 ("If the state court fails to consider the very evidence that the claim is based upon, then the state court has not adjudicated the

[5] *See also People v. Barnett*, 17 Cal. 4th 1044, 1183 (1998) (declining to consider a claim that execution after inordinate delay violated the Eighth Amendment because it relied on "evidence and matters not reflected in the record on appeal" and the state court's review on direct appeal is limited to the appellate record). The California Supreme Court's precedent in other cases is relevant to assessing its adjudication of Mr. Jones's claim. *See, e.g.*, *Mercadel v. Cain*, 179 F.3d 271, 274 (5th Cir. 1999) (holding that "what the state courts have done in similar cases" is relevant in assessing whether the state court disposed of a petitioner's claim on the merits). The state court is presumed to have applied already-decided legal principles and precedents when those principles and precedents predate the events on which the dispute turns. *Beam Distilling Co. v. Georgia*, 510 U.S. 529, 534 (1991).

merits of the claim.").[6] Andrews, by contrast, raised his claim on state habeas, so *Barnett* and its progeny did not preclude the state court from considering extra-record facts.

That the state court failed to adjudicate Mr. Jones's claim on the merits entitles him to de novo review, *Cone v. Bell*, 556 U.S. 449, 472 (2009), and further distinguishes this case from *Andrews*.[7]

CONCLUSION

For the reasons set forth herein and in Petitioner-Appellee's Answering Brief, this Court should affirm the district court's judgment.

Dated: August 24, 2015

Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

By: */s/ Michael Laurence*
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[6] The presumption that the state court adjudicated Mr. Jones's claim on the merits is further rebutted by its holding that Mr. Jones suffered no prejudice. By doing so, the court did not scrutinize capital punishment's legitimate penological purpose or lack thereof; Supreme Court precedent instructs courts making such inquiries to ask whether capital punishment in a class of cases serves a legitimate penological purpose, rather than examining its effect in any individual case. *See, e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002).

[7] If it was a merits adjudication, the state court's decision was an unreasonable determination of the facts under § 2254(d)(2) because state law barred consideration of the facts in support of Mr. Jones's claim. *See, e.g.*, *Miller-El*, 537 U.S. at 346; *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004).

CERTIFICATE OF COMPLIANCE

I certify that this brief is proportionately spaced, has a typeface of 14 points or more, and, in compliance with this Court's August 10, 2015 order, does not exceed 10 pages.

Dated: August 24, 2015

/s/ Michael Laurence
Michael Laurence

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 24, 2015.

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

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