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NOTE

JONES V. DAVIS AND THE CRITICAL ISSUE OF TIME IN CALIFORNIA'S CAPITAL PUNISHMENT SYSTEM

*HEATHER VARANINI**

“[L]ife in prison with the remote possibility of death.”¹

INTRODUCTION

Capital punishment is a long-standing, controversial topic in America. The controversy lies in competing notions of justice; should retribution, vengeance, rehabilitation, or some other ideal govern how we treat those convicted of the worst crimes? This tension is exemplified in my own experiences. The legal proceedings surrounding the 1993 kidnapping and murder of 12-year-old Polly Klaas, a friend-of-a-friend in a neighboring small town, shaped my understanding of crime and punishment.² However, my understanding was permanently transformed after hearing Sister Helen Prejean, a leading anti-death penalty activist, ex-

* Executive Ninth Circuit Survey Editor, *Golden Gate University Law Review*, Volume 47; J.D. Candidate, Golden Gate University School of Law, May 2017; B.A. Politics/Latin American and Latino Studies, University of California, Santa Cruz, March 2006. I want to extend my sincerest gratitude to Professor Eric Christiansen for his patience and invaluable insight as he guided this Note from inception to publication. Additionally, I want to thank my family and friends for their support throughout the process of writing this piece. I also want to thank the 2015-2016 Executive Board for believing in my Note and selecting it for publication; and I want to thank the 2016-2017 *Law Review* staff for their time and contributions, which made this Note better. I dedicate this Note to my husband, who continues to inspire me and encourage me to write.

¹ *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1053 (C.D. Cal. 2014), *rev'd sub nom. Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

² In 1993, twelve-year-old Polly Klaas was kidnapped from her Petaluma, California home while hosting a slumber party for friends and while her mother slept down the hall. Several months later, Polly's body was found outside a small town approximately sixty miles north of Petaluma. Twenty-three years have passed since Polly was killed, and twenty years have passed since her killer was sentenced to death. As of this writing, he continues to sit on death row in San Quentin State Prison awaiting execution, while Polly's father continues to wait for justice. *See People v. Davis*, 208 P.3d 78, 78-106 (Cal. 2009) (detailing the facts and proceedings of the case from the guilt phase

plain the complexities of capital punishment.³ My previous experiences motivate my contemporary interest in California's capital punishment system. While the facts differ, the same fraught emotions and legal uncertainty are reflected in the case examined in this Note. *Jones v. Davis*⁴ concerns related tensions in modern death penalty law and practice.

The current landscape of capital punishment in California illuminates the controversy. California is home to almost 25% of all death row inmates in America⁵ and the State has spent approximately \$4 billion on capital punishment since 1978.⁶ However, there have been no executions in California since 2006.⁷ This illustrates some of the dysfunction in the system and the need for change.

Arguments about the death penalty in California have reached yet another critical point and are currently focused on the lengthy delays that plague the State's capital punishment system. Death row inmates as well as victims' families and friends agree that the delays cause serious dysfunction in the system. As a result, justice is delayed for those affected by a sentence of death imposed in California.

Jones v. Davis exemplifies the issue of excessive delays.⁸ Nearly 25 years have passed between the time Ernest Dewayne Jones committed the crime and today, but he continues to await execution in San Quentin. Jones was convicted and sentenced to death in 1995 for the rape and murder of Julia Miller. On the day Jones was sentenced, the victim's daughter declared that she wanted Jones to receive the death penalty.⁹

through the penalty phase). See also *Polly's Story*, POLLY KLAAS FOUND., <http://www.pollyklaas.org/about/pollys-story.html> (last visited Nov. 13, 2016).

³ See SISTER HELEN PREJEAN, *DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES* (Vintage Books ed., 1994). The book details Sister Helen's experience as a spiritual adviser to a man sitting on death row in Louisiana. She gained notoriety for the book as it was an international best seller and was on the *New York Times Best Seller* list for 31 weeks.

⁴ In the case of *Jones v. Davis*, which is the focus of this Note, Ernest Dewayne Jones currently sits on death row for the rape and murder of Julia Miller in a case previously known as *People v. Jones*. However, because Jones' post-conviction review process has been ongoing since 1995, some case names have changed. When Jones filed his claim in federal district court against Kevin Chappell, the previous warden of San Quentin, the name of that case was *Jones v. Chappell*. When the current Warden of San Quentin, Ron Davis, filed an appeal before the Ninth Circuit, the case name changed to *Jones v. Davis*.

⁵ Phillip Reese, *How California Death Row Inmates Die*, THE SACRAMENTO BEE (Sept. 21, 2015, 2:40 PM), <http://www.sacbee.com/site-services/databases/article35995422.html>.

⁶ Judge Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to End or Mend the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 LOY. L.A. L. REV. (SPECIAL ISSUE) 41 (2011).

⁷ CAL. DEP'T OF CORR. & REHAB., *Number of Executions, 1893 to Present*, http://www.cdcr.ca.gov/Capital_Punishment/Number_Executions.html (last visited Nov. 13, 2016).

⁸ *Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

⁹ Paul Feldman, *Murderer is Sentenced to Death*, L.A. TIMES (Apr. 8, 1995), http://articles.latimes.com/1995-04-08/local/me-52200_1_death-sentence.

She also said that since executions were rarely carried out at San Quentin, sentencing Jones to death was a hollow act.¹⁰

It was 15 years later when Jones made a parallel argument before a federal district court in California, and another year later when he made the argument before the Ninth Circuit Court of Appeals. Jones argued that the delays in California's capital punishment system were so excessive it was "gravely uncertain" whether he would ever be executed.¹¹ Thus, the excessive delays resulted in arbitrary implementation of the death penalty, a violation of the Eighth Amendment to the United States Constitution.¹² When the Ninth Circuit heard oral arguments on August 31, 2015, after the Warden of San Quentin filed an appeal to challenge the federal district court's order, it was nearly 23 years to the day from when Julia Miller was killed.¹³

In *Jones*, the Ninth Circuit reversed the federal district court decision that vacated Jones' death sentence and declared California's capital punishment system unconstitutional.¹⁴ In doing so, the Ninth Circuit paved the way for executions to resume in California even though a prisoner has not been executed in the State for a decade.¹⁵

This raises several significant concerns. What are the legal consequences of citizens seriously questioning the use and purpose of the death penalty? If the courts do not provide answers, where do Californians look for relief? What is the significance of the death penalty in a state with a de facto moratorium on executions? And how should judges respond to these changing dynamics?

This Note argues that the Ninth Circuit should have affirmed the district court's holding, thus invalidating California's capital punishment system for three main reasons. First, citizens are losing confidence in the death penalty, which undermines its deterrent effect. Second, capital punishment is a critical issue for the State, and Californians and death row inmates alike must look to the judiciary for relief. Third, the Ninth Circuit avoided the constitutional issue of California's capital punishment

¹⁰ *Id.*

¹¹ First Amended Petition for Writ of Habeas Corpus by a Prisoner in State Custody at 414, *Jones v. Chappell*, 31 F. Supp. 3d 1050 (C.D. Cal. 2014) (No. 09-02158-CJC), *rev'd sub nom.* *Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

¹² U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

¹³ *People v. Jones*, 64 P.3d 762, 768 (Cal. 2003) (providing that Julia Miller was killed on August 24, 1992).

¹⁴ *Jones v. Davis*, 806 F.3d 538, 553 (9th Cir. 2015).

¹⁵ *Number of Executions, 1893 to Present*, *supra* note 7.

system by relying on *Teague v. Lane*.¹⁶ In doing so, the court deepened the problems the Defendant and the district court sought to alleviate.

I. THE FACTUAL AND PROCEDURAL BACKGROUND OF *JONES V. DAVIS*¹⁷

Part A provides a detailed description of the facts that resulted in Jones' death sentence. Part B discusses Jones' trial court conviction, sentencing, and automatic appeal.¹⁸ Then Part C examines Jones' petition for writ of habeas corpus¹⁹ and the federal district court's order.²⁰ Next, the Warden's appeal to the Ninth Circuit challenging Judge Carney's order is reviewed in Part D. Lastly, Part E examines Jones' argument that the systematic failure in the capital punishment system yields unconstitutional delays.²¹

A. FACTUAL BACKGROUND: THE REASON FOR JONES' DEATH SENTENCE

Ernest Dwayne Jones was accused of sexually assaulting his long-time friend Kim in May of 1984.²² According to court records, Jones and Kim used illegal drugs together at her house one day, but when she asked Jones to leave he assaulted her, threatened to kill her, and raped her at knifepoint.²³ However, Kim dropped the charges after testifying against Jones at a preliminary hearing because she thought he needed a second chance.²⁴

In March of 1985, Jones committed rape, sodomy, assault with a deadly weapon, residential robbery, and first-degree burglary against his ex-girlfriend's mother.²⁵ After the assault, Jones asked the mother to kill

¹⁶ *Teague v. Lane*, 489 U.S. 288 (1989) (holding that federal courts are prohibited from recognizing new constitutional rules of criminal procedure on collateral review such as habeas corpus petitions unless an exception applies).

¹⁷ *Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

¹⁸ *People v. Jones*, 64 P.3d 762 (Cal. 2003); *Jones v. Chappell*, 31 F. Supp. 3d 1050 (C.D. Cal. 2014), *rev'd sub nom. Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

¹⁹ First Amended Petition for Writ of Habeas Corpus by a Prisoner in State Custody, *Jones v. Chappell*, 31 F. Supp. 3d 1050 (C.D. Cal. 2014), *rev'd sub nom. Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

²⁰ *Jones v. Chappell*, 31 F. Supp. 3d 1050 (C.D. Cal. 2014), *rev'd sub nom. Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

²¹ *Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

²² *People v. Jones*, 64 P.3d 762, 771 (Cal. 2003).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 769.

him with a kitchen knife, but she refused.²⁶ Jones then took cash from her and tied her up.²⁷ He was convicted for the assaults and sentenced to 12 years in prison.²⁸ In 1991, he was released and placed on parole after serving five years of his 12-year prison sentence, only ten months before he committed the murder that put him on California's death row.²⁹

During August of 1992, Jones lived with a woman named Pam Miller in Los Angeles.³⁰ Their apartment was close to Pam's parents' house.³¹ On August 24, 1992 around 6:00 p.m., Pam was on the phone with her mother, Mrs. Julia Miller, when Jones interrupted to ask Pam if her parents were home.³² Pam said her mother was at home and her father was at work.³³

Jones left the apartment around 7:40 p.m., and bought cocaine and marijuana for the second time that day.³⁴ Jones' drug dealer was a friend of Pam's and lived near the Millers.³⁵ During this outing, Jones used a gold chain to pay for drugs.³⁶ He returned to the apartment at 9:30 p.m., indulged in drug use, switched the phone's ringer off, then left at 10:00 p.m.³⁷ Jones returned to the drug dealer's house and bought more drugs, paying with several pieces of pearl jewelry.³⁸ At 10:20 p.m., Jones returned to the apartment and engaged in more drug use.³⁹ Pam awoke around midnight to find Jones in different clothes.⁴⁰

Pam's father, Mr. Chester Miller, arrived home from work not long after midnight on August 25, 1992.⁴¹ Mr. Miller discovered his wife dead at the end of their bed: naked, sexually assaulted, bound, gagged, and stabbed.⁴² Pieces of three kitchen knives were found around her body, two other knives were coming out of her neck, a rag was wrapped around her face and another was used to gag her mouth.⁴³ Mrs. Miller's ankles

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 768.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 767.

⁴² *Id.* at 768.

⁴³ *Id.*

were bound by a loosely tied nightgown, and her arms were tied above her head by the strap from a purse and by the cord from a telephone.⁴⁴

Criminalists from the Los Angeles County Coroner's Office investigated the sexual assault.⁴⁵ DNA samples taken from Mrs. Miller's body and Jones' blood were compared against each other, and the test showed there was a match between the samples.⁴⁶ The Los Angeles County Coroner's deputy medical examiner performed the autopsy on Mrs. Miller and determined she was killed by the stab wound to the middle of her chest.⁴⁷

After learning that her mother had been killed, Pam went to her grandparents' house and shared the news with a friend.⁴⁸ Pam's friend said that Jones purchased drugs from her several times earlier that day and described the jewelry Jones used as payment.⁴⁹ Pam recognized the jewelry as her mother's, took it to the detectives, and told them to go to her apartment because she knew who had killed her mother.⁵⁰

Police officers found the Miller's car near Jones' apartment and watched Jones as he got in and drove away.⁵¹ A police chase ensued until the tires blew out on Jones' car.⁵² Jones shot himself in the chest when officers told him to get out of the vehicle.⁵³ He was charged with burglary, robbery, rape, and murder.⁵⁴

B. JONES' TRIAL COURT CONVICTION AND AUTOMATIC APPEAL

In 1995, Jones was convicted of the rape and first-degree murder of Mrs. Miller.⁵⁵ Jones was found not guilty of burglary or robbery.⁵⁶ The

⁴⁴ *Id.*

⁴⁵ *Id.* at 769.

⁴⁶ *Id.*

⁴⁷ *Id.* at 768-69.

⁴⁸ *Id.* at 768.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Paul Feldman, *The Mundane Murder Trial Down the Hall*, L.A. TIMES (Apr. 6, 1995), http://articles.latimes.com/1995-04-06/news/mn-51562_1_murder-trials. Just three doors down the hall from Jones' trial at the Los Angeles County Superior Courthouse, another murder trial was proceeding. It was the "trial of the century:" *People v. Simpson*, No. BA097211 (Cal. Super. Ct. L.A. Cty. 1994) (Professional athlete and actor, O.J. Simpson was tried for murder; O.J.'s ex-wife and her friend were stabbed to death on June 12, 1994 in Los Angeles). Although there were some similarities between the two cases, they could not have been more different. For example, there were only two articles written about the *Jones* trial compared to the international media coverage the *Simpson* case received.

⁵⁵ *People v. Jones*, 64 P.3d 762, 767 (Cal. 2003).

⁵⁶ *Id.*

jury found the special circumstance⁵⁷ that the murder was committed in the commission of the rape, that Jones had served a prior prison term, and that he used a deadly weapon—a knife—to commit the crimes.⁵⁸ Jones was subsequently sentenced to death.⁵⁹

In every case where the trier of fact imposes the death penalty in California, the defendant is treated as though they filed a motion to overturn or modify the jury's verdict.⁶⁰ The judge then reviews all the evidence while taking into account the aggregating and mitigating circumstances under the law,⁶¹ and evaluates the jury's decision.⁶² The judge can deny the motions, order a new trial, or reduce the sentence.⁶³ The trial court denied Jones' motions for modification of the sentence and for a new trial.⁶⁴

The appeal to the California Supreme Court was automatic.⁶⁵ When a capital sentence is imposed in California and the trial judge denies motions for a new trial or for a reduction of sentence, the sentence is automatically appealed to the California Supreme Court.⁶⁶ The California Supreme Court fully affirmed the trial court's judgment in 2003, 11 years after the crime.⁶⁷

C. JONES' PETITION FOR WRIT OF HABEAS CORPUS AND JUDGE CARNEY'S ORDER

In 2010, Jones filed an appeal to the United States District Court in the Central District of California in a 454-page amended petition for writ

⁵⁷ In death penalty cases, special circumstances are aggravating factors in connection with first-degree murder. Under California Penal Code § 190.2, there are approximately 22 special circumstances. In current California laws related to capital punishment, "87% of California's first degree murders are 'death eligible,' and could be prosecuted as death cases." CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT 120 (2008), <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1000&context=ncippubs>.

⁵⁸ *People v. Jones*, 64 P.3d 762, 767 (Cal. 2003).

⁵⁹ *Id.* Under California Penal Code § 190.4(a)-(d), Criminal cases in California that warrant a death sentence are split into two phases: the guilt phase and the sentencing phase. During the guilt phase, the jury must decide whether the defendant is guilty beyond a reasonable doubt of first-degree murder with at least one special circumstance. If the jury finds the defendant guilty, the trial moves to the penalty phase. During the penalty phase, the jury reviews evidence and must return a verdict of either life in prison without the possibility of parole or death. *See also* OFFICE OF VICTIMS' SERVS.: CAL. ATT'Y GEN. OFFICE, A VICTIM'S GUIDE TO THE CAPITAL CASE PROCESS 1, <http://oag.ca.gov/sites/all/files/agweb/pdfs/publications/deathpen.pdf> (last visited Nov. 13, 2016).

⁶⁰ CAL. PENAL CODE § 190.4(e) (2016).

⁶¹ PENAL CODE § 190.3.

⁶² PENAL CODE § 190.4(e).

⁶³ PENAL CODE §§ 190.4(e), 1181.

⁶⁴ *People v. Jones*, 64 P.3d 762, 767 (Cal. 2003).

⁶⁵ *Id.*

⁶⁶ PENAL CODE § 1239(b).

⁶⁷ *People v. Jones*, 64 P.3d 762, 767 (Cal. 2003).

of habeas corpus.⁶⁸ In Jones' 27th claim for relief, he argued that his death sentence was unconstitutional because the delays in the system "render[ed] it gravely uncertain when or whether [the] execution will ever be conducted."⁶⁹ Four years later, the federal district court issued an order stating that California's post-conviction review process was unconstitutional and instructed Jones to file an amended petition to claim 27 (hereinafter Jones' "unconstitutional delay claim"⁷⁰) addressing the system-wide delays.⁷¹ Jones filed an amended claim and the parties filed supplemental briefs addressing the delays.⁷²

Writing for the district court, Judge Carney issued an order "declaring California's death penalty system unconstitutional and vacating [Jones'] death sentence."⁷³ The court held California's death penalty was unconstitutional because the "inordinate and unpredictable delay" in executions caused by the system amounted to arbitrary implementation.⁷⁴ The order detailed the legal history of capital punishment in California and identified the root of the delays in the system, which the court identified as the system itself.⁷⁵ Judge Carney found that the delays occur at every stage of the post-conviction review process starting from the time the death penalty is imposed.⁷⁶

Statistics bolstered the opinion, showing that despite having more inmates sentenced to death than any other state in the country, most inmates will die of causes other than execution.⁷⁷ The court also relied on the report written by the bipartisan and career-diverse California Commission on the Fair Administration of Justice (hereinafter the Commission).⁷⁸ The Commission was established by the California legislature and was responsible for reviewing the state's justice system in-depth.⁷⁹

⁶⁸ First Amended Petition for Writ of Habeas Corpus by a Prisoner in State Custody, Jones v. Chappell, 31 F. Supp. 3d 1050 (C.D. Cal. 2014), *rev'd sub nom.* Jones v. Davis, 806 F.3d 538 (9th Cir. 2015).

⁶⁹ *Id.* at 414.

⁷⁰ When a death row inmate claims that their incarceration is so long that it amounts to cruel and unusual punishment, and thus a constitutional violation, the claim is referred to as a Lackey claim. Lackey v. Texas, 520 U.S. 1183 (1995); *see also* Johnson v. Bredesen 558 U.S. 1067 (2009) (mem.). Here, Jones does not assert a Lackey claim because he is not asserting a constitutional violation related to the length of his imprisonment, but the length of delays within the post-conviction review process.

⁷¹ Jones v. Davis, 806 F.3d 538, 542 (9th Cir. 2015).

⁷² *Id.*

⁷³ Jones v. Chappell, 31 F. Supp. 3d 1050, 1052 (C.D. Cal. 2014), *rev'd sub nom.* Jones v. Davis, 806 F.3d 538 (9th Cir. 2015).

⁷⁴ *Id.* at 1069.

⁷⁵ *Id.* at 1053-60.

⁷⁶ *Id.* at 1054-60.

⁷⁷ *Id.* at 1053-54.

⁷⁸ *Id.* at 1055.

⁷⁹ *Id.*

As part of its review, the Commission analyzed the State's administration of the death penalty.⁸⁰ The Commission concluded that "California's death penalty system is dysfunctional. The system is plagued with excessive delay"⁸¹

According to Judge Carney, death sentences in California have been transformed into "life in prison, with the remote possibility of death."⁸² Furthermore, for the "random few for whom execution does become a reality, they will have languished for so long on Death Row that their execution will serve no retributive or deterrent purpose and will be arbitrary."⁸³ In other words, a capital sentence in California is a violation of the Eighth Amendment⁸⁴ because of excessive delays. The delays in the post-conviction review process permeate the system to the extent that the ultimate punishment no longer serves its original purpose and results in random implementation of the executions.

D. THE WARDEN OF SAN QUENTIN OBJECTS TO JUDGE CARNEY'S ORDER

The California Attorney General, on behalf of the Warden of San Quentin, submitted an opening brief to the Ninth Circuit on December 1, 2014,⁸⁵ and filed a reply brief on April 13, 2015.⁸⁶ The Warden argued that the order vacating Jones' death sentence and declaring the State's capital punishment system unconstitutional should be reversed.⁸⁷ Further, the Warden argued that Judge Carney's order was improper for several reasons⁸⁸ and characterized it as "fundamentally misguided."⁸⁹ While the Warden recognized the serious interests at stake in death penalty cases, he argued that California's system is designed to create more protection because of the weight of the interests involved.⁹⁰ Further, California's capital punishment system operates to ensure no arbitrary im-

⁸⁰ *Id.*

⁸¹ CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 57, at 111.

⁸² Jones v. Chappell, 31 F. Supp. 3d 1050, 1053 (C.D. Cal. 2014), *rev'd sub nom.* Jones v. Davis, 806 F.3d 538 (9th Cir. 2015).

⁸³ *Id.*

⁸⁴ U.S. CONST. amend. VIII (prohibiting the infliction of cruel and unusual punishments).

⁸⁵ Appellant's Opening Brief at 58, Jones v. Davis, 806 F.3d 538 (9th Cir. 2015) (No. 14-56373), <http://cdn.ca9.uscourts.gov/datastore/general/2015/07/23/14-56373%20%20opening%20brief.pdf>.

⁸⁶ Appellant's Reply Brief at 31, Jones v. Davis, 806 F.3d 538 (9th Cir. 2015) (No. 14-56373), <http://cdn.ca9.uscourts.gov/datastore/general/2015/07/23/14-56373%20%20reply%20brief.pdf>.

⁸⁷ Appellant's Opening Br. 1-3.

⁸⁸ *Id.*

⁸⁹ *Id.* at 2.

⁹⁰ *Id.* at 2-3.

plementation of the death penalty as it affords capital defendants ample opportunities and resources to challenge their convictions.⁹¹ The Warden argued that the process takes time because it provides “careful, individualized review.”⁹² Additionally, the Warden criticized the court for using a policy argument as its basis for finding California’s capital punishment system unconstitutional, and argued that there is no legal basis for the judge’s determination.⁹³

The Warden outlined four main arguments to support his position. First, the district court had improperly granted relief based on a theory never presented to any court by Jones.⁹⁴ He distinguished Jones’ argument in two ways: by asserting that Jones had alleged an Eighth Amendment violation would result from the continuing litigation process that is part of California’s dysfunctional system and that Jones had not argued that it was the system-wide dysfunction that created the arbitrary implementation of the death penalty.⁹⁵ Further, the Warden argued that Jones’ claim was prohibited under the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter AEDPA)⁹⁶ because the law prohibits “federal habeas relief for any claim adjudicated on the merits in state court.”⁹⁷ The Warden asserted that Jones’ amended unconstitutional delay claim presented the same Eighth Amendment claim Jones had brought before the California Supreme Court.⁹⁸ Since the court rejected the claim, the Warden argued that the Ninth Circuit, under AEDPA, was prohibited from providing Jones relief.⁹⁹

Second, the arbitrariness theory had not been exhausted in state courts¹⁰⁰ as required by AEDPA.¹⁰¹ The Warden insisted that Jones failed to present his Eighth Amendment claim to the various state courts as required by the rule.¹⁰²

Third, the anti-retroactivity doctrine outlined in *Teague*¹⁰³ prohibited the district court from providing Jones relief on the theory of arbi-

⁹¹ *Id.* at 2.

⁹² *Id.*

⁹³ *Id.* at 3.

⁹⁴ *Id.* at 14.

⁹⁵ *Id.* at 14-15.

⁹⁶ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 110 Stat. 1214 (1996) (codified in part into 28 U.S.C. § 2245 (2016)).

⁹⁷ Appellant’s Opening Br. 15.

⁹⁸ *Id.* at 19.

⁹⁹ *Id.* at 21.

¹⁰⁰ *Id.* at 15.

¹⁰¹ 28 U.S.C. § 2254(b)(1)(A) (2016).

¹⁰² Appellant’s Opening Br. 25-26.

¹⁰³ *Teague v. Lane*, 489 U.S. 288 (1989) (holding that federal courts are prohibited from recognizing new constitutional rules of criminal procedure on collateral review such as habeas corpus petitions unless an exception applies).

trariness because it was a new rule and did not fall under any exception outlined by *Teague*.¹⁰⁴ Fourth, Judge Carney's order was in contravention of Eighth Amendment precedent, and California's capital punishment review process is consistent with the Eighth Amendment to the United States Constitution.¹⁰⁵ The Warden substantiated his arguments about the flawed nature of the district court's ruling and stated that the State's post-conviction review process in death penalty cases is long, but also crucial to avoid violations related to error and arbitrariness.¹⁰⁶

E. JONES ASSERTS SYSTEMATIC FAILURE YIELDS UNCONSTITUTIONAL DELAYS

In Jones' Answering Brief,¹⁰⁷ he relied on the landmark case from the United States Supreme Court, *Furman v. Georgia*,¹⁰⁸ to argue that the system-wide delays present in California's capital punishment system result in arbitrary, thus unconstitutional, implementation of the death penalty within the State.¹⁰⁹ According to Jones, the delays are "so extraordinary" the State's "death penalty has ceased to serve any legitimate penological purpose."¹¹⁰ Thus, Jones argued that the Ninth Circuit should affirm the district court's judgment.¹¹¹ Jones likened his case to *Furman* by discussing the arbitrariness by which the sentences of death were implemented and by presenting an abundance of statistical evidence.¹¹²

Jones raised five main arguments in his brief. First, unconstitutional delays are present at every level of the capital punishment system in California.¹¹³ Second, Jones was properly granted relief by the district court because California's death penalty system results in arbitrary implementation in violation of the Eighth Amendment.¹¹⁴ Third, the exhaustion

¹⁰⁴ *Id.* at 16-17.

¹⁰⁵ *Id.* at 17-19.

¹⁰⁶ *Id.* at 18.

¹⁰⁷ Petitioner-Appellee's Answering Brief, *Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015) (No. 14-56373), <http://cdn.ca9.uscourts.gov/datastore/general/2015/07/23/14-56373%20answering%20brief.pdf>.

¹⁰⁸ *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam) (holding that the imposition and carrying out of the death penalty in certain cases violated the Eighth Amendment's prohibition on cruel and unusual punishment).

¹⁰⁹ Pet'r-Appellee's Answering Br. 1-2.

¹¹⁰ *Id.* at 11.

¹¹¹ *Id.* at 58.

¹¹² *Id.* at 1-4. For example, the majority of death row inmates will spend more than 30 years challenging their capital sentence in part because it takes an average of 16 years to appoint habeas corpus counsel.

¹¹³ *Id.* at 18.

¹¹⁴ *Id.* at 22, 24, 29.

rule from AEDPA was not a barrier to relief because: the Warden waived exhaustion, Jones fell under one of the AEDPA exceptions, and Jones was unable to exhaust that claim in state court because he does not yet have an execution date.¹¹⁵ Fourth, 28 U.S.C. section 2254(d) did not apply to his amended unconstitutional delay claim because it was different from the claim he raised on direct appeal and was never adjudicated on the merits by the state court.¹¹⁶ Fifth, the district court correctly held that his claim was not barred by *Teague*¹¹⁷ because the Warden waived the defense,¹¹⁸ the rule was not new, and if the district court did announce a new rule,¹¹⁹ it was substantive.¹²⁰

After Jones submitted his brief, the Ninth Circuit reviewed briefs from both parties and amici.¹²¹ The court heard oral arguments on August 31, 2015¹²² and issued the opinion on November 12, 2015.¹²³

II. THE NINTH CIRCUIT ALLOWS EXECUTIONS TO RESUME IN CALIFORNIA

The Ninth Circuit reversed the federal district court's judgment that granted relief to Jones and declared California's death penalty unconstitutional,¹²⁴ effectively paving the way for executions to resume in California. The court held that it was prohibited from analyzing the substantive claim challenging the constitutionality of the State's capital punishment system because Jones asked the court to apply a novel constitutional rule as barred by *Teague v. Lane*.¹²⁵ First, the court analyzed *Teague*, then explained its use of discretion to address the *Teague* inquiry rather than the issue of exhaustion.¹²⁶ Finally, the court discussed additional reasons for not addressing Jones' unconstitutional delay claim, such as Congressional intent regarding AEDPA and concerns of comity.

¹¹⁵ *Id.* at 32-33, 40, 43.

¹¹⁶ *Id.* at 48-49.

¹¹⁷ *Id.* at 49.

¹¹⁸ *Id.* at 49-51.

¹¹⁹ *Id.* at 51-53.

¹²⁰ *Id.* at 53-54.

¹²¹ *Jones v. Davis: Constitutionality of California Death Penalty*, U.S. COURTS FOR THE NINTH CIRCUIT (last updated Feb. 23, 2016, 12:17 PM), http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000802 (listing amici who filed timely briefs, including The Criminal Justice Legal Foundation, California Attorneys for Criminal Justice, Death Penalty Focus, Empirical Scholars, Murder Victims' Families, State Senator Loni Hancock, Loyola Law School, Correctional Lieutenant M. Thompson, and the Innocence Project).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Jones v. Davis*, 806 F.3d 538, 553 (9th Cir. 2015).

¹²⁵ *Id.*

¹²⁶ *Id.* at 545-553.

A. *TEAGUE* BARS JONES' CLAIM FOR RELIEF

The Ninth Circuit held that *Teague* barred Jones' claim because Jones sought to apply a new rule and neither of the *Teague* exceptions applied.¹²⁷ The Court in *Teague* held that habeas corpus could not be used as an instrument to create new constitutional rules of criminal procedure except in two instances where the rule would apply retroactively.¹²⁸

1. *Teague's Retroactivity Doctrine and its Two Exceptions*

The United States Supreme Court used *Teague* to clarify how retroactivity should be decided for cases on collateral review,¹²⁹ and stated that the issue of retroactivity is a threshold question.¹³⁰ New constitutional rules of criminal procedure do not apply retroactively to cases on collateral review unless one of two exceptions applies.¹³¹ The Court clarified that habeas corpus is a collateral remedy, and “habeas corpus cannot be used . . . to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to all defendants on collateral review” through either exception.¹³² The first exception is that “a new rule should be applied retroactively . . . if it places ‘certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.’”¹³³ The second exception is limited to watershed rules of criminal procedure and new rules should be applied retroactively if they require adherence to procedures that were “implicit in the concept of ordered liberty.”¹³⁴

¹²⁷ *Id.* at 552.

¹²⁸ *Teague v. Lane*, 489 U.S. 288, 306-08, 316 (1989).

¹²⁹ *Id.* at 305-08 (quoting *Mackey v. U.S.*, 401 U.S. 667, 682 (1971) (Harlan, J., concurring)). Collateral review is “judicial review that occurs in a proceeding outside of the direct review process.” *Wall v. Kholi*, 562 U.S. 545, 560 (2011). See also James Bickford, *Opinion Recap: All Judicial Review is Either Direct or Collateral*, SCOTUSBLOG (Mar. 9, 2011, 2:42 PM), <http://www.scotusblog.com/2011/03/opinion-summary-all-judicial-review-is-either-direct-or-collateral>.

¹³⁰ *Teague*, 489 U.S. at 300.

¹³¹ *Id.* at 316.

¹³² *Id.* at 306, 316 (quoting *Mackey v. U.S.*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring)).

¹³³ *Id.* at 290 (quoting *Mackey v. U.S.*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring)).

¹³⁴ *Id.* at 311 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). The Court in *Teague* defined watershed rules as “new procedures without which the likelihood of an accurate conviction is seriously diminished.”

2. *The Teague Analysis Applied to Jones*

Teague is a requirement to analyze the substance of one aspect of the claim and not the foundational merits of the claim.¹³⁵ The Ninth Circuit evaluated the *novelty* of Jones' unconstitutional delay claim because the *Teague* inquiry is not wholly procedural: "*Teague* requires an analysis of the underlying legal theory of the claim—albeit to determine its novelty rather than its ultimate persuasiveness."¹³⁶ Here, *Teague* barred Jones' unconstitutional delay claim because Jones sought to apply a novel constitutional rule and neither of the two exceptions applied.¹³⁷

Jones sought to apply a new rule, "[A] state may not arbitrarily inflict the death penalty," created by Jones and the district court.¹³⁸ Jones argued that his rule was substantive, and thus an exception to *Teague*.¹³⁹ Jones focused on the inherent delay of the system as opposed to the delays he experienced as an individual, which distinguished his unconstitutional delay claim from similar claims regarding delays in the State's post-conviction review process.¹⁴⁰ However, the court found that the long delays in the system prior to execution were not violations of the Eighth Amendment's prohibition on cruel and unusual punishment.¹⁴¹

The court also rejected Jones' rule for being too broad.¹⁴² Several United States Supreme Court cases rejected rules in capital punishment cases it considered "too broad."¹⁴³ For example, the Court applied a rule similar to Jones' in one specific form of arbitrariness in *Furman*, a death penalty case that was meant to be read narrowly.¹⁴⁴ Jones' rule is distinguishable from the rule set forth in *Furman* in two ways. First, *Furman* argued arbitrary sentencing while Jones argued arbitrary implementation of death sentences.¹⁴⁵ Second, Jones argued that the appeals process is so long it creates uncertainty as to whether a prisoner will ever be executed, and that is arbitrary.¹⁴⁶ Jones neither argued that the State gave the fact finder discretion regarding the execution date, nor did he argue the exe-

¹³⁵ Jones v. Davis, 806 F.3d 538, 544 (9th Cir. 2015).

¹³⁶ *Id.*

¹³⁷ *Id.* at 541, 552.

¹³⁸ *Id.* at 543 (quoting Jones v. Chappell, 31 F. Supp. 3d 1050, 1068 (C.D. Cal. 2014)).

¹³⁹ *Id.* at 552.

¹⁴⁰ *Id.* at 548-49.

¹⁴¹ *Id.* at 548 (citing Allen v. Ornoski, 435 F.3d 946, 958 (9th Cir. 2006)).

¹⁴² *Id.* at 550.

¹⁴³ *Id.*; see Gray v. Netherland, 518 U.S. 152, 169 (1996); see also Gilmore v. Taylor, 508 U.S. 333, 344 (1993).

¹⁴⁴ Jones v. Davis, 806 F.3d 538, 550 (9th Cir. 2015).

¹⁴⁵ *Id.* at 550-51.

¹⁴⁶ *Id.* at 551.

cution date was chosen randomly.¹⁴⁷ *Furman* is not so broad as to encompass Jones' rule,¹⁴⁸ and “there is a simple and logical difference between *Furman*'s rule prohibiting *unfettered discretion* by a jury deciding whether to *impose* the death penalty and a rule prohibiting *systemic lengthy delays* resulting from a state's post-sentencing procedures in the *carrying out* of that sentence when permissibly imposed.”¹⁴⁹ Additionally, Jones' conviction became final in 2003 after the Court's rulings in *Furman* and *Gregg*, so neither applies.¹⁵⁰ Lastly, *Teague*'s second exception did not apply because Jones did not argue that his proffered rule fell under the watershed exception.¹⁵¹

B. THE NINTH CIRCUIT DECLINES TO ANALYZE THE EXHAUSTION ISSUE

The Ninth Circuit used its discretion to focus on the *Teague* inquiry rather than the exhaustion issue.¹⁵² Usually exhaustion is considered first because an application for a writ of habeas corpus is not granted unless the petitioner has exhausted all state court remedies or the petitioner has shown an exception to the exhaustion requirement under 28 U.S.C. section 2254(b)(1).¹⁵³ Additionally, under 28 U.S.C. section 2254(b)(2), an application for writ of habeas corpus can be denied on the merits, regardless of exhaustion.¹⁵⁴ Further, the Ninth Circuit pointed to Congressional intent as support for its decision to primarily review the *Teague* inquiry and deny the petitioner's application.¹⁵⁵ Congressional intent regarding denial on the merits included the *Teague* inquiry as part of the merits upon which the court could deny a writ of habeas corpus.¹⁵⁶

The court further explained its avoidance of the exhaustion issue, stating that “analyzing the exhaustion issue would serve no useful pur-

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* (quoting *Saffle v. Parks*, 494 U.S. 484, 490 (1990)).

¹⁵⁰ *Id.* at 548. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam) (holding that the “imposition and carrying out of the death penalty” is a violation of the Eighth and Fourteenth Amendments when it constitutes cruel and unusual punishment. Although the justices could not agree on the rationale, this opinion created a de facto moratorium on the death penalty in America.). *Gregg v. Georgia*, 428 U.S. 153 (1976) (holding that the statutory death penalty system in Georgia was constitutional. As a result, executions resumed across the country.).

¹⁵¹ *Jones v. Davis*, 806 F.3d 538, 552 n.6 (9th Cir. 2015).

¹⁵² *Id.* at 543.

¹⁵³ *Id.* 28 U.S.C. § 2254(b)(1) requires petitioners to exhaust state court remedies in order for a federal court to grant an application for writ of habeas corpus.

¹⁵⁴ *Jones v. Davis*, 806 F.3d 538, 543-44 (9th Cir. 2015).

¹⁵⁵ *Id.* at 544.

¹⁵⁶ *Id.*

pose.”¹⁵⁷ The Ninth Circuit was required to analyze *Teague* regardless of whether the court analyzed Jones’ claim that he showed an exception to exhaustion, or whether it analyzed the government’s argument that Jones fulfilled the exhaustion requirement.¹⁵⁸ Dealing with either issue first would create further delay in Jones’ quest for relief, and effectively further his argument.¹⁵⁹ The decision to focus on *Teague* was rooted in concerns about judicial economy.¹⁶⁰

Additionally, Judge Watford issued a concurrence stating that he would reverse the district court’s judgment on the basis that Jones’ did not satisfy the exhaustion requirement.¹⁶¹ The judge also characterized the new rule announced by the federal district court as “substantive rather than procedural.”¹⁶²

C. THE NINTH CIRCUIT’S JUSTIFICATIONS FOR NOT ADDRESSING JONES’ UNCONSTITUTIONAL DELAY CLAIM

Interpretation of Congressional intent and issues of comity also prevented the Ninth Circuit from addressing Jones’ unconstitutional delay claim. Congressional intent regarding the language in the Antiterrorism and Effective Death Penalty Act of 1996 coupled with the requirement that federal courts “*must* apply *Teague* before” reaching substantive questions,¹⁶³ meant that the Ninth Circuit did not have to address Jones’ unconstitutional delay claim. Congressional intent was not to construe section 28 U.S.C. section 2254(b)(2) narrowly so that the court did not have to look solely to the substantive issue for a denial of the writ: “[section] 2254(b)(2) encompasses, at a minimum, the substance-like inquiry demanded by *Teague*.”¹⁶⁴ The phrase “on the merits” from section 2254(b)(2) was meant to be construed broadly, even though “in the abstract, the phrase ‘on the merits’ has many potential meanings, including a narrow meaning that requires adjudication of the substantive validity of the underlying claim itself.”¹⁶⁵

The court was also concerned with comity and upsetting the state court’s judgment.¹⁶⁶ Comity speaks to the inherent issue of federalism

¹⁵⁷ *Id.* at 545.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 545-46.

¹⁶¹ *Id.* at 555 (Watford, J. concurrence). This case was presented before Judges Graber, Rawlinson, and Watford. Judge Graber wrote the opinion.

¹⁶² *Id.* at 553 (Watford, J. concurrence).

¹⁶³ *Id.* at 545 n.1 (quoting *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994)).

¹⁶⁴ *Id.* at 544.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 546.

and the system's attempt at balancing federal and state interests. Since criminal law and procedure are traditionally state police powers that encompass health, welfare, safety, and morals, federal courts like the Ninth Circuit are hesitant to regulate in those areas. Under the rule of comity, state courts have the first opportunity at dealing with claims by petitioners alleging that their confinement is a violation of federal law.¹⁶⁷ Here, the Ninth Circuit did not want to disturb the state court judgment for reasons of comity, "conclud[ing] that it is 'perfectly clear' that [Jones] cannot prevail."¹⁶⁸ Additionally, federal courts can only deny relief under section 2254(b)(2) when it is "perfectly clear that the petitioner has no hope of prevailing."¹⁶⁹

III. THE NINTH CIRCUIT CIRCUMVENTED REVIEW OF THE CONSTITUTIONALITY OF CAPITAL PUNISHMENT IN CALIFORNIA

For purposes of this Note, it is helpful to think of the Eighth Amendment's protection against the infliction of cruel and unusual punishment from two distinct, but interrelated perspectives: procedural and substantive. The procedural perspective relates to the how: the method of sentencing and execution, as well as the processes for post-conviction review. The substantive perspective relates to the core legality: in this context, fundamental questions about the existence and use of capital punishment, and whether the methods and procedures surrounding capital punishment are constitutional.

In *Jones v. Davis*, the Ninth Circuit used the "substance-like" *Teague* inquiry¹⁷⁰ to avoid the substantive issues at hand: whether the duration of California's post-conviction review process in death penalty cases is so long that the implementation of the penalty is arbitrary, and thus unconstitutional under the Eighth Amendment. Sidestepping that issue meant the court also avoided the broader issue of whether California's capital punishment system should be abolished. While the court treated *Teague* as the substantive issue in *Jones*, it was Jones' unconstitutional delay claim that was truly the substantive issue.

The Ninth Circuit should have addressed the substantive issue of whether California's capital punishment system is constitutional in light of three challenges presented in this case. First, citizens are losing confi-

¹⁶⁷ *Id.* (quoting *O'Sullivan v. Boerckel*, 525 U.S. 838, 844 (1999)).

¹⁶⁸ *Id.* (quoting *Cassett v. Stewart*, 406 F.3d 614, 624 (9th Cir. 2005)).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 544 ("[28 U.S.C. §] 2254(b)(2) encompasses, at a minimum, the substance-like inquiry demanded by *Teague*.").

dence in the capital punishment system's ability to effectively deter crime. Second, capital punishment is a uniquely critical issue in California, home to more death row inmates than any other state. Third, by focusing on the *Teague* inquiry, the court used Jones' arguments against him and suggested a remedy that is deeply problematic to the people affected by a capital sentence.

A. CITIZENS ARE LOSING CONFIDENCE IN CAPITAL PUNISHMENT

America is dealing with the death penalty as a nationwide issue and confidence in capital punishment has been waning.¹⁷¹ Each year since 2011, states have been abolishing and invalidating the death penalty.¹⁷² Many states in America are not utilizing executions as the ultimate punishment as 36 out of 50 states have not executed a person in at least five years or have repealed the death penalty.¹⁷³ Although the death penalty remains legal in 32 states,¹⁷⁴ 18 of those states did not impose any new death sentences in 2015.¹⁷⁵ In California, more than 900 men and women have been sentenced to death since 1978,¹⁷⁶ but only 13 people have actually been executed since then.¹⁷⁷

¹⁷¹ *Death Penalty*, GALLUP, <http://www.gallup.com/poll/1606/death-penalty.aspx> (last visited Nov. 13, 2016).

¹⁷² *II: Timeline of State Death Penalty Laws, 1972-Present*, PROCON.ORG (last updated Nov. 9, 2016, 1:14 PM), <http://deathpenalty.procon.org/view.resource.php?resourceID=001172>. While New York and New Jersey invalidated their capital punishment systems in 2007, no states abolished the death penalty in 2008 or 2010. The following states abolished or imposed a moratorium on the death penalty in recent years: New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013), and Nebraska (2015). *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last updated Nov. 9, 2016). Florida houses the second largest number of death row inmates in the country as 385 await execution. *Death Row Roster*, FLA. DEP'T OF CORR., <http://www.dc.state.fl.us/activeinmates/deathrowroster.asp> (last updated Nov. 13, 2016). Florida's death penalty has been in flux during 2016: the United States Supreme Court ruled that the State's capital punishment process was unconstitutional, then legislators passed new laws in response which have been challenged and deemed unconstitutional by Florida's Supreme Court. *Florida Supreme Court Says State's New Death Penalty Law is Unconstitutional*, THE WASHINGTON POST (Oct. 14, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/10/14/florida-supreme-court-says-states-new-death-penalty-law-is-unconstitutional/?utm_term=.0441104d0b26.

¹⁷³ *Jurisdictions With No Recent Executions*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/jurisdictions-no-recent-executions> (last updated Aug. 18, 2016).

¹⁷⁴ *32 States With the Death Penalty and 18 States With Death Penalty Bans*, PROCON.ORG, <http://deathpenalty.procon.org/view.resource.php?resourceID=001172> (last updated Nov. 9, 2016 1:14 PM).

¹⁷⁵ *The Death Penalty in 2015: Year End Report*, DEATH PENALTY INFO. CTR. 4 (2015), <http://deathpenaltyinfo.org/documents/2015YrEnd.pdf>.

¹⁷⁶ *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1053 (C.D. Cal. 2014), *rev'd sub nom. Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

¹⁷⁷ CAL. DEP'T OF CORR. & REHAB., *Inmates Executed, 1978-Present*, http://www.cdcr.ca.gov/Capital_Punishment/Inmates_Executed.html (last visited Nov. 13, 2016).

According to a 2011 Gallup poll, more than 60% of people feel that the death penalty does not act as a deterrent or does not lower the murder rate compared to Americans who were polled in 1985.¹⁷⁸ This means the number of people who feel as though the death penalty does not act as a deterrent or does not lower the murder rate more than doubled in the span of almost 30 years. Additionally, almost 60% of people think that an innocent person has been executed under the death penalty in America within the last five years.¹⁷⁹ The data also shows that overall support for the death penalty has been declining and opposition has been increasing.¹⁸⁰ This is important because people must believe that the system works and those sentenced to death will be executed within a reasonable amount of time for capital punishment to have a deterrent effect.¹⁸¹

B. CAPITAL PUNISHMENT IS A CRITICAL ISSUE FOR CALIFORNIA

The death penalty is a critical issue economically, socially, and politically to California and its residents. Californians are losing confidence in the capital punishment system and must find relief through the judiciary.

California houses almost 25% of America's death row inmates¹⁸² with 750 people currently awaiting execution.¹⁸³ This means the State is home to those affected the most: families and friends of the victims harmed by the inmates, the death row inmates themselves, and their families and friends. Since the reinstatement of the State's death penalty in 1978, 119 of California's death row inmates have died—104 of those deaths have been classified as non-execution deaths (i.e., natural causes, suicide, or other).¹⁸⁴ Moreover, the State has spent approximately \$4 billion on capital punishment since its reinstatement.¹⁸⁵

¹⁷⁸ *Death Penalty*, GALLUP, <http://www.gallup.com/poll/1606/death-penalty.aspx> (last visited Nov. 13, 2016).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ "The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

¹⁸² Phillip Reese, *How California Death Row Inmates Die*, THE SACRAMENTO BEE (Sept. 21, 2015, 2:40 PM), <http://www.sacbee.com/site-services/databases/article35995422.html>.

¹⁸³ CAL. DEP'T OF CORR. & REHAB., *Condemned Inmate List*, http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateListSecure.pdf (last updated Nov. 3, 2016).

¹⁸⁴ During the writing of this Note, four inmates on California's death row have died. One died of natural causes in August of 2015 just days before Jones' case was heard at the Ninth Circuit, another was executed in Virginia in October of the same year, and two died of natural causes in 2016. CAL. DEP'T OF CORR. & REHAB., *Condemned Inmates Who Have Died Since 1978* (Jul. 18, 2016), http://www.cdcr.ca.gov/Capital_Punishment/docs/CONDEMNEDINMATESWHO_HAVEDIEDSINCE1978.pdf.

¹⁸⁵ Alarcón & Mitchell, *supra* note 6.

Like many Americans, Californians are losing confidence in the death penalty. A poll conducted in 2012 found that 55% of all adults in California believed life without the possibility of parole should be the punishment for first-degree murder, with only 38% believing the punishment should be death.¹⁸⁶

Californians have unsuccessfully sought answers from the State legislature despite the loss of confidence in the death penalty. Proposition 34, the SAFE California Act, was on the ballot in 2012.¹⁸⁷ Prop 34 would have repealed and abolished the death penalty, replacing it with life imprisonment without the possibility of parole for those convicted of murder with special circumstances.¹⁸⁸ It was defeated by a very narrow margin with 48% of votes in favor of the proposition and 52% against it.¹⁸⁹ At the time the Ninth Circuit was deciding *Jones*, two competing death penalty propositions were slated for California's November 2016 ballot.¹⁹⁰ This made the Ninth Circuit's decision even more critical because the State legislature has struggled to produce definitive results. Californians and victims of crimes committed by death row inmates must rely on the judiciary for answers. Additionally, those awaiting execution are confined to using the judicial process for relief, which further underscores the need for a fair and predictable judicial process. Judge Carney's order holding California's death penalty unconstitutional provided the answer the State legislature failed to produce. Yet, the Ninth Circuit reversed Judge Carney's order, ostensibly creating more litigation, more unnecessary delays, and allowing the system-wide problems outlined by Judge Carney and *Jones* to worsen in California.

¹⁸⁶ Mark Baldassare et. al, *Californians and Their Government*, 53 PUB. POLICY INST. OF CAL. at 21 (Sept. 2012), http://www.ppic.org/content/pubs/survey/S_912MBS.pdf. This independent, nonpartisan study was conducted as part of the PPIC's ongoing efforts to understand what influences Californians voting choices and policy preferences.

¹⁸⁷ *Proposition 34: Death Penalty*, SMART VOTER (Dec. 3, 2012 10:07 PM), <http://www.smartvoter.org/2012/11/06/ca/state/prop/34/>.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Mayde Gomez, *Death Penalty Reform and Saving Act of 2016 Pushes to Speed Up California Executions*, ABC 7 EYEWITNESS NEWS (Oct. 30, 2015), <http://abc7.com/news/group-pushes-to-speed-up-executions-in-california/1060763/>. The two competing ballot measures were Propositions 62 and 66. Proposition 62 sought to repeal the State's death penalty and replace it with life imprisonment without the possibility of parole; it would also apply retroactively. Proposition 66 sought to shorten the amount of time in which an inmate may challenge a death sentence while also significantly changing other procedures related to challenging and carrying out a death sentence. Both propositions would increase the amount of money deducted from affected inmates for restitution to victims' and their families. CAL. SEC'Y OF STATE, OFFICIAL VOTER INFO. GUIDE 78-83, 104-09 (2016), <http://vig.cdn.sos.ca.gov/2016/general/en/pdf/complete-vig.pdf>. Regardless of the outcome, the arguments related to the constitutionality of California's death penalty remain. However, future articles may examine the short and long-term effects of the winning proposition on the State's capital punishment system.

C. THE COURT'S IMPROPER DEFENSE OF THE *TEAGUE* BAR

By focusing squarely on the *Teague* inquiry, the Ninth Circuit avoided the substantive issue of the constitutionality of California's capital punishment system raised by Jones. The court supported its decision to do so primarily based on arguments of judicial economy and protecting the rights of death row inmates. By focusing on judicial economy, the Ninth Circuit struck at the heart of the petitioner's argument, using it as a shield and a sword. Further, the court acted callously in ignoring Jones' attacks on the inherent delays that plague the post-conviction review process by relying on the protection argument.¹⁹¹

The Ninth Circuit firmly and repeatedly defended its decision to focus on and apply the retroactivity doctrine from *Teague*.¹⁹² The court also interpreted the *Teague* inquiry as not wholly procedural, as it evaluated the novelty of the claim: "*Teague* requires an analysis of the underlying legal theory of the claim—albeit to determine its novelty rather than its ultimate persuasiveness."¹⁹³ Instead of discussing and deciding this case on the issue of whether California's death penalty post-conviction review process is "so fraught with delay" as to render it unconstitutional, the court focused on whether it could even get to that issue, and the court decided under *Teague* it was barred from doing so. However, the Ninth Circuit acknowledged that these delays are a serious problem: "Many agree with Petitioner that California's capital punishment system is dysfunctional and that the delay between sentencing and execution in California is extraordinary."¹⁹⁴ But ultimately the court avoided the complex issues and ramifications of affirming Judge Carney's order invalidating capital punishment in California.

The court used *Teague* as a procedural bar to avoid the substantive constitutional issues. While procedural issues are crucial and act as thresholds that must be met prior to hearing a case on the merits, courts usually have a substantial amount of discretion in how they deal with those procedural issues and how they get to the merits. In Jones' case before the federal district court, Judge Carney put Jones' unconstitutional delay claim front and center when he heard the case. Out of the 30 claims

¹⁹¹ Although it is outside the scope of this Note to evaluate whether judicial bias exists in capital punishment cases, and if it does exist, what role it plays, Michele Benedetto Neitz explores the broader issue of bias in the judiciary and how it affects decisions on the bench. See Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137 (2013) ("The Article verifies the existence of implicit socioeconomic bias on the part of judges . . . [Fourth Amendment and child custody cases] reveal that judges can and do favor wealthy litigants over those living in poverty, with significant negative consequences for low-income people.").

¹⁹² *Jones v. Davis*, 806 F.3d 538, 545 n.1 (9th Cir. 2015).

¹⁹³ *Id.* at 544.

¹⁹⁴ *Id.* at 553.

alleged by the petitioner over the course of 454 pages in his first amended petition, Judge Carney honed in on Jones' unconstitutional delay claim: "the extraordinarily lengthy delay in execution of sentence in Mr. Jones' case, coupled with the grave uncertainty of not knowing whether his execution will ever be carried out, renders his death sentence unconstitutional."¹⁹⁵

1. *The court used judicial economy as a sword and a shield against Jones*

The Ninth Circuit used arguments related to judicial economy to buttress its opinion.¹⁹⁶ Judicial economy was used as a sword to turn the table on Jones, effectively using his arguments against him to avoid dealing with his substantive unconstitutional delay claim. Judicial economy was also used as a shield to protect the court from wholeheartedly addressing Jones' claim.

Jones' own arguments were used against him by the court: "[T]he very nature of Petitioner's claim is that constitutional harm flows from the delay inherent in judicial proceedings. If we know that we must deny relief under *Teague*, we see nothing useful to be gained by imposing more delay unnecessarily."¹⁹⁷ This is also what the court used to further explain its reasoning for deciding the *Teague* issue.¹⁹⁸ The court expressly stated that "judicial economy may outweigh constitutional-avoidance concerns."¹⁹⁹ Effectively, the Ninth Circuit avoided the constitutional issue by partially relying on arguments of judicial economy. However, "[r]equiring Mr. Jones to return to the California Supreme Court to exhaust his claim would only compound the delay that has already plagued his post-conviction review process."²⁰⁰

The Ninth Circuit used judicial economy to shield itself from deciding the Eighth Amendment issue. It did so by improperly relying on *Teague* and avoiding the current landscape of capital punishment jurisprudence.

¹⁹⁵ First Amended Petition for Writ of Habeas Corpus by a Prisoner in State Custody at 414, *Jones v. Chappell*, 31 F. Supp. 3d 1050 (C.D. Cal. 2014) (No. 09-02158-CJC), *rev'd sub nom.* *Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

¹⁹⁶ For the purposes of this Note, judicial economy refers to "[e]fficiency in the operation of the courts and their judicial system; esp., the efficient management of litigation so as to minimize duplication of effort and to avoid wasting the judiciary's time and resources." *Judicial Economy*, BLACK'S LAW DICTIONARY (10th ed. 2014).

¹⁹⁷ *Jones v. Davis*, 806 F.3d 538, 545 (9th Cir. 2015).

¹⁹⁸ *Id.* at 544-45.

¹⁹⁹ *Id.* at 545.

²⁰⁰ *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1068 (C.D. Cal. 2014), *rev'd sub nom.* *Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

In *Teague*, the United States Supreme Court expressly noted it was not stating how or whether retroactivity applied in death penalty sentences,²⁰¹ but the Ninth Circuit applied *Teague* in Jones' death penalty case. In fact, *Teague* has been criticized for making the law "hopelessly complex and unworkable."²⁰² Further, no new "watershed rule[] of criminal procedure" has ever qualified for retroactivity under *Teague*.²⁰³ Additionally, the *Teague* Court said collateral challenges to capital cases create such delays in enforcement, which may result in ongoing litigation where there is no end in sight for those sentenced to death.²⁰⁴

The Ninth Circuit also avoided the current landscape of capital punishment jurisprudence by treating *Teague* as a procedural bar to deciding Jones' unconstitutional delay claim. In the 2014-2015 term of the United States Supreme Court, the Court issued five opinions for death penalty related cases,²⁰⁵ and seven in the 2015-2016 term,²⁰⁶ one of which had an immediate impact on executions.²⁰⁷ Two death penalty related cases were scheduled for argument during the October 2016 term.²⁰⁸ In recent years, some of the justices have voiced concerns about the death penalty both on and off the bench. Justices Kennedy and Stevens raised serious questions in recent cases relating to the amount of time prisoners spend on death row as it relates to the death penalty.²⁰⁹ Justices Scalia and

²⁰¹ "Because petitioner is not under sentence of death, we need not, and do not, express any views as to how the retroactivity approach we adopt today is to be applied in the capital sentencing context." *Teague v. Lane*, 489 U.S. 288, 314 n.2 (1989).

²⁰² John H. Blume & William Pratt, *Understanding Teague v. Lane*, 18 N.Y.U. REV. L. & SOC. CHANGE 325, 326 (1991).

²⁰³ Lyle Denniston, *Court Query of Teague Retroactivity*, SCOTUSBLOG (Mar. 21, 2007, 10:40 AM), <http://www.scotusblog.com/2007/03/court-query-on-teague-retroactivity/> (quoting *Teague v. Lane*, 489 U.S. 288, 311 (1989)).

²⁰⁴ "Collateral challenges to the sentence in a capital case . . . delay the enforcement of the judgment at issue and decrease the possibility that 'there will at some point be the certainty that comes with an end to litigation.'" *Teague*, 489 U.S. at 314 n.2 (quoting *Sanders v. United States*, 373 U.S. 1, 25 (1963) (Harlan, J., dissenting)).

²⁰⁵ *United States Supreme Court Decisions: 2015-2015 Term*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/united-states-supreme-court-decisions-2015-2016-term> (last updated July 1, 2016).

²⁰⁶ *United States Supreme Court Decisions: 2014-2015 Term*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/united-states-supreme-court-decisions-2014-2015-term> (last updated Dec. 17, 2015).

²⁰⁷ *Glossip v. Gross*, 135 S. Ct. 2726 (2015).

²⁰⁸ *Buck v. Davis*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/buck-v-stephens/> (last visited Nov. 13, 2016); *Moore v. Texas*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/moore-v-texas/> (last visited Nov. 13, 2016).

²⁰⁹ *Johnson v. Bredesen*, 130 S. Ct. 541, 543 (2009) (mem.) ("[T]he penological justifications for the death penalty diminish as the delay lengthens. Thus, I find constitutionally significant . . . the nature of the penalty itself." (citations omitted)). *Justice Kennedy's Questions About the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/statements-death-penalty-su>

Brennan spoke publicly about the death penalty: Justice Scalia said the death penalty will likely be overturned soon²¹⁰ and Justice Brennan said executions are often arbitrary.²¹¹

2. *The court's proposed remedy for Jones is deeply problematic*

In California, the capital punishment system continues to fail not only death row inmates, their family and friends, but also the family and friends of the victims as they await justice. The Ninth Circuit stated that “[Jones] remains free to seek relief through other means, including the state courts.”²¹² However, there are two problems with this suggestion. First, the court used arguments related to judicial economy to explain why and how they came to decide this case and reverse the federal district court’s decision. In suggesting that Jones return to the state courts, the Ninth Circuit undermines its own arguments of judicial economy. In effect, the court suggests that Jones must start the process all over again, which contravenes any idea or understanding of judicial economy. Second, the implication is that Jones has another alternative regarding his unconstitutional delay claim: give up. This implication is deeply problematic because it suggests that Jones cannot ever prevail and thus discourages his pursuit of future legal claims. The court itself states that the post-conviction review process is in place to secure the rights of inmates on death row potentially facing execution.²¹³ However, the sentence of death “is in a class by itself” and must be treated accordingly.²¹⁴ Anyone, let alone the courts, should understand that those facing the ultimate sentence may use every means available to fight for their lives. Ironically,

preme-court-justices#Kennedy (last visited Nov. 13, 2016). In *Hall v. Florida*, 134 S. Ct. 1986 (2014), Justice Kennedy asked whether the average wait time for execution of a death row inmate in Florida, 24.9 years, “is consistent with . . . the purposes that the death penalty is designed to serve, and is it consistent with an orderly administration of justice?” And in *Davis v. Ayala*, 135 S. Ct. 2187 (2015), Justice Kennedy again focused on the length of time, and noted out that death row inmate Ayala committed the crime approximately 30 years prior and his trial was in 1996.

²¹⁰ Jennifer Pignolet, *Pope’s Death Penalty Remarks Draw Renewed Attention to Scalia’s Memphis Speech*, THE COMMERCIAL APPEAL (Sept. 24, 2015), <http://www.commercialappeal.com/news/national/popes-death-penalty-remarks-draw-renewed-attention-to-scalias-memphis-speech—2088701b-fa02-3683-e05-329371591.html> (“If we decide—and it wouldn’t surprise me if we decided the death penalty is unconstitutional—that will be the end of it.”).

²¹¹ Ari Melber, *Justice Stephen Breyer: Executions Are Often ‘Arbitrary’*, MSNBC, <http://www.msnbc.com/msnbc/justice-stephen-breyer-executions-are-often-arbitrary> (last updated Oct. 6, 2015 6:34 PM) (“Often it’s very arbitrary as to who gets executed. . .”).

²¹² *Jones v. Davis*, 806 F.3d 538, 546 n.2 (9th Cir. 2015).

²¹³ *Id.* at 551 (quoting *Chambers v. Bowersox*, 157 F.3d 560, 570 (8th Cir. 1998)).

²¹⁴ “The unusual severity of death is manifested most clearly in its finality and enormity. Death, in these respects, is in a class by itself.” *Furman v. Georgia*, 408 U.S. 238, 288 (1972) (Brennan, J. concurring).

the one available avenue that may be most effective is the very system that sentenced them to death, rightly or wrongly, in the first place.

The Ninth Circuit relied on the argument that “such delays are the product of a constitutional safeguard, not a constitutional defect, because they assure careful review of the defendant’s conviction and sentence.”²¹⁵ The court noted that the systematic delays may not be arbitrary, as argued by Jones.²¹⁶ Again, the court ignored the legitimacy of a constitutional attack on the state’s death penalty system with an argument about the constitutional protections afforded to prisoners. Effectively, the court is saying “Don’t complain about the process, be glad that you have one at all.”

III. CONCLUSION

The Ninth Circuit should have affirmed Judge Carney’s order vacating Jones’ death sentence and declaring California’s capital punishment system unconstitutional. Instead, the court implemented and analyzed the *Teague* doctrine to avoid the critical issue of the constitutionality of California’s death penalty. The court used arguments of judicial economy and protecting the rights of death row inmates to support their decision. By doing so, the court suggested Jones “seek relief through other means,”²¹⁷ a suggestion that is deeply problematic because it contravenes any appropriate understanding of judicial economy and implies Jones should give up his fight against being executed. The suggestion is also problematic because it ignores the legitimacy of a constitutional challenge to the State’s capital punishment system. Instead, the court reminds Jones that the delays act as a safeguard,²¹⁸ effectively suggesting that the delays work to benefit him and other inmates awaiting execution in California.

The death penalty is a critical issue, especially in California. Like people across the country, Californians are losing confidence in capital punishment. The State houses more death row inmates than any other state in the country and spends billions of dollars doing so,²¹⁹ but has not executed a prisoner since 2006.²²⁰ As each day passes, more death row inmates die of natural causes while they, alongside victims’ families,

²¹⁵ Jones v. Davis, 806 F.3d 538, 551 (quoting People v. Seumanu, 355 P.3d 384, 442 (Cal. 2015) (citing People v. Anderson, 22 P.3d 347, 390 (2001))) (9th Cir. 2015).

²¹⁶ *Id.* at 552 (citing People v. Seumanu, 355 P.3d 384, 442 (Cal. 2015)).

²¹⁷ *Id.* at 546 n.2.

²¹⁸ *Id.* at 551 (quoting People v. Seumanu, 355 P.3d 384, 442 (Cal. 2015) (citing People v. Anderson, 22 P.3d 347, 390 (2001))).

²¹⁹ Alarcón & Mitchell, *supra* note 6.

²²⁰ *Number of Executions, 1893 to Present*, *supra* note 7.

await the ultimate punishment promised by the State: execution. The legislative process in California has not provided an answer, so Californians and death row inmates must rely on the judicial process for relief.

Jones' case exemplifies the problem for both supporters and protesters of California's capital punishment system. After Jones was sentenced to death, Pam, the victim's daughter, declared in the courtroom that "the sentencing was a hollow act because executions are rarely carried out at San Quentin."²²¹ This is the same argument Jones made before the federal district court and the Ninth Circuit Court of Appeals. Two decades later with Jones still sitting on death row, Pam's fear has become a reality: Jones' death sentence has transformed into "life in prison, with the remote possibility of death."²²²

²²¹ Feldman, *Murderer is Sentenced to Death*, *supra* note 9.

²²² Jones v. Chappell, 31 F. Supp. 3d 1050, 1053 (C.D. Cal. 2014), *rev'd sub nom.* Jones v. Davis, 806 F.3d 538 (9th Cir. 2015).