

# SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,) CAPTIAL CASE

Plaintiff and Respondent,

) S093803

vs.

ROPATI SEUMANU,

) Alameda No.

) No. H24057A

Defendant and Appellant.

SUPREME COURT  
FILED

AUG 04 2014

Frank A. McGuire Clerk

Deputy

APPELLANT'S SUPPLEMENTAL BRIEF  
PURSUANT TO CALIFORNIA RULES OF COURT,  
RULES 8.630(d) and 8.520(d)(1)

Mark David Greenberg  
Attorney at Law  
SBN 99726  
484 Lake Park Avenue, No. 429  
Oakland, CA 94610  
510 452 3126  
[markdgreen2@comcast.net](mailto:markdgreen2@comcast.net)

Attorney for Appellant

DEATH PENALTY

## TABLE OF CONTENTS

APPELLANT’S SUPPLEMENTAL BRIEF	1
INTRODUCTION	1
SUPPLMENTAL ARGUMENT	3
<b>THE ARBITRARINESS AND UNCERTAINTY     OF ACTUAL EXECUTION OF A DEATH     SENTENCE IN CALIFORNIA RENDERS THAT     CAPITAL REGIMEN UNCONSTITUTIONAL     UNDER THE EIGHTH AMENDMENT OF THE     UNITED STATES CONSTITUTION</b>	3
CONCLUSION	8
CERTIFICATION OF WORD-COUNT	9
ATTACHED CASE (Cal. Rules of Court, Rule 8.1115(c))	10

## TABLE OF AUTHORITIES

### Cases

<i>Californians for Disability Rights v. Mervyn’s LLC</i> (2008) 165 Cal.App.4 <sup>th</sup> 571	2
<i>Furman v. Georgia</i> (1972) 408 U.S. 238	5
<i>Gregg v. Georgia</i> (1976) 428 US. 153	5
<i>Jones v. Chapell</i> (2014, C.D. Cal.) 2014 U.S. Dist. LEXIS 97254	1 <i>et passim</i> .
<i>Kennedy v. Louisiana</i> (2008) 554 U.S. 407	5
<i>People v. Anderson</i> (2001) 25 Cal.4 <sup>th</sup> 543	6

### Constitutional Provisions

U.S. Const., Amend. 8	3
-----------------------	---

**Rules**

Cal. Rules of Court, Rule 8.520(d)(1)	2
Cal. Rules of Court, Rule 8.630(d)	2
Cal. Rules of Court, Rule 8.1115(c)	2

Mark D. Greenberg  
Attorney at Law  
SBN No. 99726  
PMB No. 429  
484 Lake Park Avenue  
Oakland, CA 94610  
510-452-3126

Attorney for Appellant

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

**PEOPLE OF THE STATE OF CALIFORNIA,**)  
)  
**Plaintiff and Respondent,**) **S093803**  
)  
**vs.**)  
)  
**ROPATI SEUMANU,**) **Alameda No.**  
) **No. H24057A**  
**Defendant and Appellant.**)  
)  
)  
)  

---

**APPELLANT’S SUPPLEMENTAL BRIEF  
PURSUANT TO CALIFORNIA RULES OF COURT,  
RULES 8.630(d) and 8.520(d)(1)**

**INTRODUCTION**

On July 16, 2014, the District Court for the Central District of California issued an order and opinion declaring California’s death penalty unconstitutional under the Eighth Amendment of the United States Constitution. The opinion and

order, from the case of *Jones v. Chapell* (2014, C.D. Cal.) 2014 U.S. Dist. LEXIS 97254 is attached to this pleading.<sup>1</sup>

California Rules of Court, Rule 8.630(d) allows for the filing of supplemental briefs in this Court “as provided in rule 8.520(d).” Rule 8.520(d)(1) provides that “[a] party may file a supplemental brief limited to new authorities, new legislation, or other matters that were not available in time to be included in the party’s brief on the merits.” This brief is proffered for filing on this basis insofar as *Jones v. Chappell* is a “new matter” or “authority” that was “not available in time to be included in” the “brief on the merits in this case.”

---

<sup>1</sup> It is permissible to cite unpublished federal decisions, and if they are available in electronic form they must be attached to the pleading in which they are cited. (*Californians for Disability Rights v. Mervyn’s LLC* (2008) 165 Cal.App.4<sup>th</sup> 571, 589, fn. 8; cf. Cal. Rules of Court, Rule 8.1115(c).)

## SUPPLEMENTAL ARGUMENT

### **THE ARBITRARINESS AND UNCERTAINTY OF ACTUAL EXECUTION OF A DEATH SENTENCE IN CALIFORNIA RENDERS THAT CAPITAL REGIMEN UNCONSTITUTIONAL UNDER THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION**

The Court in *Jones v. Chapell*, *supra*, 2014 U.S. Dist. LEXIS 97254 undertook an extensive examination of the current death penalty system in California. The Court found that systemic delay rendered the infliction of the death penalty in California arbitrary and capricious, and therefore in violation of the Eighth Amendment proscription of cruel and unusual punishment. (*Id.*, at pp. 1-2, 46-47, 51.) The delay in appointment of counsel for the direct appeal, the time required for briefing by both parties, the hiatus between briefing and oral argument and decision, all rendered an average time of 12 to 14 years for completion of the direct appeal. (*Id.*, at pp. 12-15.) Habeas counsel for collateral review, if available at all, is usually appointed about ten years after imposition of the death judgment; a petition, to be presumptively timely, has to be filed within 6 months of the reply brief on direct appeal or three years from appointment of habeas counsel, whichever is longer; and once a petition is filed, it takes this Court approximately five years to issue an order, usually denying the petition. (*Id.*, at pp. 16-21.) State review is followed by federal habeas corpus, which will take, on average, another ten years. (*Id.*, at p. 22.)

Of the 900 individuals who have, since 1978, received a capital judgment, only 13 have been actually executed. There are currently, however, 748 inmates on Death Row, for 94 of the 900 have died of causes other than execution by the State, and 39 have been granted relief from their death sentences by the federal courts and have not been resentenced to death. Currently of the 81 who, since 1978, have completed federal review, there are now 17 awaiting execution, each one of whom has been on Death Row for more than 25 years, while 8 of them

have been there for more than 30 years. (*Id.*, at pp. 2-3, 24.) There has not been an execution in California since 2006. (*Id.*, at p. 24.)

The upshot, according to the Court in *Jones*, is a death penalty system that

“ . . . has resulted, and will continue to result, in an inordinate and unpredictable period of delay preceding . . . actual execution. Indeed, for most, systemic delay has made their execution so unlikely that the death sentence carefully and deliberately imposed by the jury has been quietly transformed into one no rational jury or legislature could ever impose: *life in prison, with the remote possibility of death*. As 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.” (*Id.*, at pp. 1-2, emphasis in original.)

The Court in *Jones* also found that the delays that render this system uncertain and arbitrary are not attributable to the efforts of the defendants to inject delay into the system:

“On the record before it, the Court finds that much of the delay in California’s post-conviction review process is created by the State itself, not by the inmates’ own interminable efforts to delay.[fn. omitted.] Most Death Row inmates wait between three and five years for counsel to be appointed for their direct appeal. After the issues are briefed on direct appeal, another two to three years are spent waiting for oral argument to be scheduled before the California Supreme Court. On state habeas review, far from meeting the ideal goal of appointing state habeas counsel shortly after the death verdict, at least eight to ten years elapse between the death verdict and appointment of habeas counsel. When that counsel is appointed by the State, investigation of potential claims is hampered by underfunding, which in turn slows down the federal habeas process. Then, after state habeas briefs are submitted, another four years elapse before the California Supreme Court issues a generally conclusory denial of the inmate’s claims. This lack of a reasoned opinion further slows adjudication of inmates’ federal habeas claims. Finally, even after filing a petition for federal habeas review, many

inmates, often because of deficiencies rooted in the State's process, must stay their federal cases to exhaust claims in state court.

“These delays – exceeding 25 years on average – are inherent to California's dysfunctional death penalty system, not the result of individual inmates' delay tactics, except perhaps in isolated cases. . . .” (*Id.*, at pp. 43-44.)

The Court went on to note various proposed reform recommendations that could, without curtailing the rights of defendants to fairness in their postconviction proceedings, bring the time between sentence and execution down to between 11 and 14 years, more in line with, and even below, the national average, which is about 15 or 16 years. (*Id.*, at p. 45.)

But what is the legal consequence of this situation? Under United States Supreme Court precedent, the death penalty is excessive under the Eighth Amendment if it is grossly disproportionate to the crime or when “it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes.” (*Kennedy v. Louisiana* (2008) 554 U.S. 407, 441.) The purposes of deterrence and retribution cannot be served if the infliction of a sentence of a death is “so wantonly and freakishly imposed” as to conform to the description of “arbitrary and capricious.” (*Gregg v. Georgia* (1976) 428 US. 153, 188; *Furman v. Georgia* (1972) 408 U.S. 238, 310, (Stewart, J., concurring; See *Jones v. Chapell, supra*, 2014 U.S. Dist. LEXIS 97254, pp. 28-29.) By this measure, the state of the death penalty as administered in California violates the Eighth Amendment:

“[F]or too long now, the promise [that the death penalty will actually be carried out] has been an empty one. Inordinate and unpredictable delay has resulted in a death penalty system in which very few of the hundreds of individuals sentenced to death have been, or even will be, executed by the State. It has resulted in a



system in which arbitrary factors, rather than legitimate ones, like the nature of the crime or the date of the death sentence, determine whether an individual will actually be executed. And it has resulted in a system that serves no penological purpose. Such a system is unconstitutional.” (*Id.*, at pp. 28-29; but see *People v. Anderson* (2001) 25 Cal.4<sup>th</sup> 543, 606.)

The facts pertinent to Mr. Seumanu’s case fall within the empirical outline set forth by the Court in *Jones*. Judgment of death was imposed in Mr. Seumanu’s case on December 12, 2000. He was without counsel for four years until, on December 14, 2004, counsel was appointed to represent him on direct appeal to this Court. A little over two and a half years after appointment of counsel, an opening brief was filed on July 31, 2007. The Attorney General took 13 months to file a responsive brief on September 3, 2008, while a reply brief was filed seven months later on April 14, 2009. As of July, 2014, over five years later, no oral argument has been scheduled. Mr. Seumanu’s direct appeal has already equaled the average 14 years it takes for a *completed* direct appeal. If habeas counsel is usually appointed ten years after imposition of the death judgment, Mr. Seumanu’s counsel was appointed in less than nine years, on July 8, 2009. A presumptively timely petition for writ of habeas corpus was filed on July 9, 2012, and informal briefing on the petition was completed a year and a half later on March 3, 2014.<sup>2</sup>

From this point, Mr. Seumanu is well on his way to at least a thirty-year sojourn on Death Row before the *possibility* of execution even arises. For if the five-year average for a disposition on the habeas petition holds, Mr. Seumanu’s habeas will have been decided by 2019 or 2020. Assuming further that he obtains a resolution of his direct appeal before that time, the time between judgment and completion of state review of his death sentence will be 19 or 20 years. With

---

<sup>2</sup> It is worth noting that a confidential request for further funding for habeas investigation was filed in this Court insofar as the funds allowed by this Court for habeas investigation had been exhausted.

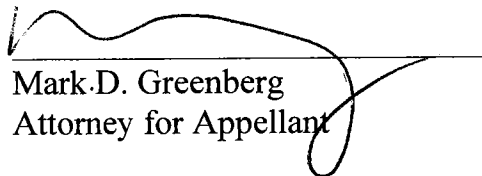
another ten years for federal habeas, he will have been on Death Row for 30 years before all levels of review of his sentence have been exhausted. And then he will await execution, which, in accord with historical experience, will *still* have no certain, predictable date of infliction. As the Court in *Jones* demonstrated, this renders the California death penalty unconstitutional under the Eighth Amendment, and the judgment of death imposed on Mr. Seumanu must be reversed. (*Jones v. Chappell, supra*, 2014 U.S. Dist. LEXIS 97254, p. 51.)

## CONCLUSION

For the foregoing reasons, judgment of death must be reversed.

Dated: July 28, 2014

Respectfully submitted,

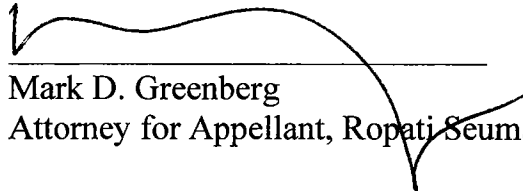


Mark.D. Greenberg  
Attorney for Appellant

## CERTIFICATION OF WORD-COUNT

I am attorney for appellant in the above-titled action. This document has been produced by computer, and in reliance on the word-count function of the computer program used to produce this document, I hereby certify that, exclusive of the table of contents, the proof of service, and this certificate, this document contains 1853 words.

Dated: July 28, 2014



Mark D. Greenberg  
Attorney for Appellant, Ropati Seumanu



**ATTACHED COPY OF  
*JONES V. CHAPPELL* (2014, C.D. Cal.) 2014U.S. Dist. LEXIS 97254  
(Cal. Rules of Court, Rule 8.1115(c))**





**ERNEST DEWAYNE JONES, Petitioner, vs. KEVIN CHAPPELL, Warden of California State Prison at San Quentin, Respondent.**

**Case No.: CV 09-02158-CJC**

**UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA**

**2014 U.S. Dist. LEXIS 97254**

**July 16, 2014, Decided**

**PRIOR HISTORY:** *People v. Jones*, 29 Cal. 4th 1229, 131 Cal. Rptr. 2d 468, 64 P.3d 762, 2003 Cal. LEXIS 1544 (2003)

**COUNSEL:** [\*1] For Ernest DeWayne Jones, Petitioner: Cliona R Plunkett, Michael Laurence, LEAD ATTORNEYS, Habeas Corpus Resource Center, San Francisco, CA.

For Kevin Chappell, Respondent: Herbert S Tetef, LEAD ATTORNEY, CAAG - Office of Attorney General of California, Los Angeles, CA; James W Bilderback , II, Sarah Jean Farhat, CAAG - Office of the Attorney General, California Department of Justice, Los Angeles, CA.

**JUDGES:** CORMAC J. CARNEY, UNITED STATES DISTRICT JUDGE.

**OPINION BY:** CORMAC J. CARNEY

**OPINION**

**ORDER DECLARING CALIFORNIA'S DEATH PENALTY SYSTEM UNCONSTITUTIONAL AND VACATING PETITIONER'S DEATH SENTENCE**

On April 7, 1995, Petitioner Ernest DeWayne Jones was condemned to death by the State of California. Nearly two decades later, Mr. Jones remains on California's Death Row, awaiting his execution, but with complete uncertainty as to when, or even whether, it will ever come. Mr. Jones is not alone. Since 1978, when the current death penalty system was adopted by California voters, over 900 people have been sentenced to death for their crimes. Of them, only 13 have been executed. For the rest, the dysfunctional administration of



California's death penalty system has resulted, and will continue to result, in an inordinate and [\*2] unpredictable period of delay preceding their actual execution. Indeed, for most, systemic delay has made their execution so unlikely that the death sentence carefully and deliberately imposed by the jury has been quietly transformed into one no rational jury or legislature could ever impose: *life in prison, with the remote possibility of death*. As 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.

That is the reality of the death penalty in California today and the system that has been created to administer it to Mr. Jones and the hundreds of other individuals currently on Death Row. Allowing this system to continue to threaten Mr. Jones with the slight possibility of death, almost a generation after he was first sentenced, violates the *Eighth Amendment's* prohibition against cruel and unusual punishment.

## BACKGROUND

### A. Delay in California's Death Penalty System

California juries have imposed the death sentence on more than 900 individuals since 1978.<sup>1</sup> Yet only 13 of those 900 have been executed by the State. Of the remainder, 94 have died [\*3] of causes other than execution by the State, 39 were granted relief from their death sentence by the federal courts and have not been resentenced to death, and 748 are currently on Death Row, having their death sentence evaluated by the courts or awaiting their execution.<sup>2</sup>

1 In 1977, five years after the California Supreme Court first invalidated the State's death penalty statute, *see People v. Anderson*, 6 Cal. 3d 628, 100 Cal. Rptr. 152, 493 P.2d 880 (1972), the California Legislature acted to reinstate the punishment. One year later, the current death penalty system took form, when voters passed Proposition 7, known as the Briggs Initiative, amending the death penalty statute and significantly expanding the circumstances under which prosecutors could seek the death penalty. *See* California Commission on the Fair Administration of Justice, Final Report 120 (Gerald Uelmen ed., 2008) ["Commission Report"], available at <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf> ("Under the death penalty statute now in effect, 87% of California's first degree murders are 'death eligible' . . .").

2 *See* Cal. Dep't of Corr. & Rehab., Condemned Inmate List (July 2014), available at [http://www.cdcr.ca.gov/capital\\_punishment/docs/condemnedinmatelistsecure.pdf](http://www.cdcr.ca.gov/capital_punishment/docs/condemnedinmatelistsecure.pdf). [\*4] Despite having been granted relief by the federal courts, 10 of the 39 individuals are listed by the CDCR as being among the 748 inmates currently on Death Row. *See id.* In at least some of these cases, this may be explained by the State's intention to again seek the death penalty against these inmates in a new trial.

The simplest explanation for the size of California's Death Row is that in each year since 1978, more individuals have been sentenced to death than have been removed

from Death Row. *See* Commission Report at 121 (showing historical growth in the size of California's Death Row). As the size of California's Death Row grows larger and larger, so too do the delays associated with it. Of the 748 inmates currently on California's Death Row, more than 40 percent, including Mr. Jones, have been there longer than 19 years.<sup>3</sup> Nearly all of them are still litigating the merits of their death sentence, either before the California Supreme Court or the federal courts.<sup>4</sup> *See* Appendix A.<sup>5</sup>

3 *See* Cal. Dep't of Corr. & Rehab., *Condemned Inmate Summary List at 2* (June 2014) ["CDCR Summary"], *available at* [http://www.cdcr.ca.gov/Capital\\_Punishment/docs/CondemnedInmateSummary.pdf](http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateSummary.pdf).

4 Those sentenced [\*5] to death in California proceed through a post-conviction review process that begins with a mandatory automatic appeal to the California Supreme Court. If that appeal is denied, an inmate may seek collateral review of the death sentence, again from the California Supreme Court. If state habeas relief is denied, an inmate may then pursue collateral review of the death sentence from the federal courts. If relief is denied at each of these levels, then the inmate may be executed.

5 Between 1978 and 1997, 591 new death judgments were issued in California. *See* Cal. Dep't of Justice, *Criminal Justice Statistics Center, Homicide in California, 2011 at tbl. 35*, *available at* <http://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/homicide/hm11>

/hm11.pdf. Appendix A describes the current case status of 511 individuals sentenced in that time period. It does not include individuals whose death sentences were overturned by the California Supreme Court, unless subsequently reinstated. Because most of the death sentences overturned by the California Supreme Court were overturned in the period between 1979 and 1986, inclusion of those sentences in Appendix A would not accurately reflect the current [\*6] state of affairs in the California death penalty system. *See* Commission Report at 120 n.21 (noting that between 1979 and 1986, the California Supreme Court reversed 59 of 64 death judgments it reviewed, but that since that time, it has reversed death judgments less than 10 percent of the time). Appendix A also does not include individuals whose post-conviction proceedings have been stayed based on their lack of mental competency to face the death penalty. Finally, Appendix A does not include individuals sentenced to death after 1997 because state proceedings are ongoing for all but a small handful, and none have completed the federal habeas process.

For those whose challenge to the State's death sentence is ultimately denied at each level of review, the process will likely take 25 years or more. *See* Gerald Uelman, *Death Penalty Appeals and Habeas Proceedings: The California Experience*, 93 *Marq. L. Rev.* 495, 496 (2009) ("Typically, the lapse of time between sentence and execution is twenty-five years, twice the national average, and is growing wider each year."). The majority of that time will likely

be spent litigating before the California Supreme Court. *See* Dkt. No. 109-3, Exh. 15 [\*7] ["Laurence Decl."] ¶ 15 (noting that for inmates who had their state habeas petitions decided between 2008 and 2014, the average delay between sentencing and disposition of the petition was 17.2 years). There is no evidence to suggest that the trend is reversing.

Of course, the vast majority of those sentenced to death in California will not actually be executed by the State. Indeed, the most common way out of California's Death Row is not death by State execution, but death by other means. Of the 511 individuals sentenced to death between 1978 and 1997, 79 died of natural causes, suicide, or causes other than execution by the State of California. *See* Appendix A. Another 15 sentenced after 1997--or two more than the total number of inmates that have been executed by California since the current death penalty system took form--have died of non-execution causes.<sup>6</sup> As California's Death Row population gets older, that number is sure to rise. *See* CDCR Summary at 1 (showing that nearly 20 percent of California's current Death Row population is over 60 years old).

6 *See* Cal. Dep't of Corr. & Rehab., *Condemned Inmates Who Have Died Since 1978* (2014) (showing that since 1978, 63 inmates have died [\*8] of natural causes, 22 have committed suicide, 8 have died of other causes, including drug overdose or violence on the exercise yard, and 1 has been executed by another state), *available at* [MATESWHOHAVEDIED-SINCE1978.pdf.](http://www.cdcr.ca.gov/Capital_Punishment/docs/CONDEMNEDIN-</a></p>
</div>
<div data-bbox=)

For those that survive the extraordinary wait for their challenge to be both heard and decided by the federal courts, there is a substantial chance that their death sentence will be vacated. As of June 2014, only 81 of the 511 individuals sentenced to death between 1978 and 1997 had completed the post-conviction review process. Of them, 32 were denied relief by both the state and federal courts--13 were executed, 17 are currently awaiting execution, and two died of natural causes before the State acted to execute them.<sup>7</sup> *See* Appendix A. The other 49--or 60 percent of all inmates whose habeas claims have been finally evaluated by the federal courts--were each granted relief from the death sentence by the federal courts.<sup>8</sup> *See id.*

7 These 17 inmates are awaiting execution because since 2006, federal and state courts have enjoined executions by California. In 2006, the federal district court for the Northern District of [\*9] California enjoined the State from executing Death Row inmate Michael Morales on grounds that, as administered, the State's lethal injection protocol "create[d] an undue and unnecessary risk that an inmate will suffer pain so extreme" that it violated the *Eighth Amendment's* prohibition against cruel and unusual punishment. *See Morales v. Tilton*, 465 F. Supp. 2d 972, 974, 976-77 (N.D. Cal. 2006). The State subsequently amended the protocol, but because those amendments were not promulgated in compliance with the State's Administrative Procedures Act

(APA), the Marin County Superior Court enjoined executions under them. *See Morales v. Cal. Dep't of Corr. & Rehab.*, 168 Cal. App. 4th 729, 732, 85 Cal. Rptr. 3d 724 (2008). In response to the ruling, the State undertook to promulgate a lethal injection protocol through the APA's rulemaking process. After the regulations went into effect in August 2010, Death Row inmate Mitchell Sims sued to enjoin executions under the amended protocol, again for failure to comply with the APA. The state court agreed, invalidating the regulations for substantial failure to comply with the requirements of the APA, and permanently enjoining executions in California until the State [\*10] is able to adopt an execution protocol that complies with its own procedural law. *See Sims v. Dep't of Corr. & Rehab.*, 216 Cal. App. 4th 1059, 157 Cal. Rptr. 3d 409 (2013). California is therefore without any execution protocol by which to execute the 17 Death Row inmates who have been finally denied relief by both the state and federal courts, or to execute any other inmates who may similarly be denied relief in the near future.

8 The State resentenced 10 of these individuals to death, thus starting anew the post-sentencing appeal process on the renewed sentences, though two have since died while on post-conviction review for the second time. *See Appendix A.*

## **B. The Nature of Delay in California's System**

The nature of the delay in California's administration of its death penalty system has been comprehensively studied, including by the State itself. In 2004, the California State Legislature established the California Commission on the Fair Administration of Justice (the "Commission"), and tasked it with conducting a comprehensive review of the State's justice system, including its administration of the death penalty. *See Commission Report* at 113-14. The Commission, a bipartisan panel which was composed of prosecutors, [\*11] criminal defense attorneys, law enforcement officials, academics, representatives of victim's rights organizations, elected officials, and a judge, issued its Final Report in June 2008. Its conclusion was a stern indictment of the State's death penalty system:

California's death penalty system is dysfunctional. The system is plagued with excessive delay in the appointments of counsel for direct appeals and habeas corpus petitions, and a severe backlog in the review of appeals and habeas petitions before the California Supreme Court.

*Id.* at 114-15.<sup>9</sup> The Commission is not alone in reaching this determination. In 2008, then-Chief Justice of the California Supreme Court Ronald M. George offered the same assessment. *See Ronald M. George, Reform Death Penalty Appeals*, L.A. Times, Jan. 7, 2008 ("The existing system for handling capital appeals in California is dysfunctional and needs reform. The state has more than 650 inmates on death row,

and the backlog is growing.") (cited in Commission Report at 164-65 n.3). Ninth Circuit Court of Appeals Senior Judge Arthur L. Alarcón has suggested the same in his study of the issue. See Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the [\*12] Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 *Loy. L.A. L. Rev.* 541, 561 (2011) (describing California's "broken" death penalty system).

9 Even the commissioners who dissented from the Commission Report agreed "wholeheartedly" that "delay on appeal and in habeas corpus in state and federal court is excessive and frustrates the effective administration of the death penalty." Commission Report at 164 (separate statement of Commissioners Totten, Boscovich, Cottingham, Dunbar, and Hill).

In reaching these conclusions, the Commission and others have documented the source and nature of the delay in California's death penalty system. Their studies confirm that delay is evident at each stage of the post-conviction review process, including from the time the death sentence is issued.

### 1. Delay on Direct Appeal

In California's death penalty system, delay sets in at the first step of post-conviction review--direct appeal. California law mandates that after a death sentence is imposed, it must be automatically appealed to the California Supreme Court for review. See *Cal. Penal Code* § 1239. To pursue that appeal, indigent Death Row inmates [\*13] are

entitled to the assistance of court-appointed counsel.<sup>10</sup> See *Cal. Penal Code* § 1240. But inmates must wait years--on average, between three and five years--until counsel is appointed to represent them. See Commission Report at 122. Indeed, as of June 2014, there were 71 Death Row inmates awaiting appointment of counsel for their direct appeal. Dkt. No. 116 ["Laurence Supplemental Decl."] ¶ 3. Unsurprisingly, until such counsel is appointed, there is effectively no activity on the inmate's case.

10 That a Death Row inmate is indigent is essentially a foregone conclusion. Of the 670 inmates on California's Death Row in 2008, each was indigent and therefore entitled to the assistance of court-appointed counsel in the post-conviction review process. See Commission Report at 121.

This delay is likely due to the severe shortage of qualified attorneys available to accept appointment as counsel on direct appeal. To be appointed, attorneys must have at least four years of active law practice, experience in felony appeals, completion of training, and demonstrated proficiency in appellate skills. Commission Report at 132 (citing *Cal. Rule of Court Rule 8.605(d)*). Notably, however, the Commission [\*14] did not find a general dearth of lawyers able to meet these qualifications or willing to take on the representation of Death Row inmates. Rather, the Commission found the State's underfunding of its death penalty system to be a key source of the problem. *Id.* For example, the Commission noted that despite the high volume of applicants willing to represent Death Row inmates from the security of an agency setting, the Office of the State Public Defender's budget has

been cut and its staff reduced. *Id.* (recommending that "[t]he most direct and efficient way to reduce the backlog of death row inmates awaiting appointment of appellate counsel would be to again expand the Office of the State Public Defender"). Similarly, as to appointments of private counsel, the Commission found that the low rate at which private appointed counsel are paid by the State is "certainly a significant factor in the decline of the pool of attorneys available to handle death penalty appeals." *Id.*; see also Arthur L. Alarcón, *Remedies for California's Death Row Deadlock*, 80 *S. Cal. L. Rev.* 697, 734 (2007) ["Alarcón Study"] ("Private practitioners who can bear the financial sacrifice of accepting court-appointment [\*15] at the present hourly rates are scarce.").

Once counsel is eventually appointed, that counsel must learn the trial record, which often totals more than 9,000 pages, must research the law, and must file an opening brief with the California Supreme Court. See Commission Report at 131. Including the time spent by the State to file a responsive brief, and by counsel for the inmate to file a reply brief, the briefing process will typically consume under four years. *Id.* The parties must then wait for the case to be scheduled for argument before the California Supreme Court. On average, the California Supreme Court generally hears between 20 and 25 death penalty appeals per year, and so another two to three years will likely pass before arguments are scheduled and the case is subsequently decided. *Id.* Taken together then, from the sentence of death to the California Supreme Court's disposition of the automatic appeal, between 11.7 and 13.7 years will have elapsed, see *id.*, with inmates spending

much of that time waiting for counsel to be appointed and for oral argument to be scheduled.

## 2. Delay on State Collateral Review

Whereas on direct review the inmate challenges issues raised at the trial [\*16] and sentencing, on collateral review the inmate may attack the legality of his confinement based on issues that normally cannot be determined in the direct appeal process, including claims of ineffective assistance of counsel at trial. As on direct appeal, indigent Death Row inmates are entitled to the assistance of state-appointed counsel to pursue their habeas petitions. See *Cal. Gov't Code* § 68662. Unless the inmate requests that the same counsel provide representation both on direct appeal and during collateral review, California law directs that different counsel be appointed at each stage. *Cal. Gov't Code* § 68663. The majority of counsel appointed in capital habeas cases are private attorneys, though a number of inmates receive the assistance of the Habeas Corpus Resource Center ("HCRC"), the entity created by the Legislature to provide habeas representation to Death Row inmates.<sup>11</sup> See Laurence Decl. ¶ 11 (in fiscal years 2005 to 2012, the HCRC was appointed, on average, in 43 percent of state habeas cases).

11 Whether an inmate receives the assistance of the HCRC or a private attorney may significantly affect the extent of delays in the inmate's post-conviction review proceedings. [\*17] Whereas the HCRC may be able to provide continuous representation in both the inmate's state and federal habeas claims, the same is not true of