

Jones v. Chappell: The California Death Penalty is Unconstitutional

By SIMON MAXWELL LEVY*

[F]or most [inmates on death row], 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.¹

Introduction

ON JULY 16, 2014, Federal District Judge Cormac J. Carney held California's death penalty scheme unconstitutional.² The petitioner in the case, Ernest DeWayne Jones, raised a number of challenges to his death sentence, but Judge Carney focused on the inordinate delays associated with California's post-conviction appeals process—delays that had already kept Jones on death row for nearly two decades. Based on the significant delay between the imposition of a death sentence and actual execution in California, Judge Carney held that it was essentially random which offenders were executed as opposed to dying from natural causes, suicide, or violent incidents in prison.³ This randomness stands in direct opposition to the United States Supreme Court's mandate, handed down in *Furman v. Georgia*,⁴ that the death penalty not be arbitrarily imposed. In ruling on Jones's habeas petition, Judge Carney became the first judge in California to look at empirical evidence of the death penalty's actual functioning in the state and to hold its scheme unconstitutional.

This Note will examine the U.S. District Court for the Central District of California's *Jones v. Chappell* opinion and consider its implications for

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1. *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1053 (C.D. Cal. 2014).
2. *Id.* at 1069.
3. *Id.* at 1062.
4. 408 U.S. 238 (1972).

California's death row population. Further, *Jones's* consideration of empirical evidence has potentially far-reaching implications for future death penalty challenges. The arbitrariness in California's death penalty jurisprudence and its consequences is not limited to the way those chosen to be executed for their crimes actually die, but also influences the way capital murder is defined, as well as when a prosecutor chooses to pursue the death penalty.

Part I discusses relevant U.S. Supreme Court precedent to the *Jones* decision and describes the current state of the death penalty in California. Part II analyzes *Jones*, focusing on its application of U.S. Supreme Court precedent to empirical evidence of arbitrariness in the application of the death penalty. Finally, Part III considers the implications for death row inmates in California and then describes the nature and sources of arbitrariness inherent in the California death penalty scheme and how the *Jones* decision may support other data-driven challenges to the death penalty in California.

I. The Eighth Amendment and the California Death Penalty Scheme

The *Jones* decision reflects Judge Carney's understanding of the U.S. Supreme Court cases interpreting the Eighth Amendment and of the realities of the California death penalty scheme. Part A of the foregoing section reviews the relevant Eighth Amendment law, while Part B describes the California scheme in operation.

A. The Eighth Amendment and the Problem of Arbitrariness and Delay

The Eighth Amendment prohibits the infliction of "cruel and unusual punishment."⁵ In a series of decisions beginning in the 1970s, the U.S. Supreme Court established that, in order for the death penalty to comport with the Eighth Amendment, it must be applied in a consistent and orderly manner.⁶ More recently, the Court has struggled with the question of whether long delays between sentencing and execution contravene the Eighth Amendment's mandate.⁷

5. U.S. CONST. amend. VIII.

6. *See infra* Parts I.A.1–2.

7. *See infra* Part I.A.3.

1. Overruling Death: *Furman v. Georgia*

In 1972, the U.S. Supreme Court decided *Furman v. Georgia*, overruling the capital sentencing scheme in Georgia.⁸ In effect, *Furman* invalidated the death penalty laws of all thirty-nine states that allowed for death as a possible punishment.⁹ In *Furman*, empirical evidence demonstrated that only 15 to 20% of offenders who were statutorily eligible for the death penalty in Georgia were eventually sentenced to death.¹⁰ Justices William Brennan and Thurgood Marshall believed that the death penalty was cruel and unusual *per se*.¹¹ Whereas, Justices William Douglas, Potter Stewart, and Byron White believed that the death penalty was unconstitutional as applied, but each for different reasons. The four dissenters saw no constitutional problem with the death penalty theoretically or as applied. Thus, the three concurring opinions of Justices White, Douglas, and Stewart controlled the decision. Ultimately, as discussed below, Justice Stewart's and Justice White's concurrences came to embody the holding of *Furman* as interpreted by the Court's subsequent decisions.¹² Both Justices Stewart and White were concerned that the death penalty was being arbitrarily imposed, but each defined the involved arbitrariness differently.

Justice Stewart's principal concern was the seemingly random way in which some defendants were selected to die, while others found guilty of committing similar crimes were not.¹³ To that effect, Justice Stewart described the petitioners in *Furman* as "among a capriciously selected random handful upon whom the sentence of death has in fact been imposed."¹⁴ For Justice Stewart, there was no legally significant way to explain why those defendants who received the death penalty were any more deserving than

8. *Furman*, 408 U.S. at 239–40.

9. *Id.* at 417–18 (Powell, J., dissenting).

10. *Id.* at 435 n.11 (Burger, C.J., dissenting); *see also* Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics: Furman, McCleskey, and a Single County Case Study*, 34 CARDOZO L. REV. 1227, 1231 (2013).

11. *Furman*, 408 U.S. at 305 (Brennan, J., concurring); *id.* at 360–70 (Marshall, J., concurring).

12. Justice Douglas's concurrence addressed the equal protection concerns created by the death penalty as applied at the time of *Furman*. Douglas explained:

[W]e know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.

Id. at 255 (Douglas, J., concurring). Douglas observed that, with unfettered discretion to apply the death penalty to certain crimes, judges and juries were bound to be influenced by arbitrary and illegitimate factors such as prejudice based on class and race.

13. *Id.* at 309–10 (Stewart, J., concurring).

14. *Id.*

their similarly situated peers, rendering those death sentences wholly arbitrary.¹⁵ In this regard, Justice Stewart compared being sentenced to death to being struck by lightning.¹⁶

Justice White's concurrence addressed a similar concern to Justice Stewart's, only framed slightly differently. Justice White discussed the infrequency of death sentences issued in Georgia relative to the number of death-eligible crimes committed.¹⁷ In Justice White's view, the death penalty could not serve as a deterrent to future crime while being invoked so infrequently.¹⁸ He concluded that the death penalty would be cruel and unusual if it did not serve some societal end.¹⁹ Justice White explained:

At the moment that [the death penalty] ceases realistically to further these purposes, . . . the emerging question is whether its imposition . . . would violate the Eighth Amendment. It is my view that it would, for its imposition would then be the pointless and needless extinction of life A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.²⁰

2. The Risk of Arbitrariness: *Furman v. Georgia* to *McCleskey v. Kemp*

The "holding" of *Furman* is perhaps best understood as articulated by the U.S. Supreme Court in its subsequent decisions interpreting it. In *Gregg v. Georgia*, the Court approved Georgia's new death penalty scheme.²¹ That same day, the Court also approved of the statutory schemes implemented in Florida²² and Texas.²³ In all three cases, the Court approved the statutes on their face based on the belief that the new laws upheld *Furman*'s mandate that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and

15. *Id.* at 310 ("[I]f any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race.").

16. *Id.* at 309 ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.").

17. *Id.* at 313 (White, J., concurring).

18. *Id.* at 312 ("[C]ommon sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct and that the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring those crimes for which it may be exacted.").

19. *Id.*

20. *Id.*

21. 428 U.S. 153, 207 (1976).

22. *Proffitt v. Florida*, 428 U.S. 242 (1976).

23. *Jurek v. Texas*, 428 U.S. 262 (1976).

capricious manner.”²⁴ The Court believed that the Georgia scheme accomplished this in two ways: (1) by more narrowly defining the class of death-eligible crimes,²⁵ and (2) by providing for a comparative proportionality review of every death sentence by the Georgia Supreme Court.²⁶

Seven years after *Gregg*, the U.S. Supreme Court decided *Zant v. Stephens*,²⁷ which further articulated the principles discussed in *Furman*.²⁸ In upholding the petitioners’ death sentences, Justice John Paul Stevens, writing for the majority, held that, to satisfy the Eighth Amendment, a death penalty scheme’s aggravating circumstances had to “genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.”²⁹ In both *Gregg* and *Zant*, the Court identified that reducing the number of statutorily death-eligible crimes, along with providing for comparative appellate review of each death sentence, was one way that a death penalty scheme could satisfy *Furman*’s mandate that the penalty not be arbitrarily imposed.

The Court’s theory was that by limiting the number of death-eligible crimes to those deemed to be the most socially reprehensible, the likelihood that judges and juries would sentence perpetrators of those crimes to death would increase, thereby mitigating the possibility that impermissible factors such as race might influence their decision. Furthermore, the Georgia Supreme Court reviewed every death sentence, which would hypothetically ensure that the death penalty was applied in some kind of consistent fashion.³⁰ The problem, however, was that these features were never tested in application in Georgia or in any other state.³¹ Instead, schemes exhibiting these characteristics on their face were approved as being compatible with *Furman*.³²

In *McCleskey v. Kemp*,³³ the petitioner attempted to meaningfully test the Court’s theoretical approach to limiting arbitrariness in the death penalty’s

24. *Gregg*, 428 U.S. at 188.

25. *Id.* at 222 (White, J., concurring).

26. *Id.* at 196–98 (majority opinion).

27. 462 U.S. 862 (1983).

28. *Id.* at 876–77.

29. *Id.* at 877.

30. *Id.* at 876.

31. *See* Shatz & Dalton, *supra* note 10, at 1234.

32. *Id.*

33. 481 U.S. 279 (1987).

application.³⁴ Despite the Court's previous approval of the Georgia death penalty scheme on its face in *Gregg* and *Zant*, the petitioner in *McCleskey* sought to demonstrate that racial bias permeated the Georgia death penalty scheme.³⁵ Warren McCleskey was an African American man, sentenced to death for killing a white police officer.³⁶ In challenging his sentence, McCleskey presented the results of a study performed by Professor David Baldus and others ("Baldus Study").³⁷ Specifically, the Baldus Study demonstrated that defendants convicted of killing white victims in Georgia were more than four times as likely to receive the death penalty than if the victim was African American.³⁸

McCleskey presented two constitutional arguments to the Supreme Court based on this apparent discrimination: (1) that the influence of race on the imposition of the death penalty violated the Equal Protection Clause of the Fourteenth Amendment,³⁹ and (2) that, in accordance with *Furman*, the influence of the arbitrary factor of race in the Georgia scheme violated the Eighth Amendment.⁴⁰

Justice Lewis Powell, writing for the majority, dismissed McCleskey's equal protection claim on the basis that he did not produce evidence of discrimination in his conviction and sentencing.⁴¹ In other words, although McCleskey demonstrated a statewide discriminatory effect, he did not prove that *his* conviction was the product of discriminatory intent on behalf of anyone involved in his case.⁴²

The majority's dismissal of McCleskey's Eighth Amendment challenge appeared to foreclose the possibility of empirically based challenges to the death penalty.⁴³ Justice Powell explained that the Georgia scheme was not

34. *See id.* at 286–87 (explaining that McCleskey attempted to demonstrate that race impermissibly influenced the imposition of the death penalty in Georgia).

35. *Id.*

36. *Id.* at 283.

37. *Id.* at 286. The Baldus Study analyzed over 2,000 murders committed in Georgia throughout the 1970s. *See* DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 5 (1990).

38. *McCleskey*, 481 U.S. at 287.

39. *Id.* at 292–93.

40. *Id.* at 299.

41. *Id.* at 292–93.

42. *Id.* This is in line with the Supreme Court's equal protection analysis requiring a showing of intent when only disparate impact on a protected class is shown. *See* *Washington v. Davis*, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.").

43. Shatz & Dalton, *supra* note 10, at 1241.

cruel and unusual for the familiar reasons that it narrowed “the class of murders subject to the death penalty” and provided for an “automatic appeal of a death sentence to the State Supreme Court.”⁴⁴ Even in the face of the results of the Baldus Study, it appears that Justice Powell believed these safeguards adequately controlled the discretion of judges and juries in imposing death sentences. This allowed Justice Powell to dismiss McCleskey’s Eighth Amendment claim without questioning the reliability of the statistical evidence presented. Ultimately, Justice Powell concluded that the “risk of racial bias” in the Georgia scheme was not “constitutionally significant.”⁴⁵ In so many words, the Court concluded that racial disparities, such as those presented by McCleskey, were inevitable in the criminal justice system, and, to the extent those disparities were problematic, it was the legislatures’ responsibility to fix them, not the Court’s.⁴⁶

3. Excessive Delay in Execution: *Lackey* Challenges

In a series of cases in the last twenty years, death row inmates have challenged the excessive delays between sentence and execution. The first of such cases to draw attention from the Supreme Court was *Lackey v. Texas*, in which Justice Stevens authored a memorandum opinion respecting the denial of certiorari.⁴⁷ Lackey claimed the fact that he had spent seventeen years on death row awaiting execution violated the Eighth Amendment.⁴⁸

Justice Stevens divided Lackey’s claims into two parts. First, that spending an excessive amount of time on death row exposes an inmate to the “death row phenomenon,” which can amount to psychological torture.⁴⁹ This phenomenon is described in *Soering v. United Kingdom*, where a European court considered whether to extradite a German national to the United States to face possible execution for multiple murders.⁵⁰ The court stated, “[A]ccount is to be taken not only of the physical pain experienced but also, where there is a considerable delay before execution of the punishment, of

44. *McCleskey*, 481 U.S. at 302, 303. The Court also identified the fact that death trials were bifurcated and that defendants had the opportunity to present mitigating evidence as safeguards, limiting the possibility that a death sentence would be arbitrary or capricious. *Id.* at 302.

45. *Id.* at 313.

46. *See id.* at 314–19.

47. 514 U.S. 1045 (1995) (mem.) (Stevens, J., respecting the denial of certiorari).

48. *Id.*

49. *See, e.g., Soering v. United Kingdom*, 11 Eur. Ct. H.R. 25, para. 81 (1989); *see also Regina C. Donnelly, Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking?*, 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 339, 340–46, 350 (1990).

50. *Soering*, 11 Eur. Ct. H.R. at 4, para. 11.

the sentenced person's mental anguish of anticipating the violence he is to have inflicted on him."⁵¹ At the time of this statement, the average delay between sentencing and execution in the State of Virginia was between six and eight years.⁵² Based on this period of delay, the European court unanimously voted not to extradite.⁵³

Second, Justice Stevens explained that long delays between sentencing and execution could sap the eventual execution of any penological purpose. In his *Lackey* memorandum, Justice Stevens explained that the Court had reinstated the death penalty in *Gregg* in part because the Justices believed the death penalty might serve the penological purposes of retribution and deterrence.⁵⁴ While acknowledging that a claim like Lackey's had never been considered by the Supreme Court, Justice Stevens gave serious consideration to the possibility that a seventeen-year delay (and counting) between issuance of a death sentence and execution might rob the death penalty of its supposed retributive or deterrent purposes.⁵⁵ Long delays between sentencing and execution affect the value of the death penalty as a deterrent because they reduce the possibility that an inmate will actually be executed, rather than die in prison.⁵⁶ Furthermore, the death penalty does not adequately serve a retributive purpose if society must wait an inordinate amount of time for an inmate, whose murderous conduct incites moral outrage, to be executed.⁵⁷

Since *Lackey*, other death row inmates have asserted similar claims—delays in their post-conviction appeal processes—rendered their sentences unconstitutional.⁵⁸ In more recent cases, Justice Stephen Breyer has taken the mantle from Justice Stevens in dissenting from denial of certiorari in cases involving *Lackey* claims. In *Elledge v. Florida*, the petitioner spent twenty-three years awaiting the conclusion of his post-conviction appeals process.⁵⁹ Justice Breyer reiterated Justice Stevens's concerns from *Lackey*.⁶⁰ Additionally, Justice Breyer characterized the petitioner's claim as "serious" because the

51. *Id.* at 33, para. 100.

52. *Id.* at 17, para. 56.

53. *Id.* at 43, para. 1.

54. *Lackey v. Texas*, 514 U.S. 1045 (1995) (mem.) (Stevens, J., respecting the denial of certiorari) (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)).

55. *Id.* ("Though novel, petitioner's claim is not without foundation.").

56. *See infra* Part II.B.

57. *See infra* Part II.B.

58. *See, e.g., Elledge v. Florida*, 525 U.S. 944 (1998) (Breyer, J., dissenting); *Knight v. Florida*, 528 U.S. 990, 993 (1999) (Breyer, J., dissenting).

59. *Elledge*, 525 U.S. at 944.

60. *Id.*

delay was the result of the State's own faulty post-conviction process.⁶¹

In *Knight v. Florida*, the Court denied certiorari of *Lackey* claims asserted by two petitioners who had been on death row for nearly twenty and twenty-five years, respectively.⁶² Again, Justice Breyer dissented from denial of certiorari, arguing that as a rule, a delay of at least twenty years or more between sentencing and execution raised constitutional concerns about the validity of an inmate's death sentence.⁶³ In support of his argument, Justice Breyer cited the same concerns he and Justice Stevens had articulated in earlier cases, as well as the fact that the number of inmates who had spent more than twenty years on death row was multiplying across the country.⁶⁴

Justice Clarence Thomas disagreed and argued that giving death row inmates yet another constitutional challenge to their death sentence would only extend the delays between sentencing and execution.⁶⁵ Furthermore, Justice Thomas concluded that in the five years since the Court's denial of certiorari in *Lackey*, lower courts across the country had "resoundingly rejected" the claim that delay between sentencing and execution raised concerns about the constitutionality of an inmate's death sentence.⁶⁶ Therefore, according to Justice Thomas, the legitimacy of *Lackey*-type claims was no longer a live issue.⁶⁷ Justice Breyer disagreed on this point, noting that only four lower court decisions addressed a *Lackey* claim on the merits, and, in three of those four cases, the delay was less than twenty years.⁶⁸

B. The California Death Penalty Scheme

The California death penalty scheme is unique in its scope, which is at least part of the reason that California is home to the largest death row

61. *Id.*

62. *Knight*, 528 U.S. at 990 (Stevens, J., respecting the denial of certiorari); *id.* at 993–94 (Breyer, J., dissenting).

63. *Id.* at 999 (Breyer, J., dissenting) ("Finally, the constitutional issue, even if limited to delays of close to 20 years or more, has considerable practical importance.").

64. *Id.* at 993, 999.

65. *Id.* at 992 (Thomas, J., concurring).

66. *Id.*

67. *Id.* at 992–93 ("Five years ago, Justice Stevens issued an invitation to state and lower courts to serve as 'laboratories' in which the viability of this claim could receive further study. . . . I submit that the Court should consider the experiment concluded.").

68. *Id.* at 998 (Breyer, J., dissenting) (citing *Bell v. State*, 938 S.W.2d 35 (Tex. Crim. App. 1996) (twenty-year delay); *Ex parte Bush*, 695 So. 2d 138 (Ala. 1997) (sixteen-year delay); *State v. Smith*, 931 P.2d 1272 (Mont. 1996) (thirteen-year delay); *People v. Massie*, 967 P.2d 29 (Cal. 1998) (sixteen-year delay)).

population in the nation.⁶⁹ The breadth of the California scheme,⁷⁰ the delays in the post-conviction appeals process,⁷¹ and the population of death row⁷² have grown together for the past four decades.

California's current death penalty scheme is a product of a 1978 state ballot proposition known as the "Briggs Initiative," which replaced the narrower 1977 Death Penalty Law and greatly increased the number of death-eligible crimes.⁷³ The Briggs Initiative was advertised to voters as "giv[ing] Californians the toughest death penalty law in the country."⁷⁴ The Briggs Initiative attempted to, and arguably did, accomplish this goal by more than doubling the number of special circumstances—which make a first-degree murderer death-eligible—bringing the total number of death-eligible murders from twelve to twenty-eight.⁷⁵

Since 1978, the breadth of the California scheme has been expanded by voter initiatives in 1990,⁷⁶ 1996,⁷⁷ and 2000,⁷⁸ each time increasing the number of special circumstances that may trigger death eligibility. The heart of the California death penalty scheme is contained in section 190.2 of the California Penal Code, which delineates the list of special circumstances.⁷⁹ There are currently twenty-two such circumstances specifically enumerated

69. *Death Row Inmates by State*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year?scid=9&did=188#state> (last visited May 7, 2015).

70. See *infra* notes 76–82 and accompanying text.

71. See *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1062 (C.D. Cal. 2014).

72. *Id.*

73. See Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. REV. 1283, 1312 (1997).

74. California Center for Research and Education in Government, *California Journal Ballot Proposition Analysis*, CAL. J., Nov. 1978, at 4–5; Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 LOY. L.A. L. REV. S41, S142 (2011).

75. Alarcón & Mitchell, *supra* note 74, at S137–38.

76. In 1990, California voters passed Propositions 114 and 115, which added five more special circumstances and increased the number of death-eligible crimes to thirty-three. Crime Victims Justice Reform Act, ch. 1165, sec. 16, 1989 Cal. Stat. 4486, 4486–88 (codified at CAL. PENAL CODE § 190.2 (West 1990)); Alarcón & Mitchell, *supra* note 74, at S143, S146.

77. In 1996, California voters passed Propositions 195 and 196, which added three more special circumstances, bringing the total number of death-eligible crimes to thirty-six. Alarcón & Mitchell, *supra* note 74, at S146.

78. In 2000, California voters passed Propositions 18 and 21, which added three additional special circumstances, increasing the number of death-eligible crimes enacted by the California voters to thirty-nine. See CAL. SEC'Y OF STATE, PRIMARY ELECTION BALLOT PAMPHLET 32, 44 (2000), available at libraryweb.uchastings.edu/ballot_pdf/2000p.pdf; Alarcón & Mitchell, *supra* note 74, at S156.

79. CAL. PENAL CODE § 190.2(a)(1)–(22) (West 2014).

by section 190.2, that, in turn, encompass thirty-nine categories of first-degree murder.⁸⁰

Research demonstrates that, based on the breadth of section 190.2, a staggering percentage of murderers in California are statutorily eligible for the death penalty. Professors Steven Shatz and Nina Rivkind demonstrated that a comparison of the 1997 version of California's first-degree murder statute and section 190.2 revealed that there were only seven narrow categories of first-degree murderers in California who were *not* statutorily death-eligible.⁸¹ Additionally, David Baldus, one of the authors of the study featured in the *McCleskey* case, performed his own analysis of the California death penalty, finding that, under the 2008 version of section 190.2, 95% of defendants convicted of first-degree murder were statutorily death-eligible.⁸²

In 2004, California established the California Commission on the Fair Administration of Justice ("Commission") by California State Senate Resolution Number 44.⁸³ The Commission was a bipartisan coalition of legal scholars and professionals tasked with analyzing, among other things, the administration of the death penalty in California.⁸⁴ The Commission provided the most comprehensive review of the California death penalty in operation and explained simply that each year since 1978 far more inmates have been added to the death row population than have been executed.⁸⁵

The Commission identified several delays in California's capital post-conviction process. The first step in the post-conviction review process is the defendant's automatic appeal to the California Supreme Court. The Commission found that, on average, inmates on death row waited three to five years to be appointed counsel for their direct appeal.⁸⁶ Once counsel was appointed and all briefs were filed, the Commission identified a delay of more than two years in scheduling oral arguments before the California Supreme Court.⁸⁷ The next step in the post-conviction review process is the inmate's

80. *Id.*

81. Shatz & Rivkind, *supra* note 73, at 1318.

82. Petitioner's Evidentiary Hearing Exhibits: Amended Declaration of David C. Baldus at 14, *Ashmus v. Wong*, No. 3:93-CV-00594-TEH (N.D. Cal. Sept. 9, 2010) [hereinafter *The Baldus Declaration*].

83. CALIFORNIA COMM'N ON THE FAIR ADMINISTRATION OF JUSTICE, FINAL REPORT 113 (Gerald Uelman ed., 2008), available at <http://ccfaj.org/documents/CCFAJFinalReport.pdf> [hereinafter *COMMISSION REPORT*].

84. *Id.* at 1-9.

85. *Id.* at 121.

86. *Id.* at 122.

87. *Id.* (explaining that, as of 2008, there was a backlog of eighty fully-briefed cases ready for oral argument, but the California Supreme Court only hears twenty to twenty-five such cases each

state habeas corpus application. The Commission discovered there was, on average, an eight- to ten-year delay in appointing counsel for state habeas corpus proceedings.⁸⁸ Additionally, it took twenty-two months, on average, for the California Supreme Court to decide state habeas petitions in capital cases.⁸⁹ The last step in the post-conviction process is the inmate's federal habeas corpus application. The Commission found, on average, there was a longer than six-year delay for the federal courts to decide federal habeas petitions.⁹⁰ Altogether, the estimated wait between sentencing and execution was twenty to twenty-five years.⁹¹

The scope of the California death penalty scheme, combined with the delays discussed above, have led to an increase in the size and in the age of the state's death row population. Since 1978, only thirteen prisoners in California have been executed, while, as of the summer of 2014, ninety-four prisoners had died from other causes while awaiting execution.⁹² Based on the size of California's death row and the fact that no one has been executed in the state since 2006, the current ratio of more than seven-to-one deaths by other causes to executions will likely only grow in the future.⁹³ Furthermore, of the 511 offenders sentenced to death in California between 1978 and 1997, only eighty-one had exhausted their post-conviction appeals when *Jones* was decided.⁹⁴ Of those eighty-one, 60% were granted post-conviction relief, and only seventeen remained on death row.⁹⁵ At the time of the *Jones* decision, nearly half of those on death row, or 352 inmates, had yet to be assigned habeas counsel.⁹⁶ As of the summer of 2014, there were 748 people on death row in California, making it, by far, the largest of its kind in the country.⁹⁷ Of those 748 inmates, fifty-two had been on death row for more than thirty years.⁹⁸ Additionally, there were 206 inmates who had been serving time on California's death row for twenty to twenty-nine years, many

year).

88. *Id.*

89. *Id.* at 122–23.

90. *Id.* at 123 (explaining that much of the delay in federal habeas proceedings is attributable to California courts' failure to publish state habeas opinions and conduct evidentiary hearings).

91. *Id.*

92. *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1053, 1062 (C.D. Cal. 2014).

93. *Id.* at 1062.

94. *Id.* at 1055.

95. *Id.*

96. *Id.* at 1058.

97. *Id.* at 1053. *See also Death Row Inmates by State*, *supra* note 69.

98. *See Jones*, 31 F. Supp. 3d at 1069–87 app. A.

of whom were still waiting to complete their state habeas corpus review.⁹⁹ Even if California began executing one death row inmate per week, a truly unprecedented pace,¹⁰⁰ it would still take more than fourteen years to execute every inmate currently on death row.¹⁰¹

Based on the above data, the Commission resoundingly concluded that the California death penalty is broken. On the report's very first page, the Commission concluded, "California's death penalty is dysfunctional."¹⁰² Despite the Commission's findings and conclusions, in the six years that passed between the Commission report and the *Jones* decision, the California Legislature did nothing to address the state's death penalty problems.

II. The *Jones v. Chappell* Case

Unlike so many death penalty cases before it, the *Jones* decision is remarkable because it recognized the constitutional problems created by the California death penalty scheme as it is applied. This stands in contrast to the countless prior cases where courts have instead chosen to analyze the death penalty law on its face alone.

A. Factual and Procedural Background

Ernest Dewayne Jones was sentenced to death on April 7, 1995 for a murder committed in August 1992.¹⁰³ After his sentence was imposed, Jones had to wait four years for counsel to be appointed to represent him for his direct appeal.¹⁰⁴ Four years after appointment of counsel and after spending eight years on death row, the California Supreme Court affirmed Jones's death sentence.¹⁰⁵ In the meantime, Jones was appointed counsel for his state habeas petition in the fall of 2000, during the pendency of his direct

99. *Id.*

100. In Texas, the state responsible for the most executions by far in the United States, even in 2000, its most prolific year since 1982, only executed forty death row inmates. *Executions*, TEX. DEPT OF CRIMINAL JUSTICE, http://www.tdcj.state.tx.us/death_row/dr_executions_by_year.html (last updated Apr. 16, 2015).

101. *Jones*, 31 F. Supp. 3d at 1062.

102. COMMISSION REPORT, *supra* note 83, at 111.

103. First Amended Petition for Writ of Habeas Corpus By a Prisoner in State Custody at 415, *Jones v. Chappell*, 31 F. Supp. 3d 1050 (C.D. Cal. 2014) (No. 105) [hereinafter *Jones's Habeas Petition*].

104. *Jones*, 31 F. Supp. 3d at 1060.

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

appeal.¹⁰⁶ Jones's state habeas petition was filed in October 2002.¹⁰⁷ It took the California Supreme Court until March 2009, six and a half years later, to deny Jones's petition in an unpublished opinion.¹⁰⁸ Finally, in March 2010, Jones timely filed his federal habeas petition, for which briefing was concluded in January 2014.¹⁰⁹

Nineteen years after being sentenced to death, Ernest Jones submitted his First Amended Petition for the Writ of Habeas Corpus ("Petition") in federal district court.¹¹⁰ The Petition was 454 pages long and included thirty claims for relief based on several alleged constitutional violations stemming from Jones's conviction and death sentence.¹¹¹ Jones's twenty-seventh claim was a *Lackey* claim. He argued that, because he had been confined for nearly two decades—while living with the uncertainty of if and when his death sentence would ever be finalized—his sentence was unconstitutionally cruel and unusual.¹¹²

Jones's Amended Petition was prompted by an order of Judge Carney for supplemental briefing and oral arguments regarding the *Lackey* claim from Jones's original petition.¹¹³ Judge Carney's inquiry, however, was not strictly limited to an evaluation of the validity and viability of Jones's *Lackey* claim as stated.¹¹⁴ Rather, Judge Carney encouraged the parties to

submit, and to address in their briefing, the relevant statistics reported in the two law review articles referenced above, as well as any other reliable studies or public records addressing the delay associated with the administration of California's death penalty, the number of individuals on death row and the likelihood that any of those individuals will ever be executed or will instead die of natural causes or suicide.¹¹⁵

The two law review articles referred to by Judge Carney were both written by Judge Arthur L. Alarcón of the U.S. Court of Appeals for the Ninth Circuit and concerned the tremendous economic costs of the death penalty in California.¹¹⁶ Both articles only briefly mentioned the fact that

106. *Jones*, 31 F. Supp. 3d at 1060.

107. *Id.*

108. *Id.*

109. *Id.*

110. *See Jones's Habeas Petition, supra* note 103.

111. *Id.* at 414–27.

112. *Id.* at 414, 424.

113. Order Re: Briefing and Settlement Discussions at 4–5, *Jones v. Chappell*, 31 F. Supp. 3d 1050 (C.D. Cal. 2014) (No. 103).

114. *See id.*

115. *Id.* at 5.

116. *See Alarcón & Mitchell, supra* note 74, at S41; *See generally* Arthur L. Alarcón, *Remedies for*

many more death row inmates have died from causes other than execution.¹¹⁷ In neither article was this fact addressed in the context of arbitrariness, as defined by *Furman*.¹¹⁸ Judge Carney's order, however, gave a *Furman* twist to the *Lackey* claim, seeming to suggest that the long delays between sentencing and execution rendered any eventual execution arbitrary. In other words, those inmates were executed because they just so happened to survive long enough to be executed by the State. As discussed below, this was the basis for his final decision.

B. The Opinion

Judge Carney's analysis of the issues associated with the delays in California's post-conviction process was based on two premises: (1) "[N]o rational person can question that the execution of an individual carries with it the solemn obligation of the government to ensure that the punishment is not arbitrarily imposed and that it furthers the interests of society;"¹¹⁹ and (2) Judge Carney recognized that the death penalty is unlike any other punishment, and therefore it necessitates a corresponding heightened "'need for reliability in the determination that death is the appropriate punishment in a specific case.'"¹²⁰

In order to reach the merits of the Jones's arbitrariness claim, Judge Carney first had to address the issue of possible procedural bars. Under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), federal courts generally may not consider claims for habeas relief unless the inmate asserting the claim has exhausted the remedies available to him in state court.¹²¹ The State argued that Jones's claims concerning delay were never addressed in state court and therefore were not exhausted.¹²² AEDPA, however, provides an exception to this procedural bar.¹²³ Exhaustion is not required in cases where "'circumstances exist that render [the state] process ineffective to protect the rights of the applicant.'"¹²⁴

Judge Carney explained that this exception applied in *Jones* because the delays associated with California's post-conviction appeals process could not

California's Death Row Deadlock, 80 S. CAL. L. REV. 697 (2007).

117. Alarcón & Mitchell, *supra* note 74, at S53; Alarcón, *supra* note 116, at 724.

118. Alarcón & Mitchell, *supra* note 74, at S53; Alarcón, *supra* note 116, at 724.

119. *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1061 (C.D. Cal. 2014).

120. *Id.* (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)).

121. 28 U.S.C. § 2254(b) (2012).

122. *Jones*, 31 F. Supp. 3d at 1067.

123. *Id.* at 1067.

124. *Id.* at 1068 (quoting 28 U.S.C. § 2254(b)(1)(B)(ii) (2012)).

be solely attributed to the death row inmates themselves.¹²⁵ Instead, the State bore responsibility for its inability to promptly appoint counsel for direct appeal,¹²⁶ schedule oral arguments before the California Supreme Court,¹²⁷ and appoint state habeas counsel.¹²⁸ According to Judge Carney, the State also underfunded state habeas investigations, which in turn slowed down the federal habeas review process.¹²⁹ Judge Carney concluded that none of these delays, which together amount to more than twenty-five years, on average, were the result of self-serving “tactics” employed by death row inmates.¹³⁰ In Judge Carney’s estimation, it would be futile to subject Jones’s claims to further review in California courts because the State’s procedures were the primary source of Jones’s delays in the first place.¹³¹ Furthermore, because there was no underlying state decision on the merits of Jones’s claims concerning the delays he experienced, his claims were not considered under AEDPA’s deferential standard.¹³² Therefore, the claim was not procedurally barred.

In determining the death penalty regime in California was unconstitutionally arbitrary, Judge Carney relied heavily on *Furman*. He explained that *Furman* held that the death penalty “‘could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.’”¹³³ Judge Carney described the *Furman* Court as being preoccupied with the notion that the death penalty was being imposed in “an at best random manner against some individuals, with ‘no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not.’”¹³⁴ Judge Carney further explained that in the forty years since *Furman*, the Supreme Court has maintained that “the Constitution quite simply ‘cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.’”¹³⁵

125. *Id.* at 1066.

126. *Id.* (explaining that, on average, it takes three to five years for counsel to be appointed for direct appeal).

127. *Id.* (explaining that it usually takes two to three years to schedule oral arguments before the Supreme Court).

128. *Id.* (explaining that it takes at least eight to ten years to appoint state habeas counsel).

129. *Id.*

130. *Id.*

131. *Id.* at 1068.

132. *Id.* at 1068 n.23.

133. *Id.* at 1061 (quoting *Gregg v. Georgia*, 428 U.S. 153, 188 (1976)).

134. *Id.* (quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring)).

135. *Id.* (quoting *Furman*, 408 U.S. at 310 (Stewart, J., concurring)).

Applying the facts of delay associated with Jones's case and, the systemic delays in California's capital appeals process, Judge Carney concluded that the criterion for executing inmates "will depend upon a factor largely outside an inmate's control, and wholly divorced from the penological purposes the State sought to achieve by sentencing him to death in the first instance: how quickly the inmate proceeds through the State's dysfunctional post-conviction review process."¹³⁶

Judge Carney was concerned that, unlike many death row inmates, Jones faced a meaningful threat of execution.¹³⁷ Judge Carney addressed his concern by presenting data about Jones's place in the post-conviction process relative to those inmates sentenced to death in the same year.¹³⁸ Of the thirty-eight inmates sentenced to death in 1995, Jones and only six others had completed their state habeas proceedings.¹³⁹ Moreover, Jones appeared to be even further along in the post-conviction appeals process as compared to some inmates who had been on death row much longer. Of the 511 inmates sentenced to death between 1978 and 1997 whose convictions were not overturned by the California Supreme Court, 380 remained on death row at the time of the *Jones* decision.¹⁴⁰ Two hundred eighty-five of those inmates had been on death row longer than Jones, and, of those inmates, more than a third were still litigating their state habeas petitions.¹⁴¹ In the eyes of Judge Carney, those individuals still litigating their state habeas petitions after decades on death row did not face the "realistic possibility" of execution.¹⁴² Judge Carney concluded, "[B]ecause of the inordinate delays inherent in California's system, many of the rest [of the inmates in earlier stages of the appeals process] will never be executed. They will instead live out their lives on Death Row."¹⁴³

Ultimately, Judge Carney concluded that the systemic delays in the post-conviction process resulted in the arbitrary execution of death row

136. *Id.* at 1062.

137. *Id.* at 1063 ("Were his petition denied today, Mr. Jones would . . . have his federal habeas petition under review by the Ninth Circuit, effectively the last available stage before execution.").

138. *Id.*

139. *Id.*

140. *Id.* at 1069 app. A. Three hundred eighty of the original 511 inmates remained after thirteen were executed, thirty-nine were granted relief in federal habeas proceedings, and seventy-nine died on death row from causes other than execution. *Id.*

141. *Id.* at 1063.

142. *Id.*

143. *Id.* (quoting Gerald F. Uelman, *Death Penalty Appeals and Habeas Proceedings: The California Experience*, 93 MARQ. L. REV. 495, 496 (2009) ("For all practical purposes, a sentence of death in California is a sentence of life imprisonment without the possibility of parole.")).

inmates, thereby sapping the death penalty of either of its supposed penological purposes: retribution or deterrence.¹⁴⁴ To begin, Judge Carney expressed doubt as to whether the death penalty serves as a deterrent under any circumstances.¹⁴⁵ With undertones of a *Lackey* argument, Judge Carney explained that, for the death penalty to have any deterrent effect, it must be administered in a timely manner.¹⁴⁶ If not, as with the case in California, “[t]he reasonable expectation of an individual contemplating a capital crime in California then is that if he is caught, it does not matter whether he is sentenced to death—he realistically faces only life imprisonment.”¹⁴⁷ Finally, Judge Carney dismissed the possibility that the California death penalty served as a deterrent by evoking Justice Stewart’s now-famous comparison of the death sentence to being struck by lightning:¹⁴⁸ “Under such a system, the death penalty is about as effective a deterrent to capital crime as the possibility of a lightning strike is to going outside in the rain.”¹⁴⁹

Judge Carney also believed that the death penalty as applied in California did not serve retributive purpose. He reached this conclusion based on the fact that every inmate on death row committed an act the State deemed terrible enough to warrant punishment by death, yet inmates wait on average twenty-five years to complete the appeals process.¹⁵⁰ As a result, many die before being executed, rendering the possibility of retribution in those cases moot.¹⁵¹ Judge Carney was concerned that the delays were unnecessary and were created by the State of California, explaining, “Were such lengthy delay an isolated, or even necessary, circumstance of a system that otherwise acts purposefully to give meaning to society’s moral outrage, the retributive purpose of the death penalty might continue to be served.”¹⁵² Judge Carney concluded the death penalty cannot serve society’s moral outrage if it is exercised against a random sampling of those whose crimes

144. *Id.* at 1063.

145. *Id.* at 1063–64 (“Whether the death penalty has any deterrent effect when administered in a functional system is a widely contested issue upon which no clear empirical consensus has been reached.”).

146. *Id.* at 1064 (citing COMMISSION REPORT, *supra* note 83, at 115 n.8 (“If there is a deterrent value [to the death penalty], however, it is certainly dissipated by long intervals between judgment of death and its execution.”)).

147. *Id.*

148. *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring) (“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.”).

149. *Jones*, 31 F. Supp. 3d at 1064.

150. *Id.* at 1065.

151. *Id.*

152. *Id.*

society has deemed worthy of death.¹⁵³

III. The Consequences of *Jones*

In holding the California death penalty unconstitutional, the *Jones* decision, if it stands, will result in Jones's and others' death sentences being commuted in California. Additionally, the decision may have a significant impact on the viability of future empirical challenges to the death penalty.

A. The Impact of *Jones* on California's Death Row

Judge Carney held that the California death penalty is unconstitutional, at least as applied to Jones and his similarly situated cohort. That cohort includes all death row inmates sentenced to death in California on April 7, 1995—the day Jones received his death sentence—or before. If the *Jones* decision survives appeal in the Ninth Circuit, and then perhaps the U.S. Supreme Court, the death sentences of Jones and the 285 inmates sentenced before him presumably would be vacated and replaced with the sentence of life without the possibility of parole.¹⁵⁴ *Jones* does not, however, directly impact the death sentences of California inmates sentenced after 1995 because Jones challenged the California death penalty scheme in application rather than on its face. Theoretically, at least, Jones's challenge can only account for his experience and the experience of those who were sentenced to death before him.

Undoubtedly, inmates sentenced to death in California after 1995 have experienced, and will likely continue to experience, long delays between sentencing and execution.¹⁵⁵ It will be up to the inmates to test the limits of Judge Carney's decision and whether it can be applied to a petitioner who has spent less than nineteen years on death row. *Jones* cannot be read as creating a bright-line rule concerning delay because Judge Carney hints that an isolated incident of delay would be constitutionally permissible.¹⁵⁶ Only when the delays are systemic, as they were determined to be in *Jones*, do they violate the Eighth Amendment.

There is also the faint possibility that the delays plaguing the administration of the death penalty in California could be remedied, in

153. *Id.*

154. *Id.* at 1063.

155. *See supra* Part I.B.

156. *Jones*, 31 F. Supp. 3d at 1065 (“Were such lengthy delay an isolated, or even necessary, circumstance . . . the [constitutionally] retributive purpose of the death penalty might continue to be served.”).

which case a so-called “*Jones* claim” would no longer be viable. Judge Carney suggested that the constitutional problem posed by the inordinate delays in California post-conviction process is curable. In particular, Judge Carney focused on the 2008 Commission Report that outlined several changes to California’s post-conviction process, which could increase its efficiency dramatically.¹⁵⁷ Judge Carney seemed particularly concerned with bringing California’s delay between sentencing and execution in line with the national average, which was twelve and a half years between 2000 and 2012.¹⁵⁸ The Commission estimated that, if the State implemented its recommended changes, the average delay would decrease to between eleven and fourteen years.¹⁵⁹ Although far from drawing a bright line when the California death penalty would be constitutional again, the *Jones* decision makes clear that the status quo is unacceptable. The State of California must take action to streamline its post-conviction appeals process if it would like to maintain the death penalty in the state.

B. Future Empirical Challenges to the Death Penalty in California

Using empirical evidence in evaluating the constitutionality of death penalty law means requiring courts not to accept on faith that a scheme works the way it is supposed to. Judge Carney’s decision, for the first time, validates looking beyond the words of death penalty statutes. As discussed above, Judge Carney focused his criticism on the narrow issue of the delays in the post-conviction process and the resulting arbitrariness of inmates dying from causes other than execution. The *Jones* decision, however, ignores the other arbitrary ways in which the death penalty is meted out in California. Nonetheless, *Jones* is remarkable because it is the first time that any court has meaningfully evaluated empirical evidence in order to assess the realities of the California death penalty. In this regard, the approach used in *Jones* of determining the unconstitutionality of the California death penalty scheme *in application* may provide a road map for other courts determining the soundness of death penalty schemes in light of evidence that the scheme operates arbitrarily, regardless of the source of that arbitrariness.

The opinion in *Jones* is filled with powerful statistical evidence regarding the shortcomings of the California death penalty.¹⁶⁰ These statistics, which

157. *Id.* at 1067.

158. *Id.* The average delay between sentencing and execution nationwide rose to 15.8 years in the year 2012. *Id.*

159. *Id.*; COMMISSION REPORT, *supra* note 83, at 124.

160. *See supra* Part I.B.

both quantified the delays in the post-conviction process generally, and situated Jones relative to his peers, demonstrate the random nature by which death row inmates die in California. In this regard, *Jones* is an empirically based decision because Judge Carney relied on real world statistical evidence in holding the California scheme unconstitutional.

In general, there are two types of empirically based studies of the death penalty that can and have been used to attack the constitutionality of death sentences. First, there are “no-narrowing” challenges, which are directed at the statutory schemes that do not provide a meaningful basis for distinguishing between those murderers who receive the death penalty and those who do not.¹⁶¹ Second are studies that demonstrate actual arbitrariness in the death penalty based on the influence of impermissible factors such as race, gender, and geography.¹⁶²

The challenge articulated in *Jones* does not seem to fit neatly into either of these categories. One could argue that the challenge is its own unique blend, drawing on both *Furman* and *Lackey*, and therefore does not have anything to contribute to future challenges that do not involve arbitrariness resulting from the long delays between sentencing and execution. The influence of Jones’s *Lackey* claim is apparent throughout the opinion. It is especially prominent in the discussions as to whether the death penalty in California serves any penological purpose. To that end, Judge Carney explained, “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.”¹⁶³

The *Jones* decision, however, is based on concrete, indisputable empirical evidence, as opposed to some abstract analysis of how the California death penalty is theoretically supposed to work. As discussed above, Judge Carney clearly articulated that arbitrariness is arbitrariness and impermissible no matter where it occurs in the process of handing down a death sentence. In other words, the Eighth Amendment does not permit the influence of arbitrariness regardless of where it originates, be it the delay between sentence and execution, racial bias, or any other source. In this regard, the *Jones* decision may have profound implications for future empirically based challenges to the California death penalty scheme.

161. See generally Shatz & Rivkind, *supra* note 73; The Baldus Declaration, *supra* note 82.

162. See Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990–1999*, 46 SANTA CLARA L. REV. 1, 44–45 (2005); Shatz & Dalton, *supra* note 10, at 1229.

163. *Jones*, 31 F. Supp. 3d at 1053.

Fortunately for opponents of the death penalty, legal scholarship is filled with studies demonstrating the ways in which the California death penalty is arbitrary. The data from some of these studies has already served as the basis for legal challenges, still others have yet to be used, but in either case, the viability of legal challenges based on data may increase in the aftermath of *Jones*.

1. No-Narrowing Challenges

No-narrowing challenges are rooted in the idea that *Furman* was concerned that, of the many death-eligible crimes committed in Georgia, very few actually resulted in a death sentence.¹⁶⁴ As discussed above, the Court relied on the statistic that only 15 to 20% of all death-eligible murderers were ultimately sentenced to death in Georgia at the time of *Furman*.¹⁶⁵ Without establishing a bright-line rule, the Court in *Furman* established implicitly that this rate was below the permissible constitutional threshold.

Research demonstrates that California's ratio of death-eligible crimes committed to the number of resulting death sentences is considerably lower than the ratio discussed in *Furman*. The problem lies with section 190.2 of the California Penal Code, which outlines the special circumstances that may be applied to elevate a first-degree murder to a death-eligible offense.¹⁶⁶ Professors Shatz and Rivkind demonstrated that under the 1997 version of the statute, seven out of eight, or well over 80%, first-degree murderers in California were statutorily eligible for the death penalty.¹⁶⁷ Conversely, only one out of those eight defendants was eventually sentenced to death.¹⁶⁸ Thus, California's death penalty rate, from 1988 to 1992, as calculated by Shatz and Rivkind's study, was 11.4%, well below the rate found to be unconstitutional in *Furman*.¹⁶⁹

David Baldus performed his own analysis of the California death penalty.¹⁷⁰ The purpose of his study was, in part, to examine the scope of death eligibility under California law.¹⁷¹ His study analyzed a sample taken

164. *Furman v. Georgia*, 408 U.S. 238, 386 n.11 (1972) (Burger, C.J., dissenting); Shatz & Dalton, *supra* note 10, at 1231.

165. *Furman*, 408 U.S. at 386 n.11; Shatz & Dalton, *supra* note 10, at 1231.

166. CAL. PENAL CODE § 190.2 (West 2014).

167. Shatz & Rivkind, *supra* note 73, at 1332.

168. *Id.*

169. *Id.*

170. The Baldus Declaration, *supra* note 82, at 2.

171. *Id.*

from 27,453 homicide cases occurring in California between January 1, 1978 and June 30, 2002.¹⁷² Professor Baldus's California study demonstrated that only 4.6% of all death-eligible offenders were sentenced to death in the state, which is considerably lower than the 15 to 20% at issue in *Furman*.¹⁷³

Despite the evidence that section 190.2 does not meaningfully narrow the class of death-eligible offenders, the California Supreme Court has, time and time again, approved the California scheme on its face, without looking at whether section 190.2 actually has the required narrowing effect.¹⁷⁴ In *Ben-Sholom v. Ayers*,¹⁷⁵ however, one court at least addressed, in dicta, the breadth of death eligibility in California. Judge Anthony Ishii of the District Court for the Eastern District of California recognized "the class of [death-eligible] murderers to be very broad under the California scheme."¹⁷⁶ Judge Ishii concluded that "the merits of the [no-narrowing] claim could be considered debatable among reasonable jurists."¹⁷⁷

Jones could have a powerful effect on the impact of no-narrowing challenges going forward. If, as in *Jones*, the California Supreme Court, or any other court for that matter, examined the statistical evidence of the breadth of section 190.2, they would likely have to find that the statute is impermissibly broad. It is difficult to fathom that a court could look at the evidence, such as the research by Professors Shatz and Rivkind, or that of David Baldus, and come to any other conclusion. The impact of *Jones* is that it may provide future courts with a model for how to assess the constitutionality of the California death penalty by using statistical analysis in ascertaining how the scheme actually operates.

2. Evidence of Actual Arbitrariness

As discussed above, the *McCleskey* decision signaled to many the foreclosure of any future challenges to the death penalty based on empirical evidence.¹⁷⁸ Despite those signals, several legal scholars and social scientists have conducted studies of the impact of arbitrary factors on the application

172. *Id.*

173. *Id.* at 29.

174. *See, e.g.*, *People v. Ray*, 914 P.2d 846, 872 (Cal. 1996), *cert denied*, 519 U.S. 967 (1996); *People v. Arias*, 913 P.2d. 980, 1040–41 (Cal. 1996), *cert denied*, 520 U.S. 1251 (1997).

175. No. 1:93-CV-05531 AWI, 2008 WL 4167079, at *2 (E.D. Cal. Sept. 5, 2008).

176. *Id.*

177. *Id.* at *3. The Ninth Circuit did not address this issue on appeal, claiming that it was not ripe because Ben-Sholom's death sentence had been vacated. *Ben-Sholom v. Ayers*, 674 F.3d 1095, 1097 n.2 (9th Cir. 2012).

178. Shatz & Dalton, *supra* note 10, at 1241.

of the death penalty in California. These studies demonstrate that the death penalty has been significantly influenced by improper factors such as race, geography, and gender.

Professors Glenn L. Pierce and Michael L. Radelet analyzed racial and geographic disparities in the imposition of the death penalty by conducting a study of all homicides committed in California between 1990 and 1999.¹⁷⁹ Just as in *McCleskey*, this study showed that the race of a murder victim dramatically affected the likelihood that the death penalty would be imposed.¹⁸⁰ Pierce and Radelet found that murders involving white victims were 3.7 times more likely to result in a death sentence than those involving African American victims.¹⁸¹ Similarly, murderers whose victims were white were 4.7 times more likely to be sentenced to death than those who killed Hispanic victims.¹⁸² These disparities are in line with results of similar studies in other states.¹⁸³

Pierce and Radelet further determined that the location where a crime was committed had a significant effect on the likelihood that the death penalty would be imposed.¹⁸⁴ Their study revealed large variations in the death sentencing rates of different counties,¹⁸⁵ leading them to conclude “death sentencing in California is highest in counties with a low population density and a high proportion of non-Hispanic white residents.”¹⁸⁶

A recent study by Professor Steven Shatz and Naomi Shatz found disparities in the application of the death penalty on the basis of the victim’s gender as well as the gender of the defendant involved in the crime.¹⁸⁷ After analyzing roughly 1,300 first-degree murder convictions over a three-year period, they found that defendants involved in a single-victim murder, where that victim was female, were more than seven times as likely to receive the death penalty than if the victim was male.¹⁸⁸ Furthermore, women represent 5.3% of convicted, death-eligible, first-degree murderers not sentenced to

179. Pierce & Radelet, *supra* note 162, at 12–13.

180. *Id.* at 19.

181. *Id.*

182. *Id.*

183. Shatz & Dalton, *supra* note 10, at 1248–51.

184. Pierce & Radelet, *supra* note 162, at 31.

185. *Id.* at 38 (“Excluding counties with smaller populations, death sentencing rates vary from roughly .005% of all homicides to rates five times higher.”).

186. *Id.* at 31.

187. Steven F. Shatz & Naomie R. Shatz, *Chivalry is Not Dead: Murder, Gender, and the Death Penalty*, 27 BERKELEY J. GENDER L. & JUST. 64, 105–10 (2012).

188. *Id.* at 92–93, 107.

death, yet they make up only 1.2% of those sentenced to death.¹⁸⁹

Moreover, another study by Professor Shatz and Professor Terry Dalton demonstrated that even the crime's location within an individual county dramatically affects the likelihood that the death penalty will be imposed. The study examined 473 first-degree murder convictions in Alameda County, California occurring between 1978 and 2001.¹⁹⁰ The study found that those murders committed in the southern half of the county, which is vastly more suburban and populated by white residents, were over 2.5 times more likely to result in a death sentence than those committed in the more urban North County, where the majority of residents are people of color.¹⁹¹ Furthermore, the murders in South County were no more aggravated than the ones committed in North County, and thus this could not provide an alternative explanation for the disparate results.¹⁹²

3. *Jones's* Potential Impact on the Utility of Empirical Studies

Putting aside the equal protection arguments prompted by these statistics, which are beyond the scope of this Note, the decision in *Jones* could impact the applicability of these types of studies in making legal challenges to the death penalty based on a violation of the Eighth Amendment.¹⁹³ These studies indicate the administration of the death penalty in California is influenced by the legally impermissible factors of race, geography, and gender. In *McCleskey*, the U.S. Supreme Court was presented with very similar evidence and essentially ignored these factors because the Court had settled into the practice of approving death penalty statutes simply on their face. To the five Justices in the majority, the statistics presented in *McCleskey* were an afterthought, because, in their eyes, the Georgia scheme was *theoretically* sound. *Jones* potentially moves past that presumption. In *Jones*, Judge Carney looked to the data that demonstrated what the practical effects of the California scheme were and continue to be, and determined that the situation was constitutionally unacceptable.

Conclusion

There is no meaningful distinction between the empirical evidence relied on in *Jones* and the statistics presented in the other types of challenges

189. *Id.* at 106.

190. Shatz & Dalton, *supra* note 10, at 1260.

191. *Id.* at 1267.

192. *Id.* at 1268.

193. U.S. CONST. amend. VIII.

to the California death penalty. Empirical evidence continues to mount, demonstrating that the death penalty in California is overly broad, discriminatorily imposed, and arbitrarily carried out in ways discussed above. Evidence of California's death penalty scheme's practical effects, or any other state's for that matter, are important and should no longer be ignored. The statistics show how arbitrarily the death penalty actually works in practice and demonstrate that it must either be modified or eradicated. The *Jones* decision may finally provide an opening for other courts to holistically assess the death penalty in California, its practical applications, and find it unconstitutional as well.