Sentenced to Death in California . . . Maybe

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No judge has ever read the words “life with the remote possibility of death” aloud in a courtroom. Yet, as of this year, the 746 Californian inmates who have received the death penalty only face a small likelihood of being executed.¹ Last year, in Jones v. Chappell, Judge Cormac Carney of the Central District of California held that California’s practice of delaying executions constituted cruel and unusual punishment under the 8th Amendment.² Although the 9th Circuit may overturn Jones this year,³ Carney’s opinion highlights the necessity for reform in California’s capital punishment jurisprudence.

Criminal law scholars frequently debate the cruelty of the death penalty, but the district court in Jones examined the more painful punishment of waiting for an execution that may never come.⁴ California inmates in particular spend an inordinate amount of time on death row. The typical period between sentencing and execution stands at twenty-five years, nearly twice the national average.⁵ The state has imposed 900 death sentences since 1978 but has only executed thirteen people.⁶ Seven hundred and forty-six people remain on death row—the highest number of any state.⁷

Delays on California death row result from the state’s appeals process. For instance, a typical prisoner waits between three to five years to have counsel appointed for direct appeal and another two to three to have oral argument scheduled before the Supreme Court of California.⁸ For state habeas appeals, eight to ten years elapse between the sentence and appointment of counsel. After counsel has prepared the habeas brief, the Supreme Court of California generally takes another four years to issue a conclusory denial, at which point the case goes to federal court.⁹ These long lapses result in part from underfunding of the state’s capital sentencing process, a requirement that all death penalty appeals be heard by the Supreme Court of California, and stringent requirements on the qualifications of attorneys appointed for appellants.¹⁰

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⁴ Jones, 31 F. Supp. 3d at 1053.
⁵ Id. at 1054.
⁷ Id.
⁸ Jones, 31 F. Supp. 3d at 1056.
⁹ Id.
¹⁰ Id.
Judge Carney asserted that this process renders executions largely arbitrary—a violation of the 8th Amendment.\textsuperscript{11} From his perspective, the thirteen people executed since 1978 received arbitrary punishment because they just happened to make it through the arduous appeals process before they could die of natural causes.\textsuperscript{12}

Judge Carney skimmed over the fact that Jones, like most other inmates, has yet to be executed because he is exercising his right to appeal. An inmate sentenced to death should not be able to cry cruel and unusual punishment for dying less quickly than other prisoners while he appeals his sentence. Furthermore, the appeals process ensures that not only guilty, but also innocent inmates have a chance to challenge their sentences.\textsuperscript{13} If a state chooses to implement the death penalty, it should take every reasonable measure to ensure that an innocent person does not die. Equipping a prisoner with experienced counsel and multiple judges to review the conviction are methods of doing so. This process produces not arbitrary, but meticulously scrutinized sentences. The alternative—loosening requirements for the appeals process—poses a greater danger of arbitrary executions.

Judge Carney did raise a separate point. California’s capital punishment regime does not accomplish its twin goals of deterrence and retribution.\textsuperscript{14} Assuming the death penalty deters crime at all, it likely fails to deter individuals in California if they know death will not come. Capital punishment also does not serve its retributive purpose if the state never carries out a jury’s carefully deliberated sentence.\textsuperscript{15} In the meantime, the state spends approximately $137 million a year to maintain its capital punishment regime.\textsuperscript{16} If California were to simply incarcerate its death row inmates for life, it would only spend roughly $11.5 million a year.\textsuperscript{17}

There are two possible solutions to this problem. The first involves the California legislature appropriating additional money for the capital punishment process. Additional funds would allow the state to hire more staff and attorneys to work on cases throughout the appeals process. This would speed up investigations of potential claims and quicken the defendant’s ability to appeal. In March of this year, Governor Jerry Brown asked the legislature for $3.2 million dollars to open nearly one-hundred additional cells for condemned men living in San Quentin State Prison.\textsuperscript{18} Seven-hundred and eight out of San Quentin’s 715 available death row cells are full. The governor’s budget proposal estimates twenty additional inmates arriving every year, making California due for an overflow.\textsuperscript{19} Brown’s initiative suggests that policymakers are not

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\textsuperscript{11} Id. at 1053
\textsuperscript{12} Id.
\textsuperscript{13} See id. at 1067 (finding that the post-conviction process has a vital role in insuring that a state does not improperly execute an individual).
\textsuperscript{14} Id. at 1062.
\textsuperscript{15} Id. at 1064.
\textsuperscript{16} Id.
\textsuperscript{17} Kelly Phillips Erb, Considering the Death Penalty: Your Tax Dollars at Work, FORBES: TAXES (May 1, 2014), http://www.forbes.com/sites/kellyphillipserb/2014/05/01/considering-the-death-penalty-your-tax-dollars-at-work/. This includes pre-trial and trial costs, automatic appeals and state habeas petitions, federal habeas petitions, and the actual cost of incarceration.
\textsuperscript{18} Id.
\textsuperscript{20} Id.
spending funds to make the appeals process more efficient. Instead, they plan to expand the state’s capacity to accommodate additional inmates, failing to address the root of the overcrowding problem.

The alternative to additional funding? Getting rid of the death penalty. If the current system does not further California’s deterrent and retributive purposes, why spend the money to maintain it? A defendant could be sentenced to life in the same conditions current inmates experience on death row. The state would simply save resources on the appeals process. Abolition may eventually attract the support of a majority of California voters. A 2014 poll indicated that Californians’ support for capital punishment was at fifty-six percent, its lowest in forty years.\textsuperscript{21} Support for the death penalty was at sixty-eight percent only three years prior.\textsuperscript{22}

The United States Supreme Court may rule on this issue in the future. While the Supreme Court has never granted certiorari for a claim asserting that delays on death row violate the cruel and unusual punishment clause, otherwise known as a Lackey claim, some justices have discussed the issue.\textsuperscript{23} Independently from Judge Carney’s point of arbitrariness, Justices Breyer and Stevens have asserted that the twenty plus years an inmate serves on death row satisfy the goal of retribution, barring the need for an execution.\textsuperscript{24} They have also suggested that the isolating conditions on death row and the mental torment of waiting for death are cruel and unusual punishment.\textsuperscript{25}

While it may be easy to sympathize with a death row inmate in the abstract, the reality is not so simple. For instance, the defendant in Jones committed cold-blooded murder. Jones bound and gagged his victim, Julia Miller, raped her, and stabbed her fourteen times.\textsuperscript{26} Miller’s husband of thirty years discovered her with two knives still lodged in her body. He died a few months later, his daughter claims in part due to grief.\textsuperscript{27} As several Lackey claims critics point out, Jones remains alive while Miller has been long since buried.\textsuperscript{28} To label Jones’ situation—waiting for death in harsh prison conditions—cruel and unusual seems callous and unfair to his victims, given the nature of his crimes.

At the same time, should the Court ever take Justices Breyer and Stevens’ stance, California and other states will be forced to put resources into their capital sentencing regimes or get rid of them completely. From an economic perspective, abolition would be the optimal solution as it would free up $126 million a year for the state.\textsuperscript{29} Furthermore, there is no guarantee that additional

\textsuperscript{22} Id.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
\textsuperscript{27} Id.
\textsuperscript{28} Id.
\textsuperscript{29} Erb, supra note 17.
funding would substantially expedite the appeals process, given the safeguards California has implemented to prevent innocent executions.