Judge Carney v. The Death Penalty

Ninth Circuit Panel Suppresses *Furman's* Repudiations Of Dysfunctional Sentencing And Freakishly Rare Execution Regimes

Clifford Johnson, January 15, 2016 (Updated February 1, 2016)

This paper reviews fundamental caselaw re the constitutionality of the death penalty, arguing that *Jones v. Davis*, which attacks California's appellate review processes as dysfunctionally backlogged, offers an excellent vehicle for reconsidering the death penalty à la Justice Breyer's dissent in *Glossip v. Gross* (if only the 2016 state ballot does not eliminate the death penalty). En banc, the Ninth Circuit should reinstate Judge Carney's Order Declaring California's Death Penalty System Unconstitutional, as cruel and unusual, and as lacking due process.

Besides promoting Carney's Order, I hope to satisfy lawyers and insatiably curious laymen who are aware that legal disputes over the death penalty have recently sharpened, and want to glimpse *precisely* how battle lines are being drawn up, fought over, and glossed over in court, where the rubber meets the road. In essence, I am putting in accessible form my own research to that end, as applied to a frontline case.[1]

[1] Two shorter companion articles are: (1) Glossip v. The Death Penalty: Does Oklahoma's Negligent Mock Execution Actionably Enhance Glossip's *Lackey* Claim?, which is focused more on the death penalty's execution phase; and (2) Overdue Process And The Death Penalty, which argues that the Fourteenth Amendment's due process clause should be judicially updated to include an adequate criminal right of appeal, which California's dysfunctional death penalty regime fails to provide. A fourth article is planned, focusing on innocence issues and evidentiary standards, as applied to *People v. Masters*, S016883. My position is that the inevitably of mistakes alone warrants declaring the death penalty obsolete. But this article presents and argues the law *as is*.

1. Welcome To Groundhog Day

Responding in *Glossip* to Breyer's dissent, Scalia sarcastically began: "Welcome to groundhog day."[2] Yes indeed. Case law re the death penalty is fraught with confusions stemming from the fact that the landmark case of *Furman v. Georgia*, 408 U.S. 238 (1972), which conditionally nixed the death penalty nationwide, comprised five individual opinions; while *Gregg v. Georgia*, 428 U.S. 153 (1976), which reinstated the death penalty by holding that *Furman's* conditions were satisfied, comprised two plurality opinions. To dispel 40 years of cumulative confusion one really must take the trouble to reassess the sources.

This article accordingly provides copious excerpts from *Furman* et alia in a slowly developed argument, as a prelude to deconstructing the conclusory quoting of doctrinal sound bites by the Ninth Circuit panel in *Jones v. Davis*, 14-56373 (9th Cir. 11-12-2015). Having shrunk *Furman* and *Gregg* to misfit, the panel spent more time puzzling over the irrelevant and confusing opinion in *Andrews v. Davis*, 09-99012 (9th Cir. 8-5-2015).[3] Despite the import of the core issue and wide public interest in the case, which has been expected to reach the Supreme Court, the panel's distracted small-mindedness raised no eyebrows, let alone dropped a jaw. The decision was reported as reversing Carney's Order on a procedural technicality, the merits being buried and blocked; and no one was surprised.[4]

Surprise! The *Jones* decision is much on the merits, and it squelches *Furman*, purportedly on "perfectly clear"[5] grounds. The panel unanimously held that Jones had raised a wholly novel claim, which the federal courts therefore could not decide owing to nonretroactivity (so said Judges Graber and Rawlinson) and/or a failure to first file it in state courts (so said Judge Watford). The dispositive finding of novelty rests on confused errors. Although *Furman* announced that it applies to "the imposition and carrying out of the death penalty," the panel held that *Furman* says nothing binding about the "carrying out" period; and although "carrying out" a death sentence cannot begin until appellate review is finished, when the sentence becomes final, the panel held that *Furman's* "carrying out" period begins at close of trial. The panel concluded that, because Jones complains of post-trial, appellate dysfunction, *Furman* does not apply; and that, because *Furman* is Jones' sole authority, the claim is novel.

Contrarily, both concurring pluralities in *Gregg* ruled that Georgia's upgraded death penalty regime provisionally satisfied the requirements of *Furman* not only because of new trial court sentencing procedures, but importantly because the new sentencing standards were seemingly secured by an adequate right of appeal. In *Godfrey v. Georgia*, 446 U.S. 420 (1980), these appellate processes were found insufficient. No reasonable jurist can dispute that dysfunctional appellate review processes are on their face incompatible with care in sentencing, let alone with *Furman's* especially careful death penalty sentencing requirements.

California's review processes are so dysfunctional that, since 1978, only 31 of over 900 trial court death sentences have become final enough to "begin to be carried out," after federal review of any substantial issues.[6] The majority in *Furman* not only ruled out unfettered discretion in death penalty sentencing, where appellate processes play a vital role in the required fettering; it also ruled out just such freakishly rare actual execution percentiles as inherently arbitrary. Thus *Furman* doubly dictates Carney's finding of unconstitutional arbitrariness, which—given ludicrously low execution percentiles versus extraordinarily high concomitant personal and social agonies and burdens—seems no more than a long overdue and self-evident matter of budgetary common sense and constitutional decency.

Carney's Order makes the direct constitutional application clear, before citing *Furman* in support (at 27):

> *The rule Mr. Jones seeks to have applied here—that a state may not arbitrarily inflict the death penalty—is not new. Rather, it is inherent in the most basic notions of due process and fair punishment embedded in the core of the Eighth Amendment. See Furman . . .*

A sua sponte (on the court's own initiative) abuse of discretion standard is the unseen elephant in the court.

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[2] Groundhog Day is a 1993 comedy movie about a weatherman who keeps waking up on the same day.

[3] At the August 31, 2015 oral hearing, the panel expressed doubts only as to whether *Andrews* and *Seumanu* mattered or not, or meant or could have meant what they seemed to say; and as to whether nonretroactivity and/or nonexhaustion applied.

[4] See footnote 12 for a list of such reports.

[5] *Jones*, at 15. Re the decision being on the merits, see page 6 and point 7.

[6] "[U]nlike a term of years, a death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding. Accordingly, federal courts must isolate the exceptional cases where constitutional error requires retrial or resentencing as certainly and swiftly as orderly procedures will permit. They need not, and should not, however, fail to give nonfrivolous claims of constitutional error the careful attention that they deserve." *Barefoot v. Estelle*, 463 U.S. 880, 888 (1983).

2. *Jones v. Davis*: An Introduction And Overview

> *Crimes and criminals simply do not admit of a distinction that can be drawn so finely as to explain . . . the execution of such a tiny sample of those eligible.* *Furman*, at 294; Brennan concurrence.

Since 1978, California has sent over 900 convicted murderers to death row, but the death sentences of only 31 have been legally finalized (of whom 13 have been executed),[7] while 87 have died of natural causes or suicide.[8] Finding this due to systemic and worsening backlogs in hopelessly underfunded state postconviction review processes, on July 16, 2014 Judge Cormac Carney of the Central District of California (a George W. Bush appointee), issued an *Order Declaring California's Death Penalty System Unconstitutional*,[9] as arbitrarily selective, under *Furman*.

Carney's Order offers an excellent vehicle for reconsidering the constitutionality of the death penalty à la Breyer's dissent in *Glossip v. Gross*.[10] However, in *Jones v. Davis*,[11] a Ninth Circuit panel vacated Carney's Order on what the media universally reported as procedural/technical grounds.[12] Yet the panel itself recognized that its ruling was formally on the merits, and entailed "a detailed analysis of federal constitutional law,"[13] while the petition for rehearing complains that the merits should not have been reached.

In fact, the panel effectively struck every reference in Carney's Order to the landmark case of *Furman*, on which the order singularly relied. The panel did so by holding that *Furman* simply does not apply to postconviction processes, despite the *Furman* majority having headlined that it applied to "imposing and carrying out the death sentence." In so doing, the panel suppressed:

(1) *Furman's* holding that death penalty regimes resulting in freakishly rare executions are arbitrary *per se*;

(2) *Furman's* requirement that death sentencing be adequately fettered, *including through appeals*;

(3) the commonsense fact that a substantial or a watershed procedural rule is at bar; and

(4) the California Supreme Court's plain advice in *Seumanu*,[14] that a return to the state court would be futile.

To rescue the record from inherently irrelevant confusions, an en banc Ninth Circuit panel should sua sponte articulate and apply a new discretionary standard to review sua sponte trial court claims, under which it should reach the merits of Carney's Order, and vigorously restore it.

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[7] "Since 1978, only 81 inmates . . . have received a final determination on the merits of their federal habeas petitions. Less than half of those 81 have been denied relief at all levels." Carney's Order, at 13. My total of 31 final sentences is obtained by adding the number of stayed executions (18 today, due to a 2006 moratorium re lethal drug issues) to the 13 carried out executions. Drop-outs while awaiting execution (due to death, mental incompetency, clemency) are few and don't count, the sentences being de facto vacated. See California death penalty is broken, sides agree, but how to fix it?, Orange County Register, Nov. 13, 2015.

[8] Many more have been transferred to arguably worse-than-death, unconstitutionally deficient mental health segregation units. See *Coleman v. Brown*, (E.D.Cal 4-5-2013 and 4-11-2014) 938 F. Supp.2d 955, 970 and 28 F.Supp.3d 1068 (deliberate indifference to inmates' serious mental health care needs); and "Systemic Failures Persist" in California Prison Mental Health Care, Judge Rules, Solitary Watch. A federally-ordered death row mental health facility has just been completed in San Quentin.

[9] *Jones v. Chappell*, 31 F.Supp.3d 1050 (2014).

[10] *Glossip v. Gross*, 14-7955 (U.S. 6-29-2015).

[11] The case/decision *Jones v. Davis* is referred to as *"Jones."* It is distinguished by italics from petitioner Jones. Jones' counsel is the state-funded Habeas Corpus Resource Center, lead by Michael Laurence, whose home page is given over to *Jones v. Davis*.

[12] See Ninth Circuit Rejects Challenge to Calif. Death Penalty, The Recorder; California's Death Row Revived by 9th Circuit, Findlaw; Federal Appeals Panel Overturns Anti-Death Penalty Ruling in California, New York Times; Federal appeals court upholds California's death penalty reviews, Los Angeles Times; Appeals court rejects challenge to California death penalty, Associated Press; US Appeals court rejects challenge to California death penalty, Reuters; all Nov. 12, 2015. The best article I have found is Death Penalty Reinstated In California, The People's Vanguard of Davis, Nov. 16, 2015, although, like every other article, it really goes no further than reporting the panel's conclusion that "Because Petitioner asks us to apply a novel constitutional rule, we may not assess the substantive validity of his claim."

[13] *Jones*, at 10, 14: "[Under] § 2254(b)(2) . . . [w]e hold that Congress intended a 'deni[al] on the merits' of '[a]n application for a writ of habeas corpus' to encompass the *Teague* inquiry. . . . We acknowledge that ' . . . the *Teague* inquiry requires a detailed analysis of federal constitutional law.' [Citation.]"

[14] *People v. Seumanu*, S093803 (Cal. 8-24-2015).

3. From *Furman* And *Gregg* To Carney's Order And Breyer's Dissent

> *[R]ather than try to patch up the death penalty's legal wounds one at a time, I would ask for full briefing on a more basic question: whether the death penalty violates the Constitution [which] forbids the "inflict[ion]" of "cruel and unusual punishments." Amdt. 8.*
> *Glossip*; Breyer dissent, joined by Ginsburg.

After a 1995 conviction for a horrific rape-murder,[15] Ernest Jones spent twenty years on California's death row exhausting his state appellate remedies. His physical guilt is admitted,[16] and only two of his federal habeas claims against California attorney general Kathleen Davis are discussed—his so-called *Lackey* and *Furman* claims, both based on excessive postconviction delays, albeit in structurally distinct (and even in opposite) ways.

The *Lackey* claim alleges that Jones' long and uncertain wait on death row has already inflicted so cruel and unusual a punishment that vacation of the death sentence is now warranted. As not in the slightest unusual, this claim is a non-starter. Breyer's dissent (at 17-33) sketched the potential merits of delay-related death penalty claims under the caption "'Cruel'-Excessive Delays." Although the elements of a credibly extreme individual *Lackey* claim are posited,[17] Breyer is primarily concerned with systemic and pervasive delays, of the sort at bar in *Jones*.

Of concern herein is only Jones' *Furman* claim. Note well that Jones attacks only the appellate/review phase of the death penalty, from close of trial until the death sentence becomes final. He does not attack the "carrying out" or execution phase. The lifting of California's 2006 drug-related moratorium will cure the present execution delay, but will not cure the delays that result in freakishly few final sentences. In other words, with respect to the issues raised in *Jones*, a final sentence of death is essentially equivalent to an execution, and vice-versa. Herein, no distinction will be drawn between the two, except where appropriate for purposes of exactitude and clarity.

Jones' systemic *Furman* arbitrariness claim raises the following Eighth Amendment question:

> ***If final-death-sentences/executions are freakishly rare, are they necessarily or presumptively arbitrary, and so cruel and unusual?***

"Freakishly rare" execution is given numerical substance in the discussion of the various *Furman* opinions, where it is contrasted with rarities re trial court death sentencing.

Of course, decades of uncertain delay will cruelly toy with the heart of hope, but torturous delay is not the essence of a *Furman* claim. Delay is alleged in *Jones* only as the systemic, factual cause of freakish rarity. Note well that requiring far speedier California Supreme Court death penalty decisions would amplify what many (me included) already regard as an unacceptable risk or rate of executing the innocent.[18] California's systemic appellate delay thus poses the basic question raised in Breyer's dissent, as to whether, all things reconsidered, the changes made to meet *Furman's* requirements of accurate and appropriate death sentencing have failed in that goal with consequences that are overridingly repugnant to the constitution.

In *Furman*, "[t]he constitutionality of death itself under the Cruel and Unusual Punishments Clause [was] before [the [U.S. Supreme] Court for the first time."[19] *Furman* repudiated the death penalty nationwide, and the majority answered "yes" to the above question. In brief, a death penalty regime must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not."[20]

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[15] See *People v. Jones*, 29 Cal. 4th 1229, 1238-1242 (2003). Julia Miller, the 50-year old mother of Jones' girlfriend, was found dead in her house, bound and gagged, with 14 stab wounds and two kitchen knives sticking out of her neck and pieces of three other knives on or around her body. DNA proved the guilt of Jones, a paroled rapist. Such unsympathetic circumstances *increase* the value of the case in deciding whether to definitively outlaw the death penalty.

[16] Re guilt, Jones raised questions only re mental health (capacity to form intent). Re sentencing, questions were raised re evidentiary inclusions and exclusions. A few boilerplate unconstitutionality claims were also raised, as noted under point 7.

[17] A credible *Lackey* claim is invited by Breyer's express concerns as to the punishment implicit in recurrent and late stays of execution. Breyer dissent, at 21. *Lackey* claims are explained in my companion article, Glossip v. The Death Penalty: Does Oklahoma's Negligent Mock Execution Actionably Enhance Glossip's Lackey Claim?

[18] DNA and other exonerations give rise to estimates that about 4% of death row inmates are innocent (discussed below).

[19] *Furman*, at 285; Brennan concurrence.

[20] *Furman*, at 313; White concurrence.

According to *Furman's* majority, freakishly low execution rates are beyond this pale.[21] California's postconviction review delays give rise to a *Furman* arbitrariness claim because they cause the same extreme levels of infrequency that *Furman* outlawed on their face. In contrast to *Lackey* claims, *Furman* claims arise from the very fact that gross delays are *systemic*, i.e. the very opposite of unusual. In a *Furman* claim, what *is* unusual is an actual execution. What is cruel/barbaric/repugnant is the self-evident arbitrariness of the rare selection. A *Furman* claimant does not protest the agonizing *length* of his time on death row. He protests the capricious chance that it will be *shortened*.

Gregg v. Georgia, 428 U.S. 153, 193 (1976) reinstated the death penalty, after Georgia enacted safeguards against arbitrariness in death penalty sentencing, similar to those then recommended in the American Law Institute's model death penalty code. The changes included dividing trial into guilt and sentencing phases, a sentence of death requiring proof of at least one specified "eligibility" factor, plus consideration of any mitigating factors.[22] Most relevant, for our purposes, one of *Gregg's* two controlling pluralities explained (at 198) that Georgia's apparently adequate automatic appeal to the Georgia Supreme Court was an "important" consideration in finding compliance with *Furman;* and at 223-224 the other plurality approvingly detailed that appeal process, as applied.[23]

Four years later, *Godfrey v. Georgia*[24] held that Georgia's Supreme Court had failed to tailor the new sentencing rules narrowly enough to obviate standardless trial court sentencing discretion. Thus, postconviction processes are not only literally included in *Furman's "*imposing and carrying out the death sentence" scope, they are also an essential part of the processes wherefore *Gregg* approved and *Godfrey* disapproved Georgia's revised regime.

Changes similar to Georgia's were enacted wherever the death penalty was reinstated, but a new set of practical and political difficulties soon became apparent. In California, the supposedly narrowing statutory aggravations have multiplied so much that virtually all first-degree murders are eligible for the death penalty.[25] Despite requiring structured consideration of aggravating and mitigating circumstances, juries have not been required to articulate anything but their final vote—there need be no concurrence as to the proofs or weight of aggravating and mitigating factors. Most importantly, the requirement of accuracy through thorough appellate review entails either the sort of delays at bar, and/or politically unobtainable funding; while inadequate funding foreordains ineffective counsel issues and/or impossibly growing backlogs.[26] Even were funding adequate, the California Supreme Court could not catch up with the caseload generated by the state's guarantee of an automatic appeal to that court, nor is there any prospect of having lower courts take over the job.[27]

In the 1980s, frustration at postconviction review delays gave rise to perverse "death is different" doctrine. See, e.g., *Barefoot v. Estelle*, 463 U.S. 880 (1983) (summary procedures *especially* for capital cases upheld); *McCleskey v. Kemp*, 481 U.S. 279, 347 (1986) ("the Court relies on the very fact that this is a case involving capital punishment to apply a lesser standard of scrutiny"—Blackmun dissent); *Boyde v. California*, 494 U.S. 370, 388 (1989) ("I have long shared this Court's assessment that death is qualitatively different from all other punishments but I have never understood this principle to mean that we should review death verdicts with less solicitude"—Marshall dissent).

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[21] Hillary Clinton's proposal that the death penalty be reserved for the most extraordinarily egregious crimes (notably terrorism) is not *necessarily* up against *Furman*'s infrequency bar, which by and large presumed a relatively substantial death-penalty-eligible criminal population on which executions were inflicted with freakish rarity. See Hillary Clinton Comes Out Against Abolishing The Death Penalty, Huffington Post, Oct. 28, 2015. Of course, conceivable legitimacy does not imply good policy. For instance, in terrorism cases executions create martyrs and become rallying points for growing cycles of violence.

[22] States (including California) that allow aggravating factors beyond the eligibility factors are "weighing" states. See *Brown v. Sanders*, 546 U.S. 212 (2006). *All* mitigating factors offered must be considered. *Lockett v. Ohio*, 438 U.S. 586, 604-605 (1978). Typical aggravating factors would be a concomitant crime (e.g. robbery), a vulnerable/protected victim (e.g. child/policeman), especially heinous conduct, potential future dangerousness, prior acts of violence, and criminal record. Typical mitigating factors would be emotional state, whether under control of another, mental disability, childhood abuse, and good character.

[23] In *Woodson v. North Carolina*, 428 U.S. 280, 289-294 (1976; published with *Furman*), the primary plurality confirmed "*Furman's* basic requirement [included to] make rationally reviewable the process for imposing a sentence of death."

[24] *Godfrey v. Georgia*, 446 U.S. 420 (1980).

[25] California's Penal Code § 190.2 lists such special circumstances in 22 subsections, several of which are vague and broad, e.g. "lying in wait" (subsection 15). Subsection 17 lists *twelve* special circumstances: during a robbery, a carjacking, etc.

[26] This article does not address botched execution problems. I discuss them in Glossip v. The Death Penalty: Does Oklahoma's Negligent Mock Execution Actionably Enhance Glossip's *Lackey* Claim?, OpEdNews, October 2015.

[27] See the amicus brief of state legislators Loni Hancock, et al. (at 13 *et seq.*) re failed bills and hopeless prospects for, inter alia, "reducing the burdens on the California Supreme Court by providing for review and habeas relief in lower courts." A proposed 2016 state ballot touted as fixing appellate death penalty delays would not alleviate this hundreds-deep bottleneck, nor increase funding. See California death penalty is broken, sides agree, but how to fix it?, Orange County Register, Nov. 13, 2015. In 2015 there were only 14 new death sentences, but the Supreme Court did not begin to significantly reduce its backlog.

In the 1990s, courts began routinely dismissing decades-long-delay based *Lackey* claims. More jolting was *Herrera v. Collins*, 506 U.S. 390, 417, 426 (1993), which found *strong* new evidence of actual innocence insufficient for death row habeas relief—*only* "extraordinarily" strong new evidence *only might* suffice. To this day, whether extraordinarily strong new evidence of innocence suffices for federal courts to vacate a state death sentence remains a shockingly open question. These and many like cases led to *Furman* dissenter Blackmun's cathartic renunciation of the "machinery of death" in *Callins v. Collins*, 510 U.S. 1141, 1143-1159 (1994) (emphasis added):[28]

> *From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored — indeed, I have struggled — along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies.* ***The basic question — does the system accurately and consistently determine which defendants "deserve" to die? — cannot be answered in the affirmative.***

The Anti-terrorism And Effective Death Penalty Act of 1996 (AEDPA) was supposed to cure the death penalty's compounding problems, but the only effective relief came from cases nixing it—in 1987, re the insane; in 2002, re the retarded; in 2005, re juveniles; and in 2008, re all but murder/treason.[29] In 2009, based on a comprehensive report on the death penalty as practiced, the American Law Institute overwhelmingly voted to rescind its model death penalty code "in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment."[30] Since then, the situation has only grown worse.[31]

In 2015, Breyer's *Glossip* dissent (at 2) identified "three fundamental constitutional defects," as follows:[32]

> *In 1976, the Court thought that the constitutional infirmities in the death penalty could be healed; the Court in effect delegated significant responsibility to the States to develop procedures that would protect against those constitutional problems. Almost 40 years of studies, surveys, and experience strongly indicate, however, that this effort has failed. Today's administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability,[33] (2)*

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[28] Noonan's Ninth Circuit dissent in *Lewis* (a *Jones* precursor, discussed below) issued later that year (1994).

[29] *Ford v. Wainwright*, 477 U.S. 399 (1987); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005); *Kennedy v. Louisiana*, 554 U.S. 407 (2008). The last two of these opinions were drafted by swing-vote Kennedy, as were *Graham v. Florida*, 560 U.S. 48 (U.S. 51-17-2010) (ruling out life without parole for juvenile non-murders) and *Hall v. Florida*, 12-10082 (U.S. 5-27-2104) (disallowing a bright-line "IQ over 70" death penalty qualification). Kennedy's emphasis on the evolving national consensus and on the legitimating penological goals of retribution and deterrence are likely key to the future failure or success of the Breyer dissent. See The Most Ambitious Effort Yet To Abolish The Death Penalty Is Already Happening, Buzzfeed News, Nov. 8, 2015. Death penalty advocates are now spuriously? agonizing over the risks of bringing a case that might prompt Kennedy to reaffirm the death penalty's constitutionality. See The Odds of Overturning the Death Penalty, The Marshall Project, Nov. 16, 2015; Death Penalty Foes Split Over Taking Issue to Supreme Court, New York Times, Nov. 3, 2015. In this context, California would seem a poster-child for *Furman* arbitrariness, given its largest and oldest still-pending-review death row population.

[30] "What the institute was saying is that the capital justice system in the United States is irretrievably broken." No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code, 89 Texas Law Review 353, 360 (2010). But note the Institute's caveat that it "took no position on the desirability of the death penalty."

[31] See Bungled executions. Backlogged courts. And three more reasons why the death penalty is A Failed Experiment, Time Magazine, May 21, 2015; The Death Penalty Deserves The Death Penalty, New Yorker, Apr. 15, 2015; Death Penalty Dysfunction in 2015, Intercept, Dec. 11, 2015; The Death Penalty in 2015: Year End Report, Death Penalty Information Center.

[32] *Glossip* unsuccessfully challenged Oklahoma's lethal injection protocol as cruel and unusual.

[33] Glossip's conviction rests on nothing but dubious and rewarded accomplice testimony. See Oklahoma Inmate the Focus of Renewed Attention as Execution Date Nears, New York Times, Sep. 11, 2015; Richard Glossip and the End of the Death Penalty, New Yorker, Sep. 30, 2015. However, caselaw (e.g. *Herrera*) and statutes (AEDPA) disallow federal review of state death sentences even where new evidence raises strong doubt as to guilt. Glossip's innocence claim is also up against the verdict of *two* juries (a second trial was granted owing to ineffective counsel). A last-ditch petition, based on new evidence of actual innocence, was summarily rejected by the Supreme Court on September 30, 2015, with only Breyer publicly dissenting.

arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose.[34]

Breyer's dissent suggests that the Supreme Court might soon decide a death penalty case on landmark *sua sponte* (court-proposed) grounds, just as it did in *Furman*.[35] Of course, it is far better and ordinarily required that issues be first developed in lower courts,[36] and *Jones* (or, rather, California's dysfunctional death penalty system) squarely raises all three of Breyer's constitutional concerns. (1) The reliability of state death sentences was put at issue by the state's affirmative defense that its postconviction review delays assure reliability. (2) The district court affirmed *Furman's* arbitrariness bar, on the ground that the state's administration of the death penalty is dysfunctional owing to such delays. (3) Unconscionable delay is put at issue in the *Lackey* claim. In fact, despite the deference required by the Anti-terrorism And Effective Death Penalty Act of 1996, 60% of California's final death penalty decisions—which for most habeas petitions comprise "postcard denials"[37]—are vacated for constitutional error.[38]

The scope of the cases and death penalty studies cited by parties and amici in *Jones* is broad.[39] At a stretch, Breyer's dissent can be read as marshalling the various pro-Jones studies and theses. For example, Breyer's dissent and the amicus brief of the Innocence Project in *Jones* cite the same two studies finding that about 4% of death row inmates are innocent.[40] This implies that California's death row population of about 746 includes about 30 innocent inmates.

California has the largest death row population, and some of the longest postconviction delays. Appendix A in Carney's Order[41] lists the conviction dates and status of the 511 inmates then on death row who were sent there from 1978-1997, and whose review proceedings were not stayed because of mental incompetency. One can only guess why, e.g., Masters, sent to death row 5 years before Jones, is still waiting for his automatic appeal to be decided.

Carney's Order also cites retiring California Chief Justice George's 2008 denunciation of systemic death penalty dysfunction,[42] and a comprehensive 2008 California commission report on the state's administration of the death

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[34] In light of the court's duty to incorporate contemporary standards, Breyer's dissent adds a fourth factor: "Perhaps as a result, (4) most places within the United States have abandoned its use." (The great majority of counties in California have de facto done so.) The dissent reviews the diminishing use. Comprehensive historical, geographical, and topical death penalty data is available from the Death Penalty Information Center. See especially the page Death Penalty In Flux. Nebraska, is exemplary. A republican state, it's legislature recently abandoned the death penalty, primarily as an expensive sham. See How Nebraska Abolished the Death Penalty, Atlantic, May 27, 2015. This triggered a petition and its reinstatement, unless and until repealed in 2016 ballots. *Yet Nebraska has executed no-one for 20 years*, and does not have the drugs on hand to do so. See Nebraska to Vote on Abolishing Death Penalty After Petition Drive Succeeds, New York Times, Oct. 16, 2015. In 2016, California faces dueling pro and con death penalty ballots. See California death penalty is broken, sides agree, but how to fix it?, Orange County Register, Nov. 13, 2015. Eliminating the deathpenalty would moot *Jones*.

[35] The majority's radical "approach was not urged in oral arguments or briefs." *Furman*, at 397; Burger dissent.

[36] See: *Greenlaw v. United States*, 554 U.S. 237, 243 (2008) ("parties . . . frame the issues for decision"); The Claim of Issue Creation on the U.S. Supreme Court, 90 Am. Pol. Sci. Rev. 845, 845 (1996) ("creation of issues not raised in the record" disfavored).

[37] Oral hearing, Jones' counsel, at 5.

[38] Carney's Order, at 5. Such denials impose undue burdens on federal review, at least where habeas petitions are based on new evidence. Under AEDPA, federal courts review the "last reasoned decision" of state courts. *Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991). New evidence generally requires new reasoning. Federal courts must presume that the state court had a good reason for its action if any such reason exists, and so state court failures to articulate a reason mean that federal courts are forced, often unnecessarily, to figure out an appropriate reason.

[39] Amicus briefs were filed, by: the Innocence Project (pro); Correctional Lieutenant M Thompson (pro); Loyola Law School (pro); Loni Hancock, et al. (state legislators, pro); Murder Victims' Families, et al. (pro); Empirical Scholars, et al. (pro); Death Penalty Focus (pro); California Attorneys for Criminal Justice, et al. (pro); Habeas Corpus Scholars and Professors (pro); and the Criminal Justice Legal Foundation (con). Interest in the case caused the Ninth Circuit to create a special *Jones* page, with links to the briefs, the oral argument, and the opinion. And here is my oral argument transcript.

[40] "[R]esearchers estimate that about 4% of those sentenced to death are actually innocent. See Gross, O'Brien, Hu, & Kennedy, Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death, 111 Proceeding of the National Academy of Sciences 7230 (2014) (full-scale study of all death sentences from 1973 through 2004 estimating that 4.1% of those sentenced to death are actually innocent); Risinger, Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate, 97 J. Crim. L. & C. 761 (2007) (examination of DNA exonerations in death penalty cases for murder-rapes between 1982 and 1989 suggesting an analogous rate of between 3.3% and 5%)." Breyer dissent, at 7. *Cf.* amicus brief of the Innocence Project, at 6.

[41] The California Department of Corrections publishes a current list of condemned inmates here.

[42] "The existing system for handling capital appeals in California is dysfunctional and needs reform. The state has more than 650 [now 746] inmates on Death Row, and the backlog is growing." Carney's Order, 6.

penalty, which emphatically and with particularity found it dysfunctional, yet on which no action was taken.[43] The record also contains a fact-filled declaration by Michael Laurence, Executive Director of California's Habeas Resource Center, attesting to the Center's statutorily limited resources, and impossible litigation burdens.

Nevertheless, in *People v. Seumanu*, S093803 (Aug. 24, 2015), at 91-102 the California Supreme Court went out of its way to issue a unanimous 11-page advisory opinion, explicitly repudiating Carney's Order, thereby inviting a federal finding of futility in returning Jones to the state courts to exhaust his state remedies. Wherefore, nothing but judicial timidity stood and now stands in the way of a Ninth Circuit affirmance of Carney's drastic but commonsense declaration that California's death sentence now equates to "life in prison, with the remote possibility of death," and so, under *Furman*, is arbitrary and violates the Eighth Amendment.

4. The Great Writ Shrunk By AEDPA, Which *Jones* Remarkably Avoids

Jones petitioned the federal district court for a writ of habeas corpus. Traditionally, this "Great Writ" (rooted in Magna Carta) has been available as a final fallback for state felons, to correct constitutional mistakes, especially due process violations, resulting in their incarceration. But in 1996 the writ was narrowed by the Anti-terrorism and Effective Death Penalty Act, 28 U.S.C. § 2254, which the Supreme Court has drastically construed as anti-litigation.

AEDPA ordinarily allows a felon only one federal habeas petition, and requires that all claims brought be first litigated to the limit in the state courts except where "circumstances exist that render such process ineffective to protect the rights of the applicant," i.e. where exhaustion of state remedies is frustrated or futile. In *Jones*, Watford opined that Carney's Order should be reversed on the ground that Jones had yet to bring his supposedly novel claim in the state court. Novel or not, Jones did not raise his *Furman* claim in the state court, and so—assuming *arguendo* that Jones had raised the claim in the district court, rather than the court acting *sua sponte*—a showing of futility in returning to the state court is required in order for the federal courts to rule on its merits. As we shall see, *Seumanu* could not more clearly have informed the Ninth Circuit that a return to the state courts would be futile.

After a state ruling, AEDPA permits review of the state's final decision only if it is "contrary to clearly established federal law, as determined by the Supreme Court of the United States," or is "an unreasonable determination of the facts in light of the evidence." The Supreme Court insists that these terms be applied with *extreme* strictness. To be reviewable, a state's final decision must not only raise no trace of new law or any arguably distinguishing matter of fact, it must also have applied the very clearly established law beyond the bounds of reason. *Merely(!)* incorrect or erroneous state decisions cannot be reviewed.

A resume of the law is given in *Andrews v. Davis*, 09-99012 (9th Cir. 8-5-2015), at 19-21 (numerous Supreme Court citations omitted):

> *Under [AEDPA] the relevant Supreme Court precedent includes only the decisions in existence "as of the time the state court renders its decision." Thus, Supreme Court cases decided after the state court's decision are not clearly established precedent [] for purposes of evaluating whether the state court reasonably applied such precedent.*
>
> *A Supreme Court precedent is not clearly established law under [AEDPA] unless it "squarely addresses the issue" in the case before the state court, or "establish[es] a legal principle that 'clearly extends'" to the case before the state court. "[W]hen a state court may draw a principled distinction between the case before it and Supreme Court caselaw, the law is not clearly established for the state-court case." "[I]f a habeas court must extend a rationale before it can apply to the facts at hand, then by definition the rationale was not clearly established at the time of the state-court decision." A principle is clearly established law governing the case "if, and only if, it is so obvious that a clearly*

[43] California Commission on the Fair Administration of Justice, Final Report: Report And Recommendations On The Administration Of The Death Penalty In California (2008). The Commission comprised a bipartisan panel of prosecutors, criminal defense attorneys, law enforcement officials, academics, victims' rights representatives, elected officials, and a judge. The report (at 84) estimated that an annual budget increase of $137 million was needed to fix the death penalty as is, but the only new funding has been a lump sum of $3.2 million, allocated in 2015, to add 100 death row cells. See California's death row, with no executions in sight, runs out of room. L.A. Times, Mar. 30, 2015.

> *established rule applies to a given set of facts that there could be no fairminded disagreement on the question."*
>
> *A state court decision is "contrary to" Supreme Court precedent if "the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases." An "unreasonable application" of Supreme Court precedent is not one that is merely "incorrect or erroneous"; rather, "[t]he pivotal question is whether the state court's application of the [relevant Supreme Court precedent] was unreasonable". If "'fairminded jurists could disagree' on the correctness of the state court's decision," that decision is not unreasonable. A state court summary denial is an "unreasonable application" of Supreme Court precedent only if "there was no reasonable basis," for the decision in light of the "arguments or theories [that] . . . could have supported[] the state court's decision".*
>
> *The Supreme Court has made clear that [AEDPA] sets forth a "highly deferential standard[,] . . . which demands that state-court decisions be given the benefit of the doubt." "[AEDPA] stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings," but only "preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents" and "goes no further." "Even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." In a nutshell, "if this standard is difficult to meet, that is because it was meant to be."*

This year, the Supreme Court's Famous Five (Roberts, Scalia, Thomas, Kennedy, Alito) reversed the Ninth Circuit in holding that AEDPA deference extended to a California Supreme Court finding that a constitutional error by the trial court had not prejudiced the death penalty outcome. *Davis v. Ayala*, 13-428 (U.S. 6-18-2015) (at 9-12):

> *Ayala is entitled to relief only if the [constitutional] error was not harmless . . . For reasons of finality, comity, and federalism, habeas petitioners "are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.' . . . AEDPA's highly deferential standards kick in . . .Ayala therefore must show that the state court's decision to reject his claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement."*

Ayala is Hispanic, and he challenged a series of *seven* peremptory prosecutorial strikes of black jurors as race-based, which the trial court had permitted based on reasons *not disclosed to the defense*. The state supreme court found the nondisclosure to be a harmless error. The Ninth Circuit found the error prejudicial, and vacated the state decision. The U.S. Supreme Court overruled the Ninth Circuit on the ground that the state court's finding of no prejudice, even if erroneous, did not meet the "beyond any possibility for fair-minded disagreement" standard. In other words, Ayala could not prove *beyond reasonable doubt* that the trial court would have disallowed any of the seven strikes, had Ayala been afforded the required but denied opportunity to rebut the prosecutor's reasons for each of them.[44]

Small wonder that the author of the Ninth Circuit's reversed opinion, Judge Reinhardt, denounced AEDPA in The Demise Of Habeas Corpus And The Rise Of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences, 113 Mich. L. Rev. 1219 (2015), which begins as follows:

> *The collapse of habeas corpus as a remedy for even the most glaring of constitutional violations ranks among the greater wrongs of our legal era. Once hailed as the Great Writ, and still feted with all the standard rhetorical flourishes, habeas corpus has been transformed over the past two decades from a vital guarantor of liberty into an instrument for ratifying the power of state courts to disregard the protections of the Constitution.*

[44] *Ayala* is critiqued in The Destruction Of Defendants' Rights, New Yorker, June 21, 2015, and The Law That Keeps People on Death Row Despite Flawed Trials, New York Times, July 17, 2015.

Given the deference required by the U.S. Supreme Court's radical construction of AEDPA, it is astonishing that "60 percent of all [California] inmates [sentenced to death from 1978-1997] whose habeas claims have been finally evaluated by the federal courts were each granted relief from the death sentence by the federal courts."[45]

AEDPA deference is usually unavoidable. All claims must ordinarily be heard first by state courts, whose decisions are ordinarily unreviewable. But AEDPA deference does not apply to the *Furman* arbitrariness claim upheld in Carney's Order, because it was raised for the first time in the federal court. Together with the plain advice of *Seumanu* as to the futility of exhaustion in the state courts, this gives the lower federal courts a remarkable opportunity to fully weigh in on the controversial issue of death penalty dysfunction, before the matter reaches the Supreme Court. The California Supreme Court has spoken. Has the Ninth Circuit nothing to say?

5. *Furman's* Landmark Arbitrariness Claim

(i) *Furman's* Four Rules

In a one-paragraph majority (*per curiam*) preface, *Furman v. Georgia*, 408 U.S. 238, 240 (1972) announced that

> *the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth [] Amendment.*

It did so on various grounds that effectively nixed the death penalty as then administered nationwide.

By 1972, *mandatory* death sentences for specified crimes had long been abandoned, because they invariably resulted in significant numbers of jury nullifications of guilt. Wherefore, discretionary death sentencing became the rule.[46] *Furman* found arbitrariness at a time when "[j]uries (or judges, as the case may be) ha[d] practically untrammeled discretion to let an accused live or insist that he die."[47] Every justice wrote an opinion. There were five concurrences (Douglas, Brennan, Stewart, White, Marshall), and four dissents (Burger, Blackmun, Powell, Rehnquist). None of the concurrences were joined by any other justice.

Did any fundamental ground(s) for the holding underpin all five concurrences? As a landmark decision, and to answer this question, the numerous *Furman* opinions warrant meticulous reading, and copious quotations are appropriately provided below. Simply put, we ask what grounds if any are common to all concurrences? Racial and demographic biases are not argued by Brennan; the inevitability of mistaken guilt was not argued by Douglas; only Marshall (and arguably Brennan) found the death penalty beyond salvaging . . . Most commentators accordingly find no majority consensus, except on some choice ground.[48] The fact that such choices vary is telling.

Carefully read, *Furman's* five concurrences cohere on four related rules of law. As follows, the "evolving standards" rule sets the stage; the "arbitrariness" rule defines the claim; the "freakishly rare execution" rule is often overlooked; and the "care-in-sentencing" rule is often construed as *Furman's* only substantive holding:

(1) ***The Evolving Standards Rule***. The Eighth Amendment's "cruel and unusual punishment" clause reflects evolving standards of decency,[49] under which the death penalty was originally constitutional.

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[45] Carney's Order, 5.

[46] See *Woodson v. North Carolina*, 428 U.S. 280, 289-294 (1976) for a history of the death penalty. *Woodson's* pluralities held that reverting to a mandatory death penalty for first degree murder, although it would cure the inherently arbitrary *infrequency* of executions, nevertheless failed to meet *Furman's* care-in-sentencing requirements (at 303; emphasis added):

> *While a mandatory death penalty statute may reasonably be expected to increase the number of persons sentenced to death, it does not fulfill Furman's basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death.*

Donald Trump's campaign promise to mandate the death penalty for killing a cop fails to appreciate not only the President's inability to decree federal (let alone state) penalties, but also *Furman's* constitutional bar. See Trump: Death Penalty For Cop Killers, CNN, Dec. 11, 2015 ("Trump did not explain the legality of mandating a death penalty sentence via executive order").

[47] *Furman*, at 248; Douglas concurrence.

[48] See, e.g., An Unusual Burden: the Supreme Court's New Death Penalty Requirements, Harvard Political Review, Nov. 9, 2015 ("[*Furman*] conditions do not produce a consensus, but they do indicate the importance of evolving standards of decency").

[49] The court so held in *Trop v. Dulles*, 356 U.S. 86 (1958), in disallowing loss of citizenship to punish desertion in time of war.

(2) ***The Arbitrariness Rule.*** Under modern standards, the Eighth Amendment requires a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not,"[50] where "meaningful basis" means a fit correlation with purposes including deterrence and retribution.[51]

(3) ***The Freakishly Rare Execution Rule.*** Freakishly rare executions *per se* evince arbitrariness—Douglas, Brennan, Stewart, and White found the frequencies so small as to render inconceivable any such meaningful basis, while Marshall held that no such meaningful basis would exist at any positive frequency.

(4) ***The Care-In-Sentencing Rule.*** Without a regulated balancing of eligibility/aggravating and mitigating factors, death penalty sentencing is an arbitrary exercise of discretion—i.e. is based on impermissible factors, seen as random/happenstance and/or as biased by race/county, depending on the justice.[52]

(ii) *Furman's* Five Concurrences

The freakishly rare execution rule was soon forgotten because, at higher frequencies, arbitrariness is rebutted by showing sufficient care-in-sentencing, and because such showings have been the principle subject matter of post-*Furman* death penalty cases. See, e.g., *United States v. Mitchell*, 502 F.3d 931, 983 (9th Cir., 2007), where the court, after noting that there had only been three executions under the Federal Death Penalty Act (there are 60 inmates on the currently suspended federal death row), held:

> *That federal executions are rare does not render the FDPA unconstitutional. The relevant question — whether capital punishment in the abstract violates the Eighth Amendment — was answered in the negative by Gregg.*

However, *Gregg* (at 223-224) listed three separate *Furman* arbitrariness bars: "discriminatory, standardless, or rare."

Brennan most thoroughly elaborated the freakishly rare execution rule, in conjunction with the care-in-sentencing rule, as follows (*Furman*, at 291-295; emphasis added)):

> *[T]he deliberate extinguishment of human life by the State is uniquely degrading to human dignity. I would not hesitate to hold, on that ground alone, that death is today a "cruel and unusual" punishment, were it not that death is a punishment of longstanding usage and acceptance in this country. I therefore turn to the second principle — that the State may not arbitrarily inflict an unusually severe punishment.*
>
> *The outstanding characteristic of our present practice of punishing criminals by death is the infrequency with which we resort to it . . .*
>
> *When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system. The States claim, however, that this rarity is evidence not of arbitrariness, but of informed selectivity: Death is inflicted, they say, only in "extreme" cases.*
>
> *Informed selectivity, of course, is a value not to be denigrated. Yet presumably the States could make precisely the same claim if there were 10 executions per year, or five, or even if there were but one. That there may be as many as 50 per year does not strengthen the claim. When the rate of infliction is at this low level, it is highly implausible that only the worst criminals or the criminals who*

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[50] *Furman*, at 313; White concurrence.

[51] Despite their "welcome to groundhog day" introductory grouse, Scalia and Thomas go on to inveigh against *Furman's* settled rule that arbitrariness violates the Eighth Amendment's cruel and unusual punishment clause, and fatally undercuts the purposes of deterrence and retribution. *Glossip*, Scalia and Thomas concurrence.

[52] Wealth and gender are now on the list of statistically shown biases. The Breyer dissent in *Glossip* cited studies showing (1) *no* correlation between death sentences and the obvious egregiousness of the crime, and (2) *consistent* correlations with arbitrary factors including wealth, race, gender, and county/prosecutor, e.g. (at 12): "Between 2004 and 2009 . . . just 29 counties (fewer than 1% of counties in the country) accounted for approximately half of all death sentences imposed nationwide. [Citation.] And in 2012, just 59 counties (fewer than 2% of counties in the country) accounted for *all* death sentences imposed nationwide. [Citation.]" Thomas argued that bias per county was *intended* by the Sixth Amendment mandate requiring trial "by an impartial jury of the State and district wherein the crime shall have been committed." But Thomas cannot likewise excuse similar statistics showing bias re race and gender, which are unquestionably repugnant to the constitution.

> *commit the worst crimes are selected for this punishment. No one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison.* ***Crimes and criminals simply do not admit of a distinction that can be drawn so finely as to explain, on that ground, the execution of such a tiny sample of those eligible.*** *Certainly the laws that provide for this punishment do not attempt to draw that distinction; all cases to which the laws apply are necessarily "extreme." Nor is the distinction credible in fact. If, for example, petitioner Furman or his crime illustrates the "extreme," then nearly all murderers and their murders are also "extreme." [Citation.] Furthermore, our procedures in death cases, rather than resulting in the selection of "extreme" cases for this punishment, actually sanction an arbitrary selection. For this Court has held that juries may, as they do, make the decision whether to impose a death sentence wholly unguided by standards governing that decision. [Citation.] In other words, our procedures are not constructed to guard against the totally capricious selection of criminals for the punishment of death.*
>
> *Although it is difficult to imagine what further facts would be necessary in order to prove that death is, as my Brother STEWART puts it, "wantonly and . . . freakishly" inflicted, I need not conclude that arbitrary infliction is patently obvious. I am not considering this punishment by the isolated light of one principle. The probability of arbitrariness is sufficiently substantial that it can be relied upon, in combination with the other principles, in reaching a judgment on the constitutionality of this punishment.*

Make no mistake. Although much of this language is directed towards the imposition rather than the execution of the death penalty, Brennan's most often stated concern was with execution frequencies. In footnotes 40-44 at 291-292, Brennan *first* provided and discussed annual counts of executions, followed by the higher annual counts of death sentences, the difference being broken out into commutations, transfers to mental institutions, etc.

Stewart put it this way (*Furman*, at 309-310):

> *These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [] murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. [Citation.] But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments 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.*

Agreeing, White stressed how the capricious infrequency of "imposition and execution" defeated the death penalty's penological purposes of retribution and deterrence (*Furman*, at 311-313; emphasis added):

> *[J]udges and juries have ordered the death penalty with such infrequency that the odds are now very much against imposition and execution of the penalty with respect to any convicted murderer . . . [W]hen imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied. Nor could it be said with confidence that society's need for specific deterrence justifies death for so few when for so many in like circumstances life imprisonment or shorter prison terms are judged sufficient, or that community values are measurably reinforced by authorizing a penalty so rarely invoked . . .*
>
> *[A]s the statutes before us are now administered, the penalty is so infrequently imposed that* ***the threat of execution is too attenuated to be of substantial service to criminal justice. I need not restate the facts and figures that appear in the opinions of my Brethren . . . [T]he death penalty is exacted with great***

> ***infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not . . .***
>
> ***[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.*
>
> *The imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve. At the moment that it ceases realistically to further these purposes [] the emerging question is whether its imposition in such circumstances 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 with only marginal contributions to any discernible social or public purposes.* ***A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment****.*

Douglas (*Furman*, at 248 n. 11, 249) stated his "complete agreement" with Brennan, Stewart, and White re their above arguments as to "a capriciously selected random handful upon whom the sentence of death has in fact been imposed," and agreed that "*the extreme rarity with which applicable death penalty provisions are put to use raises a strong inference of arbitrariness*."

As discussed below, from Burger's dissent in *Furman* to the panel in *Jones*, the five *Furman* concurrences have been (mis)construed as giving rise to little if any consensus, or at best as to a consensus re care-in-sentencing. Conceding that the opinions of Stewart, White, and Douglas are in large part directed against unfettered trial court sentencing, they nevertheless count as votes certain as to the self-evident arbitrariness of freakishly rare executions. First, as Burger's below dissent stresses, in condemning rarity *per se*, the concurrences use extreme metaphors and adjectives (e.g. "struck by lightning," "freakishly rare," "handful") that on their face do not apply to the 15%-20% frequency of trial court death sentences among eligible first degree murderers. Second, if and to the extent that these concurrences *do* condemn the 15%-20% frequency of trial court death sentences as arbitrary, then they necessarily condemn the far lower frequency of executions with far greater force.

Marshall broadly repudiated the death penalty as discriminatory, immoral *per se* (noting the inevitability of mistaken guilt), purposeless, and so constitutionally excessive and arbitrary.[53] he found it. Although Marshall's arguments did not require the rarity of selection for death that the other four concurrences stressed, he did list the fact that "convicted murderers are rarely executed" as one of many reasons why by 1972 the death penalty had become unconstitutional—and the rarity of course added weight to his contentions re ineffective deterrence and retribution. *Furman* at 362-363. However, Marshall held that any number of executions would be unconstitutional.

Thus, freakishly rare executions were held unconstitutionally arbitrary in all five concurrences. Just such freakishly rare executions are precisely what Carney's Order finds unconstitutional.

(iii) *Furman's* Misleading Joint Dissent

A singularly cogent dissent by Justice Burger, in which all dissenters joined, effectively limited the concurrencies to the care-in-sentencing rule (*Furman*, at 397-399):

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[53] Marshall argued that the death penalty no longer served the purposes of: retribution; deterrence; recidivism; plea bargaining; eugenics; and economics. Re plea bargaining, Marshall's argument (at 355)—that to threaten death would unconstitutionally coerce a waiver of the Sixth Amendment right to trial—is no longer taken seriously. See Why Innocent People Plead Guilty, New York Review of Books, Nov. 20, 2014. Indeed, plea bargaining to reduce trial costs and to obtain testimony against accomplices is a prosecutorial rationale for retaining California's death penalty. California commission report, at 99. However, Marshall's concurrence cited *United States v. Jackson*, 390 U.S. 570 (1968), which held analogous *statutory* plea coercion unconstitutional—and *Jackson* remains good law. See *U.S. v. Seale*, 09-166 (U.S. 11-2-2009) ("[i]n 1968 this Court held that the death penalty provision in the old § 1201 was unconstitutional because it applied 'only to those defendants who assert the right to contest their guilt before a jury' "). Using the threat of death to obtain testimony against supposed accomplices gravely risks the conviction of innocents. Glossip was convicted on such inherently unreliable testimony.

> *The actual scope of the Court's ruling, which I take to be embodied in these concurring opinions, is not entirely clear. This much, however, seems apparent: if the legislatures are to continue to authorize capital punishment for some crimes, juries and judges can no longer be permitted to make the sentencing determination in the same manner they have in the past. This approach [was] not urged in oral arguments or briefs . . . The critical factor in the concurring opinions of both MR. JUSTICE STEWART and MR. JUSTICE WHITE is the infrequency with which the penalty is imposed . . . The decisive grievance of the opinions [] is that the present system of discretionary sentencing in capital cases has failed to produce evenhanded justice.*

Burger's dissent misleadingly disputed the majority's freakish rarity rule, as follows (*Furman*, at 386-391):

> *It cannot be gainsaid that by the choice of juries — and sometimes judges — the death penalty is imposed in far fewer than half the cases in which it is available. To go further and characterize the rate of imposition as "freakishly rare," as petitioners insist, is unwarranted hyperbole . . .[fn11] Although accurate figures are difficult to obtain, it is thought that from 15% to 20% of those convicted of murder are sentenced to death in States where it is authorized [] . . . And regardless of its characterization, the rate of imposition does not impel the conclusion that capital punishment is now regarded as intolerably cruel or uncivilized . . .*
>
> *The selectivity of juries in imposing the punishment of death is properly viewed as a refinement on, rather than a repudiation of, the statutory authorization for that penalty. Legislatures prescribe the categories of crimes for which the death penalty should be available, and, acting as "the conscience of the community," juries are entrusted to determine in individual cases that the ultimate punishment is warranted. Juries are undoubtedly influenced in this judgment by myriad factors. The motive or lack of motive of the perpetrator, the degree of injury or suffering of the victim or victims, and the degree of brutality in the commission of the crime would seem to be prominent among these factors. Given the general awareness that death is no longer a routine punishment for the crimes for which it is made available, it is hardly surprising that juries have been increasingly meticulous in their imposition of the penalty. But to assume from the mere fact of relative infrequency that only a random assortment of pariahs are sentenced to death, is to cast grave doubt on the basic integrity of our jury system . . .*
>
> *The rate of imposition of death sentences falls far short of providing the requisite unambiguous evidence that the legislatures of 40 [now only 32] States and the Congress have turned their backs on current or evolving standards of decency in continuing to make the death penalty available. For, if selective imposition evidences a rejection of capital punishment in those cases where it is not imposed, it surely evidences a correlative affirmation of the penalty in those cases where it is imposed.*

This is the argument that the *Furman* majority in both varied and coherent ways *overruled*. And the majority did so based not only on the 15%-20% rate of imposing the death sentence for murder *at trial*, but also based on the greater rarity of "imposing and carrying out" the death sentence.

Burger's misstatement that the *Furman* majority addressed only sentencing has been restated in a conclusory fashion in subsequent plurality opinions; and the correct recognition of *Furman's* care-in-sentencing rule has been recited as though *Furman* affirmed nothing else. The freakishly rare execution rule is all but forgotten. In an even more narrowing vein, the *Jones* panel ruled that *Furman* did not apply at all, simply, because Jones complained only of arbitrariness caused by a dysfunctional *postconviction* process.

Even supposing that *Furman* requires no more than care-in-sentencing, that care is utterly destroyed by a sentence review processes that almost never results in a final sentence. Carney's Order makes this elementary and controlling point at the outset, where he stresses that (at 1-2) "systemic delay has made . . . execution so unlikely that the death

sentence carefully and deliberately imposed by has been quietly transformed into one no rational jury or legislature could ever impose: *life in prison, with the remote possibility of death.*"

6. Judge Carney's Sua Sponte Surprise

(i) Judge Noonan's Precursor Dissent

Despite the amicus briefs, nowhere in the record of *Jones* is there any mention of Judge Noonan's dissent (joined by Judges Pregerson and Norris) in *Jeffers v. Lewis*, 38 F.3d 411, 425-428 (9th Cir. *en banc*, 1994). Albeit without citing *Furman*, Noonan urged the affirmance of a systemic arbitrariness claim against Arizona's administration of the death penalty, in essence identical to the claim affirmed in Carney's Order, especially in that both identify an incorrigible state supreme court bottleneck (citations omitted):

> *Between 1977 and 1992 one person was executed by the state of Arizona. In the same fifteen year period 103 persons were sentenced to death in Arizona. [N]ow . . . there are 117 persons under sentence of death in Arizona, and [] no one has been executed in 1993 or 1994. On the face of these facts it appears that the administration of the death penalty in Arizona is so arbitrary as to constitute cruel and unusual punishment in violation of the Eighth Amendment . . . This contention has not been advanced by Jeffers. But this court has the power when justice requires it to consider sua sponte questions of law "neither pressed not passed upon by the court or administrative agency below." Hormel v. Helvering, 312 U.S. 552, 557 (1941)*[54] *. . .*
>
> *Under the law of Arizona every sentence of death is automatically appealed to the Supreme Court of Arizona. The entire record is then reviewed by the court. The record in capital cases has a "voluminous nature." . . . The Supreme Court of Arizona has other appeals, civil and criminal, to decide in addition to death penalty appeals. Consequently, it has, in the years 1991 and 1992, decided only twelve death penalty appeals. In the same period twenty-two persons have been sentenced to death by Arizona trial courts. Capital Punishment 1992, p. 11, Appendix Table 2. The work load of the Supreme Court of Arizona alone assures that the number of persons under sentence of death in Arizona and unexecuted will increase if the trial courts continue to impose the death penalty at the same rate as they have imposed it in the past . . .*
>
> *The result in Arizona is that, as each case is reviewed for accuracy and fairness and each case with its volumes of transcripts passes under the eyes of the reviewing courts, the death sentences imposed have been carried out at the rate of one in seventeen years. To sentence many and execute almost none is to engage "in a gruesome charade." . . . although the death-worthy person is selected more rationally than the victim in a society practicing human sacrifice, his selection from the pool of death-worthy persons is arbitrary. In Arizona he is not chosen on a FIFO [First-In, First-Out] basis . . . Jeffers is scheduled for execution only because his case was advanced in the process by decisions that bear no rational connection to his special worthiness as a sacrifice; his selection from the pool was arbitrary. [A] sentence to live under a sentence of death is not a penalty prescribed by Arizona law; mock death cannot be substituted for the real thing. Prisoners cannot be turned into "dead men walking," as once they were at San Quentin in California. [Citation.] Finally, it is unconstitutional to induce a guilty plea by a threat that is itself*

[54] *Hormel* is not a credible authority for the broad judicial power to raise new claims "when justice requires it." This language is derived from statutes specific to reviewing IRS tax decisions. Moreover, *Hormel* cites in support only another IRS case, *Blair v. Oesterlein Mach Co.*, 275 U.S. 220, 225 (1927), in which the court actually ruled that it lacked the capacity to consider a less than exceptional suggested new question. The judiciary's inherent power to raise new claims (which escapes AEDPA) is better founded on its duty not to "issu[e] an opinion containing inaccurate and misleading statements about the meaning of the law." See The Limits Of Advocacy, Duke Law Journal Vol. 59, No. 3 446, 450 (2009).

> *unconstitutional, which the death penalty is if its administration is cruel and unusual.*

Without comment, the *Jeffers* majority declined to consider this ground for reversal, and so the dissent retains persuasive value.

Perhaps what is most surprising about Carney's Order is that it took two decades of continuing degradation before Noonan's commonsense sua sponte objection resurfaced. The long wait can be attributed to expectations of tolerable celerity raised by the so-called 1996 Anti-Terrorism and *Effective Death Penalty* Act.

(ii) Judge Carney's Finding Of Systemic Arbitrariness

Jones' state appeal included boilerplate attacks on the constitutionality of its death penalty, plus a *Lackey* claim. These were summarily dismissed as settled law by the California Supreme Court (*People v. Jones*, at 1267; citations settling each point omitted):

> *[T]he [state's] death penalty law is constitutional though it (1) does not require the jury to make specific written findings as to aggravating factors; (2) does not require that the jury return unanimous written findings as to the aggravating factors; (3) does not require that the jury be instructed on the presumption of life; (4) does not provide for intercase proportionality review.*
>
> *Defendant's argument that "one under judgment of death suffers cruel and unusual punishment by the inherent delays in resolving his appeal is untenable. If the appeal results in reversal of the death judgment, he has suffered no conceivable prejudice, while if the judgment is affirmed, the delay has prolonged his life."*[55]

Jones' individual *Lackey* claim is flat up against the fact that his appellate delays, however cruel, are not unusual. Indeed, they are *below* average in California.[56] To violate the Eighth Amendment, a punishment must be unusual *in that state at that time*.[57] As aforesaid, *Lackey* claims suffer a credibility problem that dismissals routinely exploit—being based on mentally torturous delay, a *Lackey* claimant never protests that his postconviction execution schedule is unfairly *prompt*, only that his wait is already too long. The delay is then excused as due to the inmate's having freely chosen to pursue the full panoply of review procedures, and it is pointed out that the inmate had neither filed a denied petition for prompt execution, nor had been the hapless victim of recurrent last-minute reprieves.[58]

Conversely, Jones' systemic *Furman* claim credibly rests on the fact that appellate delays are usual, and that his time on death row is threatened by an arbitrary *shortening*. The unfair/unusual shortening element is implicit in the allegation that actual executions are a random rarity. As Noonan's dissent and Carney's Order explain, the differences in delay that result only in rare executions accrue from circumstantial and procedural happenstance rather than from the "meaningful basis" that *Furman* requires. Given that the great majority of the condemned now die of natural causes,[59] why should *any* inmate be singled out for execution? In *Seumanu*, the California Supreme Court set forth a specific but patently inadequate answer to this question, as shown below.

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[55] This pooh-poohs the plight of inevitable innocents, who must wait decades for appellate attention, aging while their capacity to disprove guilt may be fatally impaired by the decay of evidence. Consider, e.g., the plight of Jarvis Masters, whose automatic appeal has yet to be decided, over 25 years after he was sent to death row. The amicus brief of Death Penalty Focus, at 11-14, features Masters as the only living one of three strong-actual-innocence-claim poster-children. *People v. Masters*, S016883.

[56] "Jones was sentenced to death in April 1995. [He] spent about eight years litigating his direct appeal[], considerably less time than the 12 to 14 years spent by most individuals on California's Death Row…[O]n March 11, 2009 the California Supreme Court denied Mr. Jones's petition in an unpublished order. [O]n March 10, 2010, Mr. Jones filed his petition for federal habeas relief." Carney's Order, at 14.

[57] *Everywhere*, the Eighth Amendment prohibits only barbaric punishment. See *Solem v. Helm*, 463 U.S. 277 (1983) (life without parole for seven non-violent felonies disallowed). But three-strike laws show how vanishingly weak this limit is. See *Rummel v. Estelle*, 445 U.S. 263 (1980) (life with parole possible after 12 years for an $80 credit card fraud, a $28 forged check, and $120 obtained by false pretense cruel but not unusual in Texas); *Lockyer v. Andrade*, 538 U.S. 63 (2003) (two consecutive firm 25 year sentences for stealing videotapes worth $150 from two K-marts in California not clearly disproportionate).

[58] A credible *Lackey* claim is argued in Glossip v. The Death Penalty: Does Oklahoma's Negligent Mock Execution Actionably Enhance Glossip's Lackey Claim?

[59] "For every one inmate executed by California, seven have died on Death Row, most from natural causes." Carney's Order, 17.

Judge Carney startled the legal world by preempting Jones' original federal habeas petition, which has yet to be heard, and which seems more or less doomed by AEDPA deference. *Sua sponte* (as detailed in point 10) Carney directed Jones to add a new claim, alleging systemic arbitrariness due to dysfunctional postconviction review processes, as explained in his Order Declaring California's Death Penalty System Unconstitutional, at 3, 14-15:

> *[P]ost-conviction review [] begins with a mandatory automatic appeal to the California Supreme Court . . . Mr. Jones amended [] his petition to broaden [his Lackey] claim of unconstitutional delay in California's administration of its death penalty system. Mr. Jones's new claim asserts that as a result of systemic and inordinate delay in California's post-conviction review process, only a random few of the hundreds of individuals sentenced to death will be executed, and for those that are, execution will serve no penological purpose.*

Citing *Furman* throughout, and without reaching Jones' original petition, Carney held that the administration of California's death penalty was cruel and unusual, in violation of the Eighth Amendment. The opening paragraphs of his order contain this synopsis (*Id.*, 1-3; emphasis in orig.; footnote added):

> *On April 7, 1995, [] Jones was condemned to death by the State of California. Nearly two decades later, [] 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.*[60] *Of the remainder, 94 have died 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.*
>
> *For [these], the dysfunctional administration of California's death penalty system has resulted, and will continue to result, in an inordinate and 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.*
>
> *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).*

(iii) The Irrelevant And Confusing *Lackey* Ruling In *Andrews*

Prior to the August 31, 2015 oral hearing in *Jones v. Davis*, the Ninth Circuit panel requested supplemental briefing on *Andrews v. Davis*, 09-99012 (9th Cir. 8-5-2015), because it addressed Carney's Order, and could conceivably bind the panel. Almost half of the oral hearing was wasted discussing *Andrews*—it is mentioned 50 times in pages 1-5 of my 8-page transcript. Yet ultimately *Andrews* was deemed ambiguous and beside the point.

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[60] In 2006, California halted executions owing to problems with its lethal injection protocol. A new protocol is slated for introduction in 2016. Had there been no hiatus, the number of executions since 1978 would still be only about 25, assuming the 1978-2006 rate. The difference is too small to conceivably change the legal analysis re Jones' *Furman* claim.

In the state and district courts, Andrews had raised a routine *Lackey* claim that was routinely dismissed.[61] On appeal to the Ninth Circuit, Andrews sought a certificate of appeal re his *Lackey* claim, which alleged that (*Andrews*, at 47)

> *his execution would violate the Eighth Amendment due to the long delay between his sentence and execution. Andrews . . . moved to file a supplemental brief raising this claim after a district court [Carney] issued a decision holding that under Furman [] California's death penalty system violated the Eighth Amendment because its "dysfunctional administration" resulted in "inordinate and unpredictable" periods of delay before execution, such that executions do not serve a retributive or deterrent purpose and will be arbitrary. See [Carney's Order] . . .*

In response, the state argued that the proposed claim, being based on Carney's Order and *Furman*, was distinct from the *Lackey* claim, and so must first be brought in the state court. But the court ruled (at 52, emphasis added):

> *Andrews's supplemental brief points to [Judge Carney's] conclusion that there are systemic delays in imposing the death penalty throughout the California system, **but uses this conclusion to support his Lackey claim** that "inherent delay in capital cases" renders executions unconstitutional.*

The district court's dismissal of the *Lackey* claim was then affirmed as having held that the state's dismissal of it was reasonable, and so beyond federal review, under AEDPA. The new claim upheld in Carney's Order was not at issue in *Andrews*, nor could it have been, since appeal lies only from the district court's denial of claims. By contrast, Jones' district court habeas petition did include the new claim.

Unfortunately, *Andrews* contained language *apparently* holding that the *Furman* claim upheld in Carney's Order was no different from a *Lackey* claim *(Andrews*, at 50-51):

> *The state asserts that there is a distinction between [Andrews'] Lackey claim[] and the Eighth Amendment claim based on [Carney's Order] he is raising here, such that the state courts lacked an opportunity to consider it. Specifically, the state argues that a Lackey claim is an individual challenge, based on the theory that executing a prisoner who has spent many years on death row violates the prohibition on cruel and unusual punishment of that prisoner, while Jones was based on the theory that the California system itself creates the constitutional infirmity, because inordinate delay makes the system arbitrary and unable to serve a deterrent or retributive purpose, in violation of the Eighth Amendment. We disagree.*

If *Andrews* is construed as bindingly holding that there is no difference at law between a regular *Lackey* claim and the *Furman* claim upheld in Carney's Order, then its comparative analysis is frivolous—it does not mention even *Furman's* sentencing rule. On the other hand, if, as is logically required, *Andrews* is construed as addressing only the additionally supported *Lackey* claim, then its comparative analysis is misleadingly worded, as shown by the inordinate time consumed debating this ambiguity at the oral hearing.

In sum, *Andrews* would be nothing but a distracting nuisance, were it not for the fact that its ambiguous content calls for clarification, adding to the reasons why an en banc Ninth Circuit panel should rehear *Jones*.

(iv) *Seumanu's* Advisory But Unequivocal Repudiation Of Carney's Order

In *People v. Seumanu*, S093803 (Cal. 8-24-2015) the California Supreme Court likewise confronted a *Lackey* claim that had been amended on appeal to cite Carney's Order in support. Far more intelligently, the *Seumanu* court found that Carney's Order affirmed an arbitrariness claim that was not at issue, being structurally distinct from the *Lackey* claim. Nevertheless, taking as true *all* of the facts referenced in Carney's Order, the California Supreme Court issued a full-fledged, 11-page advisory opinion that unanimously, roundly, and decisively repudiated Carney's Order, which it published one week before the oral hearing in *Jones v. Davis*. *Seumanu*, at 91-102.

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[61] *Andrews*, at 48. The California Supreme Court dismissed Andrews' *Lackey* claim summarily. The district court dismissed it on the merits, quoting the unequivocal language of Thomas' serial concurrences with denials of certiorari sought re *Lackey* claims, most recently in *Thompson v. McNeil*, 129 S.Ct. 1299 (2009) (quoting prior concurrences):

> *I remain "unaware of support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed."*

In supplemental briefs that the *Jones* court had requested re *Andrews*, and at the hearing, the parties in *Jones* responded to *Seumanu's* holding that Carney's Order raised a distinct arbitrariness claim. The state (Davis) accordingly argued that Jones had failed exhaust his state remedies.[62] Jones conversely argued that the advisory opinion added conclusive weight to his contention that a return to the state courts would be futile, therefore excusing exhaustion.[63] Jones' argument is compelling. *At its logical core, Seumanu unanimously erases the arbitrariness claim*, establishing futility beyond reasonable doubt. Indeed, to find otherwise would not only unnecessarily burden the state court, but also would offend, rather than respect, comity.

In three excerpts, here is the entire substance of *Seumanu's* advisory opinion. *Seumanu*, at 1-2:

> *Following [Carney's Order], holding that delays in implementing the California death penalty law rendered it unconstitutional under the Eighth Amendment to the United States Constitution, the parties filed supplemental briefs addressed to that issue. As explained below, we reject the Eighth Amendment claim and otherwise affirm the judgment in its entirety.*

Seumanu, at 92-93 (emphasis added):

> *As we explain, although* ***we do not in this case pass on the viability or legitimacy of what we will here call a "Jones claim," i.e., a claim that systemic delay in resolving postconviction challenges to death penalty judgments has led to a constitutionally intolerable level of arbitrariness in the implementation of the penalty****, we conclude that — assuming such a claim exists — it has not been proved here . . .*
>
> *[W]e have, in the past, rejected the claim that delay in deciding postconviction challenges in capital cases constitutes cruel and unusual punishment. As we explained in People v. Anderson (2001) 25 Cal.4th 543, "delay inherent in the automatic appeal process is not a basis for concluding that either the death penalty itself, or the process leading to its execution, is cruel and unusual punishment." [Citations.] "[T]he automatic appeal process following judgments of death is a constitutional safeguard, not a constitutional defect [citations], because it assures careful review of the defendant's conviction and sentence [citation]. Moreover, an argument that one under judgment of death suffers cruel and unusual punishment by the inherent delays in resolving his appeal is untenable. If the appeal results in reversal of the death judgment, he has suffered no conceivable prejudice, while if the judgment is affirmed, the delay has prolonged his life." (People v. Anderson, supra, at p. 606.) We have cited Anderson for this proposition many times since it was decided. [Citations.]*

Seumanu, at 99-102 (emphasis added):

> *[W]e will assume for purposes of argument that the facts before the Jones court are accurate. We will further assume for purposes of argument that Furman v. Georgia, supra, 408 U.S. 238, and its progeny are not limited to the earlier selection process from among the class of all murderers, but prohibit as well arbitrariness in the selection for execution from among those already adjudged guilty and deserving of the death penalty.*
>
> *Even operating under these twin assumptions, we conclude defendant has not, on this record, demonstrated that systemic delays have produced arbitrariness that is violative of the Eighth Amendment. Our conclusion would be different were the California Department of Corrections and Rehabilitation to ask all capital inmates who have exhausted their appeals to draw straws or roll dice to determine who would be the first in line for execution. But the record in this case does not demonstrate such arbitrariness. Unquestionably, some delay occurs while this court locates and appoints qualified appellate counsel, permits those appointed attorneys to prepare detailed briefs, allows the Attorney*

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[62] Oral argument transcript, at 1.

[63] Oral argument transcript, at 5-6.

General to respond, and then carefully evaluates the arguments raised, holds oral argument, and prepares a written opinion. Further delays occur when this court locates and appoints qualified counsel for habeas corpus, allows ample time for counsel to prepare a petition, and then evaluates the resulting petition and successive petitions. But such delays are the product of "a constitutional safeguard, not a constitutional defect [citations], because [they] assure[] careful review of the defendant's conviction and sentence." (People v. Anderson, supra, 25 Cal.4th at p. 606.) . . .

That some inmates will exhaust their appeals and collateral attacks sooner than others, that some will obtain relief on appeal or on habeas corpus and others not, is inevitable given the complexity of the judicial review process. These differences are not necessarily attributable to arbitrariness in the process of review under state law, but may instead represent the legitimate variances present in each individual case. ***Such differences may include variances in the nature of the underlying facts, the length of record, the quality of the briefing, and the complexity and number of issues raised by the parties. For some defendants the appointed attorneys will need more time to prepare and file an opening brief or habeas corpus petition due to the relative complexity of the issues involved, and the Attorney General will for the same reasons in some cases need additional time to respond. In some cases the trial record will take longer to certify as correct due to length or legitimate accuracy concerns.*** *That capital case appeals and habeas corpus petitions are not decided in a purely chronological first in, first out manner may simply reflect the variation in the cases and this court's individual consideration of each case, and thus not demonstrate any intrinsic arbitrariness within the meaning of the Eighth Amendment.*

Nor is it clear from the record before us (even assuming we may consider the facts before the Jones court) how the process may be labeled "arbitrary," given the innumerable variables in play that affect the overall delay in this court in resolving capital appeals and habeas corpus petitions. ***To characterize the system of reviewing death penalty judgments as arbitrary as a result of long postconviction delays suggests randomness or a lack of rationality. But allowing each case the necessary time, based on its individual facts and circumstances, to permit this court's careful examination of the claims raised is the opposite of a system of random and arbitrary review.*** *Without concrete evidence of the reasons why cases take as long as they do and why some cases take so much longer than others, we cannot conclude that postconviction delays affecting the imposition of a death sentence are arbitrary, let alone so arbitrary as to violate the Eighth Amendment.*

In sum, assuming for argument the facts before the court in Jones v. Chappell, supra, 31 F.Supp.3d 1050, were before this court, and further assuming that evidence of systemic delay could implicate a capital defendant's rights under the Eighth Amendment (i.e., a Jones claim), we conclude defendant has not on this record demonstrated that delays in implementing the death penalty under California law have rendered that penalty impermissibly arbitrary.

7. *Jones'* Finding Of Novelty Squelches *Furman's* Rare Execution And Care-In-Sentencing Rules

A rational person contemplating a murder . . . is confronted, not with the certainty of a speedy death, but with the slightest possibility that he will be executed in the distant future. Furman, at 302; Brennan concurrence.

[T]he death sentence carefully and deliberately imposed by has been quietly transformed into one no rational jury or legislature could ever impose: life in prison, with the remote possibility of death. Carney's Order, at 2.

(i) The *Jones* Panel Trivializes *Furman*

Regardless of all else, the Ninth Circuit should vacate *Jones'* unprecedented, clearly erroneous, on-the-merits finding that *Furman* in no way constrains freakishly rare executions or postconviction review processes.

The decision in *Jones* comprises a majority opinion authored by Judge Graber and joined by Judge Rawlinson, plus a concurrence by Judge Watford. The majority held that Jones' claim was novel and so barred, thus (*Jones*, at 5, 16):

> *Under Teague v. Lane, 489 U.S. 288 (1989), federal courts may not consider novel constitutional theories on habeas review. That principle "serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered." Sawyer v. Smith, 497 U.S. 227, 234 (1990). Because we conclude that [Jones'] claim asks us to apply a novel constitutional rule, we must deny the claim as barred by Teague . . .*
> *"A new rule is defined as a rule that was not dictated by precedent existing at the time the defendant's conviction became final." Whorton v. Bockting, 549 U.S. 406, 416 (2007) []. "And a holding is not so dictated . . . unless it would have been apparent to all reasonable jurists." Chaidez v. United States, 133 S.Ct. 1103, 1107 (2013).*

Without discussion, Watford agreed that "[t]he rule announced by the district court [is] undoubtedly 'new' for *Teague* purposes." Watford went on to find that the claim is a special exception to *Teague*, and instead denied it on the ground that, being new, it must first be filed in the state court.[64]

The unanimous finding of novelty begins by vaguely stating *Furman's* general arbitrariness rule (*Jones*, at 16):

> *[Jones] contends that the Supreme Court's decision in Furman [] dictates the relevant rule to apply here. He formulates the relevant rule as the district court did: "[A] state may not arbitrarily inflict the death penalty."*

The panel then insinuates that *Furman* does not constrain any postconviction processes, as follows (*Jones*, at 17):

> *Each of the five concurring justices [in Furman] filed a separate opinion in support of the judgments, but each opinion received only one vote — the author's . . . Justices Brennan and Marshall thought that the death penalty is unconstitutional in all its applications. [Furman], at 305, 359. The other three justices focused primarily on the fact that the state statutes provided no guidance to the fact-finder as to when the death penalty is appropriate, thus raising the possibility of discriminatory and arbitrary imposition.*

The carefully crafted 50-page, 54-footnote and 60-page, 165-footnote concurrences of Brennan and Marshall are thus bypassed, as beside the point.

Even had these justices been as impassively opposed to the death penalty as the panel imputes, that would be no reason to discount their opinions, as though peremptorily striking a committed death penalty opponent from a capital jury.[65] Their Supreme Court votes *a fortiori* count in favor of Carney's finding that California's death penalty is unconstitutional. Just so, in *Roper v. Simmons*[66] the U.S. Supreme Court routinely counted the twelve states that by then had eliminated the death penalty, as votes against its application to juveniles.

The *Jones* decision is far worse than timid. As we shall see, the opinions of the other three concurring justices are understated, and so is the key decision in *Gregg*, where each controlling plurality decisively affirmed the importance of adequate appellate processes under *Furman*. Moreover, the finding of novelty rests on a ludicrous "carrying out" contortion, with much ado about an unintelligible and irrelevant parallel, *Andrews*. Given the life-and-death subject matter and wide public interest in *Jones*, the apparently unnoticed but dispositive and precedential nonsense raises an even wider question as to dysfunctional review, at federal, professional and public levels.

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[64] For nonexhaustion of remedies,Watford needed only to find that the claim was distinct from those filed in the state court.

[65] Striking such jurors is permitted under *Lockett v. Ohio*, 438 U.S. 586, 595-597 (1978).

[66] *Roper v. Simmons*, 543 U.S. 551, 566 (2005).

(ii) *Furman's* Freakishly Rare Execution Rule Dictates Carney's Order

> *For Mr. Jones to be executed in such a system, where so many are sentenced to death but only a random few are actually executed, would offend the most fundamental of constitutional protections—that the government shall not be permitted to arbitrarily inflict the ultimate punishment of death. See Furman, 408 U.S. at 293 (Brennan, J., concurring) ("When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system.").*
> Carney's Order, at 19.

Unquestionably, Carney's Order stakes out a classic freakishly-rare-execution *Furman* arbitrariness claim.

In *Furman*, both Brennan and Marshall held the death penalty unconstitutional only in light of circumstances pertaining in 1972,[67] notably including the rarity of *execution*. Thus, Marshall affirmed that "convicted murderers are rarely executed" as one of many facts rendering the death penalty by then unconstitutional.[68]

Brennan most thoroughly expounded the arbitrariness inherent in freakishly rare executions, listing annual counts of executions, death sentences, commutations, transfers to mental institutions, et alia.[69] After noting that death *sentences* from 1961-1970 averaged 106 per year, the lowest being 85 in 1967, he posited that an annual rate of 50 U.S. *executions* per year—well above the freakishly rare execution rate that gave rise to the *conclusive* finding of arbitrariness—would give rise to a strong *presumption* of arbitrariness:

> *Even before the moratorium on executions began in 1967, executions totaled only 42 in 1961 and 47 in 1962, an average of less than one per week; the number dwindled to 21 in 1963, to 15 in 1964, and to seven in 1965; in 1966, there was one execution, and in 1967, there were two. When a country of over 200 million people inflicts an unusually severe punishment no more than 50 times a year, the inference is strong that the punishment is not being regularly and fairly applied. To dispel it would indeed require a clear showing of nonarbitrary infliction.*[70]

Given the lower (freakishly rare) rate of executions by the mid-1960s, Brennan concluded that (*Furman*, at 294):

> *Crimes and criminals simply do not admit of a distinction that can be drawn so finely as to explain . . . the execution of such a tiny sample of those eligible.*

Preferable statistics are now readily available,[71] but Brennan's 50 executions per year can be roughly scaled to fit *Jones*. Given that California has about one tenth of the nation's population, which was about 300 million by the late 1990s, Brennan imputes that an annual California execution rate as low as (50/10)*(300/200) = 7 or 8 would require a strong showing of nonarbitrary infliction. Before the 2006 moratorium, from 1978-2006 California executed only 13 people—i.e. *less than one every two years*. But the most telling count in *Jones* is the frequency of fully final death sentences, rather than executions, since Jones' complaint is only against systemic delays in the review process. That number, which is unaffected by the moratorium on executions, is about 30 from 1978-2014,[72] i.e. *less than one*

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[67] After recognizing that the Framers did *not* intend to outlaw the death penalty, and that Supreme Court cases had allowed it, Brennan stated that "the question is whether the deliberate infliction of death is *today* consistent with the" Eighth Amendment. Marshall likewise recognized that the Framers and the Supreme Court had affirmed the death penalty, the question being whether "capital punishment is *no longer* consistent with . . . the Eighth Amendment," given that "time works changes, and brings into existence new conditions and purposes." *Furman*, at 283-285, 315, 323-324; emphasis added.

[68] *Furman* at 362-363.

[69] *Furman*, at 291-292, n. 40-44.

[70] *Furman*, at 293.

[71] An update to *Furman's* freakishly rare analysis would include executions per death sentence, which singularly reflects post-conviction processes. Per state, Executions Per Death Sentence from 1977-2010 are published by the Death Penalty Information Center. California's rate is 1.5%. Highest is Virginia (72.5%), followed by Texas (49.8%), Utah (36.8%), Missouri (34.7%), Delaware (31.1%), Oklahoma (30.5%), and Montana (30%). Of the 32 current death penalty states, 14 have rates below 10%.

[72] Appendix A of Carney's Order shows that by 2014 there were 17 stayed and 13 carried out executions. See footnote 7.

per year. This is the level of rarity that *Furman* held conclusive as to arbitrariness.[73] Thus *Furman* directly dictates Carney's Order.

Furman's other three majority justices confirm this mandate. For each, the *Jones* panel provided a terse quote showing concern at the lack of sentencing standards.[74] I need not reproduce these quotes because, while unfettered trial court sentencing may indeed have been the justices greatest concern, they of course presumed appellate review to assure the accuracy and appropriateness of death sentences, and they also recognized that arbitrariness was inherent in freakishly rare executions, e.g.:

> *These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual . . . the Eighth Amendment[] 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.*
> *Furman* at 309-310 (1972); Stewart concurrence.

> *[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and [] there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.*
> *Furman* at 313; White concurrence.

> *[Re the] capriciously selected random handful upon whom the sentence of death has in fact been imposed . . . I am in complete agreement [with the above statements of Stewart and White.]*
> *Furman* at 248 n.11; Douglas concurrence.

It seems improbable that such extremes as "struck by lightning," "freakishly" and "handful" were directed at the 15%-20% rates cited by the main dissent, of trial court death sentences per eligible first-degree murder conviction.[75] But if and insofar as they were, then they even more strongly must impeach the far lower frequencies of final death sentences and executions.

(iii) *Furman's* Care-In-Sentencing Rule Dictates Carney's Order

The panel's reduction of *Furman* to a rule excluding sentence *review* processes requires full explanation, since it was dispositive, and since, as the *Jones* majority itself reports (*Jones*, at 17; emphasis added):

> *In a short per curiam opinion joined by five justices, the Court held that "the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment."*

Despite *Furman's* express inclusion of the "carrying out" phase of the death penalty, and its many references to execution rates—and note well that "imposition and carrying out" and "imposition and execution" are used interchangeably in *Furman*[76]—the panel mistakenly concludes that Jones proposes a new rule of law simply because he alleges arbitrariness in "carrying out" the death penalty, rather than in the trial court's determination of the sentence of death (*Jones*, at 20, 25; emphasis added):

> *[Jones] asserts the legal theory that the delay in carrying out executions among all capital prisoners represents a form of arbitrary infliction of the death penalty . . . Importantly, there is a "simple and logical difference" between Furman's rule prohibiting unfettered discretion by a jury deciding whether to impose the*

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[73] Disregarding this, *Seumanu* perversely places the burden of proof on Jones to show arbitrariness (at 102):

> *Without concrete evidence of the reasons why cases take as long as they do and why some cases take so much longer than others, we cannot conclude that postconviction delays affecting the imposition of a death sentence are arbitrary, let alone so arbitrary as to violate the Eighth Amendment.*

Even supposing that the rarity of executions in *Jones* establishes only a rebuttable presumption of arbitrariness, the state cannot rebut it with an "it's the best we can do" excuse. *Seumanu* (at 101-102) in a conclusory fashion states that the de facto selection of so few for execution is not arbitrary because the unpredictable differences in postconviction delays are due to the extra time needed to assure that *Furman's* reliable sentencing requirements are met. But under *Furman*, these differences are *on their face* arbitrary, *because they have nothing to do with the reprehensibility of the crime or criminal*.

[74] *Jones*, at 17-18.

[75] Jones' counsel made this argument at the oral hearing, as quoted in footnote 80. Re this dissent, see point 5(v).

[76] To see this, search for "imposition and" in *Furman* or in the *Furman* quotes herein.

> *death penalty and a rule prohibiting systemic lengthy delays resulting from a state's post-sentencing procedures in the carrying out of that sentence when permissibly imposed.*

Not only does *Furman* embrace "carrying out" the death sentence, but *Jones* targets delays only in review processes that must finish before the sentence of death is final—or, rather, in the review processes wherefore a sentence final enough to be carried out is imposed only with freakish rarity. Even after a final state sentence, it is not until federal review of substantial issues is finished that the sentence becomes final enough to "begin to be carried out."[77]

In *Jones*, the state itself recognized that Jones attacks review processes that occur "*before* carrying out" a capital sentence (opening brief, at 43-44emphasis added):

> ***B. The System for Reviewing Capital Sentences in California Is Lengthy Because It Is Designed to Avoid Arbitrary Results, Not to Produce Them***
> *. . . California's system recognizes the profound importance of providing careful judicial review before carrying out a capital sentence.*

Jones' complaint is that the sentencing process is finished in only a tiny fraction of cases, for contingent and post-facto causes that *have nothing to do with the egregiousness of the crime or with mitigating/aggravating merits*. Note well that the injury of which Jones complains is not delay *per se*, as it is in his *Lackey* claim, but the arbitrariness inherent in death penalty regimes that result in freakishly rare executions. The delay is systemic, and is such that the careful trial court sentencing required by *Furman* does not become final 98.5% of the time.[78]

Even supposing that *Furman* required rigor in nothing but trial court sentencing, that rigor is destroyed by dysfunctional review processes that arbitrarily does not deselect only a freakish few of the so sentenced—and note that a criminal sentencing regime's de facto operation governs.[79] Again, *Furman* dictates Carney's finding of arbitrariness, this time per its care-in-sentencing rule.

(iv) The "Carrying Out" Carry-On

By finding that California's death sentences had been transformed into "life in prison, with the remote possibility of death," Carney's Order succinctly invoked both *Furman's* freakishly rare execution rule and its care-in-sentencing rule. The former rule being forgotten, the panel's oversight in *Jones* is par for the course. But the panel's tricky avoidance of the purportedly recognized care-in-sentencing rule requires explanation.

Unfortunately, overlooking the fact that confirming a death sentence through the review process is an integral part of the sentencing process, at one point Carney's Order itself suggested that *Furman* did not concern postconviction processes, as follows (Carney's Order, at 19):

> *Furman specifically addressed arbitrariness in the selection of who gets sentenced to death. But the principles on which it relied apply here with equal force. The Eighth Amendment simply cannot be read to proscribe a state from randomly selecting which few members of its criminal population it will sentence to death, but to allow that same state to randomly select which trivial few of those condemned it will actually execute. Arbitrariness in execution is still arbitrary, regardless of when in the process the arbitrariness arises.*

In its opening brief, the state transformed the correct but irrelevant point that "arbitrariness *in execution*" was no different, into a winning proof that a "fundamentally different issue" was at bar, thus (opening brief, at 40):

> *Furman, however, addressed a fundamentally different issue: arbitrariness in the selection of who is sentenced to death. The Supreme Court has subsequently described Furman as holding that the death penalty may "not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." Gregg, [] at 188 (plurality opinion.).*

The *Gregg* quotation suppresses the explicit findings of both *Gregg* pluralities re appellate processes, as detailed in the next point. Construing "sentencing procedures" as including sentence review procedures, the above *Gregg* quotation directly applies: California's death penalty is "imposed under sentencing procedures" that result in

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[77] See footnote 6.

[78] See footnote 71.

[79] *Mullaney v. Wilbur*, 421 U.S. 684, 699 (1975) ("operation and effect of the law as applied and enforced by the State").

sentences being ultimately "inflicted in an arbitrary and capricious manner." The very fact that trial court sentences *are* equitably imposed implies that the ultimate infliction only of a tiny subset of them is *not* equitable.

Fatally, Jones' answering brief fully endorsed the trial-court-only sentencing distinction, by dropping "imposition and" from the phrase "imposition and carrying out" (answering brief, at 2; emphasis added):

> *In the district court, Mr. Jones – as had the petitioners in Furman – presented a wealth of statistical evidence demonstrating that California's process for carrying out the death penalty violates the Eighth Amendment.*

Uh-oh. Jones' statistical evidence had nothing to do with "carrying out" the death penalty (i.e. with death warrants, last wishes, injection protocols, and the like), except insofar it included the freakishly rare execution counts—and these ultimate counts are inessential, the already freakishly rare final death sentence counts being sufficient.

The mislabeling should not have mattered, given *Furman's* per curiam inclusion of "carrying out." But the literal inclusion lulled Jones into arguing only that it was a distinction without a difference, in any case covered by *Furman*. This argument served only to fix the misconceived distinction, which became the panel's centerpiece excuse for altogether discounting *Furman*.

All this is apparent in an exchange re the spurious distinction, at the August 31, 2015 oral hearing. Jones' counsel restressed *Furman's* inclusion of "carrying out" the death penalty, and then went the extra mile to argue that this inclusion was not an inadvertence, by pointing out that the freakish rarities of concern to *Furman's* majority were far more extreme than the trial court sentencing infrequencies that the main dissent estimated at 15%-20%.[80] The result was a panel even more convinced that Jones took no issue whatsoever with the state's sentencing regime, and that this fundamentally distinguished *Furman*, e.g. (*Jones*, at 25):

> *Importantly, there is a "simple and logical difference" between Furman's rule prohibiting unfettered discretion by a jury deciding whether to impose the death penalty and a rule prohibiting systemic lengthy delays resulting from a state's post-sentencing procedures in the carrying out of that sentence when permissibly imposed.*

Still, given *Furman's* explicit "carrying out" inclusion, how *did* the panel manage to dispositively affirm the very opposite—that *Furman* actually did *not* apply to the "carrying out" phase? It did so by cleverly contrasting the positions of petitioners Furman and Jones (*Jones*, at 24; emphasis in orig.):

> *First, unlike the prisoners in Furman, [Jones] does not allege arbitrariness at sentencing. Instead, he alleges that the State "arbitrarily" determines when to carry out a lawfully and constitutionally imposed capital sentence. Second,*

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[80] JUSTICE GRABER: [T]hat was a *completely* different issue in that in *Furman* the question was "In which cases is the death penalty imposed by the court?" and *here* the question is, assuming that the process that led to the imposition of the death penalty was proper, the question is "Now what? What about all the people who are properly convicted, properly sentenced to death, when are they executed?" It doesn't seem to me that that's the question that *Furman* asked or answered.

JONES' COUNSEL: I respectfully disagree. The per curiam decision in *Furman*, which is the decision of the majority of the court, clearly said that they were looking at not only the imposition of a death sentence, but carrying out the death sentence, and five members of the court found that *both* of those processes . . .

JUSTICE GRABER: But the issue in the case, it wasn't teed up the way this is teed up.

JONES' COUNSEL: I again respectfully disagree. What the justices looked at was not only *who* was sentenced to death. That was certainly a major aspect of what the court was looking at, and in footnote 11 Chief Justice Burger explained that between 15 and 20% of those individuals who are eligible for death were actually sentenced to death. But *every other member of the court* looked at also how rare those executions actually occur, and that particular issue was the focus of the arbitrariness. In Justice Stewarts' words that "the randomness of the imposition of capital punishment, its carrying out, was cruel and unusual in the same sense that being struck by lightning was cruel and unusual," and I don't see *any* distinction between whether or not somebody is properly sentenced to death and then is allowed to linger on death row 30 years, or 40 years, as California's system has done so, whether or not the randomness and arbitrariness that was condemned in *Furman* exists today.

JUSTICE RAWLINSON: The question is whether or not the Supreme Court has *articulated* that as being arbitrary. That's the difficulty I'm having with your argument, is there has to be *clearly* established Supreme Court precedent on that particular point. The imposition of the death penalty as opposed to the duration of the confinement on death row.

JONES' COUNSEL: Your question raises several issues, the first of which is whether or not conditions after the sentencing of death can form the basis for an Eighth Amendment violation . . .

> *[Jones] does not contend that the State has granted unfettered discretion to a fact-finder to decide on an execution date.*[81]

The vacuity of the second point underscores the forced narrowing of *Furman* to govern only sentencing *at trial*. The tricks that accomplish this lie in using the phrase "*at* sentencing" and in characterizing the review process as resolving "*when* [rather than *whether*] to carry out" the "constitutionally imposed" sentence. The phrase "*at* sentencing" does not appear in *Furman*. The panel adopts it to impute that only trial court sentencing proceedings were at bar in *Furman*, so that whatever *Furman* might have held re postconviction proceedings could only be dicta.

But arbitrariness *at* sentencing is the key finding of Carney's Order, as stated at the outset (at 2; emphasis in orig.):

> *[T]he 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.*

Moreover, under *Furman* a capital sentence is not "constitutionally imposed" unless and until adequate review processes are finished with. *Appellate review is part of the sentencing process*, and was understood as such in *Furman*. Published the same day as *Furman*, the plurality in *Woodson v. North Carolina* affirmed that "*Furman's* basic requirement [included to] make rationally reviewable the process for imposing a sentence of death." Subsequent decisions, including *Gregg*, unambiguously confirm this.

(v) *Gregg's* and *Godfrey's* Appellate Process Findings

From *Gregg*, the Jones' panel (at 18) quotes the plurality opinion of Justices Stewart, Powell, and Stevens,[82] and then that of Justices White, Burger, and Rehnquist,[83] *only where they seem to address sentencing at trial*, imputing that this is *Furman's* full scope. As follows, the *Jones* panel suppresses the fact that both *Gregg* pluralities held that *Furman* applied to postconviction review (*Jones*, at 18-19):

> *The Court in Gregg held that the amended Georgia statutes — which provided new substantive standards to guide the fact-finder's selection of punishment and new procedures, such as bifurcated guilt and penalty trials — met the concerns expressed in Furman. Id. at 206-07 (plurality opinion); id. at 208, 220-26 (White, J., concurring).*[84]

The importance of *review* processes was in fact affirmed by the Stewart plurality thus (*Gregg*, at 198):

> *As an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for automatic appeal of all death sentences to the State's Supreme Court. That court is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a*

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[81] The panel continued:

> *Nor does [Jones] contend that the State intentionally chooses an execution date through a truly random selection process, such as a lottery. Instead, he contends that the delays in processing capital prisoners' statutorily guaranteed appeals are long, such that few prisoners are ever actually executed, a result that [Jones] describes as "arbitrary" because it is hard to predict which prisoners in fact will be executed.*

Ironically, a lottery would be arguably fairer. A prediction that one sentenced to death would not be executed would be correct 98.5% of the time (see footnote 71), and it is clear that a 20 year old is more likely to be among the very unlucky few than a 50 year old. What is complained of is not so much unpredictability as the fact that the selection is discriminatory (or random *at law*), having nothing to with egregiousness, mitigation, or aggravation, *as required by Furman*. Moreover, intentional state conduct *is* at bar, per the longstanding underfunding of review processes, which has knowingly let matters go from bad to worse.

[82] Namely: "*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." *Gregg*, at 188-189; this is also quoted in the state's brief.

[83] Namely: "*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg*, at 220-221.

[84] Having thus summarized *Gregg*, the majority in *Jones* spent the next couple of pages (19-21) wondering whether *Jones* had merely restated his *Lackey* claim, since *Lackey* was also based on postconviction delays; whether it was bound in deciding this by *Andrews* having seemingly ruled that *Jones* raised only a *Lackey* claim; and whether it was bound to dismiss *Jones* under the *Lackey* cum no-penological-purpose precedent of *Smith v. Mahoney*, 611 F.3d 978, 998 (9th Cir. 2010). In the end, the only thing that mattered was that *Smith* did not apply, because it "did not address the theory that systemic delays have led to results that are unconstitutionally 'arbitrary.'"

> *statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases. [Citation.] In short, Georgia's new sentencing procedures . . . seem to satisfy the concerns of Furman. No longer should there be "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."*

Likewise, the concurring White plurality spent two pages detailing how Georgia's automatic appeal procedure had in the case at bar met the concerns of *Furman* as to accurate and appropriate sentencing. It did so immediately after summarizing *Furman* as requiring that the court perform "the task of deciding whether in fact the death penalty was being *administered* . . . in a discriminatory, standardless, *or rare* fashion," *Gregg*, at 223-224; emphasis added.

The task of deciding whether in fact California's death penalty is being administered in an impermissibly rare fashion is precisely the task that Carney performed, under *Furman*. Of course, 40 years later and in a different state, the facts in *Jones* are superficially new. But the actionable fact of rarity is essentially the same as in *Furman*. That delays in California's appellate procedures result in freakishly rare *final* sentences of death (and so also executions) is not a novel theory, but a matter of counting. From 1978-2014 there were only 30 final sentences (including 13 executions). This being undisputed, *Furman's* freakish rarity rule directly applies.

The directness of application distinguishes *Jones* from *Sawyer* (and its ilk), which the panel cited for having held that a question as to whether certain prosecutorial statements rendered a death sentence unreliable raised a novel question under *Teague*, where an earlier case held that *dissimilar* prosecutorial statements had done so. What *Furman* held was that *any* death penalty regime resulting in freakishly rare executions was arbitrary. The fact that renders Jones' claim actionable is the very level of infrequency that *Furman* outlawed as inherently arbitrary.

The *Jones* panel announced (*Jones*, at 25; "post-sentencing" here means "post-trial"):

> *[W]e know of no other case in the four decades since Furman was decided that has invalidated a state's post-sentencing procedures as impermissibly arbitrary under the Eighth Amendment, strongly suggesting that the rule is novel.*

Really? In the above quotation from the Stewart plurality in *Gregg*, Georgia's new death penalty regime was approved only because it "*seem[ed]* to satisfy the concerns of *Furman*." Four years later *Godfrey v. Georgia* held that Georgia's Supreme Court had failed to tailor the new trial court sentencing rules narrowly enough to obviate standardless sentencing discretion.[85] The substance of Carney's Order is a *Godfrey*-like matter-of-fact finding that the appellate process in California is insufficient under *Furman's* care-in-sentencing rule.

No reasonable jurist could dispute that the state's administrative failure to finally confirm trial court death sentences in all but a tiny number of cases renders its sentencing regime beyond *Furman's* "meaningful basis" bound, and so again *Jones* does not raise a novel claim under *Teague's* new rule standard.[86]

Thus *Jones* avoids *Teague*'s novelty bar on two counts.

8. Even If Jones' Claim Were Novel, Nonretroactivity Would Not Apply

Even if Carney's Order did affirm a new claim, *Teague* would not apply because: (1) *Teague's* rationale presumes that state *convictions* are upset; and (2) *Teague* excepts substantive rules and "watershed" procedural rules.

First, in applying *Teague* the *Jones* majority relied on *Sawyer's* explanation that nonretroactivity "serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the

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[85] A plurality comprising Justices Stewart, Blackmun, Powell, and Stevens held (*Godfrey*, at 432):

> *[T]he validity of the petitioner's death sentences turns on whether, in light of the facts and circumstances of the murders that he was convicted of committing, the Georgia Supreme Court can be said to have applied a constitutional construction of the phrase "outrageously or wantonly vile, horrible or inhuman in that [they] involved . . . depravity of mind . . . ." We conclude that the answer must be no.*

The concurring Justices, Brennan and Marshall, (*Godfrey*, at 433-434)

> *agree[d] with with the plurality that the Georgia Supreme Court's construction of the provision at issue in this case is unconstitutionally vague under Gregg v. Georgia, 428 U.S. 153 . . . [in that it] upheld the jury's finding with a simple notation that it was supported by the evidence.*

[86] This "reasonable jurist" standard is applied throughout *Jones*, at 5, 16, 22, 23, 24, 26.

finality of state convictions valid when entered."[87] This rationale on its face does not apply to Carney's Order simply because it does not "upset the finality of state convictions." It sets aside every sentence of death, *without changing a single conviction*; and, as a matter of undisputed fact, instead of requiring retrials, Carney's Order will *reduce* the burdens on California's penal system and on its fisc.[88]

Teague's rationale was grounded on both the repose and the deterrence implicit in finality. *Teague*, at 306. Carney's Order would not confound but compel repose, and would do so statewide, by taking the death penalty off the table, at least pending structural administrative reforms, if not for the foreseeable future. Nor would Carney's Order effectively reduce deterrence, there being no effective deterrence to be reduced, per *Furman's* finding that freakishly rare executions negate both deterrence and retribution.[89]

Second, to quote Watford's minority opinion (*Jones*, at 28-29; emphasis in orig.):

> *The Teague bar does not apply to new rules of substantive law. Schriro v. Summerlin, 542 U.S. 348, 352 n.4 (2004). The rule announced by the district court . . . is substantive rather than procedural . . . [T]he effect of the district court's ruling is to categorically forbid death as a punishment for anyone convicted of a capital offense in California. A rule "placing a certain class of individuals beyond the State's power to punish by death" is as substantive as rules come. Penry v. Lynaugh, 492 U.S. 302, 330 (1989).*

The majority argued, apparently setting a precedent, that the new rule sought was procedural. The category "all death row inmates" was deemed not to sustain a substantial rule, whereas *lesser* subcategories such as "insane death row inmates" were substantial (*Jones*, at 27):

> *[Jones] does not assert that he fits into one of the traditionally recognized classes of persons whose "status" is an intrinsic quality, such as insanity or intellectual disability. Instead, [Jones] argues that he — and all California capital prisoners — belong to [the affected] class of persons . . . Under [Jones'] view, almost any procedural rule could be characterized as substantive merely by defining the petitioner as belonging to a class of persons with the "status" of those whose convictions or sentences were obtained through an unconstitutional procedural rule. We reject [Jones'] unconventional interpretation of the exception for substantive rules.*

Even assuming that the rule announced is procedural rather than substantive—and a possibility of correctional reform would arguably imply this—the same considerations would compel the conclusion that it is a "watershed" rule, avoiding *Teague's* bar. For the rule is a matter of life and death to hundreds, and it is fundamentally unfair that, owing to factors having nothing to do with reprehensibility, only a tiny percentage of those sentenced are de facto selected for execution. Moreover, even if the death penalty were not at bar, a "watershed" rule is proposed, in that adequate (versus dysfunctional) appellate review is a "bedrock procedural element designed to protect the fairness of criminal proceedings,"[90] to quote *Teague's* definition of a "watershed" rule.

The majority dispensed with *Teague's* "watershed" procedural rule exception as follows (*Jones*, at 26 n.6):

> *The second exception applies to a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceedings." Whorton, 549 U.S. at 417 []. [Jones] does not argue that his proposed rule falls within that "extremely narrow" exception.*

Herein, "the general rule that an appellate court will not consider sua sponte arguments not presented or urged by the litigants" does not apply because the "watershed" exception *was* presented by the litigants, and both parties "ha[d]

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[87] *Sawyer v. Smith*, 497 U.S. 227, 234 (1990); *Jones*, at 5, 21, 22, 23, 24, 27, 28.

[88] Just so, a new rule against sentencing juveniles to life *without parole* was held retroactive (in part) because "[e]xtending parole eligibility to juvenile offenders does not impose an onerous burden on the States, nor does it disturb the finality of state convictions." *Montgomery v. Louisiana*, 14-280 at 24 (U.S. 2016-01-25). According to California officials, eliminating the death penalty will save about $150 million per year, after paying for the alternative of life without parole. See Death Penalty Showdown Expected in 2016, KPCC, Nov. 30, 2015. The 2008 California commission report cited in Carney's Order (at 10, 84) estimated $125 million (growing) annual savings. See also http://www.deathpenaltyinfo.org/costs-death-penalty#financialfacts.

[89] See, e.g., *Furman*, at 302-303.

[90] Re the fundamental nature of the criminal right to appeal, see my companion article Overdue Process And The Death Penalty.

the opportunity to offer all the evidence they believe[d] relevant."[91] In the opening brief and in the reply brief, the state argued against the "watershed" rule exception, by characterizing Carney's Order as "focus[ing] only on the pace at which the State carries out postconviction review in different cases."[92] By failing to pay the slightest heed to the hundreds-fold life-and-death stakes, and to the fundamental unfairness in selecting freakishly few for execution based on factors having nothing to do with reprehensibility, this argument, and the majority's casual aside as to the exception being extremely narrow, ring so hollow as to sound self-defeating.

Of course it is not uncommon for courts to

> *note[] that the parties had failed to raise key issues that might have produced a different holding. Judges regularly insert such qualifications into their decisions to avoid establishing precedent on a question not fully briefed by the parties . . . When a court couches its opinion in such tentative terms, it has abandoned its law-pronouncement function in favor of resolving the dispute on the parties' terms. While this may be the best solution in some cases, it [is not in others].*[93]

Given the wide public interest in *Jones*, the extraordinary efforts of Carney and of ten amici, the many lives in the balance, and the longstanding systemic dysfunction that is taken as true, the majority's buried refusal to consider *Teague's* uncomplicated and potentially dispositive "watershed" procedural rule exception, simply because one of the two parties did not reach it, has the appearance of inappropriate and inexpedient evasion.[94]

9. *Seumanu* Unequivocally Establishes The Futility Of Exhaustion

In *Jones*, the state dispensed with the futility question as follows (opening brief at 28-29):

> *Some courts of appeals have found futility where the state's highest court recently addressed the same legal issue and resolved it adversely to the petitioner, see, e.g., Sweet v. Cupp, 640 F.2d 233, 236 (9th Cir. 1981) (collecting cases*[95]*), but it is debatable whether those cases remain good law. The year after Sweet, the United States Supreme Court [] stated that "[i]f a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim." Engle v. Isaac, 456 U.S. 107, 130 (1982). The California Supreme Court has never addressed the novel Eighth Amendment theory adopted by the district court. In People v. Seumanu, Cal. S. Ct. No. S093803, the parties recently filed supplemental briefs addressing the "arbitrariness" theory. The California Supreme Court has not yet scheduled argument in that case.*

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[91] *Nuelson v. Sorensen*, 293 F.2d 454, 462 (9th Cir., 1961). Moreover, even an unargued issue can be raised sua sponte to avoid "doing violence to the statutes which give federal appellate courts the power to modify, reverse or remand decisions 'as may be just under the circumstances.' 28 U.S.C.A. § 2106." *Id.* Likewise, "[w]hen [a] claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs. Inc.*, 500 U.S. 90, 99 (1991).

[92] Opening brief, at 16, 17, 33, 26, 37; reply brief, at 15-16.

[93] The Limits Of Advocacy, Duke Law Journal Vol. 59, No. 3 446, 473-474 (2009).

[94] Tellingly, the majority discussed other issues that it did not reach. In particular, *Seumanu's* explicit repudiation of Carney's Order was noted. *Jones*, at 13-14. This commonsense reading of *Seumanu* indicts Watford's forced reading of *Seumanu*, as *inviting* Jones to return the state court—just as Watford's commonsense indicts the majority's finding of no *Teague* exception.

[95] "A number of circuits have held that a petitioner may be excused from exhausting state remedies if the highest state court has recently addressed the issue raised in the petition and resolved it adversely to the petitioner, in the absence of intervening United States Supreme Court decisions on point or any other indication that the state court intends to depart from its prior decisions. E. g., *Franklin v. Conway*, 546 F.2d 579, 581 (4th Cir. 1976); *Stubbs v. Smith*, 533 F.2d 64, 68-69 (2d Cir. 1976); *Sarzen v. Gaughan*, 489 F.2d 1076, 1082 (1st Cir. 1973); *Lucas v. Michigan*, 420 F.2d 259, 261 (6th Cir. 1970); *Reed v. Beto*, 343 F.2d 723, 725 (5th Cir. 1965), aff'd on other grounds sub nom. *Spencer v. Texas*, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967). We adopt the futility doctrine because it promotes comity by requiring exhaustion where resort to state courts would serve a useful function but excusing compliance where the doctrine would only create an unnecessary impediment to the prompt determination of individuals' rights." *Sweet*, at 236. *Sweet* ultimately ruled out futility only in light of an intervening Supreme Court decision having rendered the prior decisions obsolete.

This admits that the then pending *Seumanu* decision might provide grounds for futility per *Sweet*. In *Engels*, the court also recognized that futility *could* be shown by prior adverse state rulings, in holding that prior adverse rulings in the case before it were no longer definitive in light of a recent Supreme Court decision that the state court had yet to consider, which Engels could and should have argued in that court. By contrast, albeit only as *dicta*, *Seumanu* directly ruled out the *very* claim set forth in *Jones*.

The majority opinion in *Jones* recognized the implied futility, but, having found nonretroactivity under *Teague*, this was a dictum.[96] Conversely, Watford vacated Carney's Order solely because of Jones' failure to exhaust his state remedies,[97] ruling out futility as follows (*Jones*, at 32):

> *The majority opinion suggests that requiring exhaustion would be a futile exercise because the California Supreme Court recently rejected the same claim at issue here in a case on direct appeal, People v. Seumanu, 61 Cal. 4th 1293, 1368-75 (2015). Maj. op. at 13-14, 15. I am not convinced. The court in Seumanu did say that, assuming all of the facts presented to the district court in Jones' case were true, it would not find the claim meritorious. 61 Cal. 4th at 1375. But the court sent conflicting signals on that score. It emphasized that its review of the claim was hamstrung by "the inadequate state of the record," as the case was before the court on direct appeal "and review is limited to facts in the appellate record." Id. at 1372. And its rejection of the claim was hardly definitive. The court rejected it only for purposes of the direct appeal, and expressly stated that the claim "is more appropriately presented in a petition for habeas corpus, where a defendant can present necessary evidence outside the appellate record." Id. at 1375. Far from signaling that Jones' filing of a new habeas petition raising the same claim would be futile, the court seemed to invite such a filing.*

It seems bizarre to read *Seumanu's* unanimity and extraordinary extra effort, which included reviewing therein inadmissible evidence,[98] as an invitation to send *Jones* back in the state court, so that it can *really* make up its mind. Why would the California Supreme Court go so far out of its way to disguise an open-minded invitation as a knock-out punch? And *Seumanu* does knock-out *Jones*.

The majority in Jones recognized this, as follows (Jones, at 13-14):

> *[I]n Seumanu[, at 102] . . . [t]he California Supreme Court unanimously held:*
>
> > *Assuming for argument the facts before the court in Jones were before this court, and further assuming that evidence of systemic delay could implicate a capital defendant's rights under the Eighth Amendment . . ., we conclude defendant has not on this record demonstrated that delays in implementing the death penalty under California law have rendered that penalty impermissibly arbitrary.*
>
> *In other words, even though [Jones] may not have formally exhausted his claim by raising it personally to the state courts, we have an unusual insight into the state court's view of [Jones'] claim. For this reason, too, we decline to subject this federal case to further delay.*

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[96] *Jones*, at 12-14.

[97] Watford also stated that (*Jones*, at 31-32):

> *The only relief Jones seeks on this claim is invalidation of his death sentence . . . requiring Jones to endure some period of additional delay by returning to the California Supreme Court will not prejudice his rights, given the nature of the relief he seeks.*

If there really were no prejudice in returning to the state court, why would Jones now seek a rehearing in the Ninth Circuit? There is clear prejudice in the fact that the foreordained state court loss would comprise a decision that federal courts would likely defer to, under AEDPA. I am not privy to the reason why Jones plans to petition for a rehearing rather than welcome further delay in returning to the state court, but it would seem that he prefers to risk an earlier execution date in light of his better chances of either a favorable final federal decision, or a few months even further delay in the event of an unchanged federal decision.

[98] This evidence included "two declarations by the Director of the Habeas Corpus Resource Center, neither of which is in the record before us or properly subject to judicial notice." *Jones*, at 98-99.

More to the point, and without the slightest conflicting signal, *Seumanu* restates and repudiates the simple and sole foundation of Carney's Order, its core point being as follows (*Seumanu*, at 101-102; emphasis added):

> *[D]ifferences [in delays] may include variances in the nature of the underlying facts, the length of record, the quality of the briefing, and the complexity and number of issues raised by the parties. For some defendants the appointed attorneys will need more time to prepare and file an opening brief or habeas corpus petition due to the relative complexity of the issues involved, and the Attorney General will for the same reasons in some cases need additional time to respond. In some cases the trial record will take longer to certify as correct due to length or legitimate accuracy concerns . . . To characterize the system of reviewing death penalty judgments as arbitrary as a result of long postconviction delays suggests randomness or a lack of rationality. But* ***allowing each case the necessary time, based on its individual facts and circumstances, to permit this court's careful examination of the claims raised is the opposite of a system of random and arbitrary review.***[99]

Given this unanimous holding that the matter-of-record delays at bar cannot *by any stretch* be characterized as arbitrary, there is no hope whatsoever for *Jones'* claim, since it rests on no more and no less than the allegation that such delays are arbitrary under *Furman*.

The state court could not more certainly have given notice of the futility of Jones returning to the state court, nor could it more flagrantly flout *Furman's* arbitrariness rules. *Furman's* "meaningful basis for distinguishing the few cases in which [a death sentence is imposed and carried out] from the many cases in which it is not" rests on fit consideration of *the reprehensibility of the crime and of the criminal*, versus on happenstance.[100] Indeed, mitigating factors must be considered so as to minimize the effect of adverse happenstance—i.e. of unfortunate circumstances beyond the criminal's control. As Brennan put it, the problem is that "*[c]rimes and criminals* simply do not admit of a distinction that can be drawn so finely as to explain . . . the execution of such a tiny sample of those eligible."[101]

The fact that incidental circumstances rationally explain why only 1.5% of death sentences become final is what *makes* the arbitrariness claim in *Jones*. In diametric opposition, *Seumanu* unambiguously and unanimously holds that the very same incidental facts *unmake* the claim. For necessary and expedient causes, of course some cases take more or less time to review. But reason, nature, due process, equal protection, and the Eighth Amendment place bounds on the time taken and on variation in the times taken. On its five-fold face, *Furman* denounces death penalty regimes under which entirely *post facto* incidentals, such as the unavailability of counsel and the size and complexity of the record, de facto operate as almost always dispositive mitigating factors. *Furman's* "meaningful basis" insists that selection for the death penalty demonstrably depend on *reprehensibility* factors. To quote Blackmun's renunciation of the death penalty, "[t]he basic question — does the system accurately and consistently determine which defendants 'deserve' to die? — cannot be answered in the affirmative."[102]

New or not, Jones did not first file the claim in the state court. Had he done so, the federal court would in a position to set aside the state's decision on two grounds that no reasonable jurist could dispute, namely, (1) that just such rarity of executions was barred by *Furman* as inherently arbitrary, and (2) that in any case *Furman* on its face disapproved death penalty regimes wherein the ultimate selection for execution in the great majority of cases rests on factors having nothing to do with the reprehensibility of the crime or the criminal.

Should Jones be barred from maintaining his highly developed federal claim now, even after the district court directed him to add it, and even after the state court went out of its way to issue the advisory opinion in *Seumanu*? With the claim well-pleaded and thoroughly briefed, and with en banc review in any case warranted to vacate the erroneous finding that *Furman* has nothing to do with freakishly rare executions or postconviction processes, it would seem incumbent on the Ninth Circuit to promptly decide the merits, if only in the interests of expediency. In

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[99] *Seumanu's* "careful examination" assurances do not jive with the fact that "60 percent of all [California] inmates [sentenced to death from 1978-1997] whose habeas claims have been finally evaluated by the federal courts were each granted relief from the death sentence by the federal courts." Carney's Order, at 5.

[100] *Seumanu's* being categorically against Carney's Order would nix AEDPA deference, were it not advisory. *McKinney v. Ryan*, No. 09-99018 (9th Cir. 12-29-2015). But since *Seumanu* is only advisory, AEDPA deference is not triggered.

[101] *Furman*, at 294.

[102] *Supra*, page 6.

any case, and looking beyond expediency, the prompt resolution of a major life-and-death uncertainty for 746 condemned inmates would seem a winning consideration.

10. The Unmentioned But Governing *Sua Sponte* Standard

> *As the third branch of government, federal judges are assigned the task of settling the meaning of disputed questions of law, not just for the parties, but for all who must comply with it. Furthermore, they must do so free from outside influence. As a result, courts have the power to look beyond the parties' arguments when failing to do so would lead to an inaccurate or incomplete description of the law.*
>
> *[J]udicial issue creation is not a deviant act of judicial overreaching, [but it] operates mostly under the academic radar and without explanation or support."*[103]

I changed the title of this article from "Jones v. The Death Penalty" to "Judge Carney v. The Death Penalty" so as to reflect the sua sponte essence of Carney's Order. The panel in *Jones* ignored this essence, as did Carney's Order itself.[104] But in the opening brief, at 8-10, the state recounted Carney's "sua sponte" raising of the new claim by an April 14, 2014 Order Directing Petitioner To File Amendment To Petition, as follows:

> *This Court believes petitioner may have a viable claim . . . THEREFORE, THE COURT ORDERS . . . [that Jones] shall serve and file an amendment to his operative petition for writ of habeas corpus alleging [a] claim that the long delay in execution of sentence in his case, coupled with the grave uncertainty of not knowing whether his execution will ever, in fact, be carried out, renders his death sentence unconstitutional.*

Jones was not *invited* but *ordered* to file the new claim, which on July 16, 2014 Carney's Order elaborated and affirmed, citing *Furman*. Carney's Order is thus sua sponte *in essence*, created as a matter of judicial discretion.[105] Therefore, the review standard asks whether, taking as true the allegations of longstanding dysfunction in the administration of a death penalty now imposed on 746 inmates, Carney abused his discretion by raising the new claim sua sponte. If not, then the merits of the claim are reached.

The *Jones'* panel expressly took as true the allegations "that California's capital punishment system is dysfunctional and that the delay between sentencing and execution in California is extraordinary." *Jones*, at 28. Accepting that Carney had not abused his discretion by sua sponte raising the question as to whether these circumstances violated the Eighth Amendment, the panel should have reached that question, regardless of novelty and nonretroactivity.

Instead, the panel adjudicated the new claim exactly as though originally raised by Jones, under AEDPA. That's inappropriate. In directing that the new claim be filed, the district court exercised not a right to petition under AEDPA, but its Article III power to raise inextricably intertwined new issues *when* and as necessary and proper, and

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[103] The Limits Of Advocacy, Duke Law Journal Vol. 59, No. 3 446, 452, 455 (2009).

[104] Carney's Order (at 14) states only that:

> *Jones amended [] his petition to broaden the nature of his claim of unconstitutional delay in California's administration of its death penalty system. [The] new claim asserts that as a result of systemic and inordinate delay in California's post-conviction review process, only a random few of the hundreds of individuals sentenced to death will be executed, and for those that are, execution will serve no penological purpose.*

Carney's Order treats the new claim *exactly* as though ordinarily filed under AEDPA. In fact, it was *not* so filed, nor can AEDPA apply to a nominal filing by a petitioner *who even lacks the capacity to fully comply*. Jones could not possibly have obtained a state court decision before the time in which he had to file the new federal claim. Jones drafted the new claim as directed, and Carney read it back just so. In this, Jones was an agent of the court. Jurisdiction accrues directly from the court's proper exercise of its sua sponte power; and reviewing courts must construe all sources of jurisdiction implicit in the record. No one doubts that the new claim is in sum and substance Carney's sua sponte surprise, and the law must duly follow this flagship fact.

[105] "Quietly, [] sua sponte decisionmaking has become *de rigueur*," but "there is no articulated set of criteria for determining when such power should [] be exercised." Some Concerns About Sua Sponte, 73 Ohio St. L. J. Furthermore 27 (2012). For a set of appropriate considerations, see "The Discretionary Nature Of Sua Sponte Decisionmaking," at 31-36, which begins:

> *[S]ua sponte decisionmaking [lies on] a spectrum . . . At the most permissible end of the spectrum, one might place decisions that seem to be mandatory, such as dismissals for lack of subject-matter jurisdiction.*

Carney's Order lies at the least permissible end of the spectrum, but is extraordinarily justified, as shown below.

to assign the development of a suitably argued record. No legislation can override the judicial power to say what the law is, including by raising new issues sua sponte if and as necessary and proper. A federal court's power to raise new issues, so as to properly resolve cases or controversies already before it, is not mentioned in AEDPA. Besides, any statute that purported to narrow that power would be up against the separation of powers.[106]

Unfortunately, due to the general lack of articulated sua sponte standards, the only *express* justification given for Carney's sua sponte action is that the "Court believes Jones may have a viable claim." This reason alone is obviously insufficient. The implied reason is that the court deems the ongoing systemic dysfunction no longer passively tolerable—a justification spelled out and substantiated plainly enough in Carney's Order. As a practical matter, there are sound reasons for a district court to exercise such sua sponte discretion.[107]

Historically, there is remarkably *direct* support for Carney's Order in the sua sponte dissent of Ninth Circuit Judges Noonan, Pregerson, and Norris, over twenty years ago, in *Jeffers v. Lewis*.[108] Albeit without citing *Furman*, Noonan explicitly urged the sua sponte ("justice requires it") raising and affirmance of a systemic arbitrariness claim against Arizona's administration of the death penalty, in essence *identical* to the claim affirmed in Carney's Order. Both describe an intolerable state supreme court bottleneck.

Carney's sua sponte action also finds strong support as to ripeness and all-round reasonableness in the nine pro-Jones amicus briefs; in the lack of any complaint as to his sua sponte initiative; and especially in Breyer's *Glossip* dissent a year later, which as aforesaid marshals the various theses posited by the amici in *Jones*.

Moreover, the unequivocal repudiation of Carney's Order by a unanimous California Supreme Court in *Seumanu* cements Carney's commonsense judgment as to the need for a federal decision.

Last but not least, *Furman* itself is a spot-on sua sponte precedent. As Burger's dissent pointed out, the majority's radical "approach was not urged in oral arguments or briefs." *Furman*, at 397.

Neither the state nor Jones suggested that Carney's Order should be reviewed as affirming a claim raised sua sponte, which means that *this* new contention, as to the sua sponte source of trial court jurisdiction and the corresponding standard of review, must itself be raised *sua* (or more correctly *nostra*) *sponte*, by the Ninth Circuit, in deciding the petition for rehearing. The standards to be applied are matters of district court jurisdiction,[109] and so also of appellate jurisdiction, which the court of appeal has a routine duty to independently determine. A regular cause for raising issues sua sponte is "[t]he judiciary's interest in protecting the constitutionally demarcated limits on its authority."[110]

The panel's automatic application of AEDPA's jurisdictional limitations was mistaken, because Carney exercised an extraordinary sua sponte power in introducing the new claim. The court of appeal may be mindful of and guided by AEDPA's limiting/jurisdictional terms, but the *Jones'* panel was gravely mistaken to deem those terms as controlling a judicial power that by definition is an exceptional form of *ancillary* jurisdiction.[111] As noted in

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[106] The off-point nature of the panel decision in *Jones* is illustrated by the contrast with *United States v. Quinones*, 313 F.3d 49 (2nd Cir., 2002). In *Quinones*, not confronted by AEDPA distractions, Judge Rakoff sua sponte raised the question as to whether the *Federal* Death Penalty Act was unconstitutional in light of the inevitable innocents that fortuitous DNA exonerations had by then concretized. ("I will tell you one issue that I would think might be helpful to the court to have briefed." *Id.*, at 53.) Rakoff then issued his preemptive finding of unconstitutionality; and the Second Circuit court of appeal negatively answered the question with the same directness. *Quinones* was followed in *United States v. Mitchell*, 502 F.3d 931, 983 (9th Cir., 2007).

[107] See, e.g., the recommendations of Amanda Frost re district courts (The Limits Of Advocacy, at 512):

> *[A]s a practical matter, district courts are in the best position to raise new issues because they need not be as concerned about finality, or the possibility of prejudice, as an appellate court considering whether to raise a new issue sua sponte. At the pretrial stage, the parties can explore factual questions essential to the new legal issue, and there is far less disruption to settled expectations than when an issue is injected by a court further down the line. Thus, while district courts have slightly less compelling reasons to raise new issues than appellate courts, doing so comes with fewer costs to the litigants. Furthermore, by raising overlooked issues early on, district court judges can avoid putting appellate courts into the difficult position of choosing whether to insert a new legal question into litigation at the eleventh hour.*

[108] *Jeffers v. Lewis*, 38 F.3d 411, 425-428 (9th Cir. *en banc*, 1994).

[109] Exhaustion of remedies (when not waived) *operates as* a procedural prerequisite to jurisdiction, while retroactivity *operates as* a subject-matter prerequisite. These bars do not apply to Carney's sua sponte new claim. (Note that I am not here using the term "jurisdiction" in its *strictest* sense—strictly speaking, the retroactivity determination is on the merits, as aforesaid.)

[110] The Limits Of Advocacy, *supra*, footnote 103, at 463. See also footnote 105—this decision lies at the most permissible, mandatory, end of the sua sponte spectrum.

[111] The judiciary's sua sponte ancillary jurisdiction is in *addition* to its supplemental jurisdiction per 28 U.S.C. § 1367(a):

Granberry v. Greer, 481 U.S. 129, 131 (1987), "there are some cases in which it is appropriate for an appellate court to address the merits of a habeas corpus petition notwithstanding the lack of complete exhaustion," and issues created sua sponte represent a subset of such exceptional cases.

Not only in substance, which trumps form, but expressly, Carney's sua sponte orders requiring that Jones file the new claim gave notice that Carney could not in good conscience resolve Jones' AEDPA-compliant habeas petition without also considering the concomitant question of arbitrariness due to longstanding appellate dysfunction. AEDPA says nothing against federal courts thus raising new claims as necessary to properly resolve a regular habeas petition, nor could it, without impermissibly infringing the judicial power.

11. Conclusion

In July 2014, Carney, citing *Furman*, issued his sua sponte Order Declaring California's Death Penalty System Unconstitutional, as systemically arbitrary. A year later, the Breyer dissent made abundantly clear the importance of thus revisiting *Furman*. By reducing *Furman* and its progeny to a handful of craftily packaged quotes, the panel in *Jones* has drastically reduced *Furman's* scope. However, the panel's decision is so small-minded and distracted that no-one seems to realize the drastic extent of this reduction.

> *[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III.*

A habeas petition is a civil action. Wex. Within reason, this statute grants jurisdiction over claims beyond the jurisdictional bound under which a primary claim is brought. *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U. S. 546 (2005). However, the statute doesn't ordinarily authorize adding an unexhausted claim to a habeas petition. *Rose v. Lundy*, 455 U.S. 509, 522 (1982). Sua sponte discretion *can* do so, depending on the justification, which in *Jones* is intolerable dysfunction in the state court itself.

The 746 residents on California's death row, and federal death penalty jurisprudence writ large, deserve far better. It being the duty of the Ninth Circuit court of appeal to say what the law is, and to avoid saying what it is not, an en banc panel should vigorously repudiate the finding in *Jones* that *Furman* neither requires functional postconviction review processes nor repudiates death penalty regimes that result in freakishly rare executions.

It should do so by exercising its own sua sponte powers to go beyond the narrow and tactically adjusted questions set forth in the below described pending petition for rehearing. Setting aside the exhaustion of remedies and nonretroactivity analyses under AEDPA, the en banc panel should instead:

(1) find no abuse of discretion in Carney's sua sponte raising of the systemic arbitrariness claim, and

(2) on the merits, restore Carney's Order Declaring California's Death Penalty System Unconstitutional, in violation of the Eighth Amendment under *Furman* and/or as a matter of first impression.

12. Postscript: The Tactically Adjusted Petition For Rehearing

On January 11, 2016, Jones filed a Petition For Rehearing And Petition For Rehearing En Banc arguing two points:

> *I. Rehearing is Necessary to Correct the Majority's Flawed Articulation of Substantive Rules Under Teague*
>
> *II. Rehearing is Necessary to Correct the Majority's Failure to Resolve Exhaustion*

The first point is unsurprising. In it, Jones doubles-down on his position that Carney's Order clearly amounts to a substantive rule, and again he does not argue that, in the alternative, it amounts to a "watershed" procedural rule.[112] Again, Jones cites *Furman's* own retroactivity in support. Again, in the only sentence that suggests the claim is not new, Jones actually represents that it *is* new, by doubling-down on his basic but mistaken contention that Jones attacks the "carrying out" of the death penalty, a phrase that he again emphasizes (at 11-12; emphasis in orig.):

> *[T]he Majority's specious distinction between arbitrariness in deciding whether to impose a death sentence (forbidden by Furman, according to the Majority) and arbitrariness in carrying out a death sentence (not forbidden by Furman, according to the Majority), Op. 25-26, directly contradicts Furman's decree "that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments," Furman, 408 U.S. at 239-40 (per curiam).*

The petition's second point, re exhaustion of state remedies, argues that the majority's denial of the habeas petition *on the merits*, i.e. based on *Teague's* nonretroactivity bar, conflicted with a Ninth Circuit precedent (at 13):

> *"An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S. C. § 2254(b)(2). This Circuit has made clear that "a federal court may deny an unexhausted petition on the merits only when it is perfectly clear that the applicant does not raise even a colorable federal claim." Cassett v. Stewart, 406 F.3d 614, 623- 24 (9th Cir. 2005) (emphasis added).*

There is no clear conflict with *Cassett* because *Cassett* (as quoted) concerned the denial of a habeas petition on the *substantive* merits, i.e. not merely as nonretroactive per *Teague*. Moreover, the petition for rehearing fails even to mention the majority's sole authority (at 12) for bypassing the exhaustion requirement, namely, *Runningeagle v. Ryan*, 686 F.3d 759, 777 n.10 (9th Cir. 2012), in which the "perfectly clear" standard was certainly not applied—*Runningeagle* took 10 densely argued pages to decide the merits.

Without explaining why, Jones then *reverses* his hitherto firm position, and *attacks* Carney's Order by arguing that it would *not* be futile for him to return to the state court (at 16):

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[112] I agree that the rule is substantive, bt believe that, consistently with all cited precedents, it *could* be construed as procedural, in that it (arguably) prohibits the death penalty as a punishment only as presently administered.

> *[A] federal court [should not] presume to know how a state court will rule on the merits of an Eighth Amendment claim that has not been presented to the state court. The exhaustion doctrine was intended to prevent exactly this type of condescension, where a federal court denies a state court the opportunity to adjudicate a claim because the federal court thinks it knows best. See Duncan v. Walker, 533 U.S. 167, 178 (2001); Rose v. Lundy, 455 U.S. 509, 518 (1982).*
>
> *This presumptuousness is particularly unfortunate here because, as Judge Watford explained, the Seumanu Court noted its inability to consider, on direct appeal, the extra-record evidence that it would be able to consider in habeas proceedings—which, of course, was the very evidence Mr. Jones submitted to the District Court. [] "Far from signaling that [Mr.] Jones' filing of a new habeas petition raising the same claim would be futile, the [state] court seemed to invite such a filing." Op. 32 (Watford, J., concurring).*[113]

As aforesaid, this omits the obviously important fact that *Seumanu* went on to consider the inadmissible evidence in issuing a full-fledged advisory opinion that at its core categorically asserted that *the very differences in appellate delays that Carney's Order finds arbitrary are in its unanimous opinion the very opposite of arbitrary*.

The petition for rehearing attacks only the nonretroactivity finding of the majority. Presumably welcoming the extra delay, regardless of the inevitability of losing on the merits, Jones now wants to return to the state court without the baggage/bar of a more or less summary *res judicata* nonretroactive ruling.[114] Such maneuvering does Carney's Order a grave injustice, and is rightly beside the point, when the simpler and truer sua sponte abuse of discretion standard of review is applied.

In the exceptionally compelling circumstances that Carney's Order and Breyer's dissent describe, it is now up to the Ninth Circuit to reach and restore Carney's Order, and so also *Furman*, with all due Article III sua sponte vigilance.

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[113] Contrast this with the passion of Jones' counsel at the oral hearing, in affirming futility (transcript, at 5-6):

> *No mention in Seumanu deals with the crux of this problem, and that is the state system is dysfunctional and the state court is one of the primary sources of that dysfunction. And it is precisely the reasons why the district court found it to be intolerable to send this case back to the state court system . . . And so the question is, if Mr. Jones is required to go back and exhaust his claim, what are we expecting to accomplish with that exhaustion? We expect that the California Supreme Court will take four years before Mr. Jones will get a postcard denial that will not explain its result, that will not give the federal courts any idea of how to interpret why the California Supreme Court has denied that claim, and we will be back in federal court in four years, prolonging Mr. Jones' stay on death row, prolonging the process for virtually everybody on California's death row, without any measurable result.*

[114] Calls to Jones' counsel for comments have not been returned, and so this explanation for the tactical adjustment is speculative. According to Jones' authority, *Teague* does not rule out the pursuit of a nonretroactive claim in a state court (at 16):

> *[T]he Teague retroactivity rationale [] "does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed 'nonretroactive' under Teague." Danforth v. Minnesota, 552 U.S. 264, 282 (2008) ["Teague rule [limits] only the scope of federal habeas relief . . . Teague speaks only to the context of federal habeas"].*

However, the California Supreme Court generally follows *Teague*. See *People v. Trujeque*, 61 Cal.4th 227, 250 (2015).