IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	**CAPTIAL CASE**
Plaintiff and Respondent,	**S093803**
vs.	
ROPATI SEUMANU,	
Defendant and Appellant.	

Alameda County Superior Court Case No. H24057A
The Honorable Larry J. Goodman, Judge

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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RESPONDENT'S ANSWER TO APPELLANT'S SUPPLEMENTAL ARGUMENT FAILS TO ADDRESS THE ISSUE OF THE ARBITRARY AND RANDOM OCCURRENCE OF EXECUTION AS AN EIGHTH AMENDMENT PROBLEM

In his supplemental brief, appellant followed the reasoning of the District Court's order in *Jones* v. *Chappell* (2014 C.D. Cal.) 2014 U.S. Dist. LEXIS 97254 to argue that the randomness and arbitrariness of the actual infliction of the death penalty in California constituted cruel and unusual punishment under the Eighth

Amendment. The Court described in great detail a system so beset by systemic delay, in which a small number of executions occur despite the large number of inmates who have been sentenced to death; moreover, when they do occur, they do so due to procedural fortuities with no rational relationship to any defined gradations of legal or moral guilt, or even in accord with the temporal order of the convictions and imposition of judgment. This, as the Court noted, has produced, in effect, a death penalty system in which the supreme punishment is "life with the remote possibility of death" -- a system that "no rational legislature or jury could ever impose." (*Id.*, at pp. 1-2, 30-31.)

Respondent launches into a defense of the system. According to respondent, "[t]he district court ruled, in essence, that the period of time typically consumed on direct and collateral review of capital judgments by this Court is so lengthy that the process is rendered 'arbitrary,' as are any executions that occur after the process is concluded." (Resp. Supp. Brief, p. 1.) This characterization of the district court's opinion then allows respondent to launch into an encomium of the system's salutary caution and painstaking scrutiny of death judgments. The system consists in the "interaction of legal rules, procedural protections, and practical accommodations" designed to protect the interests of the State and of the defendant, both of whom share the overriding interest "that the ultimate criminal sanction [be] imposed only on individuals who have been convicted and sentenced in full accordance with the law." (*Ibid.*) "A system," continues respondent, "that painstakingly strives to promote these interests is not 'arbitrary.'" (*Ibid.*)

In the face of this insistent rush of edifying sentiments, one must nod affirmance and say, yes, what the system *strives* to be is certainly not arbitrary; but what the system happens to be, is. To state the matter less epigrammatically, the rules and procedures are not, *de jure*, irrational and arbitrary; the actual and practical failure to implement them in a way that results in a regularity in legally valid executions has resulted in the practical arbitrariness and randomness of the

selection of those who will be executed or not. But the District Court speaks for itself much more clearly and effectively than appellant does:

> "For Mr. Jones [or Mr. Seumanu] 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* [v. *Georgia* (1972)] 408 *U.S.* [153,] 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.') To be sure, *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." (*Jones* v. *Chappell*, *supra*, 2014 U.S. Dist. LEXIS 97254, pp. 33-34.)

Respondent, in his counter-argument, transforms the issue into a claim that the Eighth Amendment does not tolerate a lengthy amount of time between imposition and execution of a capital judgment. This was the claim rejected by this Court in *People* v. *Anderson* (2001) 25 Cal.4th 543 606, and by Ninth Circuit panels in *Smith* v. *Mahoney* (9th Cir. 2010) 611 F.3rd 978, 998-999 and *Allen* v. *Ornoski* (9th Cir. 2006) 435 F.3rd 946, 958 – all cases cited by respondent as supposedly dispositive of the *Jones* v *Chappell* claim. (Resp. Supp. Brief, pp. 2, 4.) Respondent and his cases, however, address the so-called *Lackey* claim championed by Justices Stevens and Bryer in their dissenting memorandum from the denial of certiorari in *Lackey* v. *Texas* (1995) 514 U.S. 1045. But the length of

time it takes to execute judgment in a specific case is not the issue as such in *Jones*; the issue is the systemic delay that consistently and universally creates a length of time that renders a life term with a remote possibility of death the effective sentence in *every* death judgment rendered in California. (See *Jones* v. *Chappell*, *supra*, at pp. 40-43, fn. 19.) The focus of a *Lackey* claim is thus not on systemic arbitrariness in the imposition of death, but on the psychic pressure and "torture" of a lengthy hiatus between judgment and execution in a given case. (See *Valle* v. *Florida* (2011) 132 S.Ct. 1.)

Respondent nods in the direction of the distinction between a *Lackey* claim and a *Jones* claim even quoting the district court's own statement of that distinction. (Resp. Supp. Brief, p. 5.) Yet, as though no distinction was offered, respondent makes the wan assertion that "[n]o other court has ever held that the time it takes to review capital convictions and sentences through the state and federal judicial process can make it 'arbitrary' to impose punishment after all of a prisoner's claims have been considered, reconsidered, and rejected." (*Ibid.*) Apart from the fact that one is dealing solely here with *California* courts, and with a system whose features have taken on a clear delineation of its character only after three-and-half decades of consistent experience, respondent has simply sidestepped what the *Jones* court has held and why it uses the characterization of "arbitrary."

But perhaps this is unfair since respondent does assert that the district court "could find nothing to rely on for its 'system-wide dysfunction' argument beyond the general principle, stated in *Furman* [] and other cases, that the Constitution does not permit imposition of punishment on 'arbitrary' grounds." (*Ibid.*) "Indeed," respondent emphasizes:

> "*Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so

> that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.' (*Gregg* v. *Georgia* (1976) 428 U.S. 196, 199.) Nothing about California's or this Court's processes runs afoul of that teaching." (Resp. Supp. Brief, p. 5.)

No, nothing, except the random selection for execution of a "trivial few of those condemned" for reasons *other than* the rules and standards instituted to conform with the Eighth Amendment demands per *Furman*, *Gregg*, and the subsequent capital jurisprudence of the United States Supreme Court. (*Jones* v. *Chappell*, *supra*, 2014 U.S. Dist. LEXIS 97254, p. 34.) "Arbitrariness in execution is still arbitrary regardless of when in the process the arbitrariness arises" (*Jones* v. *Chappell*, *supra*, 2014 U.S. Dist. LEXIS 97254, p. 34), and, one might add, regardless how it arises. In such circumstances – where there has emerged a palpable disparity between the pretentions of the system and its functioning -- the burden clearly shifts to respondent to explain how *Furman* does *not* apply with "equal force" to prevent the random selection of the those who are actually executed even when the judgment to be executed has been imposed in accord with constitutional processes. (*Jones*, *ibid.*)

When it comes to specific details regarding the actual functioning of the system, respondent highlights the details highlighted by this Court itself in *In re Reno* (2012) 55 Cal.4th 428: in California post-conviction counsel is paid more than he or she is in other states; in California, he or she receives more money for post-conviction investigation; in California, there is no page limitation on a habeas corpus petition; and California allows more time for the filing of a timely post-conviction habeas request for collateral review. (*Id.*, at pp. 456-457, cited by respondent at Resp. Supp. Brief, p. 2.) These are all to the credit of the California system, but do not account for the predominant problems of the system as a whole. Obviously, the lack of page limits on a habeas petition or the three-year/180-days time limits for habeas petitions mean little or nothing, say, for the time required to

process the direct appeal or initially appoint habeas corpus counsel, and they mean even less in the overall systemic problem of delay.

As for the financing of counsel, whether or not California is more generous than other states, that generosity is not producing qualified counsel any faster than four to five years from judgment for direct appeal and ten years from judgment for habeas. Without getting into complex policy and financial discussions, there are of course alternative ways of organizing the same amount of money (e.g., expanding the Office of the State Public Defender) to provide representation at a faster rate. But one thing that the hiatus between judgment and the provision of representation is not: it is not, as respondent seems to maintain, a period of time during which anything, let alone " 'careful review of the defendant's conviction and sentence'" is occurring. (Resp. Supp. Brief, p. 2.)

Indeed, respondent's answer to the problems resides not in the details but in the general assertion that there is no problem: delay is the inherent concomitant of careful review, apparently even when no review at all is occurring and there is nothing in the case except delay. Further, respondent's notion that delay is not a problem misconceives the problem of delay in this context. Delay here is the medium through which death sentences become life terms with the remote possibility of death, and where the actual infliction of death is arbitrary and random; again, this is not a *Lackey* claim where merely waiting a long period of time for the execution of judgment is deemed to be the constitutional problem.

But there is at least one point respondent makes in an implied manner that is pertinent whether a *Jones* claim or a *Lackey* claim is at issue. It is the implied charge that any abusive or unnecessary delay in the system is due to the capital defendant acting on his incentive to prolong the process as long as possible. (Resp. Supp. Brief, p. 4 ["In short, there is nothing to support the district court's assertion that 'much of the delay in California's postconviction review process is created by the State itself, not by the inmates' own interminable efforts to delay.'"].) If respondent means to imply that the system is slow because of efforts

by the defendant to cultivate " 'interminable delay,'" and if this were true, then those who cause, or contribute substantially to the cause, of an Eighth Amendment violation can hardly claim prejudice from that violation.

But respondent adduces no evidence or argument of its truth beyond the typically obvious point that certain types of capital defendants do have an incentive to prolong the proceedings, and therefore their lives, as long as possible. But there are of course other types of capital defendants who have an incentive to hurry proceedings to a resolution as expeditiously as possible in order, in *their* view, to prolong their life to its natural limits. Indeed, there are undoubtedly types of prosecutors, judges, and array of support staff that have all sorts of incentives or disincentives to move or retard the process in a given case in accord a wide array of subjective priorities in each and every life as lived each and every day. Prosecutor X has scruples against the death penalty; Judge Y finds capital litigation boring and uninteresting; elbow clerk Z leaves work at 5 p.m. on the dot to attend to his stamp collection. The basic point, however, is that the *defendant* who wishes to retard the process, or expedite it for that matter, has very little power to do so successfully. He does not preside over any of the process, and indeed cannot even exercise much control over the rate of progress by his own attorney, who is not only governed by professional ethical obligations, but whose financial interests may well militate more toward expedition rather than delay.

One area where defense abuse in the capital review system has achieved some prominent notoriety is in the area of exhaustion petitions, where this Court has pronounced on the general problem of abuse of writ by capital habeas petitioners. (*In re Reno*, *supra*, 55 Cal.4th 428, 514-515.) But what this Court viewed in cases such as Reno's as "abuse of the writ" may indeed be the result of reasons *other* than the desire for delay, such as a disagreement or lack of clarity over what the law requires of constitutionally competent counsel. (See *id.*, at pp. 467-469.) In any event, the average time required for the resolution of exhaustion petitions was, as of 2008, 3.2 years, and, as of 2007, 2.8 years. (*Jones* v.

Chappell, *supra*, 2014 U.S. Dist. LEXIS 97254, p. 23.) Thus, even if those numbers were reduced to zero, the time required for the federal habeas process would still be about 7 years (*id.*, at p. 22), making a negligible dent in the overall time of post-conviction review. Of course, that time will not be reduced to zero, because *no one* advocates abolishing exhaustion petitions. Thus, this Court has instituted undoubtedly salutory reforms to expedite exhaustion petitions (*In re Reno*, *supra*, at pp. 515-517); but in the overall scheme of systemic process, the problem is marginal, and what renders the current system one of life with remote possibility of death is not due to abusive delay by capital defendants or their attorneys.

CONCLUSION

For the reasons adduced in appellant's supplemental opening brief and in this reply brief, the death penalty in California violates the Eighth Amendment. Judgement of death in this case must be vacated.

Dated: September 8, 2014

Respectfully submitted,

Mark D. Greenberg
Attorney for Ropati Seumanu

CERTIFICATION OF WORD-COUNT

I am attorney for appellant in the above-titled action. This document has been produced by computer, and in reliance on the word-count function of the computer program used to produce this document, I hereby certify that, exclusive of the table of contents, the proof of service, and this certificate, this document contains 2477 words.

Dated: September 8, 2014

Mark D. Greenberg
Attorney for Appellant, Ropati Seumanu

[CCP Sec. 1013A(2)]

The undersigned certifies that he is an active member of the State Bar of California, not a party to the within action, and his business address is 484 Lake Park Avenue, No. 429, Oakland, California; that he served a copy of the following documents:

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

by placing same in a sealed envelope, fully prepaying the postage thereon, and depositing said envelope in the United States mail at Oakland, California on September 9, 2014 addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on September 9 , 2014 at Oakland, California.

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