No. 15-8119

In the Supreme Court of the United States

RICHARD DELMER BOYER,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the California Supreme Court's decision, rejecting petitioner's claim that the judge at petitioner's capital sentencing trial should have held a full evidentiary hearing before overruling his challenge to the reliability of testimony incriminating him in a prior murder, was "contrary to" or an objectively unreasonable application of "clearly established Federal law" as determined by this Court.

2. Whether the California Supreme Court's decisions, rejecting petitioner's claims that lengthy delays attributable to post-conviction judicial review in his case and those of other death row inmates violate due process and the Eighth Amendment, were "contrary to" or objectively unreasonable applications of "clearly established Federal law" as determined by this Court.

TABLE OF CONTENTS

Page

Statutory provisions involved 1

Statement 1

Argument 12

Conclusion 21

TABLE OF AUTHORITIES

Page

CASES

Andrews v. Davis
798 F.3d 759 (9th Cir. 2015) 19

Boyer v. California
549 U.S. 1021 (2006) 7

Brecht v. Abrahamson
507 U.S. 619 (1993) 16

Carey v. Musladin
549 U.S. 70 (2006) 19

Cavazos v. Smith
132 S. Ct. 2 (2011) 15

Clemons v. Mississippi
494 U.S. 738 (1990) 16

Coleman v. Johnson
132 S. Ct. 2060 (2012) 14, 15

Furman v. Georgia
408 U.S. 238 (1972) 19, 20

Greene v. Fisher
132 S. Ct. 38 (2011) 12

Gregg v. Georgia
428 U.S. 153 (1976) 20

Harrington v Richter
562 U.S. 86 (2011) 11, 15

Jackson v. Virginia
443 U.S. 307 (1979) 8, 11, 14, 16

Jones v. Chappell
31 F. Supp. 3d 1050 (C.D.Cal. 2014) 7, 16, 17, 18

Jones v. Davis
806 F.3d 538 (9th Cir. 2015) 7, 17, 18

TABLE OF AUTHORITIES
(continued)

Page

Lackey v. Texas
514 U.S. 1045 (1995) ..... 7 *et passim*

Manson v. Brathwaite
432 U.S. 98 (1977) 9, 10, 13

Marshall v. Rodgers
133 S. Ct. 1446 (2013) 19

Montgomery v. Louisiana
136 S. Ct. 718 (2016) 18

Neil v. Biggers
409 U.S. 188 (1972) 9, 10, 13

People v. Boyer
38 Cal. 4th 412 (2006) ..... 2 *et passim*

People v. Boyer
48 Cal. 3d 247 (1989) 1

People v. Phillips
41 Cal. 3d 29 (1985) 9, 13

People v. Seumanu
61 Cal. 4th 1293 (2015) 19

Perry v. New Hampshire
132 S. Ct. 716 (2012) 10, 13, 14

Pulley v. Harris
465 U.S. 37 (1984) 20

Smith v. Mahoney
611 F.3d 978 (9th Cir. 2010) 17

Teague v. Lane
489 U.S. 288 (1989) 17

Tuilaepa v. California
512 U.S. 967 (1994) 20

TABLE OF AUTHORITIES
(continued)

Page

United States v. Williams
504 U.S. 36 (1992) 17

Watkins v. Sowders
449 U.S. 341 (1981) 9, 10, 13

Whorton v. Bockting
549 U.S. 406 (2007) 17

Williams v. Taylor
529 U.S. 362 (2000) 13

STATUTES

28 U.S.C. § 2254 ..... 1 *et passim*

CONSTITUTIONAL PROVISIONS

United States Constitution
VIII Amendment 16, 18, 20

STATUTORY PROVISIONS INVOLVED

Section 2254(d) of Title 28 of the United States Code provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

1. On December 7, 1982, during the course of a robbery in Fullerton, California, petitioner murdered Aileen and Frances Harbitz, an elderly couple who had been kind to petitioner in the past. Pet. App. A. at 4-5. Petitioner was tried three times for the murders and the robberies. *Id.* at 5. The first trial, in 1984, ended in a mistrial when the jury was unable to reach a verdict. *Id.* at 4, n.1. The second trial, also in 1984, ended with guilty verdicts and a death judgment. *Id.* at 4-5, n.1. On automatic appeal, however, the California Supreme Court reversed the judgment, holding that the police had violated petitioner's constitutional rights during questioning that resulted in petitioner's confession. *Id.* at 5, n.1; *People v. Boyer*, 48 Cal. 3d 247, 256 (1989).

The third capital trial, at issue here, was held in 1992. Pet. App. A at 5, n.1. In the guilt phase, a jury again found petitioner guilty of two counts of

first degree murder and two counts of robbery. *People v. Boyer*, 38 Cal. 4th 412, 418 (2006). The jury also found "special circumstances"—that petitioner had killed the Harbitzes during the course of a robbery and that he had committed more than one murder in the process—rendering him eligible for the death penalty. *Id.* at 419.

In the penalty phase, the prosecution sought to prove that petitioner had murdered 75-year-old Houston Compton in August 1980. *Boyer*, 38 Cal. 4th at 425. The trial court twice entertained defense motions *in limine* to exclude this evidence, once at the beginning of jury selection and again before the taking of evidence. *Id.* at 476. At the hearings on the motions, the parties focused on the anticipated testimony of Lisa Weissinger, a prosecution witness who had identified petitioner's picture in a photographic lineup as that of the man she had seen in Compton's car on the night of the murder. *Id.* at 475-77. At both proceedings, petitioner requested a full evidentiary hearing on whether Weissinger's identification was tainted by improper police procedures and whether the prosecution's proof that petitioner committed the crime was sufficient to be considered by the jury. *Id.* at 477. The court declined to hold an evidentiary hearing, explaining that such a procedure would require the court to make credibility determinations properly reserved for the jury, and that the appropriate procedure instead would be a motion to exclude the evidence at the conclusion of the prosecution's penalty-phase case. Pet. App. C at 84-85. Although the trial

court did not hear live testimony, it considered extensive evidence and argument at both hearings before ruling that the Compton murder evidence, including Weissinger's identification testimony, was admissible. *Boyer*, 38 Cal. 4th at 476-77.

Thus, the penalty-phase jury heard evidence establishing the following. Around 7:30 p.m. on August 22, 1980, the police found Compton's blood-soaked body on the campus of Fullerton College in Fullerton, California. *Boyer*, 38 Cal. 4th at 425. Compton had suffered a stab wound to the chest and 34 slash wounds. *Id.*

Compton's early 1960's Ford Fairlane was found abandoned three weeks later in Santa Monica, California. *Boyer*, 38 Cal. 4th at 425. Debris in the car included a McDonald's restaurant bag containing a receipt for food purchased at 10:12 p.m. on August 22 from a McDonald's restaurant in Whittier, California. *Id.*

The jury also heard the testimony of Weissinger, an employee at that McDonald's. *Boyer*, 38 Cal. 4th at 426. She testified that she had seen a man driving a car like Compton's in the McDonald's drive-through at closing time on August 22, 1980. *Id.* Weissinger remembered that the man had blood on his shirt and that he had leaned toward the passenger side of the car, as if he did not want to be seen. *Id.* She saw the man for 40 to 50 seconds. *Id.* Upon viewing a six-person photo array in May 1983, she identified petitioner's photo as that of the same man; and she confirmed in her trial testimony that

she had been "'sure'" in May 1983 that the man she identified in the photo array and the man she saw in the drive-through in 1980 were the same. *Id.*

Weissinger admitted at the trial that, before she identified petitioner's photo in May 1983, she had identified another man in a photo array earlier that month; that she also had selected other men in live lineups conducted in November 1980 and July 1981; and that she had been "'99 percent'" certain of her identification of the man in the November 1980 lineup. *Boyer*, 38 Cal. 4th at 426. In addition, she testified that, after she had selected petitioner's photo in the May 1983 array, she was shown the same group of photos in April 1985 and January 1991. *Id.* at 427. These were the only photos that Weissinger had seen more than once. *Id.*

Neither party asked Weissinger at trial if she was still certain about the May 1983 identification. *Boyer*, 38 Cal. 4th at 478. She was not asked to identify petitioner in court, and she did not do so on her own. *Id.*[1]

Weissinger's identification of petitioner in the array was corroborated by the testimony of William Harbitz, Aileen and Frances Harbitz's son. William Harbitz testified that, in August 1980, petitioner arrived at Harbitz's

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[1] Weissinger also tentatively identified petitioner in a live lineup in October of 1983. The parties agreed during an *in limine* hearing that that identification was inadmissible because the lineup was conducted in the absence of defense counsel. *Boyer*, 38 Cal. 4th at 477.

apartment, intoxicated and covered in blood. Pet. App. A at 10. Petitioner claimed that he had just been in a knife fight. *Id.*

The prosecution also presented evidence that petitioner had committed two other prior crimes, armed robbery and misdemeanor assault. *Boyer*, 38 Cal. 4th at 425. After the prosecution had finished presenting its penalty-phase evidence, petitioner's counsel moved to exclude the evidence of the Compton murder. Pet. App. C at 92-93. The court denied the motion with leave to renew it, but petitioner never renewed it. *Id.*

Petitioner, in turn, presented evidence of the unreliability of eyewitness identifications. Pet. App. A at 10. His defense counsel, further, attempted to focus suspicion for the Compton murder on two other men. *Boyer*, 38 Cal. 4th at 427, n.5. Finally, the defense presented evidence that petitioner had been harmed by neglect and sexual abuse occurring before he was adopted at age four. *Id.* at 427-30.

The court instructed petitioner's jurors three times during the penalty phase that uncharged crimes, before they might be considered on the question of penalty, had to be proven beyond a reasonable doubt. 4 SER 994-96; 7 SER 1748-52, 1760. The jury returned a verdict of death. Pet. App. A at 10.

Petitioner moved for a new trial and for modification of the verdict. Pet. App. C at 94. After hearing argument on the new-trial motion, the trial court indicated that the prosecution had presented substantial evidence that

petitioner was guilty of the Compton murder. *Id.* The court reiterated this belief in ruling on the motion to modify the verdict; but, in denying that motion, the court stated that it did not consider the Compton murder. *Id.*

2. In 2006, the California Supreme Court unanimously affirmed the 1992 verdict and death judgment on automatic appeal. *Boyer*, 38 Cal. 4th at 412. The supreme court rejected petitioner's claim that the trial court had violated his constitutional rights by failing to conduct a live evidentiary hearing before admitting the Compton-murder evidence. *Id.* at 476-77. While the supreme court did not expressly rule that no such hearing was required, it "independently conclude[d]" that "(1) Weissinger's identification testimony at trial was not excludable as the tainted product of flawed lineups, and (2) the evidence that defendant murdered Compton was legally sufficient for consideration by the penalty jury." *Id.* at 477.[2]

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[2] With regard to Weissinger's identification testimony, the court observed that it was carefully limited to her May 1983 photo identification. *Boyer, supra,* 38 Cal.4th at 478. Petitioner did "not suggest that, prior to May 1983, any efforts by the police to obtain an identification from Weissinger were unduly suggestive in a way that might cause her to misidentify" petitioner, and his only criticism of the May 1983 photo array was that the photos were shown in a group rather than sequentially. *Id.* at 478-79. Petitioner focused instead on events occurring after the May 1983 photo identification, i.e., the October 1983 live lineup outside the presence of petitioner's counsel and the reshowing of the May 1983 photo array to Weissinger in 1985 and 1991. *Id.* The court noted "Weissinger did not testify to anything that could have been affected by these subsequent events." *Id.*

The state supreme court also rejected petitioner's claim, based on Justice Stevens's statement respecting the denial of certiorari in *Lackey v. Texas*, 514 U.S. 1045 (1995), that his lengthy confinement on death row awaiting execution constituted cruel and unusual punishment. *Boyer*, 38 Cal. 4th at 489. The state court cited prior decisions in which it had explained that the automatic appeal process is a constitutional safeguard, not a defect. *Id.*

Petitioner filed a petition for a writ of certiorari, which this Court denied. *Boyer v. California*, 549 U.S. 1021 (2006). Petitioner there did not seek review of either his Compton-evidence claim or his *Lackey* claim.

3. Meanwhile, in 2001, petitioner filed a petition for writ of habeas corpus in the California Supreme Court. It did not raise any of his current claims before this Court. In 2009, the supreme court denied the petition on procedural grounds and the merits. Pet. App. A at 11.

In April 2010, petitioner filed a second habeas petition in the California Supreme Court, repeating the *Lackey* individual-effect-of-delay claim and adding an argument, which petitioner now refers to as his *Jones*[3] claim, that "[t]he extraordinary delay in this and other cases renders the imposition of the death penalty cruel and unusual within the meaning of the Eighth

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[3] *Jones v. Chappell*, 31 F. Supp. 3d 1050 (C.D.Cal. 2014), rev'd by *Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

Amendment." *See Boyer v. Chappell*, 06-cv-07584, Doc. 34, Lodgment 2 at 9, 30. The California Supreme Court denied petitioner's second habeas petition, solely and expressly on the merits but without explanation, in 2012. Pet. App. C at 5.

4. In June 2010, during the pendency of his second state habeas petition, petitioner filed his federal habeas petition. Pet. App. C at 5. In 2013, the district court denied habeas relief in full. *Id.* at 1-140.

Rejecting petitioner's claim that the state trial court should have afforded him a full evidentiary hearing on the reliability of Weissinger's identification, the district court concluded that petitioner had not satisfied the requirements for relief under 28 U.S.C. § 2254(d), as he had failed to show he was entitled to such a hearing under "clearly established Federal law as determined by the Supreme Court." Pet. App. C at 98-100. The district court also rejected, under section 2254(d), petitioner's related claim that the evidence was insufficient to support consideration of the Compton murder at the penalty phase. *Id.* at 99-100. The district court concluded that the California Supreme Court's determination, that the evidence satisfied the sufficiency-of-evidence standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 316-18 (1979), was not an unreasonable application of clearly established law but instead was supported by the trial record and consistent with this Court's jurisprudence. *Id.* at 100-01. Finally, the district court denied relief on petitioner's delay claim, ruling under section 2254(d) that the

California Supreme Court's rejection of petitioner's claims was neither contrary to, nor an unreasonable application of, clearly established federal law. *Id.* at 139-40.

The district court granted a certificate of appealability on four of petitioner's claims, including his challenge to the admissibility of the eyewitness testimony relating to the murder of Compton. The district court did not certify petitioner's delay claim.

5. Petitioner raised the four certified claims in the Ninth Circuit. Pet. App. A at 13-28. He also requested a certificate of appealability on five uncertified claims, none of which included any contentions regarding delays in executions under *Lackey* or any other authority. Pet. App. A at 28-32.

A three-judge panel unanimously affirmed the district court's denial of relief. Pet. App. A at 5-32. The panel held that relief on petitioner's challenges to the identification testimony regarding the Compton murder was barred under 28 U.S.C. § 2254(d). It explained that none of the cases petitioner cited—*People v. Phillips*, 41 Cal. 3d 29, 222 (1985); *Neil v. Biggers*, 409 U.S. 188 (1972); *Manson v. Brathwaite*, 432 U.S. 98 (1977); and *Watkins v. Sowders*, 449 U.S. 341 (1981)—constituted "clearly established Federal law as determined by the Supreme Court" that would have required the state trial court to conduct a full evidentiary hearing on the reliability of Weissinger's testimony. Pet. App. A at 14-17. *Phillips*, the panel observed, was a state-court case, not a United States Supreme Court decision. Pet.

App. A 14-15; *see* 28 U.S.C. § 2254(d)(1). As for *Biggers* and *Brathwaite*, the panel pointed out that neither case addressed whether the Constitution requires a trial court to hold a live evidentiary hearing before admitting challenged identification testimony. Pet. App. A at 15-16. Similarly, the panel explained that *Watkins*, although suggesting that a hearing may be constitutionally mandated in some unspecified circumstances, "did not squarely hold that an evidentiary hearing is ever required in any particular circumstances—indeed, it did not provide any guidance as to when such circumstances might arise." *Id.* at 16.

Further, as the panel pointed out, *Perry v. New Hampshire*, 132 S. Ct. 716, 723 (2012), had addressed whether the Constitution requires a trial court to conduct a preliminary reliability assessment of an "eyewitness identification made under suggestive circumstances not arranged by the police," and had held that "'the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement.'" Pet. App. A at 17, quoting *Perry*, 132 S. Ct. at 730. The panel ruled that petitioner was not entitled to relief under *Perry* because, although petitioner claimed that Weissinger's testimony was unreliable in many respects, he did not claim that the unreliability resulted from unnecessarily suggestive circumstances arranged by law enforcement. *Id.* at 17. The panel therefore concluded that the

California Supreme Court "did not unreasonably apply clearly established Supreme Court precedent when it determined that federal law did not require a live evidentiary hearing to assess the reliability of Lisa Weissinger's testimony." *Id.* at 17.

The Ninth Circuit also rejected petitioner's related argument that the Compton murder evidence should have been excluded as supported by identification testimony that was too unreliable to suffice under the sufficiency-of-evidence standard set forth in *Jackson v. Virginia*. Pet. App. A at 17. The panel recited the reasons the California Supreme Court had given when it had rejected petitioner's claim: "Weissinger readily testified that, after careful consideration, she made a positive identification of defendant from a photo array as the McDonald's customer she saw on the night of the Compton murder"; "she 'explained at length why she felt sure of her choice'"; petitioner's "counsel had 'a full opportunity to cross-examine Weissinger . . . about all aspects of the identification process'"; and "'William Harbitz provided some independent evidence of [petitioner's] identity as Compton's killer' by describing the August 1980 incident when [petitioner] informed Harbitz that he had been in a knife fight while wearing a bloody shirt." Pet. App. A 17-18 (quoting *Boyer*, 38 Cal. 4th at 480-81). The Ninth Circuit panel concluded that, in view of these facts and the applicable standard of review, "at the very least, 'fairminded jurists could disagree' on the correctness of the state court's decision." *Id.* at 19 (quoting *Harrington v. Richter*, 562 U.S. 86,

101 (2011)). Accordingly, it rejected petitioner's claim under section 2254(d). *Id.*

ARGUMENT

1. Petitioner argues that this Court should grant review "to further clarify the legal standard under which the trial judge, as gatekeeper of the evidence must hold an evidentiary hearing to determine whether challenged evidence is sufficiently reliable to be presented to a jury." Pet. 18. An "opportunity to further clarify" a substantive area of constitutional law is of little import in a habeas corpus case, however, where relief is barred unless the state court's merits decision rejecting the claim was "contrary to" or involves an objectively "unreasonable application" of a square holding of this Court at the time of the state court's decision. *Greene v. Fisher*, 132 S. Ct. 38, 43-44 (2011); *see* 28 U.S.C. § 2254(d)(1).

a. Further review would be unavailing here because, as the Ninth Circuit determined, section 2254(d) bars federal relitigation of petitioner's claim that he was denied a constitutional right to a full evidentiary hearing on the reliability and admissibility of eyewitness Weissinger's testimony. This is so because the California Supreme Court, in rejecting petitioner's claim, did not act "contrary to," or "unreasonabl[y]" apply, "clearly established Federal law as determined by the Supreme Court." 28 U.S.C § 2254(d)(1).

As he did below, petitioner argues that a full evidentiary hearing was required by *Phillips*, *Biggers*, *Brathwaite*, and *Watkins*, and particularly by Justice Brennan's dissent in *Watkins*. Pet. 20-23. Petitioner's reliance on *Phillips* and state-court jurisprudence is misplaced because, as the Ninth Circuit observed, the source of clearly established law under 28 U.S.C section 2254(d) must be this Court's decisions, not state court decisions. *Williams v. Taylor*, 529 U.S. 362, 412 (2000). Petitioner's reliance on *Biggers*, *Brathwaite*, and *Watkins* is similarly misplaced because the phrase "'clearly established Federal law, as determined by the Supreme Court of the United States'" in § 2254(d)(1) "refers to the holdings, as opposed to the dicta, of this Court's decisions." *Williams v. Taylor*, at 412. As the Ninth Circuit observed, neither *Biggers* nor *Brathwaite* discussed evidentiary hearings, and *Watkins* did not squarely hold that an evidentiary hearing is constitutionally necessary under any particular circumstances. Pet. App. A at 15-16; *see Biggers*, 409 U.S. at 193-201; *Brathwaite*, 432 U.S. at 104-17; *Watkins*, 449 U.S. at 349.

Finally, as the Ninth Circuit stated, petitioner was not entitled to relief under this Court's intervening decision in *Perry*. *Perry*'s holding in essence resolved against petitioner the issue he asks this Court to clarify. Under *Perry*, due process does not require preliminary inquiries into the reliability of an eyewitness identification when the identification was not obtained

under unnecessarily suggestive circumstances orchestrated by the police. *Perry*, 132 S. Ct. at 730.

b. Petitioner further contends that the Ninth Circuit erred in determining that the state court had reasonably applied the *Jackson v. Virginia* standard in finding the evidence of the Compton murder admissible and legally sufficient to prove an uncharged-violent-crime aggravating factor at the penalty phase. Pet. 24-25. He says the Ninth Circuit improperly bolstered the "ephemeral" evidence of his involvement in the Compton murder with his purported admission to William Harbitz that he had been in a knife fight around the same time as the murder. Pet. 24. Petitioner also faults the Ninth Circuit for failing to discuss the third-party culpability evidence offered by the defense. Pet. 25. Such challenges to the application of a settled rule of law to the unique facts of a particular case, however, do not give rise to any important legal question meriting further review in this Court.

In any event, the Ninth Circuit correctly rejected petitioner's claim. This Court has made "it clear that *Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference." *Coleman v. Johnson*, 132 S. Ct. 2060, 2062 (2012) (*per curiam*). First, on direct review, "'it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of

insufficient evidence only if no rational trier of fact could have agreed with the jury." *Id.* (quoting *Cavazos v. Smith*, 132 S. Ct. 2, 4 (2011) (*per curiam*)). Second, on habeas corpus review, "a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was 'objectively unreasonable.'" *Id.* (citation omitted).

It would not be objectively unreasonable to conclude that a rational factfinder could have determined that petitioner murdered Compton. Weissinger testified at the penalty phase that she had positively identified petitioner in a photo array in May 1983 as the man she had seen in the McDonald's drive-through on the night of the Compton murder in August 1980. *Boyer*, 38 Cal. 4th at 480. Weissinger's identification of petitioner was corroborated by William Harbitz's testimony that, one evening in August 1980, petitioner, while clothed in a bloodstained T-shirt, told Harbitz that he had been in a knife fight. *Id.* at 481. In light of this testimony, and at a minimum, "'fairminded jurists could disagree' on the correctness of the state court's" rejection of petitioner's sufficiency of evidence claim. Pet. App. A at 19 (quoting *Richter*, 562 U.S. at 101). Federal habeas relief, therefore, is barred. 28 U.S.C. § 2254(d).

That the Ninth Circuit did not expressly discuss competing evidence produced by the defense does not detract from the underlying conclusion that

state-court ruling was not objectively unreasonable. *Jackson* requires a reviewing court to view "the evidence in the light most favorable to the prosecution." *Jackson*, 443 U.S. at 319. Moreover, the California Supreme Court discussed the defense evidence; and, under section 2254(d), it is the state-court decision that is the focus of federal review.

Finally, petitioner deems it significant that the trial court did not consider the evidence of the Compton murder in denying the automatic motion to modify the death verdict. Pet. 23. But the trial court three times indicated that the evidence had satisfied the *Jackson* standard, and the California Supreme Court reached the same conclusion on direct appeal. Pet. App. C at 92-95, 97-98. If anything, the trial court's denial of the defense motion to modify the death verdict, without considering the evidence of the Compton murder, only confirms that any error in admitting that evidence did not have a "'substantial and injurious effect or influence in determining the jury's verdict'" and therefore was harmless. *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993); *see Clemons v. Mississippi*, 494 U.S. 738, 748-49 (1990).

2. a. This Court also should deny review of petitioner's claims that delay in his case and system-wide delay in the administration of California's death penalty system violate the Eighth Amendment and due process. Pet. 5-17. Petitioner did not obtain a certificate of appealability on either his *Lackey* individual-delay or his *Jones* systemic-delay claim. Indeed, it appears that he deliberately bypassed the Ninth Circuit, for he declined to raise

either claim in his appellate briefing even though he chose to raise five other uncertified claims. Pet. App. A at 28-32. Nor does he contend that the Ninth Circuit erred by not issuing a certificate of appealability on his delay claims. This Court, of course, traditionally declines to grant review where, as here, the "'question presented was not pressed or passed upon below.'" *United States v. Williams*, 504 U.S. 36, 41 (1992).

b. Petitioner's delay claims would also be barred by the habeas corpus anti-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality op.); *see Whorton v. Bockting*, 549 U.S. 406, 409 (2007), for relief would require the impermissible announcement and retroactive application of a debatable "new rule" of constitutional law to defeat a final state-court conviction. The Ninth Circuit in *Jones*, 806 F.3d at 547-53, correctly imposed the *Teague* bar to the same claim about systemic delay that petitioner now raises here. And, in *Smith v. Mahoney*, 611 F.3d 978, 998-99 (9th Cir. 2010), the Ninth Circuit correctly imposed the *Teague* bar to the same kind of *Lackey* individual-delay claim that petitioner now asserts.

Petitioner argues that the rules he proffers would be exempt from *Teague*'s proscription as "substantive" rules prohibiting a discrete punishment (life without parole with the possibility of death) from being imposed on a defined class of defendants (capital inmates in California). Pet. 15-16. But, as *Jones* also recognized, such an "expansive definition of the substantive rule of law exception" is supported by neither the case law nor

logic. *Jones*, 806 F.3d at 552-53. This Court recently explained that "[s]ubstantive rules . . . set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose." *Montgomery v. Louisiana,* 136 S. Ct. 718, 729 (2016). For example, the rule that the Eighth Amendment prohibits imposition of a sentence of life without parole on a juvenile homicide offender "absent consideration of a juvenile's special circumstance" is substantive, because a sentence of life without parole would be disproportionate when applied to all but the rare juvenile offender. *Id.* at 733-34. In contrast, a rule that individual or systemic delay in capital cases violates the Eighth Amendment would invalidate a death sentence only where a State administers its post-conviction review procedures in a certain deficient way; it would not render the death "penalty unconstitutionally excessive for a category of offenders." *See id.* at 736.

c. Review of the merits of petitioner's individual delay claim would also be unavailing because relief in any event would be barred by 28 U.S.C. § 2254(d). Under that statute, as explained above, federal habeas relief "shall not be granted" in this case unless the California Supreme Court's rejection of petitioner's *Lackey* claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." § 2254(d)(1). This Court has not considered, much less resolved, whether alleged individual or system-wide delays in a

state's post-conviction judicial review in capital cases may violate the Eighth Amendment. *See* Pet. 5 (acknowledging that this case would provide this Court with an "opportunity" to decide this issue). With no Supreme Court precedent establishing such a rule, section 2254(d)(1) bars federal relitigation of the *Lackey* claim denied by the California Supreme Court in petitioner's state-court proceedings. *Marshall v. Rodgers*, 133 S. Ct. 1446, 1450 (2013) (per curiam); *Carey v. Musladin*, 549 U.S. 70, 74-77 (2006).[4]

d. In any event, Petitioner's delay claim fails on the merits.

Petitioner cites *Furman v. Georgia*, 408 U.S. 238 (1972), as support for his assertion that California's system for post-conviction review in capital cases is so dysfunctional that "it now determines which inmates will actually be executed in a manner that is arbitrary and without any legitimate penological purpose." Pet. 13. But, as this Court has explained, "*Furman*

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[4] Petitioner contends that his 2010 state habeas petition raised "the 'Jones' claim presented here." Pet. 3-4. The claim in that petition relied on the arguments raised in Justice Stevens's memorandum opinion in *Lackey*. See, e.g., *Boyer v. Chappell*, 06-cv-07584, Doc. 34, Lodgment 2 at 10 (citing *Lackey v. Texas*, 514 U.S. 1045 (1995) (mem. of Stevens, J.). The California Supreme Court has since held that a *Lackey* claim is "distinct" from a *Jones* claim. *People v. Seumanu*, 61 Cal. 4th 1293, 1372 (2015). If petitioner is correct that his 2010 state habeas petition presented a *Jones* claim, then federal habeas relief on that claim is barred by 28 U.S.C. § 2254(d)(1), in light of the California Supreme Court's denial of that claim on the merits. *See also Andrews v. Davis*, 798 F.3d 759, 790 (9th Cir. 2015) (characterizing *Jones*-based theory as "essentially the same" as a *Lackey* claim). If the 2010 state habeas petition did not present a *Jones* claim, then petitioner's *Jones* claim is unexhausted, and may not be the basis of federal habeas relief. *See* 28 U.S.C. § 2254(b)(1).

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*, 428 U.S. 153, 199 (1976) (plurality op.). The "concerns expressed in *Furman* . . . are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." *Id.* at 195. California has adopted that type of system, and this Court has held that California's capital sentencing procedure comports with the Eighth Amendment. *See, e.g., Tuilaepa v. California*, 512 U.S. 967, 975-80 (1994); *Pulley v. Harris*, 465 U.S. 37, 44-54 (1984).

This Court has never held that a non-arbitrary death sentence that is validly imposed under such a system may become unconstitutional after the fact because of the length of post-conviction review in a particular case, or because of variations in the relative pace of review across different cases. Such a rule would undercut the constitutional interests identified in *Furman*, not serve them. Careful review after a defendant is sentenced to death provides "an important additional safeguard against arbitrariness and caprice." *Gregg*, 428 U.S. at 198 (plurality opinion). It enables state and federal courts to enforce the dictates of *Furman* and other constitutional

requirements, and to set precedent that will guide future sentencing proceedings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 10, 2016

No. 15-8119

In the Supreme Court of the United States

RICHARD DELMER BOYER, *Petitioner,*

v.

STATE OF CALIFORNIA, *Respondent.*

CERTIFICATE OF SERVICE BY COURIER, ELECTRONIC MAIL, & U.S. MAIL

I, Stephen McGee, Legal Secretary, on behalf of Deputy Attorney General Lise S. Jacobson, Counsel of Record for Respondent and a member of the Bar of this Court, hereby certify that on March 10, 2016, a copy of the **BRIEF IN OPPOSITION** in the above-entitled case were mailed, in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, first class postage thereon fully prepaid, addressed as follows:

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I further certify that all parties required to be served have been served.

I declare under penalty of perjury under the laws of the United States of America the foregoing is true and correct and that this declaration was executed on March 10, 2016, at San Diego, California.

STEPHEN MCGEE
Legal Secretary

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