No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

RICHARD DELMER BOYER, ***Petitioner***

vs.

STATE OF CALIFORNIA, ***Respondent***

PETITION FOR A WRIT OF CERTIORARI TO
THE U.S CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

1) **Do decades long delays in executions caused primarily by state action and which result in only a small number of randomly selected defendants who are actually put to death constitute a violation of Due Process under the Fifth And Fourteenth Amendment as well as cruel and unusual punishment under the Eighth Amendment.**

2) **Assuming that undependable eyewitness identification is admissible at all, after a colorable showing that eyewitness identification evidence is both tainted and otherwise unreliable in a penalty phase trial, is the trial court bound to hold an evidentiary hearing before the evidence is presented to the jury in order to establish sufficient reliability to comport with the Due Process clauses of the Fifth And Fourteenth Amendments as well as the Eighth and Fourteenth Amendments requiring greater reliability in capital cases?**

LIST OF PARTIES

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Petitioner Richard Delmer Boyer respectfully prays that a writ of certiorari issue to review the decision of the Circuit Court of Appeals for the Ninth Circuit affirming his convictions and sentence of death.

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Ninth Circuit is attached hereto as Appendix A. That Court's denial of Petitioner's petition for rehearing is attached hereto as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257. The United States Circuit Court of Appeals for the Ninth Circuit filed its opinion on July 16, 2015. Petitioner's timely petition for rehearing was denied on October 26, 2015.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Fourteenth Amendment: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner, Richard Boyer, was convicted and sentenced to death on August 3, 1992 for killing an elderly couple on December 7, 1982 in the town of Fullerton, in Orange County, California. At the time of this crime, Mr. Boyer was 24 years old.

There were three trials in this case. The first ended in a hung jury, the second was reversed on appeal. The final jury trial took place in July and August 1992. Petitioner was sentenced to death on August 3, 1992. Counsel was appointed

to both Petitioner's direct appeal and the habeas corpus petition four and half years later, on March 4, 1997. His direct appeal was filed in July, 2000. Almost six years later, on May 11, 2006, the California Supreme Court rendered its decision on direct appeal. *People v. Boyer* (2006) 38 Cal.4th 412. The court affirmed the conviction on all counts as well as the judgment of death and on May 26, 2006, Petitioner filed a timely petition for rehearing. On July 19, 2006, the California Supreme Court denied rehearing.

Mr. Boyer then filed a petition for a writ of certiorari in this Court on September 5, 2006. The petition for a writ of certiorari was denied on November 6, 2006. *Boyer v. California*, 549 U.S. 1021 (2006).

Petitioner's state habeas corpus petition, Case No. S101970 was filed in the California Supreme Court on November 7, 2001.

Almost eight years later, Petitioner's state habeas corpus petition was denied by the California Supreme Court in a memorandum opinion ("post card denial") on June 17, 2009. In the opinion, the court stated "All claims are denied on the merits, except Claim XII, which was denied without prejudice to Petitioner renewing the claim at an appropriate time. *People v. Lawley*, 27 Cal.4th 102, 169 (2002), fn. 25 [petitioner lacks competence to be executed]. Claims II and IV, and Claims VII and VIII except insofar as they allege ineffective assistance of counsel, are barred by *In re Waltreus*, 62 Cal.2d 218 (1965) at page 225."

On November 29, 2006 Petitioner filed an application for stay of execution and request for appointment of counsel in federal court. The undersigned counsel here were appointed pursuant to that request.

In the meantime, on April 19, 2010, Petitioner filed his second petition for writ of habeas corpus in the California Supreme Court to exhaust the "Jones" claim

presented here. Petitioner also asked for a hearing on the matter to present additional facts. Again without explanation or comment, the California Supreme Court denied the entire expanded claim on June 20, 2012,

Petitioner filed a petition for a writ of habeas corpus in the federal district court for the Central District of California in June 2010. The petition for a writ of habeas corpus was denied on May 22, 2013. Nevertheless, the district court certified four of Petitioner's claims for decision by the Ninth U.S. Circuit Court of Appeals, including the first of those presented in this petition.

Petitioner appealed to the Ninth U.S. Circuit Court of Appeals in January 2014, urging review of the certified and several uncertified claims. The Ninth Circuit reviewed the certified and two uncertified claims. On July 16, 2015, the Ninth Circuit denied relief on all claims. See Appendix A. On Sept 4, 2015, Petitioner requested a rehearing and rehearing en banc. On October 26, 2015, the Ninth Circuit denied Petitioner's request for rehearing and rehearing en banc. See Appendix B.

Petitioner timely files this petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED IN THIS CASE TO DETERMINE WHETHER LENGTHY DELAYS IN EXECUTIONS CAUSED BY STATE ACTION AND WHICH RESULT IN PSYCHOLOGICALLY INHUMANE STRESS AND WHEREBY ONLY A SMALL NUMBER OF RANDOMLY SELECTED DEFENDANTS ARE ACTUALLY PUT TO DEATH CONSTITUTE A VIOLATION OF DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENT AS WELL AS CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT.

Reasons to Grant Certiorari

This case presents this court with the opportunity to decide whether decades long confinement under sentence of death that is caused by a State that refuses to provide adequate and timely resources for the defense and which results in a death row that is so bloated and backlogged that only a random few inmates will ever be executed violates the cruel and unusual proscription of the Eighth and Fourteenth Amendments. See, e.g., *Glossip v. Gross,*576 U.S. ___ [192 L.Ed.2d 761, 135 S.Ct. 2726, 2736] (2015), (dis. opn. of Breyer, J., joined by Ginsburg, J.) ["lengthy delays both aggravate the cruelty of the death penalty and undermine its jurisprudential rationale"].)

Procedural History of this Claim

In his opening brief to the California Supreme Court, Petitioner presented a

traditional "Lackey"[1] claim. Citing Justice Stevens dissent, Petitioner argued that his [then] 17 years on death row, evidence of the psychological "death row phenomenon" and citations to international opinions demonstrated a violation of the Eighth Amendment. *Boyer* opening brief to the California Supreme Court at pp. 380-384. Additionally, however, Petitioner specifically confronted the argument that post conviction delays were primarily caused by a condemned inmate's pursuit of collateral avenues of relief. Petitioner first noted that California's procedure for review of death judgments does not even permit a condemned person to choose whether he or she wishes to appeal his or her sentence in the first place, as the appeal is automatic. (Pen. Code, section 1239 subd. (b).)

More important, however, Petitioner argued that "[t]he delays in appellant's automatic appeal are attributable to the state and the system that it has instituted. The delays have nothing to do with the exercise of any discretion on appellant's part. The delays have been caused by 'negligence' or 'deliberate action by the State.'" Petitioner's opening brief to the California Supreme Court at p. 382.

Denying Petitioner's claim, the California Supreme Court ruled: "We have consistently rejected the contention that the delays inherent in the capital appeal process render the death penalty, or the process leading to it, cruel and unusual. [citations] We do so again." *People v. Boyer*, 38 Cal.4th 412 at p. 489 (2006) .

The claim was not presented in Petitioner's initial state habeas corpus petition. However, On April 19, 2010, Petitioner filed his second petition for writ of habeas corpus in the California Supreme Court. Similar to the claim presented here, he argued the "*Lacke*y" issue and expanded his argument to allege that prolonged

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[1] *Lackey v. Texas,* 514 U.S. 1045 (1995)

incarceration plus institutional delay constitute cruel and unusual punishment in violation of the Eighth Amendment [the "Jones" claim]. Petitioner also asked for a hearing on the matter to present additional facts. The California Supreme Court denied the entire expanded claim on June 20, 2012, noting only that the petition was denied.

The expanded argument was raised in claim XXIV of Petitioner's federal habeas corpus petition to the Federal District Court for the Central District of California. In that claim, Petitioner first pointed out that at the time the federal petition was filed in 2010, he had already been continuously confined for more than 27 years and under sentence of death for more than 25 years.[2] He argued not only the "*Lackey*" claim that lengthy confinement served no valid penological purpose, but that the delay was overwhelmingly attributable to the state. He also argued that the unconscionable and increasing delay implicated the Eighth Amendment "evolving standards of decency." Petitioner cited the California Commission on the Fair Administration of Justice, Report and Recommendations on the Administration of the Death Penalty in California (June 30, 2008) online at http://www.ccfaj.org/rr-dp-official.htm [hereafter the Fair Commission] report documenting that lengthy and increasing delay and the state's responsibility for failing to remedy the problem. Finally, he asked for a hearing to present facts in support of his claim. (Petitioner's federal habeas corpus petition at pp. 200-217.)

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[2] Petitioner was first convicted and sentenced to death in September of 1984 after approximately a year and a half of imprisonment in the county jail. His conviction was reversed by the California Supreme Court on March 13 1989 based upon the State's misconduct in coercing a confession. Petitioner was convicted and again sentenced to death on August 3, 1992. As of the date of filing of this petition, Petitioner will have served over 31 years on death row.

Respondent has conceded that all of Petitioner's claims in the federal habeas corpus petition had been exhausted in state court.

The federal district court denied Petitioner's claim without a hearing, ruling that the claim was barred under Section 2254(d) of the AEDPA. (Magistrate's order at p. 140.) The magistrate did not certify the claim for further review at the Ninth Circuit Court of Appeals and the Ninth Circuit did not review it.

Merits of the Argument

Petitioner argues that in his case and in those of other death row inmates, the administration of California's death penalty system is dysfunctional and results in delays before execution that are both unconscionable and unpredictable. Moreover, of all those who endure the delay waiting execution, only a random few will be executed. Allowing this system to continue to impose the "death row phenomenon" on inmates for decades and then threaten inmates with the slight possibility of death violates the Eighth Amendment's prohibition against cruel and unusual punishment.

Petitioner invites this court's attention to the case of *Jones v. Chappell* 31 F. Supp. 3d 1050 (2014), a federal district court case from the Central District Court of California that deals with the issues similar to those Petitioner presents here. Petitioner specifically notes that *Jones* was recently reversed by the U.S. Circuit Court of Appeal for the Ninth Circuit in *Jones v. Davis*, ___F.3d ___, 2015 U.S. App. LEXIS 19698, 2015 WL 6994287 (9th Cir. 2015). The Ninth Circuit opined that the *Jones* issue was barred by the doctrine of *Teague v. Lane* [new federal

Constitutional issues may not be raise on collateral review]. Thus *Jones* cannot be considered precedent.[3]

Nevertheless, since the Ninth Circuit specifically held that it was NOT deciding the **merits** of Mr. Jones' case, the district court opinion might be considered persuasive authority. In that regard, the factual underpinnings of this issue as set forth in *Jones* were NOT contested by the State. As the district court judge pointed out, "The State is not arguing that the delay in Mr. Jones's execution is an isolated incident in a system that otherwise operates as expeditiously as possible to execute those sentenced to death. Nor does the State argue that it is rational or necessary for it to take more than two decades to provide Death Row inmates with the process required to ensure that their death sentence comports with constitutional requirements. Indeed, the State cannot reasonably make these arguments." *Jones v. Chappell, supra,* at p. 1066.)

In support of the conclusion that the administration of California's death penalty does not comport with the Eighth Amendment, the court looked primarily to the Fair Commission report. In 2004, the California senate established the California Commission on the Fair Administration of Justice, and tasked it with conducting a comprehensive review of the State's justice system, including its administration of the death penalty. See Fair Commission Report at 113-14. The Commission was a bipartisan panel composed of prosecutors, criminal defense attorneys, law

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[3] It should be noted that counsel in *Jones v. Davis supra*, will likely ask for reconsideration and reconsideration en banc. If neither is granted, the *Jones* case will likely be before this Court on a petition for certiorari within a few months. Since the federal district court granted a hearing in the *Jones* case, many of the factual matters that Petitioner herein sought a hearing to present were actually presented in that case.

enforcement officials, academics, representatives of victim's rights organizations, elected officials and a judge. The Fair Commission issued its Final Report in June 2008. The Commission found that the entire death penalty system is dysfunctional. The system is beset with significant delay in the appointments of counsel for direct appeals and habeas corpus petitions. There was also a severe backlog in the review of appeals and habeas petitions before the California Supreme Court. Moreover those delays were increasing, not getting better. *Id*. at pp. 1055-1056.

The district court judge also noted that "in 2008, then-Chief Justice of the California Supreme Court Ronald M. George offered the same assessment. See Ronald M. George, Reform Death Penalty Appeals, L.A. Times, Jan. 7, 2008 ('The existing system for handling capital appeals in California is dysfunctional and needs reform. The state has more than 650 inmates on death row, and the backlog is growing.') (cited in Fair Commission Report at 164-65 n.3)." Additionally, the district court judge referred to Ninth Circuit Court of Appeals Senior Judge Arthur L. Alarcón who "suggested the same in his study of the issue. See Arthur L. Alarcón & Paula M. Mitchell, Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle, 44 Loy. L.A. L. Rev. S41, S61 (2011) (describing California's "broken" death penalty system)." *Id* at p. 1056.

Relying on these sources and a few others presented in the federal court hearing, the district court judge set forth the uncontested statistics showing unprecedented delay. He observed that "California juries have imposed the death sentence on more than 900 individuals since 1978. Yet only 13 of those 900 have been executed by the State. 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." *Id* at p. 1053. Further,

> " the vast majority of those sentenced to death in California will not actually be executed by the State. .... Of the 511 individuals sentenced to death between 1978 and 1997, 79 died of natural causes, suicide, or causes other than execution by the State of California. See Appendix A. Another 15 sentenced after 1997—or two more than the total number of inmates that have been executed by California since the current death penalty system took form—have died of non-execution causes. As California's Death Row population gets older, that number is sure to rise. See CDCR Summary at 1 (showing that nearly 20 percent of California's current Death Row population is over 60 years old).
>
> For those that survive the extraordinary wait for their challenge to be both heard and decided by the federal courts, there is a substantial chance that their death sentence will be vacated. As of June 2014, only 81 of the 511 individuals sentenced to death between 1978 and 1997 had completed the post-conviction review process. Of them, 32 were denied relief by both the state and federal courts—13 were executed, 17 are currently awaiting execution, and two died of natural causes before the State acted to execute them. [cite] The other 49—or 60 percent of all inmates whose habeas claims have been finally evaluated by the federal courts—were each granted relief from the death sentence by the federal courts. (citation)" *Id.* at pp. 1054-1055.

More important, there is no rhyme or reason why some inmates are actually executed and some are not. As the district court judge noted: "the current population of Death Row is so enormous that, realistically, California will still be unable to execute the substantial majority of Death Row inmates. In fact, just to carry out the sentences of the 748 inmates currently on Death Row, the State would have to conduct more than one execution a week for the next 14 years. Such an outcome is

obviously impossible for many reasons, not the least of which is that as a result of extraordinary delay in California's system, only 17 inmates currently on Death Row have even completed the post-conviction review process and are awaiting their execution. (Citation) For all practical purposes then, a sentence of death in California is a sentence of life imprisonment with the remote possibility of death—a sentence no rational legislature or jury could ever impose." *Id*. at p. 1062.

The judge also noted that at least for some inmates, the remote possibility will be realized. Nevertheless, as he correctly observed: "their selection for execution will not depend on whether their crime was one of passion or of premeditation, on whether they killed one person or ten, or on any other proxy for the relative penological value that will be achieved by executing that inmate over any other. Nor will it even depend on the perhaps neutral criterion of executing inmates in the order in which they arrived on Death Row. Rather, it will depend upon a factor largely outside an inmate's control, and wholly divorced from the penological purposes the State sought to achieve by sentencing him to death in the first instance: [instead, it is simply a random selection based on] how quickly the inmate proceeds through the State's dysfunctional post-conviction review process." *Id*. at p. 1062.

Delay Violates the Eighth Amendment

It could be argued that lengthy delays are in place by design because they are necessary to protect individual and governmental interests. The California Supreme Court acknowledged, however, that the long delays are caused by its inability to appoint counsel in capital cases. They are not by design and do not further any prompt and fair review. *In re Morgan*, 50 Cal.4th 932, 940-41 and fn.7 (2010).

More to the point, lengthy delays are highly prejudicial. For example, lengthy delays prejudice inmates whose convictions are reversed and retried. "[A] prolonged delay in retrying a case can result in the death of potential witnesses, the loss or impairment of their memory, or the destruction of evidence that may support a defense theory." Arthur L. Alarcón, Remedies for California's Death Row Deadlock, 80 S. Cal. L. Rev. 697, 733 (2007), available at http://lawreview.usc.edu/index.php/articles-remedies-forcalifornias-death-row-deadlock/ .

Moreover, an assertion that no period of delay is prejudicial if necessary to protect a defendant's rights is similarly untenable. By that reasoning, no period of delay—not even delays that require an inmate to spend forty or fifty or sixty years on death row prior to his execution—would ever trigger Eighth Amendment concerns, so long as those delays are "necessary" under the State's system. Of course no evidence supports that conclusion. Additionally, as noted above, the delays are only "necessary" because the State has refused to take the steps needed to address the problems in its system, like the serious shortage of available and qualified counsel to represent death row inmate in post-conviction proceedings.

Finally, decades on death row can be highly prejudicial to those who die waiting for their appeals to be decided and who may have been wrongfully convicted or wrongfully sentenced to death row.

These death sentences, as actually carried out by the State, categorically violate the Eighth Amendment's Cruel and Unusual Punishments Clause because the system is so overwhelmed that it now determines which inmates will actually be executed in a manner that is arbitrary and without any legitimate penological purpose. See *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (per curiam) (Stewart, J., concurring);

Baze v. Rees, 553 U.S. 35, 78 (2008) (Stevens, J., concurring). No other state imposes sentences of death by execution on hundreds of individuals, knowing that only a randomly selected few will ever actually be executed. Most importantly, no other state sentences hundreds to death row and then denies them their fundamental due process right to timely appellate review, such that most die while waiting the decades now required for the courts to review their direct appeals and habeas petitions.

From the foregoing it is apparent that there is no basis to conclude that inmates on California's Death Row are simply more dilatory, or have stronger incentive to needlessly delay the capital appeals process, than are those Death Row inmates in other states. Most of the delay in California's postconviction process and in Petitioner's case is attributable to California's own system, not Petitioner or other inmates themselves.

Teague Is Not a Bar

Under *Teague v. Lane*, 489 U.S. 288 (1989), new rules may not be announced in cases on collateral review unless they fall under one of two exceptions. *Penry v. Lynaugh*, 492 U.S. 302 (1989). Even if a rule is new, it can still apply retroactively in a collateral proceeding if "(1) the rule is substantive or (2) the rule is a watershed rul[e] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Whorton v. Bockting*, 549 U.S. 406, 416 (2007).

The exception for substantive rules has often been referred to by this Court as not being subject to *Teague* nonretroactivity in the first place. See, e.g., *Schriro v. Summerlin*, 542 U.S. 348, 352 n.4 (2004) (stating such rules are "more accurately

characterized as substantive rules not subject to the bar"). The difficult question is what constitutes a "substantive" rule.

One way to answer this is to consider who is affected by the rule. "A rule is substantive . . . if it alters the . . . class of persons that the law punishes." *Summerlin*, 542 U.S. at 353. Another approach is to consider the kind of law affected by the rule. Substantive rules prohibit "a certain category of punishment for a class of defendants because of their status or offense." *Penry*, *supra*, 492 U.S. at 330. Moreover, substantive rules produce a "single invariable result," *People v. Carp*, 496 Mich. 440, 465 (2014), and "entirely remove [ ] a particular punishment from the list of punishments that may be constitutionally imposed on a class of defendants," *Ex parte Maxwell*, 424 S.W.3d 66, 74 (Tex. Crim. App. 2014).

A final approach is to weigh the government's interest in finality against the defendant's interest in suffering from constitutionally unsanctioned punishment. See *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring) (finding state's finality interest yields when rules are substantive because society should not "permit[] the criminal process to rest at a point where it ought properly never to repose").

Petitioner's Claim is that the death penalty is unconstitutional as applies both to him and to a certain class of defendants: capital inmates in California. Regardless of the procedures followed at trial or postconviction, the death penalty cannot constitutionally be imposed on defendants in California because, as currently administered by the State, it is cruel and unusual. There is a single, invariable outcome of the rule when applied to any member of this class: their death sentence

must be vacated. Last, the state's interest in finality lacks force when over 700 people would be deprived of their constitutional rights without retroactive application.

It is well established that categorical prohibitions are substantive rules that may be retroactively applied. Lower courts have unanimously concluded that *Atkins v. Virginia*, 536 U.S. 304 (2002), which prohibits execution of the intellectually disabled, and *Roper v. Simmons*, 543 U.S. 551 (2005), which prohibits execution of juveniles, are substantive rulings. See Steven W. Allen, "Toward a Unified Theory of Retroactivity," 54 N.Y.L.S. L. Rev. 106, 125 & n.108–10 (2009). In *Moore v. Biter*,725 F.3d 1184 (9th Cir. 2013) the Ninth Circuit held that *Graham v. Florida*, 560 U.S. 48 (2010), which prohibited life without parole for juveniles convicted of nonhomicide offenses, announced a substantive rule. 725 F.3d 1184, 1190 (9th Cir. 2013). The rule announced in *Graham* satisfied the *Penry* test because "[i]t applies to a class of defendants . . . defined by: (1) the status of the defendants (juveniles) . . . and (2) the type of offense (nonhomicide crimes)[, and it] prohibits the punishment of life without parole [as] to this class of defendants." *Id*.

Petitioner's claim is a substantive one. Like *Graham*, it seeks to categorically prohibit a discrete punishment from being imposed on a defined class of defendants: the punishment is life without parole with the possibility of death, and the class is "capital" inmates in California. The death penalty is unconstitutional in California because the substance of this punishment is such a freakish departure from a regular execution that the State could not constitutionally enact such a punishment.

Alternatively Remand Is Appropriate

The underlying factual basis of Petitioner's claim could not reasonably have been discovered at the time Petitioner filed his original direct appeal and habeas corpus petitions in the California Supreme Court. His direct appeal was filed in 2000. His original habeas corpus petition was filed in November 2001. The direct appeal was decided on 2006. The habeas corpus petition was decided in 2009. The Fair Commission did not even begin to hold hearings to collect the data on execution delay in California or the institutional reasons therefore until 2006. The final report was not issued until 2008,well after Petitioner's direct appeal was decided. Moreover, after the Fair Commission report was issued, Petitioner filed a second petition in the California Supreme Court citing the report and asking for a factual hearing to support his expanded request for relief. Petitioner's second habeas petition was summarily denied with no explanation or comment.

Recently, however, in *People v. Seumanu,* 61 Cal.4th 1293 (2015), the California Supreme Court noted that although it repeatedly and routinely denied "*Lackey*" claims, nevertheless, "the Eighth Amendment/delay claim, doctrine can evolve. This is especially true when interpreting the Eighth Amendment, which was ratified in 1791." *Id* at p. 1369. Moreover, since respondent never challenged the underlying factual basis for the claim set forth in the *Jones v. Chappell* case, (*id* at p. 1373) the California Supreme Court declared that it would entertain habeas corpus presentations presenting a combined "*Lackey*" and "*Jones*" claim so the facts could be more fully developed. *Id* at p. 1375.

Pursuant to that assertion, if this court deems Petitioner's claim not sufficiently developed through no fault of his own, this court should remand this case to the lower courts to hold a hearing on Petitioner's claim.

II. **ASSUMING THAT UNDEPENDABLE EYEWITNESS IDENTIFICATION TESTIMONY IS ADMISSIBLE AT ALL, AFTER PETITIONER MADE A COLORABLE SHOWING THAT THE EYEWITNESS TESTIMONY AGAINST HIM WAS BOTH TAINTED AND UNRELIABLE, THE TRIAL COURT COMMITTED CONSTITUTIONAL ERROR BY REFUSING TO HOLD AN EVIDENTIARY HEARING BEFORE ALLOWING THE TESTIMONY TO BE ADMITTED.**

Reasons to Grant Certiorari

This case presents this court with the opportunity 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.

Background

Petitioner was tried three times for a double homicide purportedly committed as part of a robbery of a Mr. and Mrs. Harbitz in their home. He claimed the homicide was excusable as a result of an hallucination caused by ingestion of drugs.

Over objection at trial and complaint on direct appeal in the state courts, Petitioner asserted that the trial judge improperly permitted penalty phase testimony regarding an unrelated homicide of one Houston Compton that took place many months before the charged homicides of Mr. and Mrs. Harbitz. The only evidence purportedly linking Petitioner to the uncharged Compton homicide was the testimony of Lisa Weissinger, a young woman who was an employee of McDonald's. Ms. Weissinger was allowed to testify that she saw Petitioner in a photo lineup as the person driving Mr. Compton's car through a drive-in window at a McDonald's restaurant on the night of Compton's death.

Significantly, however, the evidence is uncontradicted that in the time between the Compton homicide and the apprehension of Petitioner for the Harbitz homicides, Ms. Weissinger viewed photo lineups in which she identified other persons as the suspect she saw at her drive-through window. She was 99 percent sure that one of those other persons was the suspect. She was not asked to identify Petitioner until years after the Compton killing. Moreover, when she was shown a photo lineup containing Petitioner's picture, her identification was tentative at best. Subsequently, Ms. Weissinger identified the Petitioner in a concededly illegal live lineup, again in a photo lineup containing pictures from the illegal live lineup and later in court. Thus she saw Petitioner or his photo three different times in different venues. In fact, no other person in either the photo lineups or the live lineups was shown to her more than once. Additionally, Ms. Weissinger's home was located only a few houses away from Petitioner's parents' home and there was a common area nearby. The evidence also showed that Ms. Weissinger was never at the McDonald's window. She was instead cleaning the floor nearby when the car drove through. Another employee was at the window but that employee did not provide identification testimony because her identification was hypnotically induced by law enforcement. Further, Ms. Weissinger never saw the driver's face from its front, and only fleetingly saw the driver, and even then, only just below the driver's forehead. Moreover, extensive circumstantial evidence linked two other suspects, Charles Connell and George Murphy, to the Compton homicide. Finally, the defense presented expert testimony from a psychology professor showing that Weissinger's identification of Petitioner was based on highly suggestive circumstances and was very unreliable.

The defense challenged Ms. Weissinger's identification as being tainted by the illegal live lineup and argued that the taint interfered with its ability to cross examine her at trial. Essentially, the defense argued that the creation of a false memory meant that she could not separate her prior identification from the tainted one, and thus any identification of Petitioner would be improper. The defense asked for an evidentiary hearing to determine whether her identification testimony was admissible. Although initially ruling that he would conduct such a hearing, the trial court ultimately refused and allowed the prosecution to present her identification of Petitioner based solely on the prosecution's offer of proof. The trial court ruled that it had no authority to make factual findings regarding Ms. Weissinger's evidence and that the credibility of her identification was a jury issue. Indeed, this conclusion was supported by the lower appellate court.

Petitioner's Claim

Petitioner's Claim is essentially that as a gatekeeper who decides if evidence is sufficiently reliable to come before a jury, the trial court was required to hold a preliminary evidentiary hearing[4] before allowing this evidence to be considered as aggravation in the penalty phase. Petitioner also argued that the trial court should have granted a directed verdict dismissing this evidence, pursuant to Section 1118.1 of the California Penal Code, even assuming there existed some rational legal basis to admit the evidence in the first place [which there isn't].

Thus there are two issues presented herein. The first is whether or not the trial court was required to screen this evidence with live testimony rather than simply by an offer of proof. The second issue is whether the evidence of the Compton

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[4] See, e.g., *People v. Phillips*, 41 Cal.3d 29 (1985)

homicide should have been excluded as insufficient and unreliable. Given the minimal so-called evidence of this crime, exclusion was required and the offer of proof method of screening this evidence was woefully inadequate and unfair.

While it is true that Petitioner was able to cross examine witness Weissinger and expose some of the weaknesses in her eyewitness testimony, cross examination of a tainted memory is a useless exercise. The witness herself cannot distinguish between facts that are remembered accurately and those that are not.

More important, none of this cross examination resolves the legal questions surrounding whether Weissinger's identification of Petitioner before trial was tainted, or was reliable enough to be presented to the jury at all. The only way these legal questions can be effectively evaluated is by pre-screening the testimony in an evidentiary hearing outside the jury's presence. This full evidentiary hearing is required in state court by *Phillips, supra*, and *People v. Citrino*, 11 Cal.App.3d 778 (1970). In federal court, *Neil v. Biggers*, 409 U.S. 188 (1972) is on point and so is Justice Brennan's dissent in *Watkins v. Sowders*, 449 U.S. 341 (1981). Here, however, the only "hearing" held by the court outside the jury's presence was through an offer of proof, not live testimony, and these cases require more.

Petitioner has not suggested there is a *per se* rule requiring a hearing such as the one discussed herein. Nevertheless, such a hearing is mandatory under the circumstances of the instant case. Indeed, *Watkins v. Sowders*, 449 U.S. 341 (1981) itself suggests such a hearing may be constitutionally required given the circumstances of a particular case, as here, and indeed is often advisable. More to the point, as the dissent by Justice Brennan explains:

> "It is clear beyond peradventure, I submit, that because of the dangers to a just result inherent in identification evidence - its unreliability and its

> unusual impact on a jury - a "fair hearing and reliable determination" of admissibility, *Jackson v. Denno*, 378 U.S. at 377, are constitutionally mandated. The Due Process Clause obviously precludes the jury from convicting on unreliable identification evidence. *Manson v. Brathwaite, supra*. But the only way to be sure that the jury will not rest its verdict on improper identification evidence, as a practical matter, is by not permitting the jury to hear it in the first place. A *Jackson v. Denno* hearing would expediently accomplish that purpose. I believe that the Due Process Clause requires no less". *Id.* at 349.

As Justice Brennan also pointed out, since a large majority of lower federal courts carry out such hearings, "I should think it follows from this congruence of opinion on the desirability of such a judicial hearing that evolving standards of justice mandate such a hearing whenever a defendant proffers sufficient evidence to raise a colorable claim that police confrontation procedures were impermissibly suggestive. See, e. g., *United States ex rel. Fisher v. Driber*, 546 F.2d 18, 22 (CA3 1976)." *Id.* at p. 359.

In this case, the identification testimony admitted before the jury, without pre-screening by the court was so flimsy that a hearing would have exposed it for its unreliability, and thus rendered the evidence from *Weissinger* inadmissible. Indeed, the practice of actually holding such an "advisable" hearing seems to be the order of the day in cases before this Court and the California courts. See *Neil v. Biggers, supra*, 409 U.S. 188; *Manson v. Braithwaite*, 432 U.S. 98 (1977); *People v. Citrino, supra*, 11 Cal. App.3d 778. A *per se* rule is not required to recognize how improper was the failure to conduct this preliminary evidentiary hearing in the instant case. See also *McCrary-El v. Shaw*, 992 F.2d 809 (8th Cir. 1993), [where a court's exclusion of eyewitness identification testimony was upheld after a hearing to screen

the proposed testimony, the court concluded that it was too unreliable to be admitted before the jury].

The District Court, in its denial of habeas relief in this case, devoted 28 pages of its ruling denying habeas relief to this issue, and granted a Certificate of Appealability. AER at pp. 73-102. At the risk of oversimplifying this denial ruling, the District Court opined that there was no clearly established federal law requiring an evidentiary hearing.

The District Court simply erred. Petitioner cited those cases set forth above in support of the Constitutional need to have a pre-screening hearing in this case. More to the point, both the California Supreme Court and District Court misapplied those cases. Indeed, in its decision, the District Court traced the convoluted procedural history of this issue presented at the trial level, where the trial court initially felt obliged to exclude this evidence, and then later allowed the jury to consider it as a matter in aggravation. The trial court's original instinct was to act as a gatekeeper to evaluate whether or not this evidence was reliable in the first instance, and initially doubted it was. Then, the trial court completely abandoned its gatekeeping role, and permitted the evidence to be admitted on an unsupported offer of proof. Significantly, however, when ruling on the automatic motion for a modification of the verdict, the trial judge noted that he discounted the prosecution testimony and would NOT consider the Compton homicide in his assessment of the aggravating factors. 9 RT 2357-2358. Nevertheless, the judge never excluded the jury from considering the Compton homicide when determining whether death was the appropriate punishment.

Because the Compton homicide proof depended entirely on this unreliable eyewitness identification evidence, the improper admission not only violated the Due Process clauses of the Fifth and Fourteenth Amendments it also violated the Eighth

and Fourteenth Amendment requirements for heightened reliability in the penalty phase of a capital trial. That is, the admitted evidence deprived Petitioner of a fair, and non-arbitrary penalty determination.

In this regard, under California law, juror unanimity is not required for findings on aggravating factors. *People v. Medina*, 41 Cal.4th 694, 782 (1974). Thus, even if one juror relied on the Compton homicide in the weighing process to impose death, Petitioner's sentence must be reversed. *Johnson v. Mississippi*, 486 U.S. 578, 584-587 (1988) (death penalty set aside where there was no way to determine whether jury relied on an invalid prior conviction admitted as an aggravating factor).

In the July 2015 Ninth Circuit Opinion (see Appendix A), the panel dismissed the *Biggers* discussion on the ground that it was decided before AEDPA, and the instant case was filed after the effective date of AEDPA. This kind of limitation should not be relevant. While AEDPA establishes procedural rule changes, it does not change substantive law, especially those Constitutional protections involving due process and the right to a fair trial.

Even if that were not so, the evidence of the Compton homicide should have been excluded as a matter of sufficiency of the evidence. See *Jackson v. Virginia*, 443 U.S. 307 (1979). The evidence of Petitioner's involvement in the Compton homicide was so ephemeral that its admission would be comical if it had not been so prejudicial in this case. Nevertheless, the Circuit Court opinion attempted to bolster the admission of the Compton homicide by referring to other evidence of Petitioner's "guilt." The court noted that Petitioner purportedly told someone that he had engaged in a knife fight around the time of the Compton homicide. That meaningless bit of

circumstantial evidence and the identification testimony described above, was all the prosecution offered.

Unfortunately, the defense evidence of third party liability described above was not even mentioned in the lower court's opinion. Overlooking and misconstruing salient facts should negate the normal deference given to lower court opinions. Moreover, omitting any discussion of the absolutely crucial facts alone should result in the relief requested herein.

Finally, there was immense prejudice to Petitioner from this evidence. One of the major arguments advanced on Petitioner's behalf was that the homicide of Mr. and Mrs. Harbitz was the product of a drug crazed hallucination which, if it could not excuse Petitioner's actions, should certainly mitigate his punishment. By admitting evidence of another homicide, especially on such tenuous evidence as here, it tended to portray Petitioner as a serial killer preying on the elderly. That is, the charged homicides here were not provoked by a drug crazed hallucination, but by repeated premeditated acts. That portrayal would certainly negate the defense's mitigation argument and thus severely aggravate Petitioner's sentence. That the presentation of this evidence was undoubtedly successful for the prosecution is evident from the jury vote for death.

In sum, the District Court clearly erred in upholding the denial of the evidentiary hearing which was constitutionally required by the trial court before permitting the jury to consider evidence of the Compton homicide in aggravation. Moreover, the District Court failed to recognize that the state court misapplied existing federal law in failing to grant a judgment of acquittal preventing this evidence from being considered by the jury during the penalty phase of Petitioner's trial.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the lower reviewing courts should be reversed.

Dated: January 19, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to the Rules of Court, I certify that the foregoing petition for a writ of Certiorari is:

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Dated: January 19, 2016

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APPENDIX A
Ninth Circuit Opinion in
Boyer v. Chappel

APPENDIX B
Ninth Circuit Denial of
Petitioner's Petition for Rehearing

PROOF OF SERVICE BY MAIL AND DECLARATION
OF PRINTING ON RECYCLED PAPER

I, Nancy D. Seaman, declare as follows:

I am over eighteen (18) years of age and not a party to the within action. My business address is P.O. Box 12008, Prescott, Arizona 86304. On January 19, 2016, I served the within

PETITION FOR CERTIORARI

on each of the following, by placing a true copy thereof in a sealed envelope with postage fully prepaid, in the United States mail at Prescott, Arizona, addressed as follows:

Supreme Court of California
350 McAllister Street
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I declare that the brief was printed on recycled paper. Further, I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct and that I signed this declaration on January 19, 2016 in Prescott, Arizona.

Nancy D. Seaman

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