

California Democrat urges court to reinstate death penalty

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The office of the California Attorney General argued Monday before a three-judge panel of the United States Court of Appeals for the Ninth Circuit that last year's lower court ruling barring further executions in the state should be reversed.

The death sentence of Earnest Jones, who was convicted for a rape and murder committed 23 years ago, was vacated by Federal District Judge Cormac J. Carney, an appointee of George W. Bush. As the WSWs explained at the time, this decision was the first to invalidate the California death penalty altogether since voters reinstated capital punishment in 1978.

Carney based his ruling on the fact that during the ensuing 37 years, California courts have sentenced over 900 people to death, but only 13 have been executed. About 100 have died on death row of natural causes or suicide.

"For the rest, the dysfunctional administration of California's death penalty system has resulted, and will continue to result, in an inordinate and unpredictable period of delay preceding their actual execution," Carney wrote. "As for the random few for whom execution does become a reality, they will have languished for so long on Death Row that their execution will serve no retributive or deterrent purpose and will be arbitrary."

The Supreme Court has ruled that state laws resulting in arbitrary death sentences violate the Eighth Amendment's ban on "cruel and unusual punishments." Most cases have focused on procedures for the guilt and penalty phases of the death penalty trial, but Carney based his ruling instead on the inability of California to provide condemned inmates with meaningful review after their convictions.

The challenge to Carney's ruling was argued by Michael J. Mongan on behalf of California Attorney

General Kamala Harris. The third-ranking Democrat in state government, Harris is the current favorite of the party establishment to replace retiring US Senator Barbara Boxer next year. Harris claims to personally oppose capital punishment, but attorneys for her office support it in court at every opportunity.

Mongan's arguments concerned only mind-numbing technicalities, particularly the alleged failure of the condemned man to fully litigate his claims of state court dysfunction in state court before raising them in his federal *habeas corpus* petition, a draconian legal doctrine known as "exhaustion."

The executive director of the Habeas Corpus Research Center (HCRC), Michael Lawrence, argued to uphold Carney's ruling. Lawrence told the Ninth Circuit panel that the state provided HCRC only 34 lawyers to represent 758 death row inmates. Presently 358 inmates are waiting for a lawyer to be assigned, a process that takes 8 to 10 years.

Once the HCRC lawyer is assigned to a case, the process itself can take another 8 to 10 years, much of that time spent "exhausting" state-court proceedings so that a federal *habeas corpus* petition can be filed. Lawrence explained that in most cases HCRC lawyers submit extensive papers to the state courts detailing alleged constitutional violations, and then wait up to four years for the inevitable postcard denying their petitions without explanation.

During the oral argument, all three judges, each appointed by a Democratic president, ignored the mental anguish of human beings left to languish for decades on death row, instead focusing on whether the technical requirements for exhaustion were met before Carney ruled that the state courts were dysfunctional.

As explained by Laurie Levenson, a Loyola Law School professor who frequently comments on

California legal developments, “The question is whether they have to go back to the state system—which both sides agreed is completely dysfunctional—before it comes back to the federal courts and they deal with it.”

Placing a condemned man into such a Catch-22 is cruel and unusual punishment in itself.

Most legal experts forecast that the Ninth Circuit panel will reverse Carney. That ruling, however, could either reinstate Ernest Jones’ death sentence and move him closer to the execution chamber, or send him back into the California court system for a ruling on whether those courts are too dysfunctional to administer executions in a non-arbitrary manner. A formal opinion can be issued at any time between a few weeks and several months.

After the panel rules, the losing side will likely petition the entire Ninth Circuit for review en banc. A petition to the US Supreme Court could then be filed.

Carney’s ruling reflects that opposition to the death penalty is growing not only within the population as a whole, but also within certain sections of the ruling class.

Nineteen states have abolished the death penalty, including six—Maryland, New Jersey, New York, New Mexico, Illinois, Connecticut and Nebraska—since 2007.

Opinion polls show a steady nationwide decline of support for capital punishment. Public approval in the mid-1990s reached an all-time high of 80 percent, during the Clinton administration’s promotion of a draconian “law and order” culture, with only 16 percent opposed. Support has fallen below 60 percent in the most recent polling.

Last August, a Colorado jury rejected the death penalty for James Holmes, convicted of murdering 12 people and wounding 70 others in a movie theatre. A few weeks later another Colorado jury spared the life of Dexter Lewis after convicting him of killing five people.

In 2012 California voters narrowly defeated a ballot measure that would have ended the death penalty.

Many oppose capital punishment because of the growing understanding that corrupt and dishonest police and prosecutors manipulate evidence to obtain wrongful convictions. There is also growing recognition that low-income and minority defendants are disproportionately targeted for execution.

The judicial system, representing some of the most class-conscious representatives of the ruling class, has been sensitive to this shift. In the last decade a divided Supreme Court has ruled that executions of mentally retarded individuals (*Atkins v. Virginia*, 2002) and juveniles (*Roper v. Simmons*, 2005) violate the Eighth Amendment.

Last June, Justices Stephen Breyer and Ruth Bader Ginsburg wrote a dissent urging the Supreme Court to rule “that the death penalty, in and of itself, now likely constitutes a legally prohibited cruel and unusual punishment.”

There are also “fiscal opponents” who reject capital punishment because of its exorbitant cost, estimated to exceed \$300 million per execution in California.

Despite the growing opposition, California’s Democratic Governor Jerry Brown, like Attorney General Harris, chose to appeal Carney’s ruling. Brown, like Harris, has expressed personal opposition to the death penalty, while using his political authority to support it.

In 2012, in response to a federal court’s invalidating California’s three-drug lethal injection protocol, Brown ordered prison officials to develop a single-drug method, stating, “My administration is working to ensure that California’s laws on capital punishment are upheld and carried out in conformity with our statutes.”

Both Brown and Harris also refused to publicly support California’s anti-death penalty ballot measure in 2012.



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