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PERSPECTIVE

Death penalty ruling is 50 years late

By Sanford Jay Rosen

On July 16, U.S. District Judge Cormac J. Carney invalidated California's death penalty. After reviewing voluminous evidence he held that, "Inordinate and unpredictable delay has resulted in a death penalty system in which very few of the hundreds of individuals sentenced to death have been, or even will be, executed by the state. It has resulted in a system in which arbitrary factors, rather than legitimate ones like the nature of the crime or the date of the death sentence, determine whether an individual will actually be executed. And it has resulted in a system that serves no penological purpose. Such a system is unconstitutional." *Jones v. Chappell*, CV 09-02158-CJC (C.D. Cal.).

Jones has been on death row more than 19 years.

Over several decades, I became painfully familiar with California's broken death penalty regime. I successfully represented three California defendants who were sentenced to death. I was appeals counsel for each in the state Supreme Court. I also represented one of them in retrial proceedings after his conviction had been vacated by the Supreme Court. That retrial ended in a plea bargain by which my client was resentenced to life with the possibility of parole. I represented the last of my death penalty clients in a lengthy habeas corpus evidentiary hearing that developed the record based on which en banc the 9th U.S. Circuit Court of Appeals unanimously vacated my client's death penalty.

I took no more appointments in part because I concluded that the state Supreme Court at the time vacated virtually no death sentences and had changed the rules for appointment of counsel making their job even more onerous than it had been. I could no longer be complicit in the state's fatally flawed death penalty machinery, which increasingly offered little prospect of success, while clogging the California trial courts with extraordinarily costly capital case trials and the state Supreme Court with hundreds of mandatory appeals and habeas corpus proceedings. The delays and flaws in the death penalty process exemplified by and recited in Jones validate my reasons.

If the Jones decision holds up, it will be the beginning of the end of the death penalty in many other U.S. states in addition to California. Carney has started a process that should have been started by the U.S. Supreme Court in a notorious California case more than 50 years ago. Back then, the Supreme Court could have kept Caryl Chessman from being executed in San Quentin's death chamber in 1960. Chessman had been convicted by the state of California in 1948 of attempted rape in the course of a kidnapping, a crime that could not be a capital offense today. He was executed more than 11 years later, after countless state and federal post-conviction proceedings and appeals. Unfortunately, the Supreme Court did not seize that opportunity.

Associated Press

Pickets carrying signs protesting the scheduled execution of Caryl Chessman and asking that he be saved, march in front of the State building in Los Angeles, April 30, 1960.

In his seminal book "The Least Dangerous Branch: The Supreme Court at the Bar of Politics," first published in 1960, the preeminent constitutional law scholar and teacher Alexander M. Bickel lamented that the Supreme Court had missed a signal opportunity to intervene in the Chessman proceedings to start moving toward prohibition of the death penalty. He asserted the court should have stopped Chessman's execution on the grounds that the long government-sanctioned delay and numerous proceedings after Chessman's conviction made his execution unconstitutional. (For more on Bickel's position see also my SCOTUSblog article commemorating the book: http://www.scotusblog.com/2012/08/online-bickel-symposium-how-i-spent-my-summer-of-1961/.)

With understandable passion, anticipating Carney's conclusion in the Jones case, Bickel wrote of the Chessman case, "What the Court should have done was to declare that killing Chessman in 1960, after years in the death house, was a punishment infinitely more ghastly than killing him in 1948." setting in motion a process leading to an "ultimate broader judicial judgment, at once widely acceptable and morally elevating."

I think that Alex would be smiling about Carney's decision. He certainly would have appreciated the irony that both Chessman and Jones were sentenced to death in and by the state of California, and that a Governor Jerry Brown was in office both when Chessman was executed and when the Jones case was decided.

Pat Brown, California's governor in 1960, was a longtime foe of the death penalty. Yet he did not commute Chessman's death sentence and issued a stay too late to keep Chessman from being executed in San Quentin's gas chamber on May 2, 1960. Pat Brown's son Jerry now is California's governor. He also is a foe of the death penalty. In 1964, Brown graduated from Yale Law School, where Bickel taught, just two years after "The Least Dangerous Branch" was published.

Within the next weeks and months, Brown and Attorney General Kamala Harris, who also is a foe of the death penalty, must decide whether to accept or appeal Carney's decision. Both refused to appeal Judge Vaughn Walker's decision invalidating California's Proposition 8 which had prohibited same-sex marriages.

One can but hope they will do the right thing again and stand by their convictions by accepting Carney's decision. The time has come to bring this part of Alex Bickel's constitutional legacy to fruition, and end the broken, expensive, delay-plagued death penalty in California and the rest of the United States.

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