

CRUEL AND UNUSUAL PUNISHMENT: A RECONSIDERATION OF THE *LACKEY* CLAIM

JEREMY ROOT*

INTRODUCTION

*My lawyer tells me that I've spent over 5000 days on death row. Not a single waking hour of any of those days has gone by without me thinking about my date with the executioner.*¹

*There must be a point, however, at which the court steps in and says enough is enough. Beyond a certain number of years and a certain number of failed attempts by the State to secure a constitutionally valid sentence of death, the litigation becomes a form of torture in and of itself.*²

Death is an exceptional punishment. No punishment is more severe or more final. Though legislators have increasingly been imposing mandatory sentences for criminal offenses, the Constitution forbids a mandatory death penalty.³ Despite its exceptional character, the number of people who have been condemned to die has grown steadily in the past twenty-five years. As of January 1, 2002, there were 3711 people awaiting execution in the United States.⁴ If the government revoked the due process rights of condemned inmates today, and began executing them at a rate of one per day, it would take over ten years to kill them all.

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1. Willie Lloyd Turner, *quoted in* Kathleen M. Flynn, *The "Agony of Suspense": How Protracted Death Row Confinement Gives Rise to an Eighth Amendment Claim of Cruel and Unusual Punishment*, 54 WASH. & LEE L. REV. 291, 296 n.30 (quoting Petition for Writ of Habeas Corpus at 58, Turner v. Jabe, 58 F.3d 924 (4th Cir. 1995) (No. 95-4005)).

2. *People v. Simms*, 736 N.E.2d 1092, 1143 (Ill. 2000) (Harrison, C.J., dissenting).

3. *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion) (holding that a mandatory death sentence for first degree murder violates the Eighth and Fourteenth Amendments).

4. See NAACP LEGAL DEF. & EDUC. FUND, DEATH ROW U.S.A. 3 (2002).

The life of a death sentence is extraordinarily long. Capital convictions and sentences wend their way through the appellate process slowly, with a lengthy delay between sentence and execution. The average elapsed time from death sentence to execution as of December 2000 was eleven years and five months,⁵ and the duration of incarceration on death row appears to be growing.⁶ Commentators from both sides of the passionate death penalty debate decry the delays in the system. Supporters of the death penalty are willing to consider drastic solutions to delays that, in their view, undermine the efficacy of capital punishment.⁷ Death penalty opponents, on the other hand, claim that lengthy delays constitute cruel and unusual punishment and should be constitutionally forbidden. From either perspective, delay is a source of tremendous frustration.

In 1995, Justice John Paul Stevens expressed the view that inordinate delays associated with executions in the United States might constitute cruel and unusual punishment in violation of the Eighth Amendment.⁸ In an opinion respecting the denial of certiorari, Justice Stevens urged the lower state and federal courts to examine Eighth Amendment claims that are based on lengthy periods of incarceration on death row, so that the Supreme Court could benefit from the lower courts' review of the question.⁹ The opinion also indicated that Justice Breyer agreed that "the issue is an important undecided one."¹⁰ Since then, state and federal courts have considered this issue, but they have rarely undertaken a thorough analysis of the merits of the claim. More frequently, the courts have dismissed the delay question as procedurally barred, or have summarily declared it to be meritless. Instead of assessing the issue in earnest, many decision-makers see in this claim yet another "affront to law-abiding citizens who are already rightly disillusioned with [the justice] system . . . [by] those who have politicized capital punishment even within the judiciary."¹¹ The issue does not deserve to be seen with such a jaundiced eye. When more than one member of the Supreme Court has indicated that this issue raises constitutional concerns, the question deserves serious scrutiny.

5. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 2000, at 12 (Dec. 2001).

6. *Id.* at 12 tbl.12; see also JAMES S. LIEBMAN, JEFFREY FAGAN & VALERIE WEST, A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995, at 10 (2000) [hereinafter LIEBMAN & FAGAN, A BROKEN SYSTEM] (noting increasing pre-execution incarceration during study period).

7. See Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 28 (1995) (suggesting, among other, more realistic solutions, "a wholesale repudiation of the Eighth Amendment case law developed by the Supreme Court over the last quarter century" to speed up executions).

8. *Lackey v. Texas*, 514 U.S. 1045, 1045-46 (1995) (mem.) (Stevens, J., respecting the denial of certiorari).

9. *Id.* at 1047 (urging "state and federal courts to 'serve as laboratories in which the issue receives further study before it is addressed by [the Supreme] Court.'" (quoting *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of certiorari))).

10. *Id.*

11. *Turner v. Jabe*, 58 F.3d 924, 933 (4th Cir. 1995) (Luttig, J., concurring).

This article addresses itself to the constitutional questions regarding the delays associated with capital punishment. Courts that have considered the claim that delay violates the Eighth Amendment have struggled to find footing for the claim in the American constitutional tradition. In addition to addressing the Eighth Amendment basis for the claim,¹² this article will also explore the constitutional and jurisprudential traditions outside of the Eighth Amendment that could be useful in assessing the claim. Specifically, it will draw support from an analogy to Sixth Amendment claims under the Speedy Trial Clause to assess the constitutional implications of delays in capital cases. The familiar tools that courts use when addressing those claims can and should be utilized when addressing capital petitioners' claims of unconstitutional delay. This article will also discuss double jeopardy and due process principles, as they also have a place in the assessment of the merits of the claim.

The other critical question about constitutional claims of delay in capital cases regards the remedy. Even if a court were willing to accept the merits of the claim, what remedy would be appropriate? Should there be a maximum time frame beyond which the state is forbidden from executing someone? This article will argue that courts should consider remedies for unconstitutional delays in two distinct contexts. In the first context, the allegation of unconstitutional delay between sentence and execution would depend upon resolution of other constitutional claims. When other constitutional arguments persuade a court to reverse a capital conviction or sentence of death, the period of time the defendant has already spent incarcerated under an unconstitutional sentence of death should be a factor in determining the remedy for those other constitutional violations. In particular, when convictions are reversed on the basis of state misconduct, unconstitutional delay should mandate a remedy that prohibits the state from seeking a second death sentence against the defendant.

The second context in which courts should consider remedies for unconstitutional delays is when the delay question is presented as a freestanding constitutional claim. Acknowledging that the appellate process is inherently time-consuming, a claim of unconstitutional delay in this context would not become viable until it exceeds the average duration of the appellate process. Freestanding claims of unconstitutional delay present difficult procedural and substantive problems. Among the problems this article will address with the freestanding claim are timing and ripeness questions, procedural impediments,

12. The Eighth Amendment foundation for the claim is already well-established. See Dwight Aarons, *Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?*, 29 SETON HALL L. REV. 147 (1998); Michael P. Connolly, *Better Never Than Late: Prolonged Stays on Death Row Violate the Eighth Amendment*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 101 (1997); Dan Crocker, *Extended Stays: Does Lengthy Imprisonment on Death Row Undermine the Goals of Capital Punishment?*, 1 J. GENDER RACE & JUST. 555 (1998); Jessica Feldman, *A Death Row Incarceration Calculus: When Prolonged Death Row Imprisonment Becomes Unconstitutional*, 40 SANTA CLARA L. REV. 187 (1999); Flynn, *supra* note 1; Richard E. Shugrue, "A Fate Worse Than Death" – *An Essay on Whether Long Times on Death Row Are Cruel Times*, 29 CREIGHTON L. REV. 1 (1995).

subjective prejudice requirements, and most importantly, attributing causes for the delay. This article argues that importing the analytical tools from the Sixth Amendment context will assist courts to arrive at more reasoned conclusions about the freestanding Eighth Amendment claim of delay. In both contexts, constitutional support for the remedy should not be limited to the Eighth Amendment. Equitable arguments supporting relief can be borrowed from the Fifth, Sixth, and Fourteenth Amendment jurisprudential traditions.

This article is divided into three parts. Part I describes the nature and origins of delays in the processing of a capital case. After a general description of the procedures, this section will follow the progress of one death penalty case from crime to execution. Next, it offers a description of common causes of delay in capital cases. The description of delays in this article relies heavily on the recent work of Professor Liebman and Professor Fagan assessing error rates in capital cases to demonstrate that the delay problem is unlikely to dissipate in the foreseeable future. Part I will conclude with a brief description of Eighth Amendment case law generally, and a more detailed description of the genesis of the delay claim. Part II will explore the constitutional foundations for a claim that inordinate delay between sentencing and execution violates a citizen's rights. It will begin by addressing the familiar Eighth Amendment foundation of the claim. Next, it will show that the delay claim has merit extending beyond the Eighth Amendment. This part will develop analogous support for the claim from other areas of the American constitutional tradition, in particular from Sixth Amendment Speedy Trial Clause jurisprudence, and Fifth Amendment Double Jeopardy Clause and Due Process Clause cases. Part II will conclude by addressing the procedural problems that accompany this claim. Part III addresses appropriate remedies for this constitutional violation. It will differentiate the claim according to the two contexts described in the introduction and discuss distinct and appropriate remedies in both contexts. In conclusion, this article addresses the question of the potential fallout from the recognition of delays as a constitutional problem; in essence, it asks: "Who wins?"

I.

THE DEVELOPMENT OF THE DELAY PROBLEM

A. Description of the Processing of a Capital Case

Capital trials arguably present the single most difficult task for criminal practitioners. For both the prosecution and the defense, the stakes are incredibly high. This increases the perceived need for protracted pre-trial litigation, including issues of discovery, venue, and, especially, jury selection. The special rules governing jury selection in capital cases make that process more difficult, more costly, and more time-consuming than it is in noncapital cases. These procedures are so important that capital practitioners on both sides often declare that their cases are won or lost during jury selection.

If the trial results in a conviction and death sentence, the path ahead is long and difficult both for the state and the defendant. Prisoners under sentence of death can, and often do, pursue three avenues of appeal. First, the prisoner pursues a direct appeal of his¹³ conviction. All criminal defendants are entitled to a direct appeal. In noncapital cases, appeal requires an affirmative act from the defendant; in capital cases, however, the initial direct appeal in the state courts is mandatory in most jurisdictions. Such special procedures for direct appeals constitute one of the components of modern death penalty legislation that led the Supreme Court to affirm the constitutionality of capital punishment in *Gregg v. Georgia*.¹⁴ While specialized review procedures are not constitutionally mandated, they possess such a salutary nature that they are nearly universal in states that utilize the death penalty.

The direct appeal process includes at least one mandatory appeal in the state courts, and the availability of certiorari review in the United States Supreme Court. In some jurisdictions, this process also includes one additional level of appeal in the state court system. If the prisoner gets relief from his conviction or sentence at any stage in this process, the state is most often ordered to retry or resentence the defendant.

If the direct appeal process does not result in relief, the prisoner can pursue a collateral appeal. Collateral appeals have twin routes, through the state and federal courts. Before the prisoner may pursue his appeal in federal court, he is first required by statute to exhaust available state remedies;¹⁵ this rule of exhaustion is based on the principle of judicial comity.¹⁶ The criminal

13. As the vast majority of individuals on death row in the United States are male, this article refers to capital defendants in the abstract with male pronouns. See Death Penalty Information Center, *Women and the Death Penalty*, at <http://www.deathpenaltyinfo.org/womenstats.html> (last visited Apr. 6, 2002) (identifying 1.46% of death row inmates as female as of January 1, 2002, and noting that eight women have been executed since 1976); Victor L. Streib, *Death Penalty for Female Offenders* 3, at <http://www.law.onu.edu/faculty/streib/femdeath.pdf> (last updated Mar. 1, 2002) (noting that between the years 1900 and 2000, women comprised 0.6% of all persons executed in America).

14. 428 U.S. 153, 207 (1976) (“[T]he review function of the Supreme Court of Georgia affords additional assurance that the concerns that prompted our decision in *Furman* [*v. Georgia*, 408 U.S. 238 (1972) (per curiam)] are not present to any significant degree in the Georgia procedure applied here.”).

15. 28 U.S.C. § 2254(b)–(c) (1994 & Supp. V 1999).

16. As the Court stated in *Rose v. Lundy*:

Because “it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation,” federal courts apply the doctrine of comity, which “teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.”

455 U.S. 509, 518 (1982) (quoting *Darr v. Burford*, 339 U.S. 200, 204 (1950)). See also BLACK’S LAW DICTIONARY 262 (7th ed. 1999) (Defining “judicial comity” as, “The respect a court of one state or jurisdiction shows to another state or jurisdiction in giving effect to the other’s laws and judicial decisions.”).

conviction is primarily a state judgment, so states are granted the first opportunity to review their judgments for error.

The collateral appeal, however, is more than a simple re-examination of the issues litigated on direct appeal. There is an entire class of constitutional issues that cannot be litigated on direct appeal because its factual foundation requires development beyond the trial record. Whether trial counsel's performance met the Sixth Amendment requirement for effectiveness, for example, will rarely, if ever, be apparent from the trial record alone. Other issues that are not often evident from the face of the trial record include suppression of evidence favorable to the defense, jury misconduct, and competency to stand trial. These issues must be litigated in the state courts in a collateral appeal before they can be heard in the federal courts.

After the petitioner has litigated all of his collateral issues in state court, he has an opportunity to challenge the constitutionality of his conviction and sentence in the federal courts through a petition for a writ of habeas corpus.¹⁷ Here, federal courts review state court judgments on federal issues. Critics of the Supreme Court's death penalty jurisprudence often assail the writ of habeas corpus as a fruitless burden on the federal court system. Perhaps in response to these criticisms, access to the writ has been progressively restricted over the last quarter century, first by the judiciary, then by Congress.¹⁸

Habeas corpus proceedings begin with the filing of a petition in a federal district court in the state and district where the defendant was convicted. If relief is denied *and* the petitioner can show that his case presents a substantial constitutional claim, he can appeal to the federal circuit court. If that appeal is also denied, he can petition the Supreme Court for a writ of certiorari. Despite direct and collateral appeals in state courts, which themselves reverse a significant percentage of capital judgments,¹⁹ the reversal rate of capital convictions and sentences in federal courts remains startlingly high at forty percent.²⁰ This process, regardless of the outcome, can also take a considerable amount of time.²¹

B. *The Unusual Case of Duncan McKenzie*

This article will use the case of Duncan Peder McKenzie as a conceptual aid to understanding the types and causes of delay in the administration of capital punishment. McKenzie spent over twenty years incarcerated on death row,

17. 28 U.S.C. §§ 2241–2255 (1994 & Supp. V 1999) (statutory provisions governing habeas corpus).

18. See *infra* Part II.D.

19. LIEBMAN & FAGAN, A BROKEN SYSTEM, *supra* note 6, at 35–37 (demonstrating that forty-one percent of capital judgments were reversed during direct appeals in state courts, and an additional ten percent were reversed during collateral appeals in state courts).

20. *Id.* at 37.

21. BUREAU OF JUSTICE STATISTICS, *supra* note 5, at 12.

awaiting his execution.²² As his execution approached, he alleged that the lengthy delay violated his constitutional rights.²³ His case became one of the leading circuit court cases addressing the delay claim.²⁴ Although McKenzie's case took considerably longer than average to proceed through the system, his unusually long case is instructive because it presents most, if not all, of the causes of delay most common to death penalty cases. Here are the facts of his case.

1. *Crime and Pretrial Procedures*

On the morning of January 22, 1974, Lana Harding, a twenty-three-year-old teacher at a rural school, did not report to work.²⁵ When the police went to her house to investigate, they discovered scuff marks, throw rugs in disarray, and a pair of women's glasses on the floor. There appeared to be a trail from her residence to a nearby road where someone may have dragged a body. At the end of the trail, the police found a substance that appeared to be blood and a woman's wristwatch. A witness told the authorities that they saw McKenzie's black 1948 Dodge pickup truck the previous evening parked where the drag trail ended. McKenzie was arrested on charges of misdemeanor assault in the late afternoon of January 22, 1974.

On January 23, 1974, the police discovered Lana Harding's dead body, naked from the waist down.²⁶ She had been beaten severely and sexually assaulted before her death.²⁷ The eventual cause of death was a skull-splitting blow to the right side of her head; a rope was tied around her neck and a coil of wire was tangled in her hair.²⁸ After McKenzie's arrest, the police impounded his pickup truck.²⁹ Blood was found in the bed and springs of the pickup, and blood that matched Harding's blood-type was found on the exhaust manifold.³⁰ The police also discovered brain and cortical tissue matching Harding's on the exhaust manifold of the pickup truck.³¹ Near where the body was found, the police found McKenzie's work gloves stained with human blood.³² The police

22. One account of the history of the McKenzie case was included as an appendix to Judge Norris's dissenting opinion in *McKenzie v. Day*, 57 F.3d 1461, 1490-93 (9th Cir. 1995).

23. For a careful analysis of McKenzie's Eighth Amendment claim based on delay, see Amber A. Bell, *McKenzie v. Day: Is Twenty Years on Death Row Cruel and Unusual Punishment?*, 26 GOLDEN GATE U. L. REV. 41 (1996).

24. See *McKenzie v. Day*, 57 F.3d 1461.

25. *State v. McKenzie [McKenzie II]*, 581 P.2d 1205, 1238 (Mont. 1978) (Shea, J., dissenting).

26. *State v. McKenzie [McKenzie I]*, 557 P.2d 1023, 1027 (Mont. 1976).

27. *Id.*

28. *Id.*

29. *McKenzie II*, 581 P.2d at 1210.

30. *Id.*

31. *Id.*

32. *Id.*

also found overshoes with Harding's blood-type and brain tissue on them; the impressions in the overshoes matched McKenzie's boots.³³

The community was outraged at the gruesome nature of this crime and the outrage spread throughout the state of Montana.³⁴ After discovering convincing evidence linking McKenzie to this grisly homicide, the state amended the charge of misdemeanor assault, and on January 24, 1974, charged him with one count of deliberate homicide.³⁵ Between January 24 and May 28, the state amended the charging information twice.³⁶ The second amended information (in Montana, charging instruments are referred to as informations) charged McKenzie with twenty-two counts of criminal conduct: seven counts of deliberate homicide, ten counts of aggravated kidnapping, three counts of aggravated assault, and two counts of sexual intercourse without consent.³⁷ McKenzie petitioned the Montana Supreme Court to limit the charges against him to those for which the state demonstrated probable cause. On August 6, 1974, the Montana Supreme Court reduced the charges from twenty-two to seven counts: two counts of deliberate murder, two counts of aggravated kidnapping, two counts of aggravated assault, and one count of sexual intercourse without consent.³⁸ The court also ordered that on remand, the prosecution omit "unnecessary, redundant, and inflammatory" penalty provisions from the charging document.³⁹

Prior to the beginning of trial, defense counsel engaged in plea negotiations.⁴⁰ On Sunday, December 22, 1974, counsel for both sides met and agreed to enter a plea of guilty to the charges of deliberate homicide and aggravated assault. Pending the approval of the trial judge, the parties agreed that McKenzie was to serve concurrent sentences of fifty years for deliberate homicide and twenty years for aggravated assault.⁴¹ The next day, all counsel met in the trial judge's chambers for more than three hours to discuss the case and the plea agreement.⁴² Although the judge was dissatisfied with the length of the prison sentences, he agreed to accept the plea.⁴³ The parties scheduled the plea agreement to be entered on December 30, 1974.⁴⁴ After the agreement was reached, defense counsel and prosecutors went to a restaurant to discuss the

33. *Id.*

34. *Id.* at 1236 (Shea J., dissenting) ("The circumstances of this murder whipped the emotions of the citizens of Pondera County to a feverish pitch and caused an outcry throughout this state.").

35. *Id.* at 1210; *State ex rel. McKenzie v. Dist. Court of the Ninth Judicial Dist.*, 525 P.2d 1211, 1213 (Mont. 1974).

36. *State ex. rel. McKenzie*, 525 P.2d at 1213.

37. *Id.* at 1216-18.

38. *Id.*

39. *Id.* at 1218.

40. *See State v. McKenzie [McKenzie I]*, 557 P.2d 1023, 1038 (Mont. 1976).

41. *McKenzie v. Osborn*, 640 P.2d 368, 386 (Mont. 1981).

42. *Id.*

43. *Id.*

44. *Id.*

potential fallout from reaching a plea agreement in this high publicity case.⁴⁵ At this meeting, defense counsel divulged their theories of defense to the state and highlighted the weaknesses in the state's case.⁴⁶ On Saturday, December 28, 1974, the prosecutor told defense counsel that the deal was off because the victim's family would not approve. Specifically, the prosecutor said that the victim's father "threatened bodily harm to McKenzie, defense counsel, and the prosecutor if the plea bargain was carried out."⁴⁷ At the hearing on December 30, McKenzie sought to enforce the plea agreement, but the court refused.⁴⁸

2. McKenzie's Trial and Direct Appeal

McKenzie's trial began in January 1975 and concluded the same month with a jury finding him guilty of deliberate homicide and aggravated kidnapping. On March 3, 1975, the trial judge sentenced McKenzie to death.⁴⁹ After the Montana Supreme Court affirmed his conviction and sentence,⁵⁰ the United States Supreme Court vacated the judgment and remanded for consideration in light of a recent decision.⁵¹ The Montana Supreme Court reaffirmed the conviction and sentence over a vigorous dissent.⁵² The United States Supreme Court then vacated the judgment again and remanded for consideration,⁵³ this time in light of *Sandstrom v. Montana*.⁵⁴ In *Sandstrom v. Montana*, the United States Supreme Court held that an intent instruction identical to the one the trial judge gave the jury in McKenzie's case was unconstitutional.⁵⁵ The Montana

45. *Id.* at 386–87.

46. *Id.*

47. *Id.* at 387.

48. *See id.* at 387–88.

49. *McKenzie v. Day*, 57 F.3d 1461, 1471 (9th Cir. 1995) (Norris, J., dissenting).

50. *State v. McKenzie* [McKenzie I], 557 P.2d 1023, 1023 (Mont. 1976).

51. *McKenzie v. Montana*, 433 U.S. 905 (1977). The case was remanded for reconsideration in light of *Patterson v. New York*, 432 U.S. 197 (1977). *Patterson* affirmed that the Due Process Clause required the state to bear the burden of proof for all elements of criminal statutes including intent and that New York's requirement that a defendant bear the burden of proof for the affirmative defense of extreme emotional disturbance did not unconstitutionally shift the burden of proof on the question of intent.

52. *State v. McKenzie* [McKenzie II], 581 P.2d 1205 (Mont. 1978). For the dissent, see *id.* at 1235–77 (Shea, J., dissenting) (beginning with, "the majority has effectively ruled that a brutal, heinous murder justifies the State of Montana in suspending the operation and application of the [state and federal] Constitutions," and ending with, "[i]f this is the standard by which all review is to be conducted, then I see no reason at all why appellate courts should exist").

53. *McKenzie v. Montana*, 443 U.S. 903 (1979).

54. 442 U.S. 510 (1979).

55. The intent instruction in *Sandstrom* was that "the law presumes that a person intends the ordinary consequences of his voluntary acts." *Id.* at 512. At McKenzie's trial, the prosecution and the defense both objected to the use of the faulty intent instruction, but the judge gave the instruction nonetheless. *See McKenzie v. Riskey*, 842 F.2d 1525, 1544 (9th Cir. 1988) (en banc) (Fletcher, J., dissenting) ("The instructions in this case are so bad that even the prosecution at trial objected to their use and requested that alternatives be read in their place. They are instructions that the

Supreme Court once again affirmed the conviction and sentence over a dissent, holding the jury instruction error to be harmless in light of overwhelming evidence of guilt.⁵⁶ On December 8, 1980, McKenzie's conviction and sentence became final when the United States Supreme Court denied his petition for certiorari.⁵⁷ Justice Marshall, who by this time was dissenting in every death penalty case, ardently dissented in McKenzie's case to express his shock at the state court's decision.⁵⁸ By the time his direct appeal concluded, McKenzie had spent five years and nine months incarcerated on death row.

3. *McKenzie's Petition for State Post-Conviction Relief*

McKenzie immediately filed a petition for post-conviction relief in the state courts. His petition was denied in the trial court without a hearing on January 5, 1981. The Montana Supreme Court affirmed the denial of relief on October 29, 1981, once again over a vigorous dissent, this time from two justices.⁵⁹ One of the dissenters announced, "Never in the annals of criminal history in this state has a defendant ever been the victim of such a consistent and wholesale denial of fundamental rights. Only a federal court can now give the fair and even-handed review that the [Montana Supreme] Court has so consistently refused to give."⁶⁰ So ended McKenzie's relatively quick pursuit of post-conviction review in state court.

4. *McKenzie's First Federal Habeas Petition*

McKenzie filed a petition for a writ of habeas corpus in federal district court before the end of 1981, alleging in large part that the unconstitutional jury instructions violated his right to a fair trial. The federal district court dismissed the petition in an unpublished order on August 16, 1985.⁶¹ Before the petition was dismissed, McKenzie learned that the lead prosecutor had a forty-five minute *ex parte* conference with the sentencing judge after he was convicted but before he was sentenced. McKenzie promptly filed a petition for relief in state court on this ground. The petition was dismissed without a hearing in an unpublished opinion.

counsel for the State at the *en banc* oral argument [in the federal habeas appeal] admitted were in some respects the worst he had ever seen.").

56. *State v. McKenzie*, 608 P.2d 428, 457-59 (Mont. 1980). For the dissent, see *id.* at 459-88 (Shea, J. dissenting).

57. *McKenzie v. Montana*, 449 U.S. 1050 (1980).

58. See *id.* at 1053 (Marshall, J., dissenting) ("I cannot help but be shocked that in taking this approach, the Montana court simply applied the forbidden presumption [of intent].").

59. *McKenzie v. Osborn*, 640 P.2d 368 (Mont. 1981) (4-2 decision).

60. *Id.* at 434-35 (Shea, J., dissenting). The second dissenting justice also submitted an opinion; though it was short, it was equally contentious. See *id.* at 436 (Morrison, J., dissenting) ("An appellate court must vigilantly protect the structure [of justice] from mob assault. This Court, in *McKenzie*, has failed miserably.").

61. *McKenzie v. Day*, 57 F.3d 1461, 1491 (9th Cir. 1995) (Norris, J., dissenting).

The denial of McKenzie's first federal petition was appealed to the Ninth Circuit Court of Appeals. A panel of the court affirmed the denial of relief on October 8, 1986,⁶² but the court subsequently voted to rehear the case en banc.⁶³ The Ninth Circuit en banc affirmed the dismissal of McKenzie's first habeas petition by a seven to four vote on March 10, 1988.⁶⁴ The United States Supreme Court denied certiorari on October 11, 1988.⁶⁵ By the time his first federal habeas appeal was complete, McKenzie had spent thirteen years and seven months incarcerated on death row.

5. McKenzie's Second Federal Habeas Petition

On June 27, 1985, before his first federal petition was decided in the district court, McKenzie filed a second federal habeas petition based on the newly discovered evidence of the ex parte meeting. Ordinarily, the abuse of the writ doctrine makes it very difficult for prisoners to obtain merits review on second or subsequent federal habeas petitions,⁶⁶ but the State of Montana waived the abuse of the writ doctrine for this second petition, conceding that the claims could not have been raised earlier.⁶⁷ The federal district court took testimony from the prosecutor at the evidentiary hearing, but it could not take testimony from the trial judge: he was unavailable due to poor health, and shortly thereafter died. The prosecutor testified that the primary purpose of the meeting was to discuss his fee,⁶⁸ but he "may have" discussed facts about the case, including the victim's rape and torture, and community outrage over the crime.⁶⁹ The federal district court dismissed McKenzie's petition in an unpublished order on March 3, 1987.⁷⁰

McKenzie filed a timely appeal of the dismissal to the Ninth Circuit. As the record of the prosecutor's testimony had been lost, his testimony had to be reconstructed at least three years after the evidentiary hearing for the appeal.⁷¹ The Ninth Circuit reversed the district court's opinion because the district court had applied the wrong legal standard, requiring McKenzie to prove that the judge and prosecutor affirmatively discussed his sentencing. The proper inquiry

62. McKenzie v. Risley, 801 F.2d 1519 (9th Cir. 1986).

63. McKenzie v. Risley, 815 F.2d 1323 (9th Cir. 1987).

64. McKenzie v. Risley, 842 F.2d 1525 (9th Cir. 1988) (en banc).

65. McKenzie v. McCormick, 488 U.S. 901 (1988).

66. For a discussion of the abuse of the writ doctrine see *infra* Part II.D.3. The adoption of the Antiterrorism and Effective Death Penalty Act (AEDPA) has enacted a statutory change to the abuse of the writ doctrine, making it arguably more difficult to file a second federal habeas petition. See 28 U.S.C. § 2244(b) (Supp. V 1999).

67. See McKenzie v. McCormick, 27 F.3d 1415, 1417 n.3 (9th Cir. 1994).

68. Pursuant to a Montana statute, a private attorney, Douglas Anderson, was appointed to be a special prosecutor at Mr. McKenzie's trial. See McKenzie v. Risley, 915 F.2d 1396, 1397 (9th Cir. 1990).

69. *Id.* at 1397-98.

70. McKenzie v. Day, 57 F.3d 1461, 1492 (9th Cir. 1995) (Norris, J., dissenting).

71. McKenzie v. Risley, 915 F.2d at 1397 n.3.

was whether matters that "did or could have influenced the judge in his sentencing decision" were discussed.⁷²

However, before the district court could hold a hearing on remand, the prosecutor also died.⁷³ This placed McKenzie in the difficult position of proving that certain matters were discussed at an *ex parte* meeting where both of the participants had since died. On November 13, 1992, the district court denied McKenzie's petition for habeas corpus in an unpublished order. The Ninth Circuit affirmed the district court's decision on June 24, 1994.⁷⁴ McKenzie's petition for a writ of certiorari was denied in the United States Supreme Court on January 17, 1995,⁷⁵ and his petition for a rehearing was denied by the Court on March 20, 1995.⁷⁶ By the time McKenzie's second habeas corpus petition had exhausted all available remedies, he had been incarcerated for twenty years on death row.

6. McKenzie's Third Federal Habeas Petition

On March 27, 1995, a lower Montana state court set May 10, 1995 as McKenzie's execution date. Also on March 27, Justice Stevens issued the memorandum opinion in *Lackey v. Texas*, urging lower courts to consider constitutional problems with delays between sentencing and execution for condemned inmates. That same day, McKenzie appealed the scheduling of his execution to the state supreme court. He asserted two grounds for relief: an *ex post facto* violation since the statute authorizing his execution date was enacted after his sentence became final, and the *Lackey* delay argument. The state supreme court dismissed the appeal on April 11, and issued its opinion on April 20.⁷⁷ It held that the setting of the execution date was a ministerial act that could not be appealed, so it did not address the merits of the substantive claims.⁷⁸

On April 18, 1995, McKenzie filed a third federal habeas petition alleging the two grounds that arose from the setting of his execution date. The district court dismissed the petition *sua sponte* two days later in a one-sentence order, stating that the petition was "meritless as a successive and repetitive petition."⁷⁹ McKenzie promptly appealed to the Ninth Circuit, where his claims were denied on May 8, 1995.⁸⁰ The Ninth Circuit *en banc* denied his claims the following day.⁸¹ The United States Supreme Court denied his stay application and writ of

72. *Id.* at 1398.

73. McKenzie v. Day, 57 F.3d at 1492.

74. McKenzie v. McCormick, 27 F.3d 1415 (9th Cir. 1994).

75. McKenzie v. Weer, 513 U.S. 1118 (1995).

76. McKenzie v. Weer, 514 U.S. 1033 (1995).

77. McKenzie v. Day, 57 F.3d at 1492-93.

78. State v. McKenzie, 894 P.2d 289 (Mont. 1995).

79. McKenzie v. Day, 57 F.3d at 1493.

80. McKenzie v. Day, 57 F.3d 1461.

81. McKenzie v. Day, 57 F.3d 1493 (9th Cir. 1995) (*en banc*).

certiorari on May 10, 1995.⁸² Later that day, he was executed by lethal injection in the state of Montana.

7. Types of Delay in McKenzie's Case

On May 10, 1995, the State of Montana executed Duncan McKenzie by lethal injection, more than twenty years after his original sentence. The evidence that he perpetrated the crimes of which he was accused was very convincing. So why did it take so long to reach its ultimate conclusion? The case took so long to conclude because it possessed nearly every common cause of delay in capital cases. First, a zealous prosecutor, responding to outrage in the local community, overcharged the defendant, requiring judicial correction from the state supreme court. Overcharging criminal defendants is fairly common, but published opinions limiting this practice are quite rare. Second, the prosecutor sought the participation of the victim's family in planning the trial strategy, resulting in the possible breach of a plea agreement. Third, the state's highest court demonstrated reluctance to adhere to orders from the United States Supreme Court, causing two remands on direct appeal. Fourth, discovery during post-conviction litigation uncovered state misconduct at trial that potentially violated the defendant's constitutional rights. Fifth, the evidentiary record during the litigation was incomplete or riddled with errors for at least one stage of the appeal. Sixth, the passage of time eroded the reliability of the sentence because crucial witnesses died or became unavailable. Finally, the court systems became exhausted with the defendant and refused to consider colorable claims on the merits.

C. Common Causes of Delay

As McKenzie's case demonstrates, capital cases can take a very long time to proceed to their conclusion. This part of the article addresses more generally the causes of delay in capital cases, beginning with a discussion of the trial. Although delays in the conduct of the trial are beyond the scope of this article, many things occur at the trial stage of the process that generate future delays. This section will then consider delays associated with the appellate process, the quest for counsel, and the scheduling of execution dates.

1. Trial Delays

Oftentimes, capital prosecutions are slower to proceed to trial than noncapital criminal prosecutions. Both the prosecution and the defense have to consume more time and energy in the investigation of the case because of the likelihood of an additional sentencing hearing. Moreover, the looming possibility of a death sentence generates a more complex and rigorous set of standards

82. *McKenzie v. Day*, 514 U.S. 1104 (1995) (mem.).

for jury selection in capital cases. While prospective jurors must be willing to consider imposing the death penalty,⁸³ their support for the death penalty must not be so great as to preclude them from considering mitigating circumstances.⁸⁴ These constitutional constraints on jury selection tend to increase the time required for a capital trial. The investigation, pre-trial litigation (including jury selection), and duration of the actual trial are all factors that can cause delay. In McKenzie's case, it took nearly one year to bring him to trial, in part because of litigation connected to needless overcharging.

2. *Delays in Appellate Decision-Making*

The two most common causes of delay associated with appeals of capital cases are the assembly and maintenance of the trial record and the delivery of the opinion. The assembly of the trial record is absolutely critical to the rights of the accused. Some states impose stricter transcription requirements in capital cases than in other criminal cases.⁸⁵ Direct appellate review, optionally available after all criminal convictions, is arguably constitutionally mandated in capital cases.⁸⁶ Additionally, appellate courts in many states are required to search the record in capital cases for "plain error," that is, errors in addition to those the defendant raises on appeal.⁸⁷ The record must be complete for the courts to engage in appropriate review, and failure to transcribe significant portions of the proceedings can lead to reversal of a conviction or sentence.⁸⁸ Carefully litigated capital cases create lengthy transcripts that can take substantial time to prepare, and this can be a considerable source of delay.⁸⁹

A second major cause of delay is the lengthy wait for the delivery of an opinion. It is difficult to find an explanatory principle for the wide variation in

83. See *Wainwright v. Witt*, 469 U.S. 412 (1985) (holding that veniremembers whose opposition to the death penalty "prevents or substantially impairs" their ability to be fair and impartial may be challenged for cause); *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (holding that conscientious or religious scruples about the death penalty alone are insufficient to support challenge for cause).

84. See *Morgan v. Illinois*, 504 U.S. 719 (1992) (holding that veniremembers whose support for the death penalty precludes fair and impartial consideration of sentencing options may be challenged for cause).

85. See, e.g., CAL. PENAL CODE § 190.9(a)(1) (West 1999 & Supp. 2002) (requiring the presence of a court reporter in any case in which a death sentence may be imposed at "all proceedings conducted in the municipal and superior courts, including all conferences and proceedings, whether in open court, in conference in the courtroom, or in chambers").

86. See *Gregg v. Georgia*, 428 U.S. 153, 206-07 (1976).

87. See, e.g., ALA. CODE § 13A-5-53 (1994); ARK. CODE ANN. § 16-91-113(a) (Michie 1987).

88. See, e.g., *Hammond v. State*, 665 So. 2d 970, 974-75 (Ala. Crim. App. 1995) ("Because the state failed to provide the appellant a sufficient record on appeal . . . we reverse the judgment and remand this case.").

89. See Winslow Christian, *Delay in Criminal Appeals: A Functional Analysis of One Court's Work*, 23 STAN L. REV. 676 (1971). This delay has prompted California to impose strict statutory time limits on the preparation of the trial record. See CAL. PENAL CODE § 190.8(b) (West 1999) (requiring delivery of trial record to counsel within 30 days).

decision-making time tables in capital cases. McKenzie, for example, completed the state post-conviction process in less than one year, but his first federal habeas petition was pending for three-and-a-half years before the district court issued a decision.⁹⁰ State and federal courts deal with a high volume of cases, increasing the time it takes for all cases to progress. Given that death penalty appeals are often highly politicized,⁹¹ it is also not unreasonable to assume that decisions are occasionally withheld until an appropriate political moment. Overall, courts simply take time to reach their decisions. Whether courts spend their time in careful consideration of every aspect of the litigant's claim or in Machiavellian anticipation of the election cycle is essentially irrelevant, for it does not change the circumstances of the death row inmate during the time lapse.

3. Pursuit of Appellate Remedies, or the Problem of "Discretionary Review"

Another common source of delay in capital cases accompanies pursuit of additional rounds of appellate review. Courts often attribute to the petitioner the portion of the delay that is not due to mandatory direct review, sometimes referring to it as "discretionary review."⁹² Petitioners do not control the course of their appeals, however; state statutes combine with the exhaustion requirement of the federal habeas corpus statute to control the requirements for the pursuit of appellate relief. Most states provide that direct appeals in capital cases will proceed directly to the state's highest court.⁹³ Other states provide for two rounds of direct appeals in state court: one mandatory appeal, and then a discre-

90. See *McKenzie v. Day*, 57 F.3d 1461, 1491 (9th Cir. 1995).

91. See *infra* notes 122–124, 200–07 and accompanying text.

92. See *Bonin v. Calderon*, 77 F.3d 1155, 1160–61 (9th Cir. 1996) (characterizing pursuit of post-conviction relief after exhaustion of automatic direct appeals as delay "caused by" petitioner); *Free v. Peters*, 50 F.3d 1362, 1362 (7th Cir. 1995) (noting that delay "resulted from [petitioner's] pursuit of his discretionary appeals in both state and federal court"); *Stafford v. Ward*, 59 F.3d 1025, 1028 (10th Cir. 1995) ("The lengthy delays in this case were incurred largely at the behest of Appellant himself, who sought the repeated stays to pursue his legal remedies."); *United States ex rel. Delvecchio v. Dep't of Corrections*, No. 95-C6637, 1995 WL 688675, at *7 (N.D. Ill. Nov. 17, 1995) (distinguishing between mandatory direct appeal and discretionary post-conviction appeals). The Supreme Court, in its interpretation of the right to counsel under the Sixth and Fourteenth Amendments, has also employed the distinction between "discretionary" and automatic appeals. See *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) ("[W]e have rejected suggestions that we establish a right to counsel on discretionary appeals." (citing *Wainwright v. Torna*, 455 U.S. 586 (1982); *Ross v. Moffitt*, 417 U.S. 600 (1974))).

93. See, e.g., CAL. CONST. art. VI, § 11 (providing the state supreme court with appellate jurisdiction in death penalty cases whereas courts of appeals have appellate jurisdiction in all other cases); ARIZ. REV. STAT. ANN. § 13-703.01(A) (West 2001) (providing automatic state supreme court review of all death sentences); OR. REV. STAT. § 138.012 (2001) (providing that automatic and direct review in state supreme court of death penalty cases "has priority over all other cases"); TEX. CRIM. PROC. CODE ANN. Art. 37.071 § 2(h) (Vernon 1981 & Supp. 2002) (providing for "automatic review [of conviction and death sentence] by the Court of Criminal Appeals"); TEX. CRIM. PROC. CODE ANN. Art. 4.04 § 2 (Vernon 1977 & Supp. 2002) (providing Court of Criminal Appeals with "final appellate and review jurisdiction in criminal cases [in Texas]" and providing that appeal of all death penalty cases "shall be to the Court of Criminal Appeals").

tionary appeal to the state's highest court.⁹⁴ State post-conviction procedure varies, but many states allow for presentation of post-conviction claims to three courts: a trial court, an intermediate appellate court, and the state's highest court.⁹⁵

In order to present claims in a federal habeas petition, petitioners are statutorily required to exhaust available appellate remedies in state court.⁹⁶ This requires exhaustion of both direct and post-conviction appeals at the state level. The United States Supreme Court has essentially rendered the "discretionary" appeals within the state court system to be mandatory through its interpretation of the exhaustion doctrine.⁹⁷ In *O'Sullivan v. Boerckel*,⁹⁸ the Court held that a failure to present claims for discretionary review in the state supreme court bars federal habeas corpus review of the claims.⁹⁹ This important recent development in the exhaustion doctrine substantially increases the time a prisoner sentenced to death must spend pursuing appeals in the state court system.

Moreover, many of the claims presented during the state post-conviction process cannot be litigated during the direct appeal process because they require further factual development outside the record of the trial.¹⁰⁰ Claims that the defense attorney was ineffective at trial, for example, will rarely be apparent from the face of the trial record. The standard of proof necessary to succeed on a claim of ineffectiveness requires the presentation of additional evidence.¹⁰¹ Additionally, the factual basis for claims of state misconduct are often uncovered during discovery of other post-conviction claims, as with the *ex parte* meeting in the McKenzie case, preventing them from being litigated quickly on direct appeal. It is difficult to give full effect to constitutional rights during the initial appeal if certain aspects of those rights are beyond review until post-conviction proceedings begin.

94. See, e.g., ALA. CODE § 13A-5-53 (1994) (providing for mandatory appeal of death sentence to the Court of Criminal Appeals, "subject to review [on certiorari] by the Alabama Supreme Court").

95. See, e.g., ALA. R. CRIM. P. 32.10 (providing for appeal of post-conviction judgment to the criminal court of appeals); ALA. R. APP. P. 39(a) (providing for review by state supreme court); see also OR. REV. STAT. § 138.650 (2001) (providing for post-conviction appeal to state court of appeals); OR. REV. STAT. § 2.520 (2001) (providing for review of court of appeals decisions in state supreme court).

96. 28 U.S.C. § 2254(b)-(c) (1994 & Supp. V 1999).

97. See *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999) (holding that exhaustion requires presentation of claims to state supreme court for discretionary review).

98. *Id.*

99. *Id.* at 848.

100. See *Murray v. Giarratano*, 492 U.S. 1, 24 (1989) (Stevens, J., dissenting) ("Claims that trial or appellate counsel provided constitutionally ineffective assistance, for instance, usually cannot be raised until [the post-conviction] stage. Furthermore, some irregularities, such as prosecutorial misconduct, may not surface until after the direct review is complete. Occasionally, new evidence even may suggest that the defendant is innocent.") (citations omitted).

101. See *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (requiring a successful ineffectiveness claim to show that counsel's errors lead to "a reasonable probability that . . . the outcome of the proceeding would have been different").

Petitioners often seek certiorari review in the United States Supreme Court in addition to completing the required levels of state court appeals. Although the Supreme Court reviews very few cases,¹⁰² seeking certiorari review has significant procedural and substantive effects on the litigation, especially during direct appeal. The non-retroactivity doctrine of *Teague v. Lane*¹⁰³ limits habeas corpus relief to those aspects of federal law that were decided prior to the time that the conviction became 'final.' The Court has generally held that criminal convictions become final upon denial of certiorari or the expiration of time for filing a petition for certiorari.¹⁰⁴ It behooves the defendant, therefore, to seek certiorari review to postpone the finality of his conviction and maximize the constitutional rules in existence prior to that time.¹⁰⁵ Additionally, the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA) created, for the first time, a statute of limitations for filing federal habeas corpus petitions.¹⁰⁶ In general, the statute of limitations begins to run when the conviction becomes final.¹⁰⁷ Petitioning for certiorari forestalls the commencement of the statute of limitations, enlarging the time available for filing a federal habeas corpus petition.

In a sense, all non-mandatory appeals are 'discretionary' in that they require affirmative action from the prisoner-defendant to instigate the process. There is something unique, however, about federal habeas corpus review. It is beyond the scope of this article to indulge in a historical and theoretical exposition of the purpose and function of the writ of habeas corpus.¹⁰⁸ It should suffice, however, to make two independent observations, the first more controversial than the

102. See CHIEF JUSTICE REHNQUIST, 2001 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4 (Jan. 1, 2002) (noting that the Supreme Court disposed of 83 of the 7852 cases filed in the 2000 term), available at <http://www.supremecourtus.gov/publicinfo/year-end/2001year-endreport.html>.

103. 489 U.S. 288 (1989).

104. See, e.g., *Stringer v. Black*, 503 U.S. 222, 226 (1992) ("Petitioner's conviction became final when we denied certiorari on February 19, 1985.").

105. See RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE § 5.1, at 226, § 25.6, at 1107-08 (4th ed. 2001).

106. 28 U.S.C. § 2244(d)(1) (Supp. V 1999) (providing a one-year statute of limitations for states that do not create post-conviction counsel provisions to comply with requirements of 28 U.S.C. § 2261(b)-(c)); 28 U.S.C. § 2263 (Supp. V 1999) (providing a 180-day statute of limitations for states that comply with requirements of 28 U.S.C. § 2261). No states that utilize capital punishment currently comply with statutory requirements for post-conviction counsel to trigger shorter statute of limitations.

107. See 28 U.S.C. § 2244(d)(1)(A) (Supp. V 1999). Two of the other three circumstances that trigger a different commencement of the statute of limitations are exceptionally rare. They are: removal of a state impediment to filing for relief (28 U.S.C. § 2244(d)(1)(B) (Supp. V 1999)), and date of retroactive application of new right to cases on collateral review (28 U.S.C. § 2244(d)(1)(C) (Supp. V 1999)). The other exception to the general statute of limitations is discovery of the factual predicate of a claim that could not have been discovered earlier. 28 U.S.C. § 2244(d)(1)(D) (Supp. V 1999). For a general discussion, see HERTZ & LIEBMAN, *supra* note 105, § 5.2b, at 250-52.

108. For a discussion of the purpose and function of the writ of habeas corpus, see HERTZ & LIEBMAN, *supra* note 105, § 2 and sources cited therein.

second. First, the decreasing availability of review of federal constitutional questions in the Supreme Court on certiorari leaves federal habeas corpus as the *only* forum in which state prisoners can have an Article III judge review their federal claims. Habeas corpus therefore serves as a necessary federal forum in which to prevent unconstitutional restraints on liberty.¹⁰⁹ Second, the United States Constitution explicitly provides citizens access to the writ of habeas corpus and forbids suspension of the writ.¹¹⁰ For both of these reasons, federal habeas corpus performs an exceptional function in the American criminal justice system. Citizens seeking to access ‘the great writ’ should not be penalized for doing so.

4. *The Quest for Competent Counsel*

The Sixth and Fourteenth Amendments assure the right to counsel for indigent criminal defendants at trial and on direct appeal.¹¹¹ However, the Supreme Court has held that the right to counsel in criminal cases does not extend beyond the initial direct appeal,¹¹² and that there is no right to counsel in post-conviction proceedings.¹¹³ Despite imposing “special constraints” on procedures in capital cases¹¹⁴ and requiring a “greater degree of reliability” in capital cases,¹¹⁵ the Court did not recognize a distinction between capital and noncapital cases in interpreting the Sixth Amendment right to counsel.¹¹⁶ While some states have determined that a right to counsel in capital post-conviction proceedings exists under their state constitutions,¹¹⁷ there is no guarantee that

109. Two factors differentiate habeas corpus from other areas where federal review may seem similarly unavailable: the jurisdictional prerequisite that the petitioner be in custody, and the absence of the possibility of removal to federal court during trial.

110. See U.S. CONST. art. I, § 9, cl. 2; see also Jordan Steiker, *Incorporating the Suspension Clause: Is there a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862 (1994).

111. See *Gideon v. Wainwright*, 372 U.S. 335 (1963) (assuring indigent defendants right to counsel at trial); *Douglas v. California*, 372 U.S. 353 (1963) (assuring indigent defendants right to counsel on initial direct appeal).

112. See *Ross v. Moffitt*, 417 U.S. 600 (1974) (holding that there is no right to counsel for additional discretionary direct appeals in state court).

113. See *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (refusing to recognize right to counsel during post-conviction proceedings in criminal cases: “the right to appointed counsel extends to the first appeal of right, and no further”).

114. *Murray v. Giarratano*, 492 U.S. 1, 8 (1989) (“We have recognized on more than one occasion that the Constitution requires special constraints on procedures used to convict an accused of a capital offense and sentence him to death.”) (internal citations omitted).

115. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (“We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.”).

116. Compare *Finley*, 481 U.S. at 555 (1987) (no right to counsel during post-conviction proceedings in criminal cases generally), with *Giarratano*, 492 U.S. at 10 (no right to counsel during post-conviction proceedings in capital cases).

117. See, e.g., *Jackson v. State*, 732 So. 2d 187, 190 (Miss. 1999) (recognizing that in “reality . . . post-conviction efforts, though collateral, have [through the exhaustion requirement]

counsel will be available for capital petitioners during state post-conviction proceedings. Other states provide mechanisms for appointment of counsel after a post-conviction petition is filed upon a showing of need.¹¹⁸ The appointment of counsel only after a petition is filed can generate delays, as newly appointed counsel will need time to review the petitioner's case and the proceedings on direct appeal. Typically, attorneys in such systems will also have to amend the pro se petition that the prisoner filed prior to becoming eligible for appointment of counsel. As a consequence, a significant portion of the filing period can be consumed seeking and providing competent legal representation before a decision can be reached. Death row inmates usually have access to counsel during the pendency of their federal habeas petition,¹¹⁹ but the exhaustion and procedural default doctrines can render this access meaningless in the absence of capable counsel during state post-conviction proceedings.

5. *Frivolous Filings*

Although frivolous filings are often cited in critiques of the appellate process in capital cases, truly frivolous filings are rare. There is an extensive network of procedural rules in place that discourages the filing of frivolous, premature, or otherwise inappropriate petitions. When petitions that appear to be frivolous are filed, they are either dismissed without comment (as was McKenzie's third habeas petition), or they are resoundingly condemned, occasionally by a body as august as the United States Supreme Court.¹²⁰ Frivolous petitions are highly visible elements of the process, as they tend to get trounced out of court. Because of their visibility, it is highly improbable that petitioners will be able to generate either a substantial delay or any strategic gain in the litigation from a frivolous petition. Frivolous petitions account for an infinitesimal fraction of the typical period of delay, and the system has ample mechanisms to prevent them from ever occupying a place of prominence.

become an appendage, or part, of the death penalty appeal process at the state level," and requiring appointment of counsel).

118. See, e.g., ALA. CODE § 15-12-23 (1995 & Supp. 2001) (providing for appointment of counsel after petition is filed "if it appears to the court that the person charged or convicted is unable financially or otherwise to obtain the assistance of counsel and desires the assistance of counsel and it further appears that counsel is necessary in the opinion of the judge to assert or protect the right of the person").

119. See HERTZ & LIEBMAN, *supra* note 105, § 12.2, at 601 ("Under a provision of the Anti-Drug Abuse Act of 1988 [21 U.S.C. § 848(q)(4)(B) (1994 & Supp. V 1999)] and the Supreme Court's interpretation of that provision in *McFarland v. Scott*, [512 U.S. 849 (1994)], appointed counsel is mandatory for all indigent *capital* prisoners . . .").

120. See, e.g., *Gomez v. United States Dist. Ct. for Northern Dist. of Calif.*, 503 U.S. 653 (1992) (*per curiam*) (vacating the 9th Circuit's en banc order staying petitioner's execution because "there is no reason for this abusive delay, which has been compounded by the last minute attempts to manipulate the judicial process").

6. *Delays Associated with Setting of Execution Dates*

States occasionally set execution dates fully aware that there is only a remote possibility that the person will be executed on the appointed day. In the absence of other timing mechanisms, these artificial execution dates catalyze the litigation process into motion.¹²¹ Whether the state believes the execution will proceed as scheduled or will be stayed is of little consequence to the condemned inmate. The prisoner is informed of a time and place for his execution, so he must confront the imminence of his own death. This causes an unimaginable amount of stress. Additionally, it places tremendous pressure on attorneys and the judicial system to prepare petitions for relief, stay applications, and judicial decisions that will either forestall the execution or allow it to proceed as scheduled. The satellite litigation associated with the stay consumes time and judicial resources that would be better spent on the petitioner's substantive legal arguments. This "chaotic litigation" is detrimental to all parties involved.¹²² McKenzie, for example, had seven execution dates stayed before his execution was carried out.¹²³

The state can also delay an execution through tacit refusal to set an execution date after the exhaustion of appellate remedies. It is difficult to know exactly why a state actor would postpone the scheduling of an execution, but a number of explanations are plausible. If an election cycle is approaching, the political actor may want to wait to capitalize on whatever gain is to be had from an execution during the election cycle. If a series of dramatic events occur unrelated to an election, the actor may wish to allow them to pass before setting an execution date. For example, Missouri inadvertently scheduled an execution while Pope John Paul II, a known opponent of capital punishment, was visiting the state. Then-Governor Mel Carnahan, at a great political cost to himself, commuted the prisoner's death sentence at the special request of the Pope.¹²⁴ Another type of dramatic event likely to affect willingness to set an execution date is the exoneration of a death row inmate. While execution of innocent

121. See A.B.A., *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 38-41 (1990) (recommending a mandatory stay of execution until the entire direct and post-conviction appeal is complete because the "current practice of setting execution dates, with its unrealistic deadlines and unrealistic demands, should have no place in a rational system of death penalty review").

122. *Id.* at 41.

123. See Henry Weinstein, *Death Row Dilemma: 20-Year Wait for Execution Called Cruel and Unusual in Last-Ditch Bid for a Reprieve*, L.A. TIMES, May 7, 1995, at A3 ("It is McKenzie's eighth date with death on his journey through a labyrinth of death penalty appeals.").

124. See Jo Mannies, *Showing Mercy to Condemned Killer May Have Hurt Carnahan, Poll Finds: Ashcroft Holds Edge in Senate Contest*, ST. LOUIS POST-DISPATCH, Mar. 29, 1999, at A1, available at 1999 WL 3017484; *Doubling the Death Penalty*, ST. LOUIS POST-DISPATCH, Nov. 11, 1999, at B6 (political opponent notes Carnahan's weakness on the death penalty "based mostly on Mr. Carnahan's dramatic decision to commute the death sentence of a multiple murderer at the personal request of Pope John Paul II"), available at 1999 WL 3053812.

prisoners is startling, one inmate has been exonerated for every seven or eight inmates executed in the modern death penalty era.¹²⁵

7. *Moratoria*

Exoneration of innocent inmates can provoke more substantive governmental responses than a tacit refusal to set execution dates. In Illinois, an exoneration was the catalyst for one of the most surprising developments in modern death penalty politics. On January 31, 2000, after the thirteenth innocent person on Illinois' death row was exonerated, Republican Governor George Ryan declared a statewide moratorium on executions.¹²⁶ This was not the rash act of a death penalty opponent—Governor Ryan had been a supporter of capital punishment for the entirety of his political career. Governor Ryan's action emboldened legislators in other states to consider imposing moratoria, though thus far none have gone into effect.¹²⁷ The current consideration of moratoria on executions requires its inclusion as a possible source of delay in capital appeals.

D. The Development of Delay as an Eighth Amendment Problem

The contention that lengthy periods of incarceration on death row violate the Eighth Amendment did not appear out of thin air. It emerged from the Eighth Amendment principles governing the use of capital punishment in the United States, principles the Supreme Court enunciated in decisions during the 1970s. This part of the article looks briefly at those decisions, then describes the existing jurisprudence on the delay claim.

1. Brief Overview of Modern Eighth Amendment Capital Punishment Jurisprudence

In 1972, the Supreme Court ruled in *Furman v. Georgia*¹²⁸ that the death penalty constituted cruel and unusual punishment as applied in the states that utilized it. The case resulted in the issuance of nine separate opinions, five for the majority, four for the dissent.¹²⁹ The consensus from the five opinions

125. See JAMES LIEBMAN, JEFFREY FAGAN, ANDREW GELMAN, VALERIE WEST, GARTH DAVIES, & ALEXANDER KISS, A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, & WHAT CAN BE DONE ABOUT IT 5 (2002) [hereinafter LIEBMAN & FAGAN, A BROKEN SYSTEM, PART II] (finding "99 exonerations nationally compared to about 750 executions").

126. See Ken Armstrong & Steve Mills, *Ryan: 'Until I Can Be Sure,' Illinois is First State to Suspend Death Penalty*, CHI. TRIB., Feb. 1, 2000, at 1.

127. DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY IN 2001: YEAR END REPORT 4 (2001) ("Legislation calling for a moratorium on executions was introduced in 18 states and the federal government, though none was enacted."), available at <http://www.deathpenaltyinfo.org/YearEndReport2001.pdf>.

128. 408 U.S. 238 (1972) (per curiam).

129. *Id.* at 240–57 (Douglas, J., concurring); *id.* at 257–306 (Brennan, J. concurring); *id.* at 306–10 (Stewart, J., concurring); *id.* at 310–14 (White, J., concurring); *id.* at 314–74 (Marshall, J.

constituting the majority was that the death penalty was being applied with declining frequency to cases that were indistinguishable from those where the death penalty was not applied. The majority opinions, therefore, shared the belief that discretionary death penalty statutes "are unconstitutional in their operation,"¹³⁰ though they disagreed on the abstract question of the constitutionality of the death penalty. Justices Brennan and Marshall wrote forceful opinions declaring that evolving standards of decency have rendered the death penalty an obsolete and unconstitutional punishment in all circumstances.¹³¹ Justice White agreed with them that if the death penalty fails to further legitimate societal purposes, it ceases to be constitutional.¹³² The infrequent imposition of death sentences convinced Justices Stewart and White that the death penalty had become unconstitutionally arbitrary.¹³³ In the words of Justice Stewart, the death penalty had become "cruel and unusual in the same way that being struck by lightning is cruel and unusual."¹³⁴ Justice Douglas rested his concurring opinion primarily on the existence of discrimination in the application of the death penalty, saying that this aspect rendered it unconstitutional.¹³⁵

From these five separate opinions, two general principles emerge governing the constitutionality of the death penalty.¹³⁶ First, the death penalty must serve legitimate societal purposes; if it ceases to serve those purposes, it becomes unconstitutionally excessive in violation of the Eighth Amendment. Second, the

concurring); *id.* at 375–405 (Burger, C.J., dissenting); *id.* at 405–14 (Blackmun, J., dissenting); *id.* at 414–65 (Powell, J., dissenting); *id.* at 465–70 (Rehnquist, J. dissenting).

130. *Id.* at 256–57 (Douglas, J., concurring).

131. *Id.* at 257–306 (Brennan, J., concurring); *id.* at 314–74 (Marshall, J. concurring).

132. *Id.* at 312 (White, J., concurring) ("At the moment that it ceases realistically to further these purposes [retribution and deterrence] . . . [i]t is my view that it would [violate the Eighth Amendment], for its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment."); *see also id.* at 279 (Brennan, J., concurring) ("The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering."); *id.* at 342–59 (Marshall, J., concurring) (analyzing whether capital punishment serves its asserted purposes and concluding that it does not and is therefore unconstitutionally excessive).

133. *Id.* at 309–10 (Stewart, J., concurring) ("[O]f all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed."); *id.* at 313 (White, J., concurring) ("[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.")

134. *Id.* at 309 (Stewart, J., concurring).

135. *Id.* at 256–57 (Douglas, J., concurring) ("[T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is . . . [in]compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments.")

136. The five opinions in *Furman* established many elements of modern Eighth Amendment jurisprudence. In the interest of clarity, I only identify the two most general principles emanating from the fragmented majority opinions.

death penalty may not be constitutionally applied in an arbitrary or discriminatory manner; if it is so applied, it violates the Eighth and Fourteenth Amendments.

After Justice Stevens replaced Justice Douglas in 1975, the Court was poised to confront the constitutionality of capital punishment a second time. In 1976, the Court heard cases from Florida, North Carolina, Louisiana, Texas, and Georgia, and decided that three of these states had cured the flaws in their death penalty statutes, the leading case being *Gregg v. Georgia*.¹³⁷ Georgia's amended death penalty statute included several features intended to limit the jury's discretion in deciding whether a particular offender deserves a death sentence: bifurcated guilt and sentencing trials, statutory specification of aggravating circumstances required to sustain a death sentence, expedited and mandatory appellate review of a death sentence, and specific requirements to search the record for arbitrariness and discrimination in the sentencing process.¹³⁸ The Court found that these features of Georgia's death penalty scheme sufficiently limited concerns about arbitrariness in the sentencing process.¹³⁹ Yet, while it accepted the constitutionality of capital punishment, the *Gregg* court maintained the principle from *Furman* that punishment "cannot be so totally without penological justification that it results in the gratuitous infliction of suffering."¹⁴⁰

Since 1976, most death penalty statutes in the United States have been modeled after the Georgia statute approved in *Gregg*. The salutary features of the statute that led the Court to affirm the constitutionality of capital punishment are now prominent components of a constitutional application of the death penalty. The Supreme Court has interpreted the Eighth Amendment to require an individualized sentencing determination in every capital case.¹⁴¹ In each case, the decision-maker must consider any evidence the defendant offers about the circumstances of the crime and/or the character of the defendant as factors in mitigation of the sentence.¹⁴²

In the twenty-six years since *Gregg*, the death penalty's use and availability have been expanding. After several years of cautionary growth in executions, executions during the 1990s skyrocketed to levels not seen since the 1950s.¹⁴³ As executions became more common, constitutional issues associated with the

137. 428 U.S. 153 (1976) (plurality opinion); see also *Proffitt v. Florida*, 428 U.S. 242 (1976) (plurality opinion) (upholding Florida death penalty statute); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion) (striking down North Carolina death penalty statute); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976) (plurality opinion) (striking down Louisiana death penalty statute); *Jurek v. Texas*, 428 U.S. 262 (1976) (plurality opinion) (upholding Texas death penalty statute).

138. *Gregg*, 428 U.S. at 162–68 (describing Georgia's statutory scheme).

139. *Id.* at 206–07.

140. *Id.* at 183.

141. See *Woodson*, 428 U.S. 280.

142. See *Lockett v. Ohio*, 438 U.S. 586, 602–10 (1978).

143. See BUREAU OF JUSTICE STATISTICS, *supra* note 5, at 11 fig.3.

executions themselves began to emerge. Among those issues was the claim that inordinate delay between sentencing and execution could present Eighth Amendment problems.

2. *Lengthy Incarceration Awaiting Execution Causes Eighth Amendment Concerns*

a. *Historical Roots of the Delay Claim*

Long before Justice Stevens issued his memorandum opinion in *Lackey v. Texas*, the Supreme Court had the opportunity to contemplate whether a long and indeterminate period of incarceration on death row violates the constitutional protection against cruel and unusual punishment. The Supreme Court first considered the psychological effects of awaiting a certain execution at an uncertain date over a century ago, in 1890.¹⁴⁴ The Court openly addressed the experience of a condemned inmate: "a prisoner sentenced . . . to death is confined in the penitentiary awaiting the execution of the sentence, [and] one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it . . . as to the precise time when his execution shall take place."¹⁴⁵ At that time, however, the Court interpreted the Constitution so that the Eighth Amendment did not apply to the states, thus it did not conduct a rigorous Eighth Amendment analysis in that case, deciding it instead on *ex post facto* grounds.

In the intervening century, the Court has recognized that the Eighth Amendment does apply to the states.¹⁴⁶ Since that time, state and federal courts have occasionally heard claims confronting the suffering that prisoners must endure while awaiting execution.¹⁴⁷ However, only two jurisdictions, Massachusetts and California, have decided that this delay was of significant constitutional weight to support the elimination of the death penalty.¹⁴⁸

144. *In re Medley*, 134 U.S. 160 (1890), cited in *Lackey v. Texas*, 514 U.S. 1045 (1995) (mem.) (Stevens, J., respecting the denial of certiorari).

145. *In re Medley*, 134 U.S. at 172.

146. See, e.g., *Robinson v. California*, 370 U.S. 660 (1962).

147. See *Chessman v. Dickson*, 275 F.2d 604, 607 (9th Cir. 1960); *People v. Chessman*, 341 P.2d 679 (Cal. 1959); see also *Richmond v. Lewis*, 948 F.2d 1473 (9th Cir. 1990), *rev'd on other grounds*, 506 U.S. 40 (1992), *vacated by* 986 F.3d 1583 (9th Cir. 1993); *Andrews v. Shulsen*, 600 F. Supp. 408, 431 (D. Utah 1984); *Songer v. State*, 463 So. 2d 229 (Fla. 1985); *People v. Anderson*, 493 P.2d 880, 894 (Cal. 1972) ("The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out."); *Dist. Attorney for Suffolk Dist. v. Watson*, 411 N.E.2d 1274 (Mass. 1980).

148. See *Anderson*, 493 P.2d at 894; *Watson*, 411 N.E.2d 1274. Both of these decisions relied on state constitutional grounds; both jurisdictions have since reversed course on the constitutionality of the death penalty, though Massachusetts has not re-enacted the death penalty. See CAL. CONST. art. I, § 27 ("The death penalty provided for under [California] statutes shall not be

*b. International Decisions Within Our Shared Constitutional Tradition
Question the Validity of Lengthy Delays*

There is a close kinship between the legal tradition in the British Commonwealth and the American constitutional tradition.¹⁴⁹ In the Eighth Amendment area, the relationship is particularly strong.¹⁵⁰ The text of our Eighth Amendment is taken directly from the English Bill of Rights of 1689.¹⁵¹ In its Eighth Amendment jurisprudence, the Court has often looked to international legal developments to guide its interpretation of the meaning of the Cruel and Unusual Punishment Clause. Additionally, the Court looks to the practices of other nations to determine the “evolving standards of decency” that help define the contours of the Eighth Amendment.¹⁵² When assessing the constitutionality of the death penalty for juveniles, for example, the Court examined “the views that have been expressed by . . . other nations that share our Anglo-American heritage, and by the leading members of the Western European community.”¹⁵³ Though utilizing international legal developments to guide the interpretation of the Eighth Amendment is not universally accepted on the Court,¹⁵⁴ international concepts have been repeatedly incorporated into Eighth Amendment jurisprudence. Accordingly, the Court turns to the treatment of this claim in nations that share our historical legal tradition.

In 1983, two members of the Privy Council, the United Kingdom’s highest judicial body, recognized in their dissent that “there is a formidable case for suggesting that execution after inordinate delay would have infringed the prohibition against cruel and unusual punishments to be found in . . . the Bill of Rights of 1689.”¹⁵⁵ Ten years later, when the question presented itself to the Privy Council again, in *Pratt v. Attorney General of Jamaica*,¹⁵⁶ the majority

deemed to be, or to constitute, the infliction of cruel or unusual punishments . . . nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution.”) (added 1972); MASS. CONST. pt.1, art. XXVI (“No provision of the Constitution . . . shall be construed as prohibiting the imposition of the punishment of death.”) (added 1982).

149. See *Ex parte Grossman*, 267 U.S. 87, 108–09 (1925) (“The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted.”).

150. See *Harmelin v. Michigan*, 501 U.S. 957, 966 (1990) (Scalia, J.) (“There is no doubt that the [English] Declaration of Rights [of 1689] is the antecedent of our constitutional text.”).

151. See *Gregg v. Georgia*, 428 U.S. 153, 169 (1976) (plurality opinion) (citing Anthony F. Granucci, “*Nor Cruel and Unusual Punishment Inflicted: The Original Meaning*,” 57 CAL. L. REV. 839, 852–53 (1969)).

152. See *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977); *Trop v. Dulles*, 356 U.S. 86, 102 & n.35 (1958).

153. *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion).

154. See *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) (dictum) (rejecting use of international developments and insisting that only “American conceptions of decency” matter).

155. *Riley v. Attorney General of Jamaica*, 1 A.C. 719, 734 (P.C. 1983) (Scarman, L.J. & Brightman, L.J., dissenting).

156. 2 A.C. 1, 2 (P.C. 1993) (holding that delays of more than five years provide “strong grounds” for a claim of cruel and unusual punishment).

acknowledged the “formidable case” and prohibited executions after a lengthy delay. The decisions of the Privy Council are binding throughout the British Commonwealth. Courts from other commonwealth countries have reached the same conclusion about the problem posed by inordinate delay within their own borders, independent from the Privy Council’s pronouncement in *Pratt*.¹⁵⁷

The European Court of Human Rights had an opportunity, in an extradition case, to consider the delays that occur in the administration of the death penalty in the United States. The state of Virginia requested that the United Kingdom extradite Jens Soering, a German citizen, to the United States for trial on capital murder charges. Soering challenged the extradition, claiming that the administration of the death penalty in the United States amounts to cruel and inhumane treatment in violation of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”¹⁵⁸ The European Court of Human Rights agreed, finding that “the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution . . . extradition to the United States would . . . go[] beyond the threshold set by Article 3.”¹⁵⁹

Lengthy periods of incarceration on death row preceding execution causes recurring problems when the United States requests other countries to extradite criminal suspects who would be eligible for the death penalty if convicted. In 1991, the United States requested extradition of two murder suspects, Joseph Kindler and Charles Chitat Ng, from Canada to Pennsylvania and California, respectively. Both defendants challenged the extradition because they would be potentially eligible for the death penalty in the United States. Canada’s highest court consented to the extradition,¹⁶⁰ and the two presented their case to the

157. For judgments from India, see *Sher Singh v. State of Punjab*, (1983) 2 S.C.R. 582, 582 (India) (holding that prolonged delay can determine “whether the sentence should be allowed to be executed”), and *Smt. Treveniben v. State of Gujarat*, 1 S.C.J. 383, 410 (1989) (holding that if there is inordinate delay, the condemned can challenge the execution on that basis). For a judgment from Zimbabwe, see *Catholic Comm’n for Justice and Peace in Zimbabwe v. Attorney-General*, 1 Z.L.R. 242, 269 (1993) (concluding that delays of five and six years were “inordinate” and constituted “torture or . . . inhuman or degrading punishment or other such treatment”).

158. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 221. The European Convention for the Protection of Human Rights and Fundamental Freedoms was entered into by the twelve member states of the Council of Europe in 1950. The Council of Europe has grown to include forty-three member states, all of which are signatories to this treaty. In addition to establishing human rights protections, this treaty also created the European Court of Human Rights. For a succinct description of the treaty’s history, see Giorgio Sacerdoti, *The European Charter of Fundamental Rights: From a Nation-State Europe to a Citizens’ Europe*, 8 COLUM. J. EUR. L. 37, 37–38 (2002).

159. *Soering v. United Kingdom*, 11 Eur. H.R. Rep. 439, 478 (1989). Soering was later extradited after the local prosecutor in Virginia agreed not to seek the death penalty. See Aarons, *supra* note 12, at 202 n.219.

160. See *Kindler v. Canada* [1991] S.C.R. 779.

United Nations Human Rights Committee.¹⁶¹ Despite the claim's ultimate rejection, protracted incarceration on death row pending execution was a significant element of the case against extradition in both fora.

The problems that capital punishment poses for extradition have received renewed attention in the wake of the terrorist attacks in the United States in September 2001.¹⁶² With many of the potential suspects living abroad, capital punishment and the delays associated with its exercise in the United States will continue to be an issue that receives international scrutiny.

3. *The Lackey Memorandum and Subsequent Developments*

Justice Stevens opened the question for a full debate in the American state and federal judiciary when he issued a memorandum opinion respecting the denial of certiorari in *Lackey v. Texas*.¹⁶³ In *Lackey*, the question the petitioner presented was whether executing a defendant who had spent 17 years on death row violates the Eighth Amendment's prohibition of cruel and unusual punishment. For an answer, Justice Stevens looked to the framers' intent and the "principal social purposes" of the death penalty: retribution and deterrence.¹⁶⁴

Since Justice Stevens issued his opinion in *Lackey*, the contours of this Eighth Amendment claim have become well-established in the scholarship.¹⁶⁵

161. See *Joseph Kindler v. Canada* (Comm. No. 470/1991) (views adopted on July 30, 1993), *Report of the Human Rights Committee*, U.N. GAOR, 48th Sess., Supp. No. 40, at 138, U.N. Doc. A/48/40 (1993); *Charles Chitat Ng v. Canada* (Comm. No. 469/1991) (views adopted Nov. 5, 1993), *Report of the Human Rights Committee*, U.N. GAOR, 49th Sess., Supp. No. 40, at 189, U.N. Doc. A/49/40 (1993).

162. See, e.g., *Welcome to Europe, Mr. Ashcroft*, WALL ST. J., Dec. 14, 2001, at A14 (discussing French objections to extradition based on the availability of the death penalty).

163. 514 U.S. 1045 (1995) (mem.) (Stevens, J., respecting the denial of certiorari). It is unusual, though not unheard of, for Supreme Court Justices to issue opinions in conjunction with certiorari decisions. In the last thirty years, such opinions have been most common in the context of death penalty litigation. Justices Marshall and Brennan dissented from the denial of certiorari any time the petitioner had been sentenced to death. See, e.g., *Perillo v. Texas*, 492 U.S. 925, 925 (1989) (Brennan, J. & Marshall, J., dissenting from the denial of certiorari) ("Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments . . . we would grant certiorari and vacate the death sentence in this case."). Although Justices Brennan and Marshall were the most regular dissenters—with 243 joint certiorari dissents in capital cases in the 1990 term, the last full term they were together on the Court—they were not the only Justices to utilize opinions surrounding certiorari to air their views on the death penalty and its administration. See *Lawson v. Dixon*, 512 U.S. 1215 (1994) (Blackmun, J., dissenting from the denial of certiorari); *Coleman v. Balkcom*, 451 U.S. 949, 956 (1981) (Rehnquist, J., dissenting from the denial of certiorari). One of the earliest such gestures in the capital context came in 1963 from a cohort of three justices, Goldberg, Douglas, and Brennan, who were prepared to hear arguments about the constitutionality of the death penalty for rape. See *Rudolph v. Alabama*, 375 U.S. 889 (1963) (Goldberg, J., dissenting from the denial of certiorari). Fourteen years later, the decision that Goldberg, Douglas, and Brennan anticipated in 1963 came to pass, and the death penalty was declared unconstitutional in cases of rape. See *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion).

164. *Lackey*, 514 U.S. at 1045.

165. See *supra* note 12.

There can be little doubt that lengthy delays between sentence and execution were beyond the scope of the framers' intent.¹⁶⁶ At the time of the adoption of the Eighth Amendment, delays between sentence and execution were measured in days and weeks, not years and decades.¹⁶⁷ In the middle of the eighteenth century, England enacted a law requiring that death sentences be carried out within two days of their imposition.¹⁶⁸ There is substantial evidence that the American colonies continued the practice of swift executions after independence.¹⁶⁹ Professor Aarons, in his treatment of the Eighth Amendment problem with delay, notes that "it was not until the mid-twentieth century that the time between the imposition of a death sentence and the execution began to extend into years."¹⁷⁰

Moreover, after inordinately long incarceration on death row, the state's interests in execution have diminished considerably. The principal social purposes the death penalty is supposed to serve are retribution and deterrence.¹⁷¹ Yet incarceration on death row already has greater retributive value than incarceration during a term of years. The conditions of incarceration are more restrictive on death row, as prisoners are not permitted to work and they are nearly always in isolation. Added to the more restrictive conditions of confinement is the uncertainty associated with living in anticipation of one's own execution. Justice Frankfurter extended judicial recognition to the psychological impact of living on death row in 1950, when he noted that "the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon."¹⁷² For these reasons, Justice Stevens contended that the state's interest in retribution may have "been satisfied by the severe punishment already inflicted."¹⁷³ Similarly, Justice Stevens declared that after prolonged confinement under sentence of death, the "additional deterrent effect from [the] actual execution . . . seems minimal."¹⁷⁴

166. See *Knight v. Florida*, 528 U.S. 990, 991–92 (1999) (Thomas, J., concurring in denial of certiorari) ("Justice Breyer is unmistakably correct when he notes that one 'cannot justify lengthy delays [between conviction and sentence] by reference to [our] constitutional tradition.'") (quoting Justice Breyer's dissent in *Knight*, 528 U.S. at 994) (brackets in original).

167. See Aarons, *supra* note 12, at 179–80 (describing short delays between sentence and execution in the 18th and early 19th centuries).

168. See Crocker, *supra* note 12, at 560.

169. See BARRETT PRETTYMAN, JR., *DEATH AND THE SUPREME COURT* 307 (1961) ("Before the beginning of the twentieth century, substantial delay between trial and execution was almost unthinkable, in part because of the wear and tear on the defendant. As one lawyer put it in 1774, 'The cruelty of an execution after respite is equal to many deaths, and therefore there is rarely an instance of it.'"); see also Aarons, *supra* note 12, at 179–81 (demonstrating swift timing of executions in and around the time of the framers).

170. See Aarons, *supra* note 12, at 181.

171. *Gregg v. Georgia*, 428 U.S. 158, 183 (1976) (plurality opinion).

172. *Solesbee v. Balkcom*, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting).

173. *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (mem.) (Stevens, J., respecting the denial of certiorari).

174. *Id.* at 1046.

Justice Stevens laid out the preceding argument in his *Lackey* memorandum opinion, and without deciding the question or even dissenting from the denial of certiorari, he gave his explicit approval for “state and federal courts to ‘serve as laboratories in which the issue receives further study before it is addressed by [the Supreme] Court.’”¹⁷⁵ Justice Breyer also agreed that the issue was important and, as yet, undecided.¹⁷⁶

It did not take long for state and lower federal courts to demonstrate their dissatisfaction with being pressed into laboratory service. Within four months of Justice Stevens’ memorandum opinion, the Fourth, Fifth (twice), Seventh, Ninth, Tenth, and Eleventh Circuit Courts of Appeals each rejected Eighth Amendment claims based on delay.¹⁷⁷ In the Fourth Circuit case, Judge Luttig took the opportunity to enter a three-paragraph concurrence dedicated to excoriating the claim. “It is a mockery of our system of justice and an affront to law-abiding citizens,” he wrote, “[to consider the argument that] almost-indefinite postponement [of execution] renders [the] sentence unconstitutional. With this argument, we have indeed entered the theater of the absurd.”¹⁷⁸ While not all courts have been quite so blunt in their dismissal of the claim that lengthy delays contravene constitutional requirements, most courts that have considered the claim have rejected it.¹⁷⁹

175. *Id.* at 1047 (quoting *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of certiorari)).

176. *Id.*

177. Justice Stevens issued his memorandum opinion in *Lackey* on March 27, 1995. *Id.* at 1045. By July 27, 1995, the claim had been reviewed and rejected in each of these circuits. *See* *Turner v. Jabe*, 58 F.3d 924 (4th Cir. 1995) (decided May 24, 1995; dismissing claim because of abuse of writ); *Lackey v. Scott*, 52 F.3d 98 (5th Cir. 1995) (decided Apr. 26, 1995; deeming claim barred under non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288, 310 (1989)), *vacated by* 514 U.S. 1093; *Fearance v. Scott*, 56 F.3d 633 (5th Cir. 1995) (decided June 18, 1995; dismissing claim as abuse of writ, rejecting novelty as cause to excuse abuse and declining to apply miscarriage of justice exception); *Free v. Peters*, 50 F.3d 1362 (7th Cir. 1995) (decided Mar. 21, 1995; denying stay of execution based on delay claim before the *Lackey* decision); *Williams v. Chrans*, 50 F.3d 1363 (7th Cir. 1995) (decided Mar. 21, 1995; denying stay of execution based on delay claim); *McKenzie v. Day*, 57 F.3d 1461 (9th Cir. 1995) (decided May 8, 1995; refusing to consider claim because it had not been raised sooner despite being filed the same day as the *Lackey* opinion); *Stafford v. Ward*, 59 F.3d 1025, 1028 (10th Cir. 1995) (decided June 30, 1995; rejecting claim because “no reported federal case [] has adopted the position advocated” and abuse of writ); *Porter v. Singletary*, 49 F.3d 1483, 1485 (11th Cir. 1995) (per curiam) (decided Mar. 31, 1995; rejecting claim on abuse of the writ doctrine grounds).

178. *Turner*, 58 F.3d at 933 (Luttig, J., concurring).

179. *See, e.g.,* *Ceja v. Stewart*, 134 F.3d 1368 (9th Cir. 1998); *White v. Johnson*, 79 F.3d 432 (5th Cir. 1996); *State v. Schackart*, 947 P.2d 315, 336 (Ariz. 1997) (denying claim that lengthy incarceration prior to execution violates the Eighth Amendment); *People v. Massie*, 967 P.2d 29, 44–45 (Cal. 1998) (rejecting claim that execution after 16 years of confinement on death row would violate the Eighth Amendment); *People v. Frye*, 959 P.2d 183, 262 (Cal. 1998) (rejecting claim that seven years of incarceration on death row prior to execution would violate the Eighth Amendment); *People v. Simms*, 736 N.E.2d 1092 (Ill. 2000) (holding that fifteen-year delay while incarcerated awaiting execution does not contravene the Eighth Amendment).

In 1998 and 1999, death row inmates again asked the Supreme Court to review the question of whether lengthy tenures on death row awaiting execution constitutes cruel and unusual punishment. Once again, the petitions were denied. In the 1998 case *Elledge v. Florida*,¹⁸⁰ Justice Breyer dissented from the denial of certiorari. In *Lackey*, Justice Breyer had agreed with Justice Stevens that the issue was important, but he did not dissent from the denial of certiorari in that case. *Elledge*, therefore, marks the first time that any Supreme Court Justice declared affirmatively that the question should be reviewed.

In the 1999 term, the claim was presented in two petitions that the Court consolidated.¹⁸¹ The court again denied certiorari, but this time issued three opinions. The first was Justice Stevens', in which he declared that "denial of these petitions for certiorari does not constitute a ruling on the merits."¹⁸² The two that followed, from Justice Thomas and Justice Breyer, took opposing positions on whether the claim had been considered and/or dismissed by the lower courts. Justice Thomas, concurring in the denial of certiorari, summarily belittled the merits of the claim. He declared that no appellate court is likely to hold that "a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed."¹⁸³ Justice Thomas' treatment of the claim has pragmatic appeal, but he did not undertake a genuine assessment of the question of delay in his opinion.¹⁸⁴ The seeming incongruity of the claim does not diminish or address the tremendous "suffering inherent in a prolonged wait for execution,"¹⁸⁵ nor does it alter the penological argument that "the longer the delay, the weaker the justification for imposing the death penalty in terms of punishment's basic retributive or deterrent purposes."¹⁸⁶ Dissenting from the denial of certiorari, Justice Breyer again argued for consideration of the claim: "the constitutional issue, even if limited to delays of close to 20 years or more, has considerable practical importance . . . [so] this Court should consider the issue."¹⁸⁷

Despite the public disagreement between members of the Court, the delay claim has stagnated since *Knight v. Florida*. One commentator recently derided

180. 525 U.S. 944 (1998) (Breyer, J., dissenting from the denial of certiorari).

181. Petitions of Askari Abdullah Muhamad (a.k.a. Thomas Knight) and Carey Dean Moore both presented substantially similar questions about the constitutionality of execution after lengthy periods of incarceration, both in excess of 20 years.

182. *Knight v. Florida*, 528 U.S. 990, 990 (1999) (Stevens, J., respecting the denial of certiorari).

183. *Id.* (Thomas, J., concurring in denial of certiorari).

184. Indeed, he qualified his opinion at the outset, noting that he wrote "only to point out" that the delay claim lacked precedential support. *Id.* Two sentences later, however, Justice Thomas characterized the claim as "novel," offering a potential explanation for the absence of precedent. *Id.* at 991. Justice Thomas concludes with a citation to eight lower court opinions that addressed the delay argument, and submits that the "experiment [is] concluded." *Id.* at 992-93.

185. *Id.* at 994 (Breyer, J., dissenting in denial of certiorari).

186. *Id.* at 995.

187. *Id.* at 999.

the Court for refusing to consider the issue, but it has received little other attention.¹⁸⁸

E. Delays Associated With Capital Cases Will Be an Ongoing Problem

While the delays involved in bringing a defendant to trial are beyond the scope of this article,¹⁸⁹ the delays that result from potential constitutional violations during defendant's trial are among the article's central concerns. The rules of both criminal and appellate procedure are designed to ensure that the trial is 'the main event.' Constitutional rules govern the behavior of the three central trial actors—prosecuting attorneys, defense attorneys, and judges—in ways that do not apply directly to these actors post-trial. The prosecution, for example, is required to turn over evidence that is favorable to the defendant before the trial commences (or as soon as they discover it, if it is during trial).¹⁹⁰ If they fail to do so and the evidence meets a threshold standard of materiality, the defendant is entitled to a new trial and/or a new sentencing hearing. As another example, the Constitution sets limits on the type of jury instructions that a judge can issue.¹⁹¹ If the judge issues faulty instructions and they fail to meet the harmless error standard, the defendant is entitled to a new trial and/or a new sentencing hearing. A third example is the defendant's right to counsel, a right that applies only to trial and direct appeal. The legal standard for evaluating

188. Ryan S. Hedges, *Justices Blind: How the Rehnquist Court's Refusal to Hear a Claim for Inordinate Delay of Execution Undermines its Death Penalty Jurisprudence*, 74 S. CAL. L. REV. 577, 615 (2001) (arguing that failure to consider and decide the claim "undermines the legitimacy of the Court's death penalty jurisprudence and the moral validity of criminal justice in general").

189. While these delays may be unpleasant for the defendant, this article is not concerned with delays that occur before the conviction or sentence has been decided in the trial court for several reasons. First, the Sixth Amendment right to a speedy criminal trial applies with full force to delays associated with the trial. If the delay becomes oppressive, the defendant need not seek an analogy to the Sixth Amendment, for the Sixth Amendment itself may be invoked to protect against unnecessary delays. In McKenzie's initial direct appeal, for example, he claimed that the length of time he spent awaiting trial violated the Speedy Trial Clause. See *State v. McKenzie* [McKenzie I], 557 P.2d 1023, 1044 (Mont. 1976) (discussing a speedy trial claim that was based on 350 days elapsed between charging and beginning of trial). Second, defendants are typically incarcerated off of death row in less restrictive circumstances prior to their conviction and sentence. But see PETE EARLEY, CIRCUMSTANTIAL EVIDENCE 180, 184 (1995) (describing how, in one Alabama case, the defendant was incarcerated on death row pre-trial). Third, and perhaps most importantly, these defendants are not living in concrete anticipation of their own execution. They inevitably fear that their trial could result in a death sentence, but there is no certainty until the conviction and sentence are announced. Extremely restrictive conditions of incarceration combined with the palpable sense that one is simply waiting around to die trigger the constitutional concerns at the center of the claim that inordinate delays are unconstitutional.

190. See *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that due process requires the prosecution to disclose materially favorable evidence to the defense); *Giglio v. United States*, 405 U.S. 150 (1972) (holding that due process rule in *Brady v. Maryland* mandating disclosure of favorable evidence also requires disclosure of impeachment evidence).

191. See, e.g., *Francis v. Franklin*, 471 U.S. 307 (1985) (holding that jury instruction that allowed for a presumption of intent impermissibly shifted the burden of proof to the defendant and required reversal).

claimed violations of the right to counsel gives broad deference to decisions that counsel made at the trial level.¹⁹²

While the same set of constitutional rules govern trial actors in capital and noncapital cases, the incentive structure in these two types of cases differs greatly. For prosecutors and defendants alike, the stakes in capital cases are as high as they come. Violent crimes typically generate considerable media attention, so the spotlight is very much on. Under this spotlight, no one wants to make perceivable errors, and, more importantly, no one wants to lose. Plea agreements, the manner in which most criminal cases conclude, are perceived as a loss for the prosecution for they do not result in a death sentence.¹⁹³ As a result, both sides dig in their heels and battle for the life or death of the criminal defendant.

1. Error-Filled Capital Trials Will Continue to Generate Lengthy Appellate Processes

The best way to limit delays during the appellate process is to afford the defendant a clean, constitutional, error-free trial. Unfortunately, most capital defendants have not received error-free trials. *A Broken System: Error Rates in Capital Cases 1973–1995*, a study published in June 2000,¹⁹⁴ demonstrates that high intensity capital trials are very error-prone. In *A Broken System*, Professor Liebman and his colleagues conducted the most comprehensive examination of the administration of capital punishment in America to date, assembling and reviewing an exhaustive list of capital convictions imposed and reviewed between January 1, 1973 and December 31, 1995.¹⁹⁵ Their findings are deeply troubling: “Nationally, over the entire 1973–1995 period, the overall error rate in our capital punishment system was 68 percent.”¹⁹⁶ The astonishingly high error rates in capital cases should give all observers pause. The most common type of error in capital cases was egregiously incompetent defense lawyering, accounting for thirty-seven percent of state post-conviction reversals.¹⁹⁷ It is yet more

192. See *Strickland v. Washington*, 466 U.S. 668, 686–88 (1984).

193. Professor Liebman suggests one version of a prosecutor’s mental calculus around capital cases: “Don’t seek a death sentence—very bad. Seek it and don’t get it—even worse. Seek it and cut corners to make sure I *do* get it—very good (emotionally, politically, professionally) in the short-run, with only a small chance of something mildly bad happening many years later.” James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2129 (2000) [hereinafter Liebman, *The Overproduction of Death*].

194. LIEBMAN & FAGAN, *A BROKEN SYSTEM*, *supra* note 6.

195. *Id.* at 25–28. Professor Liebman acknowledges that their study was not completely comprehensive due to practical problems in accessing judicial opinions, particularly opinions from state post-conviction review, which are often unpublished. *Id.* at 27. As a result, the authors made a set of assumptions that resulted in “understated and conservative” estimates of serious error on state post-conviction review. *Id.* at 27–28.

196. *Id.* at 5.

197. *Id.* State post-conviction review is the first time that the conduct of defense counsel can be substantively reviewed. See *infra* Part I.C.3.

startling to note that the second most common type of error in capital cases was prosecutorial suppression of evidence favorable to the defendant, accounting for sixteen to nineteen percent of the reversals.¹⁹⁸

Once we are aware of the incredibly high rates of error in capital cases, the question that naturally follows is: why are these rates so high? After publishing *A Broken System*, Professor Liebman addressed his research to this question.¹⁹⁹ He concluded that the incentive structure in capital trial and appellate litigation is perverse. “[P]olice, prosecutors, judges, and juries operate with strong incentives to generate as many death sentences as they can—reaping robust psychic, political, and professional rewards—while displacing the costs of their many consequent mistakes onto capital prisoners, post-trial review courts, victims, and the public.”²⁰⁰ Additionally, he noted that the personnel working for and against the death penalty have inverse involvement in the process of capital litigation. The relatively plentiful pro-death penalty forces concentrate their energies on obtaining a death sentence at trial, while the relatively scarce anti-death penalty forces concentrate their energies on the latter stages of the appeal.²⁰¹ Outrage in the local community inspires “the temptation—indeed, at times, the compulsion—for the legal arm of the community to move more swiftly and directly toward that punishment than [the law] permits.”²⁰²

Elected prosecutors and judges compound the problem. Judges are elected in thirty-two of the thirty-eight states that have the death penalty.²⁰³ Supporters of judicial elections argue that they are an appropriate response to an anti-democratic critique of the American judicial system. They argue that an increase in public accountability will diminish the likelihood of the judiciary losing touch with the sensibilities of the majority. But these perceived gains fundamentally misperceive the nature of limited government and the separation of powers. The American constitutional system rests on a principle of limited democracy, one that takes protecting minority interests from ‘the tyranny of the majority’ as its polestar. When constitutional rights are at stake and the issue is as fraught with political baggage as the death penalty is, judges that are facing election may

198. *Id.*

199. See Liebman, *The Overproduction of Death*, *supra* note 193.

200. *Id.* at 2032.

201. *Id.* at 2073 (“The result is that the pro-death penalty forces [local police and prosecutors to] have their way at trial, essentially generating as many death sentences as it is professionally rewarding to generate, while anti-death penalty lawyers are able at the later stages of the process, if not to have *their* way, then at least to have substantial success exposing the astonishingly high amounts of error rates . . .”).

202. *Id.* at 2078 (quoting JAMES S. LIEBMAN & RANDY HERTZ, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 2.6, at 101–02 (3d ed. 1998)).

203. Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805, 1808 (2000) [hereinafter Bright, *Elected Judges and the Death Penalty in Texas*] (citing Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 779 (1995)).

refuse to enforce the constitutional rights of a criminal defendant in order to retain their jobs. Similarly, prosecutors are quick to capitalize on the electoral gains from maintaining a 'tough on crime' stance evinced by successful capital prosecutions. Both prosecutors and judges can easily lose sight of the interests of justice in a partisan political campaign. The combination of these two factors, electoral actors and perverse incentives, militates in favor of a rule that can fully protect capital petitioners from being deprived of their constitutional rights.²⁰⁴

Finally, the actors that cause later reversals are rarely, if ever, held accountable for their unconstitutional conduct.²⁰⁵ The decision to reverse a death sentence comes many years after the conduct causing the reversal. As of 1995, the average duration of direct appellate review in a state court is five years.²⁰⁶ Where a state conviction or sentence is reversed in federal court, the average time lapse between sentence and reversal is 7.6 years.²⁰⁷ By the time the reversible error is detected and remedied, the individual responsible for the violation has usually moved on from the position that she held at the time of trial.²⁰⁸ Court-appointed defense attorneys, if they are still practicing law,²⁰⁹ have often progressed to the point that they no longer need or seek court appointments. Prosecutors, meanwhile, often move on to become members of the judiciary.²¹⁰ Without meaningful accountability in capital cases, there is every reason to believe that the overproduction of marginally constitutional death sentences will continue indefinitely.

2. Uncertain Effect of AEDPA on Delays in Capital Cases

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), substantially amending the statutory availability of federal habeas corpus relief.²¹¹ The principal concerns motivating the habeas provisions were repetitive filings and lengthy delays.²¹² The AEDPA therefore imposed a statute

204. See discussion *infra* Part III.

205. See Liebman, *The Overproduction of Death*, *supra* note 193, at 2119–29.

206. LIEBMAN & FAGAN, *A BROKEN SYSTEM*, *supra* note 6, at 47.

207. *Id.*

208. See Liebman, *The Overproduction of Death*, *supra* note 193, at 2119–20.

209. See *id.* at 2104 n.178 (noting that a high percentage of ineffective lawyers have been suspended from practice or disbarred). For a more general discussion of poor lawyering in capital cases, see, for example, Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 *YALE L. J.* 1835 (1994); Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 *IOWA L. REV.* 433 (1993).

210. See Liebman, *The Overproduction of Death*, *supra* note 193, at 2120.

211. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 28 U.S.C. (Supp. V 1999)).

212. Note, *The Avoidance of Constitutional Questions and the Preservation of Judicial Review: Federal Court Treatment of the New Habeas Provisions*, 111 *HARV. L. REV.* 1578, 1580 (1998) ("There is scant legislative history discussing the habeas provisions, but the history available indicates a congressional desire to eliminate both the delay of habeas and the filing of frivolous habeas claims, with a particular focus on capital cases.").

of limitations on petitions for habeas corpus relief,²¹³ restricted the discretion of the federal courts to grant relief,²¹⁴ limited the discretion of the federal district courts to grant evidentiary hearings,²¹⁵ and all but prohibited prisoners from filing more than one petition for habeas corpus relief.²¹⁶

Though the statute effected a substantial revision of federal habeas corpus procedures, the legislative history of the habeas provisions is relatively scant. Six years after the passage of the act, it is uncertain whether the provisions of the statute will substantially shorten the process. For those petitioners who miss the filing deadline and are denied access to the federal courts, the process is likely to become considerably shorter. But for those who comply with the requirements and timely file a petition for federal habeas corpus review, it is uncertain whether the act will effectuate its purpose. The more substantive alterations that AEDPA made to habeas corpus could have the effect of speeding up the process, but whether this will happen remains uncertain. Limiting the discretion of federal judges to grant evidentiary hearings, for example, may decrease the average length of time that habeas petitions are pending in the district court. But decreased time is not a necessary consequence of limited discretion. An alternative plausible result of more limited discretion is that district court judges will request a more extensive showing before granting an evidentiary hearing and therefore will take longer to reach the decision whether to grant an evidentiary hearing.

It is possible, but by no means assured, that the problem of delays will dissipate as the interpretation of AEDPA becomes more settled. Many of the causes of delays mentioned above will be unaffected by the existence of a statute of limitations for filing federal habeas petitions.

213. 28 U.S.C. § 2244(d) (Supp. V 1999) (imposing a one-year statute of limitations for filing of all federal habeas petitions). In capital cases in selected jurisdictions, the statute of limitations could be shorter still. 28 U.S.C. § 2263 (Supp. V 1999) (imposing a 180-day statute of limitations for filing of federal habeas petitions in states that choose to comply with the procedures of 28 U.S.C. § 2261).

214. 28 U.S.C. § 2254(d)(1) (Supp. V 1999) (“[W]rit of habeas corpus . . . shall not be granted . . . unless the adjudication of the claim 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.”).

215. 28 U.S.C. § 2254(e)(2) (Supp. V 1999) (“[T]he court shall not hold an evidentiary hearing . . . unless . . . (A) the Claim relies on (i) a new rule of constitutional law made retroactive to cases on collateral review; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.”).

216. 28 U.S.C. §§ 2244(b), 2255 (Supp. V 1999) (limiting second or successive habeas corpus petitions to claims that the petitioner is actually innocent or those that involve a new rule of law applied retroactively to cases on collateral review).

II.

THE CONSTITUTIONAL FOUNDATION FOR A CLAIM THAT INORDINATE DELAY
BETWEEN SENTENCING AND EXECUTION VIOLATES A CITIZEN'S RIGHTS

The United States Constitution explicitly recognizes that lengthy delays in the administration of criminal justice violate the rights of citizens. Because this explicit recognition is located not in the Eighth Amendment, but in the Sixth Amendment Speedy Trial Clause, it has been overlooked as a source of support for the Eighth Amendment claim based on delay. The central thrust of the constitutional foundation for the claim that inordinate delays violate individual rights comes from the Eighth Amendment, but the Eighth Amendment need not stand alone. Specifically, the jurisprudential framework for assessing delays developed from the Sixth Amendment Speedy Trial Clause should be applicable to Eighth Amendment delay claims, for the individual and societal interests at stake are nearly identical in both contexts. This part of the article will begin with an explanation of the merits of the Eighth Amendment foundation for the claim. Then it will proceed to develop the analogy to the Sixth Amendment Speedy Trial Clause, demonstrating the ways in which the Sixth Amendment can support the Eighth Amendment claim.

Further, this portion of the article will address the question of appropriate relief for this type of Eighth Amendment violation. The question of relief for this violation is a somewhat complicated one. There is a natural reluctance to bear responsibility for what can be perceived as freeing a murderer. In the discussion of relief, analogies once again will be drawn to other areas of our constitutional traditions. Specifically, this section will address Fifth Amendment protections against double jeopardy and Fifth and Fourteenth Amendment due process protections. The relief that is afforded for violations in those contexts bears upon the appropriate type of relief for the Eighth Amendment delay claim because similar interests are implicated.

Finally, this section of the article will analyze the myriad procedural difficulties the delay claim has encountered and will continue to encounter. First, it will look at the ripeness problem. Can a claim of inordinate delay become ripe before the court knows, at least approximately, the full length of the delay? Second, it will address the question of whether the non-retroactivity doctrine perpetually forecloses relief on the merits of the claim. Finally, it will address the problems associated with litigating the claim in a second or successive petition for relief.

A. The Eighth Amendment Foundation for the Delay Claim

The general outline of the Eighth Amendment foundation for the delay claim is described above in Part I.D. The central tenet of the Eighth Amendment claim is that an execution after a period of inordinate delay no longer serves any legitimate social purpose. Indeed, lengthy delays would have been unimaginable

to the framers of the constitution, so they cannot be justified via the framers' intent.²¹⁷ In both of the principal capital punishment decisions from the 1970's, the Court accepted that the legitimate purposes of punishment place a constitutional limit on its use.²¹⁸ To quote Justice White: "[T]he moment that it ceases realistically to further these purposes [retribution and deterrence] . . . [the execution] would [violate the Eighth Amendment], for its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes."²¹⁹ After a lengthy period of delay, the execution makes no further contribution either to the legitimate aspects of retribution or the deterrent value of the punishment.

1. The Enhanced Retributive Nature of Death Row Confinement Undermines Retributive Support for a Delayed Execution

In his opinion in *Lackey*, Justice Stevens notes that the state's interest in retribution may have been satisfied by "the severe punishment already inflicted."²²⁰ Here, Justice Stevens makes a subtle, but important, distinction between incarceration during a prison sentence and incarceration during a death sentence. Incarceration during a prison sentence affords the prisoner an opportunity to adjust to his surroundings and accept the conditions of his confinement. The conditions of incarceration without a death sentence are uniformly less restrictive, even in maximum-security facilities, than the conditions of incarceration during a death sentence. Prisoners under sentence of death are typically confined to their cells for at least twenty-two hours a day, are not permitted to work in the prison environment, and live in total isolation.²²¹ In some jurisdictions, the inmates are not permitted any physical human contact.²²² Other problems with facilities often compound the harsh nature of incarceration on death row.²²³ In one case, the conditions of confinement were "so adverse

217. See *supra* Part I.D.3.

218. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion); *Furman v. Georgia*, 408 U.S. 238, 279 (1972) (Brennan, J., concurring); *Id.* at 312 (White, J., concurring); *Id.* at 342–59 (Marshall, J., concurring).

219. *Furman*, 408 U.S. at 312 (White, J., concurring).

220. *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (Stevens, J., respecting denial of certiorari).

221. See *Ceja v. Stewart*, 134 F.3d 1368, 1369 (9th Cir. 1998) (Fletcher, J., dissenting) (describing restrictive conditions during lengthy confinement and concluding that petitioner's "de facto sentence will be 23 years of solitary confinement in the most horrible portion of the prison—death row—followed by execution").

222. See New York Department of Correctional Services, Directive #0054: Unit for Condemned Persons, at 11–12 (Aug. 31, 1995) (on file with the NYU Review of Law & Social Change) (requiring that all visits with condemned inmates, including visits with legal counsel and spiritual advisers, take place in a specially-designed portion of the death row cell where there can be no physical human contact).

223. See *Groseclose ex rel. Harries v. Dutton*, 594 F. Supp. 949, 959–62 (M.D. Tenn. 1984), appeal dismissed *sub nom.* *Groseclose v. Dutton*, 788 F.2d 356 (6th Cir. 1986) (describing

that they caused [a prisoner] to waive his post-conviction remedies involuntarily.”²²⁴ These more restrictive conditions of confinement undoubtedly enhance the retributive nature of the incarceration.

Adding to the more restrictive physical conditions of incarceration is the mental anguish of living under the shadow of death, an anguish the Court recognized in *In Re Medley*.²²⁵ French philosopher Albert Camus described capital punishment as imposing two deaths, the first when the sentence is imposed and the second, the eventual execution.²²⁶ As Camus put it, “[a]s a general rule, the man is destroyed by waiting for his execution long before he is actually killed.”²²⁷ This lengthy imprisonment dehumanizes the prisoner, often leading to the onset of insanity.²²⁸ The more harsh conditions of incarceration together with the psychological impact of anticipating one’s own execution significantly enhance the retributive nature of lengthy incarceration during a death sentence.²²⁹ Additional gains in retribution from the execution after an inordinate delay are small.

Retribution needs to be distinguished from revenge. A vengeful motive may form part of the justification for retributive punishments, but the role of the state is to channel and limit vengeance in society, not to reproduce it in the correctional setting.²³⁰ As Justice Murphy wrote nearly sixty years ago:

[T]he necessary punishment of those guilty of atrocities [must] be as free as possible from the ugly stigma of revenge and vindictiveness Otherwise stark retribution will be free to masquerade in a cloak of false legalism. And the hatred and cynicism engendered by

conditions of death row confinement where poor ventilation, inadequate lighting, stifling heat, and lack of access to religious services compel a conclusion that the conditions induced an involuntary waiver of post-conviction appeals).

224. *Id.* at 961.

225. 134 U.S. 160 (1890); see generally WILLIAM A. SCHABAS, *THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE: CAPITAL PUNISHMENT CHALLENGED IN THE WORLD’S COURTS* 96–156 (1996) (describing the traumatic effects of living on death row and examining cases that have discussed the death row phenomenon); see also Flynn, *supra* note 1, at 294–98; Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U. L. REV. 513, 552 (1989); Note, *Mental Suffering under the Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814, 826–31 (1972).

226. See Aarons, *supra* note 12, at 163 n.59.

227. ALBERT CAMUS, *REFLECTIONS ON THE GUILLOTINE* 25–29 (1960), quoted in Aarons, *supra* note 12, at 163 n.59.

228. *Solesbee v. Balkcom*, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting).

229. William A. Schabas, *Execution Delayed, Execution Denied*, 5 CRIM. L.F. 180, 183–84 (1994).

230. See *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring) (“The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law.”).

that retribution will supplant the great ideals to which this nation is dedicated.²³¹

The state's legitimate interest in retribution is arguably satisfied after a prisoner spends a lengthy period of time incarcerated on death row.

2. Execution After a Lengthy Delay Does Not Contribute to Deterrence

Similarly, the state stands to gain little or no additional deterrence from an execution temporally distant from the crime. Two essential types of deterrence undergird penological theory: specific and general deterrence. Specific deterrence is concerned with preventing the individual offender from violating the criminal law again. Owing to the enhanced retributive nature of death row confinement, the state will gain little more specific deterrence from executing the inmate who has endured inordinate delay under sentence of death. Additionally, the most plausible relief the offender will obtain when the delay claim is recognized is a reduction of sentence to life without the possibility of parole. Once that occurs, the prisoner will be unable to commit any crime outside of the highly controlled prison setting, further limiting the specific deterrence gains from the execution. General deterrence is concerned with preventing members of society from violating the criminal law for fear of the punishment meted out to others. General deterrence theory depends on celerity for much of its force. Since the community response to the crime has quieted from the lengthy incarceration, the general deterrence gains are nominal at best.²³² Without any historical basis or valid penological rationale, executions after an inordinate delay are excessive and beyond the limits of acceptability the Eighth Amendment establishes.²³³

231. Application of Yamashita, 327 U.S. 1, 29–30 (1946) (Murphy, J., dissenting).

232. A lively debate exists as to whether there can be any general deterrence gained from executions. It is beyond the scope of this article to participate in this debate. For the most recent discussions, compare Hashem Dezhbakhsh, Paul H. Rubin & Joanna Mehlhop Shepherd, Does Capital Punishment Have a Deterrent Effect?: New Evidence from Post-moratorium Panel Data (January 2001) (unpublished manuscript, on file with the NYU Review of Law & Social Change), with David Baldus & George Woodworth, Review of Paul Rubin, et al., "Capital Punishment and Deterrence: County Level Estimates Using Recent Execution Data" (June 25, 1999) (unpublished literature review, on file with the NYU Review of Law & Social Change). See also William C. Bailey & Ruth D. Peterson, *Murder, Capital Punishment, & Deterrence: A Review of the Literature*, in THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 135 (Hugo Adam Bedau ed., 1997).

233. See *Gregg v. Georgia*, 428 U.S. 158, 183 (1976) (plurality opinion) ("[T]he sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering."); see also *Furman*, 408 U.S. at 312 (White J., concurring) ("[When the death penalty] ceases realistically to further these purposes . . . its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.").

3. *After A Lengthy Delay, Often the Offender is No Longer Deserving of Execution*

One of the most important Eighth Amendment principles is individualized sentencing. Every person whom the state seeks to execute is entitled to an individualized determination of his moral culpability for the crime he committed.²³⁴ The potential condemned can marshal virtually unlimited evidence about his character or background to make his case for mercy.²³⁵

In 1986, the Supreme Court held that a prisoner's conduct while incarcerated is relevant mitigating evidence that cannot properly be excluded from the jury's consideration.²³⁶ This principle adds force to the contention that execution after inordinate delay may violate the petitioner's Eighth Amendment rights. After spending an unreasonable duration incarcerated on death row, the petitioner is rarely going to be the same person that he was when he was sentenced to death. Lengthy periods of incarceration on death row effect profound changes on an individual that are not limited to the onset of insanity. The well-publicized case of Karla Faye Tucker exemplifies the type of change that a person can undergo while awaiting their execution.²³⁷

To be sure, this argument is in need of a limiting principle. If taken to the extreme in every case, it would prevent any execution that failed to take place within a very short time of the crime. The underlying principle is that the Eighth Amendment requires that a sentence be determined on the individual moral blameworthiness of the perpetrator. After an unreasonable delay, the blameworthiness of the person may have diminished, further undermining the state's interest in the execution. This examination would not undermine the state's interest in continued incarceration, however, for periods of incarceration are not subject to the same Eighth Amendment strictures as executions.

B. The Sixth Amendment Analogue to Support Claims Based on Delay

"In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . ."²³⁸ Like the Eighth Amendment's Cruel and Unusual Punishment Clause, the Speedy Trial Clause of the Sixth Amendment places a limit on the state's criminal justice capacities. The historical foundation for the right to a speedy trial is nearly as old as the Anglo-American legal tradition

234. See *Lockett v. Ohio*, 438 U.S. 586 (1978).

235. *Id.*

236. See *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (holding that good behavior over seven months of pre-trial incarceration was erroneously excluded requiring new sentencing hearing).

237. Ms. Tucker was convicted of murdering a couple with a pickaxe in 1983. While she was incarcerated, she experienced a religious conversion and, by all accounts, was a radically different person when she was executed in 1998 than when she was sentenced in 1984.

238. U.S. CONST. amend. VI.

itself, dating to the Assize of Clarendon in 1166 and the Magna Carta in 1215.²³⁹ Yet violations of the Speedy Trial Clause have not received much attention in American legal history. The Clause was one of the last components of the Bill of Rights applied to the states when it was incorporated through the Fourteenth Amendment's Due Process Clause in 1967,²⁴⁰ and before that incorporation Supreme Court opinions applying the Speedy Trial Clause were infrequent.²⁴¹

Though the right to counsel in the Sixth Amendment continues to receive more attention, the Court declared that, "the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment."²⁴² The state must bring an accused to trial in a timely fashion or forfeit the opportunity to try the person for the crime—the remedy for a violation of the Speedy Trial Clause is dismissal of the indictment with prejudice. Although this remedy is disfavored for being "unsatisfactorily severe," the Court has candidly recognized that "it is the only possible remedy."²⁴³ The policies supporting the Speedy Trial Clause of the Sixth Amendment are directly relevant to claims that inordinate delay between the day of the sentence and the day of execution violate constitutional rights, because a parallel set of interests are at stake.

The Speedy Trial Clause of the Sixth Amendment protects the interests of the accused and society alike.²⁴⁴ For the accused, it guards against three separate injuries that can result from undue trial delay: (i) oppressive pretrial incarceration; (ii) inconvenience, indignity, and anxiety resulting from the pendency of unresolved charges; and (iii) prejudice against the ability to present defensive evidence at trial.²⁴⁵ The first two injuries stem from unreasonable derogation of a citizen's liberty, while the third results from the passage of time itself. Memories fade, witnesses become unavailable, and circumstantial elements, most notably intent, become more difficult to prove or disprove. While the limitations on liberty were the principal concerns motivating the historical foundation of the right to a speedy trial, the Court has declared that diminished ability to present defensive evidence is "the most serious injury resulting from trial delay because the inability of a defendant adequately to

239. See Brian P. Brooks, *A New Speedy Trial Standard for Barker v. Wingo: Reviving a Constitutional Remedy in an Age of Statutes*, 61 U. CHI. L. REV. 587, 587 (1994).

240. See *Klopper v. North Carolina*, 386 U.S. 213 (1967).

241. See *Dickey v. Florida*, 398 U.S. 30, 40 (1970) (Brennan, J., concurring) ("Before *Klopper* [*v. North Carolina*, 386 U.S. 213], only three of our opinions dealt at any length with the right, and each was decided with little analysis of its scope and content." (citing *Beavers v. Haubert*, 198 U.S. 77 (1905); *Pollard v. United States*, 352 U.S. 354 (1957); *United States v. Ewell*, 383 U.S. 116 (1966))).

242. *Klopper*, 386 U.S. at 223.

243. *Barker v. Wingo*, 407 U.S. 514, 522 (1972).

244. *Id.* at 519 ("In addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused.").

245. *Doggett v. United States*, 505 U.S. 647, 654 (1992). See also RANDY HERTZ, MARTIN GUGGENHEIM & ANTHONY G. AMSTERDAM, TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE COURT § 15.04(b), at 416 (1991).

prepare his case skews the fairness of the entire system.”²⁴⁶ In making the analogy to excessive delays associated with capital appeals, each of these types of prejudice are clearly present and would be relevant to the assessment of the claim.

While the defendant’s interests in a speedy trial are essentially personal, society’s interests in speedy criminal trials focus on the integrity of the judicial system. The principal societal interest in speedy criminal trials is the effective prosecution of criminal cases, “both to restrain those guilty of crime and to deter those contemplating it.”²⁴⁷ Deterrence theory relies on swiftness for much of its force. Excessive delays in pursuing convictions undermine their deterrent effect.

In addition to this practical penological concern, the Speedy Trial Clause places an affirmative duty on the state to vindicate society’s interests in swift crime control.²⁴⁸ While it is understandable why a criminal defendant might tolerate unusual delays in the trial or appellate process, it is less easy to discern why the state would do so. While certain delays may accrue benefits to the defendant since the state carries the burden of proof, the state may not legitimately seek to take advantage of the benefits associated with delay. One trial judge, whom the Supreme Court lauded for his careful consideration of the Speedy Trial Clause, compared the interests of the defendant and the State in delays as follows:

It is commonly understood that the defendant will hesitate to disturb the hushed inaction by which dormant cases have been known to expire. There is no comparable ground—at least no justification—for ambivalence in the prosecutor’s office about performance of the unquestioned duty to implement the right to a speedy trial.²⁴⁹

While the state can readily justify delays associated with gathering evidence or prosecuting co-defendants, it cannot legitimately seek to gain an advantage at trial from the delays.²⁵⁰ The Speedy Trial Clause, therefore, “penaliz[es] official abuse of the criminal process and discourag[es] official lawlessness.”²⁵¹

The Sixth Amendment speedy trial guarantee is subject to an extensive balancing test. Pursuant to *Barker v. Wingo*, the balancing test considers the

246. *Barker*, 407 U.S. at 532.

247. *Dickey v. Florida*, 398 U.S. 30, 42 (1970) (Brennan, J., concurring).

248. *Barker*, 407 U.S. at 527 (“[S]ociety has a particular interest in bringing swift prosecutions, and society’s representatives are the ones who should protect that interest.”).

249. *United States v. Mann*, 291 F. Supp. 268, 274–75 (S.D.N.Y. 1968) (citation omitted), *cited with approval in Barker*, 407 U.S. at 533 n.36 (“For an example of how the speedy trial issue should be approached, see Judge Frankel’s excellent opinion in *United States v. Mann*.”) (internal citation omitted); *see also Dickey*, 398 U.S. at 37–38 (“Although a great many accused persons seek to put off the confrontation as long as possible, the right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial.”).

250. *Dickey*, 398 U.S. at 43 (Brennan, J., concurring) (“Deliberate governmental delay in the hope of obtaining an advantage over the accused is not unknown [and it imperils] the fair administration of justice.”).

251. *Id.*

conduct of the prosecution and the defendant as it weighs four factors: “(1) length of delay, (2) reason for delay, (3) defendant’s assertion of his right, and (4) prejudice to the defendant.”²⁵² None of these factors have “talismanic qualities,” hence assessing speedy trial violations requires a “difficult and sensitive balancing process.”²⁵³

The first factor, length of delay, acts as a “triggering mechanism.”²⁵⁴ It sets a flexible minimum length of time that must pass before the delay in processing the criminal case can be deemed unreasonable. The second factor, the reason for the delay, can be difficult to assess, and “different weights should be assigned to different reasons.”²⁵⁵ Clearly deliberate delays to hamper the defense should be “weighted heavily against the government,”²⁵⁶ but government negligence in pursuing the case should also be weighed against the government.²⁵⁷ The longer the delay, the greater is the prejudice arising from the delay.²⁵⁸ The third factor, the defendant’s assertion of the right, is considerably less important in the analysis.²⁵⁹ Primarily, it gives courts flexibility to account for delays that the defendant may have deliberately sought. The fourth factor, prejudice to the defendant, is required. The defendant must demonstrate that he suffered prejudice to the interests that the Speedy Trial Clause protects. As noted above, the most important form of prejudice to the defendant is the inability to present defensive evidence. In one of the Court’s most recent considerations of the Speedy Trial Clause, the defendant, Doggett, was neither incarcerated pending trial nor aware of the pendency of the charges against him.²⁶⁰ Although Doggett was unable to specifically demonstrate how the delay diminished his ability to present defensive evidence, the Court granted him relief because “excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify.”²⁶¹

While the Sixth Amendment Speedy Trial Clause directly applies only to criminal trials, the due process protections in the Fifth and Fourteenth Amendments extend the Clause’s protections to the appellate process.²⁶² While its

252. *Barker*, 407 U.S. at 530.

253. *Id.* at 533.

254. *Id.* at 530.

255. *Id.* at 531.

256. *Id.*

257. *Doggett v. United States*, 505 U.S. 647, 657 (1992) (“Although negligence is obviously to be weighted more lightly than a deliberate intent to harm the accused’s defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun.”).

258. *Id.* (“And such is the nature of the prejudice presumed that the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows.”).

259. *See Barker*, 407 U.S. at 529.

260. *Doggett*, 505 U.S. at 654.

261. *Id.* at 655.

262. *See United States v. Loud Hawk*, 474 U.S. 302, 314 (1986) (adopting the *Barker* test “to determine the extent to which appellate time consumed in the review of pretrial motions should

application in these contexts has generally been limited to direct appeals, there is no affirmative reason why it must be so limited. When the state fails to perform its elementary duties in protecting a defendant or convict's due process rights, the rationale of the Sixth Amendment's speedy trial guarantee applies with full force, as the same set of interests are at stake.

This set of interests is also implicated when citizens suffer inordinate delays between condemnation and execution. Persons facing the death penalty are in a very similar position to those facing criminal charges. If the word 'execution' is substituted for the word 'trial,' nearly all of the Sixth Amendment rationales apply perfectly to capital petitioners who suffer inordinate delay. The interests for the defendant and society are similar. The defendant's interests in this context relate to oppressive incarceration prior to execution, anxiety and indignity from the uncertainty associated with the pendency of the unresolved appeals, and diminished ability to present evidence due to the passage of time. Society's interest lies in the deliberate and swift punishment that deterrence theory requires. Consequently, it would be sensible for courts to process Eighth Amendment delayed execution claims in a similar manner as Sixth Amendment speedy trial claims.

The American constitutional tradition as expressed in the Sixth Amendment Speedy Trial Clause recognizes that delays in criminal proceedings can infringe on the constitutional rights of citizens. Courts presented with the questions about inordinate delays in execution should recognize the similarity between these two important areas of our constitutional tradition and assess the claims in a similar fashion.²⁶³

C. *The Substantive Challenge for Relief On a Claim of Inordinate Delay*

In *Chessman v. Dickson*,²⁶⁴ one of the early constitutional challenges to a lengthy period of incarceration awaiting execution, Chief Judge Richard H. Chambers of the Ninth Circuit succinctly summarized the challenge to relief: "I do not see how we can offer life as a prize for one who can stall the processes for a given number of years, especially when in the end it appears the prisoner never

weigh towards a defendant's speedy trial claim"); *Harris v. Champion*, 15 F.3d 1538, 1546-47 (10th Cir. 1994) (using *Barker* factors to consider delays on appeal); *Burkett v. Fulcomer*, 951 F.2d 1431 (3d Cir. 1991) (using *Barker* factors to establish due process violation); *Rheuark v. Shaw*, 628 F.2d 297, 303 (5th Cir. 1980) ("We conclude that an ad hoc evaluation of the four factors [for analyzing speedy trial claims] set forth in *Barker* is appealing as means to determine whether a denial of due process has been occasioned [when delays accompany appeal] in any given case.").

263. Dwight Aarons has previously noted the similarities between the Sixth Amendment Speedy Trial Clause and Eighth Amendment claims of inordinate delay. See Aarons, *supra* note 12, at 207; Dwight Aarons, *Getting Out of this Mess: Steps Toward Addressing and Avoiding Inordinate Delay in Capital Cases*, 89 J. CRIM. L. & CRIMINOLOGY 1, 40-41 (1998) [hereinafter Aarons, *Getting Out of this Mess*].

264. 275 F.2d 604 (9th Cir. 1960).

really had any good points.”²⁶⁵ Granting Eighth Amendment relief to a prisoner for diligently pursuing his appeals without regard to the merits has seemed impossible to many of the judges who have considered this claim. The same judge on the Fourth Circuit who derided the Eighth Amendment delay claim as a mockery also urged that “[p]etitioner’s claim . . . be recognized for the frivolous claim that it is, and his delay in raising it, for the manipulation that it is.”²⁶⁶ Other courts have been equally distressed with the nature of the claim for precisely the same reason. The certiorari opinion of Justice Thomas in *Knight v. Florida* is representative of this position. Justice Thomas objected that “[i]t is incongruous to arm capital defendants with an arsenal of ‘constitutional’ claims with which they may delay their executions, and simultaneously to complain when executions are inevitably delayed.”²⁶⁷

In order to get past this complaint about the Eighth Amendment claim, it is important to recall how it was framed in Justice Stevens’ memorandum opinion in *Lackey*. There, Justice Stevens noted: “It may be appropriate to distinguish, for example, among delays resulting from (a) a petitioner’s abuse of the judicial system by escape or repetitive, frivolous filings; (b) a petitioner’s legitimate exercise of his right to review; and (c) negligence or deliberate action by the state.”²⁶⁸ Although he does not identify the analogy explicitly, Justice Stevens’ effort to distinguish among the sources of delay bears strong resemblance to the Sixth Amendment analysis.

In Justice Stevens’ view, then, where a constitutional claim is based on inordinate time spent on death row, the cause of the delay is of paramount importance. Not surprisingly, Justice Breyer, the Supreme Court member most willing to address this Eighth Amendment claim, has been careful to distinguish the different causes of delay as he assesses the viability of a claim.²⁶⁹ Significantly, the opinion of the Fourth Circuit Court of Appeals in *Turner v. Jabe*, which dismissed the claim as an abuse of the writ for failing to bring the claim sooner, noted both that the petitioner sought to “distinguish between innocent delays and delays caused by a defendant’s dilatory tactics” and that the distinction had some slight precedential support.²⁷⁰

Almost without exception, courts have been unwilling to consider Eighth Amendment claims based upon delay where the petitioner has abused the system

265. *Id.* at 607.

266. *Turner v. Jabe*, 58 F.3d 924, 933 (4th Cir. 1995) (Luttig, J., concurring).

267. *Knight v. Florida*, 529 U.S. 990, 992 (1995) (Thomas, J., concurring in the denial of certiorari).

268. *Lackey v. Texas*, 514 U.S. 1045, 1047 (1995) (mem.) (Stevens, J., respecting the denial of certiorari).

269. *Knight*, 528 U.S. at 998 (Breyer, J., dissenting from denial of certiorari) (“Of the eight cases . . . that decided *Lackey* claims solely on the merits, only four involve lengthy delays for which the state arguably bears responsibility.”).

270. *Turner*, 58 F.3d at 928 (citing *Chessman v. Dickson*, 275 F.2d 604, 607 (9th Cir. 1960)).

in one way or another (Justice Stevens' type (a)).²⁷¹ However, the merits of the Eighth Amendment claim strengthen where the delay results solely from the exhaustion of appellate procedures available to the petitioner (Stevens' type (b)). To suggest that a citizen loses the protection of the Eighth Amendment because he chooses to pursue appellate review of a capital conviction seems highly improper. In the Sixth Amendment context, delays associated with the normal processing of a case, even when unintentional, are attributed to the state.²⁷² In the capital context, passage of time is often considered evidence that the cases are receiving extraordinary judicial scrutiny because of the high stakes. Consequently, the delays are deemed to have some salutary effect.²⁷³

Claims where the cause of delay is attributable to the state (Stevens' type (c)), on the other hand, deserve special attention. When the state delays the capital post-conviction process, the balance of equities weighs heavily in favor of a grant of relief. These delays, resulting from negligent or deliberate action by the state, will often offer an independent ground for relief, as with claims that state authorities suppressed evidence favorable to the accused at trial.²⁷⁴ In the unique circumstances of the capital convict, the relief that such claims offer—retrial on the same charges—is wholly insufficient to protect fully his constitutional rights.

In this area, it is instructive to consider the types of relief offered in other circumstances where negligent or deliberate state behavior generates reversals.

1. *The Reach of the Fifth Amendment's Double Jeopardy Clause*

The Double Jeopardy Clause guarantees that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."²⁷⁵ The Double Jeopardy Clause protects citizens from three types of prosecutions: (1) re-prosecution for the same offense after an acquittal; (2) re-prosecution for the same

271. In 1972, the state of California was willing to recognize even delays that the petitioner brought upon herself as part of a problem of constitutional dimensions. "An appellant's insistence on receiving the benefits of appellate review of the judgment condemning him to death does not render the lengthy period of impending execution any less torturous or exempt such cruelty from constitutional proscription." *People v. Anderson*, 493 P.2d 880, 894-95 (Cal. 1972) (footnotes omitted). As previously noted, California has since reversed course. See *supra* note 148.

272. The court stated in *Strunk v. United States*:

Unintentional delays caused by overcrowded court dockets or understaffed prosecutors are among the factors to be weighed less heavily than intentional delay, calculated to hamper the defense, in determining whether the Sixth Amendment has been violated but . . . they must nevertheless be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.

Strunk v. United States, 412 U.S. 434, 436 (1973) (citation and internal quotations omitted).

273. See *Chambers v. Bowersox*, 157 F.3d 560, 570 (8th Cir. 1998) ("[D]elay, in large part, is a function of the desire of our courts . . . to get it right, to explore exhaustively, or at least sufficiently, any argument that might save someone's life.").

274. See *supra* Part I.E.

275. U.S. CONST. amend. V.

offense after a conviction; and (3) multiple prosecutions for the same offense.²⁷⁶ In the event that a criminal defendant finds himself facing one of those three sets of circumstances, the defendant is entitled to a dismissal of the pending charge.

Double jeopardy protections prevent the state from undertaking continuing efforts to prosecute a criminal defendant for alleged offenses. In *Green v. United States*, the Court explained that the Clause protects citizens from “the State with all its resources and power . . . [making] repeated attempts to convict [him] for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.”²⁷⁷ This protection must be balanced against the societal need for effective enforcement of its criminal laws. As a consequence, the Double Jeopardy Clause does not prevent reprosecution of citizens whose convictions were reversed on appeal,²⁷⁸ unless the conviction was reversed due to insufficient evidence.²⁷⁹ Society’s interest in capturing and punishing criminals is thought to outweigh the individual interest in avoiding the expense, embarrassment, and inconvenience associated with a second trial on the same charge.²⁸⁰ As the Court stated, “The determination to allow reprosecution [after reversal on appeal] reflects the judgment that the defendant’s double jeopardy interests, however defined, do not go so far as to compel society to so mobilize its decision-making resources that it will be prepared to assure the defendant a single proceeding free from harmful governmental or judicial error.”²⁸¹

The Supreme Court announced a narrow additional ground for dismissal on the basis of the Double Jeopardy Clause in *Oregon v. Kennedy*.²⁸² In that case, the Court held that the Double Jeopardy Clause precludes retrial when the government engages in prosecutorial misconduct that (1) gives rise to a successful defense motion for retrial; and (2) “was intended to provoke the defendant into moving for mistrial.”²⁸³ While the first portion of the *Kennedy* exception is easy to meet, the second portion, relating to the subjective mental state of the prosecutor at the time of the misconduct, is extremely difficult to prove. Consequently, double jeopardy motions based upon the *Kennedy* exception “are nearly impossible to win.”²⁸⁴

276. Ellis M. Johnston, et al., *Double Jeopardy*, 88 GEO. L.J. 1272 (2000).

277. *Green v. United States*, 355 U.S. 184, 187–88 (1957).

278. *See United States v. Ball*, 163 U.S. 662 (1896).

279. *See United States v. Burks*, 437 U.S. 1 (1978).

280. *Id.* at 15 (holding that when a conviction is reversed due to procedural error, “society maintains a valid concern for insuring that the guilty are punished”).

281. *United States v. Jorn*, 400 U.S. 470, 484 (1971).

282. 456 U.S. 667 (1982).

283. *Id.* at 679.

284. Barry Tarlow, *Narrowing Double Jeopardy Bar to Retrial After Intentional Prosecutorial Misconduct Reversal*, CHAMPION, Apr. 1998, at 49.

Recognizing the practical limitations of this rule, states have begun to move away from the subjective intent requirement in *Oregon v. Kennedy*. Texas abandoned the subjective intent standard in 1996, noting that there is no difference of constitutional magnitude between a prosecutor misbehaving to goad a mistrial and a prosecutor misbehaving to strengthen his case.²⁸⁵ The Supreme Court of New Mexico, in *State v. Breit*,²⁸⁶ rejected prosecutorial goading of a mistrial as a standard for double jeopardy protection. Instead, the New Mexico court focused on the prosecutor's "willful disregard" of the defendant's right to a fair trial.²⁸⁷

The most sweeping expansion of the federal rule came from Pennsylvania in 1999, in a case called *Commonwealth v. Martorano*.²⁸⁸ Describing the prosecutorial behavior in the case as "Machiavellian," the court affirmed, "A fair trial is not simply a lofty goal, it is a constitutional mandate Where that constitutional mandate is ignored and subverted by the Commonwealth, we cannot simply turn a blind eye and give the Commonwealth another opportunity."²⁸⁹

The purposes of double jeopardy protection are strongly implicated in the case of a person who has spent time on death row pursuant to an unconstitutional judgment. If a defendant has been incarcerated on death row owing solely to the negligent or deliberate actions of the state, the individual interests of the Double Jeopardy Clause are particularly relevant. It is hard to imagine a more compelling instance of "the state with all its resources and power . . . compelling him to live in a continuing state of anxiety and insecurity,"²⁹⁰ than the case of the death row inmate who daily confronts the possibility that his execution date could be set at any time.

Relief for a double jeopardy violation is a permanent foreclosure of the state's ability to try the defendant on the charge. In the context of the Eighth Amendment delay claim, relief need not be so drastic. A reduction in sentence from death to life would maintain the state's interest in punishing violent criminals while giving cognizance to the individual rights of the inmate defendant.

2. A Role for Due Process Protections Against Negligent State Misconduct

While there is a certain level of intentionality associated with the extension of double jeopardy protections, there are other areas of state misconduct that can merit reversal that do not require intentional misconduct. The most prevalent

285. *Bauder v. State*, 921 S.W.2d 696, 699 (Tex. Crim. App. 1996).

286. 930 P.2d 792 (N.M. 1996).

287. *Id.* at 830.

288. *Commonwealth v. Martorano*, 741 A.2d 1221 (Pa. 1999).

289. *Commonwealth v. Daidone*, 684 A.2d 179, 184 (Pa. Super. Ct. 1992), *aff'd sub nom. Commonwealth v. Martorano*, 741 A.2d 1221 (Pa. 1999).

290. *Green v. United States*, 335 U.S. 184, 187-88 (1957).

example is the rule requiring disclosure of all material evidence favorable to the defense. This rule has its roots in the Due Process Clause of the Fifth and Fourteenth Amendments. The modern exegesis of the rule occurred in the 1963 case of *Brady v. Maryland*,²⁹¹ in which the Court announced that suppression of evidence violated the defendant's due process right to a fair trial "irrespective of the good faith or bad faith of the prosecution."²⁹² Since then, the components of the due process violation have become better defined and are understood to be as follows: "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."²⁹³ The most difficult of those three to establish is prejudice, which is determined on a materiality standard that requires the suppressed evidence to be so serious as to render the verdict unreliable.

Despite the difficulty in proving that suppressed evidence was sufficiently favorable to affect a verdict, a significant number of capital cases have been overturned on the basis of failure to disclose favorable evidence.²⁹⁴ Although the state misconduct in *Brady* cases amounts only to negligence, it is this negligence that is responsible for the duration of the defendant's incarceration on death row.

As such, the existence of a *Brady* violation could be a factor in the evaluation of the claim of delay. If, for example, a prisoner had demonstrated that the state suppressed favorable evidence, but the suppressed evidence was not sufficiently material to grant relief, then the delay in processing the case might be properly attributed to the state.

Both the due process rule and the double jeopardy rule embody the broader principle that the state should not be permitted to tilt the scales of justice against the defendant. The state has an obligation to the defendant, but also to society at large, to act as scrupulously as possible. In both of those areas of the law, state misbehavior constitutes grounds for relief. State misbehavior should to be grounds for relief in the context of the Eighth Amendment delay claim as well.

As noted above, the Sixth Amendment Speedy Trial Clause extends to the appellate process through the Due Process Clause of the Fifth and Fourteenth Amendments. The interests the Speedy Trial Clause protects are at stake for the condemned inmate during the post-conviction appellate process. It is well-settled that the Speedy Trial Clause should not generally impede the state's ability to retry defendants after their convictions are reversed on appeal:

It has long been the rule that when a defendant obtains a reversal of a prior unsatisfied conviction, he may be retried in the normal course of

291. 373 U.S. 83 (1963).

292. *Id.* at 87.

293. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

294. See LIEBMAN & FAGAN, A BROKEN SYSTEM, *supra* note 6, at 5.

events. The rule of these cases, which dealt with the Double Jeopardy Clause, has been thought wise because it protects the societal interest in trying people accused of crime, rather than granting them immunization because of legal error at a previous trial, and because it enhances the probability that appellate courts will be vigilant to strike down previous convictions that are tainted with reversible error These policies, so carefully preserved in this Court's interpretation given the Double Jeopardy Clause, would be seriously undercut by an interpretation given the Speedy Trial Clause [that raised a Sixth Amendment obstacle to retrial following successful attack on conviction].²⁹⁵

The application of this general rule to all criminal cases makes sense, for it assumes that the state should not be penalized when it acted with all deliberate speed in seeking the initial conviction.

One aspect of prejudice that the Sixth Amendment guards against is the defendant's ability to present evidence on his behalf. In one of its most recent pronouncements on the Speedy Trial Clause, the Court found sufficient prejudice to prevent a trial on the basis of an unarticulated showing of prejudice to the ability to present defensive evidence. There, the Court recognized that "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify."²⁹⁶ While compromised reliability is always a concern, it is of particular concern in capital cases, where the strictures of the Eighth Amendment require a greater degree of reliability.²⁹⁷

Given that prejudice to the defendant's ability to present evidence can alone be sufficient to prohibit a trial in the first instance, it does not stretch the rationale of the Sixth Amendment to prohibit the state from seeking a second death sentence against a capital defendant whose conviction or sentence was overturned on the basis of state misconduct.

D. Procedural Default Problems With the Claim of Inordinate Delay

Since *Gregg v. Georgia*,²⁹⁸ the Supreme Court, and more recently Congress, have restricted access to collateral review in federal courts.²⁹⁹ The process of restricting access to collateral review began in 1976, when in *Stone v. Powell*, the Court held that Fourth Amendment claims of unreasonable search or seizure are not reviewable in federal courts, provided that the state afforded a full and fair opportunity for the claim to be heard.³⁰⁰ One year later, in *Wainwright v.*

295. *United States v. Ewell*, 383 U.S. 116, 121 (1966).

296. *Doggett v. United States*, 505 U.S. 647, 655 (1992).

297. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

298. 428 U.S. 153.

299. For a short overview of these restrictions, see Bright, *Elected Judges and the Death Penalty in Texas*, *supra* note 203, at 1832-36.

300. *Stone v. Powell*, 428 U.S. 465, 481-82 (1976) ("We hold, therefore, that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the

Sykes, the Court announced that failure to comply with state procedural rules could preclude federal habeas corpus review.³⁰¹ In 1989, in *Teague v. Lane*, the Supreme Court declared that prisoners seeking collateral review of their judgments cannot benefit from “new constitutional rules of criminal procedure,” but can only access those claims for relief that were “dictated by precedent existing at the time the defendant’s conviction became final.”³⁰² The adoption of AEDPA, with its ambiguous admixture of new procedures and codifications of existing case law, has complicated the picture yet further.³⁰³ It is into this procedural morass that the claim of inordinate delay must enter. In many ways, this constitutional claim possesses procedural peculiarities that make it difficult to introduce.

1. Ripeness

To begin with, there is a justiciability question regarding when the claim becomes ripe for judicial review. Ripeness is a fundamental requirement for judicial review. In order for a claim to be considered ‘ripe,’ two requirements must be met: (1) it must be fit for judicial decision, and (2) there must be hardship to the parties of withholding court consideration.³⁰⁴ *Lackey* claims are more likely to ripen, therefore, in state or federal post-conviction proceedings.³⁰⁵ The Ninth Circuit, for example, held that this claim does “not accrue until substantial time had passed after imposition of the sentence [of death].”³⁰⁶

This brings us to the exceedingly difficult question of when a delay claim would become ripe: the conundrum about the timing of the claim has baffled courts that have considered it on the merits.³⁰⁷ One answer would be to treat it

Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence was obtained in an unconstitutional search or seizure was introduced at his [or her] trial.”).

301. *Wainwright v. Sykes*, 433 U.S. 72 (1977). State procedural defaults can be overcome in federal habeas through a showing of cause and prejudice. *Id.* at 87 (“[F]ederal habeas review [should be barred] absent a showing of ‘cause’ and ‘prejudice’ attendant to a state procedural [rule].”). In order to preclude federal review, the state procedural rule must constitute an independent and adequate ground to deny relief. *Id.* at 81.

302. *Teague v. Lane*, 489 U.S. 288, 301 (1989). In so holding, the Supreme Court also allowed for two possible exceptions. *See infra* Part II.D.2.

303. *Lindh v. Murphy*, 521 U.S. 320, 336 (1997) (“All we can say is that in a world of silk purses and pigs’ ears, the Act [AEDPA] is not a silk purse of the art of statutory drafting.”).

304. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967) (“The problem [of ripeness] is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.”).

305. *See McKenzie v. Day*, 57 F.3d 1461, 1468 n.15 (9th Cir. 1995) (“A claim like . . . *Lackey*’s cannot normally be raised on direct appeal because much of the delay complained of arises in post-conviction proceedings.”).

306. *McKenzie v. Day*, 57 F.3d at 1465, *adopted en banc*, 57 F.3d 1493 (9th Cir. 1995).

307. *See State v. Smith*, 931 P.2d 1272, 1292 (Mont. 1996) (“Short of establishing some arbitrary time period within which a death sentence must be carried out, I see no simple answer to the conundrum which results from the conflict between a defendant’s right to due process and appellate review and his [or her] right to be free from cruel and unusual punishment.”). *Aarons*

like claims that are only ripe when an execution date has been set. A primary exemplar is a claim regarding competency to be executed.³⁰⁸ The Supreme Court has held that it is unconstitutional to execute people who are insane.³⁰⁹ Just as it is impossible to determine the person's sanity until the approximate time of the execution, one could argue that inordinate delay remains indeterminate until such time as the prisoner is scheduled to be executed. The flaw in that approach, however, is that it permits virtually unending incarceration pending execution so long as the state has not set an execution date for the prisoner. Additionally, it has been met with dissatisfaction in the courts for its "unsettling" implications for last minute litigation.³¹⁰

2. Retroactivity

While our constitutional traditions and equitable considerations may point toward relief in some circumstances, it is certain that, at this point, relief would not be dictated by precedent.³¹¹ This presents a *Teague v. Lane* retroactivity problem, as granting relief to a petitioner on this claim during a collateral appeal is arguably forbidden by the Court's retroactivity doctrine. The provision of AEDPA limiting "clearly established federal law" to the decisions of the Supreme Court of the United States³¹² aggravates the problem, for no Supreme Court decision has clearly recognized delay as an Eighth Amendment concern.³¹³

recommended just such a bright line rule: "twice as long as the national average of time spent on death row by other executed inmates." Aarons, *supra* note 12, at 211.

308. It is unclear whether these claims are still viable under AEDPA. See Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 740-51 (discussing applicability of successive petition provision of AEDPA to competency to be executed claims).

309. *Ford v. Wainwright*, 477 U.S. 399, 401 (1996). The most recent article on the *Lackey* question makes an explicit connection between the two claims, attributing Ford's insanity to his lengthy incarceration on death row. See Hedges, *supra* note 188, at 612-13.

310. As the Court stated in *Turner v. Jabe*:

Finally, we note that the implications of Turner's argument here are unsettling. Under this argument a habeas petition should never raise this Eighth Amendment claim until the eve of execution, for only then would the claim be sufficiently strong and ripe. And a petitioner could never abuse the writ by failing to raise this issue in an earlier petition, for he could always argue that the factual predicate had just developed.

58 F.3d 924, 931 (4th Cir. 1995).

311. See *Moore v. Kinney*, 119 F. Supp. 2d 1022, 1051 (D. Neb. 2000) ("[B]ecause this claim presently lacks any basis in this circuit, or any other circuit for that matter, I conclude it is meritless."), *rev'd on other grounds*, 278 F.3d 774 (8th Cir. 2002).

312. 28 U.S.C. § 2254(d)(1) (Supp. V 1999).

313. See *Chambers v. Bowersox*, 157 F.3d 560, 568 (8th Cir. 1998) ("There is of course no decision of the Supreme Court of the United States holding that delay in execution violates the Eighth Amendment. There is only an opinion by one Justice indicating that the issue deserves consideration, plus a notation by another Justice that the issue is important and undecided."). Justice Breyer's opinions in *Elledge* and *Knight* are dissents from the denial of certiorari, hence they do not have the force of precedent. Additionally, they represent only his view.

This leaves the claim in an awkward procedural posture, for it is arguably unavailable for judicial review during direct appeal, while raising it for the first time during the post-conviction appeal process risks a threshold dismissal on retroactivity grounds.³¹⁴ The Ninth Circuit, in its treatment of McKenzie's delay claim, suggested that it might not be barred on retroactivity grounds,³¹⁵ but its holding is far from clear.

The Court in *Teague* allowed two classes of exceptions to the non-retroactivity of new rules on collateral review: "First . . . if [the new rule] places 'certain kinds of primary, private individual conduct beyond the power of the [state] to proscribe.' Second . . . if [the new rule] requires the observance of those procedures that . . . are 'implicit in the concept of ordered liberty.'"³¹⁶ If the retroactivity doctrine of *Teague* were to apply, this claim would have to fit within one or both of its exceptions.

If the Eighth Amendment prohibits the petitioner's execution after an inordinate delay, then the first exception arguably applies with full force. The Court has recognized that rulings that would render an entire class of defendants ineligible for the death penalty avoid the non-retroactivity rule based on the first *Teague* exception.³¹⁷ A ruling that it is unconstitutional to execute condemned inmates who, through no fault of their own, have been awaiting execution for too long could similarly qualify for the first exception.

A strong argument can also be made that the Eighth Amendment delay claim falls under the second *Teague* exception. At the time of the adoption of the Eighth Amendment, lengthy periods of incarceration awaiting execution were exceedingly rare.³¹⁸ In addition, the conditions of confinement on death row have been universally acknowledged to be of a particularly unpleasant nature. When one considers the legitimate penological justifications—retribution and deterrence—that capital punishment serves, it can be forcefully argued that both purposes have already been served from the period of incarceration already spent on death row.

314. See *White v. Johnson*, 79 F.3d 432, 438 (5th Cir. 1996) ("Even if we accept petitioner's assertion that he could not have raised his *Lackey* claim on direct review, we must still find it barred by *Teague*.").

315. See *McKenzie v. Day*, 57 F.3d 1461, 1468 n.15 (9th Cir. 1995).

316. *Teague v. Lane*, 489 U.S. 288, 307 (1989) (quoting *Mackey v. United States*, 401 U.S. 667, 692–93 (1971) (opinion of Harlan, J.)).

317. See *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), *aff'd and rev'd on other grounds*, 532 U.S. 782 (2001) ("In our view, a new rule placing a certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all. In both cases, the Constitution itself deprives the State of the power to impose a certain penalty, and the finality and comity concerns underlying Justice Harlan's view of retroactivity have little force."). *But see White v. Johnson*, 79 F.3d 432, 438 (5th Cir. 1996) (holding that Eighth Amendment claim that execution after seventeen years on death row is precluded by *Teague* retroactivity doctrine).

318. See *Elledge v. Florida*, 525 U.S. 944 (1998).

3. *Successive Petitions & Abuse of the Writ Doctrine*

Since the delay claim might not prevail in an initial federal habeas corpus petition due to its delay component, it will probably be included in a second or successive petition. The abuse of the writ doctrine, therefore, is likely to be considered as a reason to preclude judicial review of the claim.³¹⁹ The abuse of the writ doctrine's essential concerns are finality and efficiency. In order for the state and petitioner to rely on the finality of the judgment and to avoid unnecessarily repetitive litigation, all federal claims should be litigated in the first federal habeas petition. There will be cases, like McKenzie's second federal habeas petition, where new facts are discovered during litigation that prevent the application of the abuse of the writ doctrine, but it will apply to most second or successive petitions for the writ. In order to have the petition treated on its merits, the petitioner will have to demonstrate "cause"—why he failed to raise the claim in an earlier petition—and "prejudice"—harm to the petitioner resulting from the court's failure to consider the claim in the second or successive petition.³²⁰

Once again, the AEDPA made important changes to the abuse of the writ doctrine.³²¹ As an initial matter, Congress created "a gatekeeping mechanism for the consideration of second or successive applications in the district court."³²² Before filing any subsequent habeas petition, the petitioner must seek permission to file from the governing circuit court of appeals.³²³ Additionally, the AEDPA appears to have eliminated discretion for federal judges to entertain claims that were presented in previous federal habeas petitions.³²⁴ If the claim is presented in a first federal habeas petition, then, the petitioner risks never being able to present the claim again based on AEDPA. If the claim is not presented in a first federal habeas petition, it falls under the provision of AEDPA governing new claims in second or successive petitions.³²⁵ The statute is silent about whether the cause and prejudice framework survives the new statutory require-

319. See *McCleskey v. Zant*, 499 U.S. 467, 470 (1991) ("The doctrine of abuse of the writ defines the circumstances in which federal courts decline to entertain a claim presented for the first time in a second or subsequent petition for a writ of habeas corpus.").

320. *Id.* at 494 ("To excuse [the] failure to raise the claim earlier, [the petitioner] must show cause for failing to raise it and prejudice therefrom as those concepts have been defined in our procedural default decisions.").

321. See, e.g., 28 U.S.C. § 2244(b) (Supp. V 1999). For an insightful analysis of the effect of this new provision on subsequent or successive petitions in capital cases, see Stevenson, *The Politics of Fear & Death: Successive Problems in Capital Federal Habeas Corpus Cases*, *supra* note 308.

322. *Stewart v. Martinez-Villareal*, 523 U.S. 637, 641 (1998).

323. 28 U.S.C. § 2244(b)(3) (Supp. V 1999).

324. 28 U.S.C. § 2244(b)(1) (Supp. V 1999) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.").

325. 28 U.S.C. § 2244(b)(2) (Supp. V 1999).

ments, but it appears unlikely.³²⁶ The statute requires federal courts to dismiss subsequent federal habeas petitions unless the claim relies on a new rule that the Supreme Court has made retroactive to cases on collateral review,³²⁷ or the factual predicate for the claim was not previously discoverable *and* the facts would “establish by clear and convincing evidence” that “no reasonable factfinder would have found the applicant guilty of the underlying offense.”³²⁸ This is an extremely restricted set of circumstances, and it does not appear that the delay claim would qualify.³²⁹

III.

A PROPOSAL TO ENABLE ALL ACTORS TO PROCEED TO THE MERITS OF THIS EIGHTH AMENDMENT CLAIM

American courts have rarely been willing to consider the *Lackey* claim on the merits, and none have been willing to furnish a remedy for the constitutional violation. Clearly, then, any discussion of remedies must take account of the substantive and procedural barriers to relief that courts have already identified. In order to avoid those obstacles, petitioners and courts should consider this claim in two separate contexts. In both contexts, the basis for the claim is that prolonged incarceration on death row in anticipation of execution creates an Eighth Amendment problem. In the first context, the capital petitioner would raise the claim with the recognition that the claim cannot independently support relief until the delay reaches a point where its length becomes unusual. This is dubbed the “Dependent Delay Claim.” The petitioner should nevertheless raise the claim throughout the appellate process in connection with the other alleged violations of his constitutional rights. If his conviction and sentence are held to be valid, the Eighth Amendment problem does not emerge as a compelling ground for relief because insufficient time has lapsed. If his conviction and sentence are held invalid, however, the Eighth Amendment problem becomes tangible and compelling. This petitioner has been incarcerated under sentence of death with all the attending restrictions and anxieties pursuant to a conviction or sentence that was obtained in violation of his constitutional rights. The relief courts should afford in this context is to preclude death as a sentencing option when and if the state chooses to retry the petitioner.

326. If the cause and prejudice framework survived AEDPA, the only viable way to establish cause would be through a lack of ripeness. Novelty as ‘cause’ was tried and roundly rejected. *See, e.g., Fearance v. Scott*, 56 F.3d 633, 636–67 (5th Cir. 1995) (rejecting novelty as cause to excuse abuse of writ because claim had been previously litigated). Ineffective assistance of counsel can provide cause to excuse procedural default, but since there is no right to counsel after the direct appeal, this too is likely to be unavailing. If cause were established, prejudice from failure to consider the claim would be clear—the petitioner would be executed, arguably in violation of the Constitution. Death is often considered prejudicial.

327. 28 U.S.C. § 2244(b)(2)(A) (Supp. V 1999).

328. 28 U.S.C. § 2244(b)(2)(B)(i)–(ii) (Supp. V 1999).

329. *See Ortiz v. Stewart*, 149 F.3d 923, 944 (9th Cir. 1998) (holding that *Lackey* claim does not fall within either exception to AEDPA’s bar against subsequent petitions).

The Eighth Amendment claim arises in a second context when the period of time the petitioner has spent incarcerated on death row becomes unreasonably long. Here, the passage of time under the sentence of death itself becomes the substantive foundation for relief. This is dubbed the “Independent Delay Claim.” Courts presented with this claim must undertake an assessment of the delays on a case by case basis. Reliance on the Sixth Amendment Speedy Trial Clause framework when assessing the delays in this context should impose order at the end of a seemingly chaotic process, while clearing away some of the dissatisfaction with the lengthy process of a capital appeal. Additionally, conceptually dividing the claim into these two contexts potentially eliminates some of the procedural obstacles to considering the claim on the merits in the latter context.

A. The Case for Relief on the Dependent Delay Claim

A superficial assessment of the delay question assumes that all delays benefit death row prisoners for, if there were no delays, they would be executed. Such an assessment takes a dim view of the Eighth and Fourteenth Amendment rights at issue in appeals of capital convictions.³³⁰ Implicitly, the assumption that all delays benefit death-sentenced inmates requires that, to avoid a potential Eighth Amendment problem with their detention, they should choose to terminate their appeals and request their execution. Tragically, these ‘voluntary executions’ are becoming increasingly common.³³¹ Precisely because death sentences are “overproduced,” to use Liebman’s phrase, it is necessary to pursue appeals to the end.³³² Dwight Aarons, one of the scholars who has dedicated substantial attention to the development of the delay claim, noted that “a defendant is more likely to be on death row for an inordinate period when the case is on the margins of death eligibility and errors occur during the state’s processing of the case.”³³³ These two connected conclusions, that death sentences are overproduced and overproduction contributes to inordinate delay, generate a need for a new model of relief for the delays. One of the principal procedural and substantive problems that confronts the delay claim is that the petitioner is perceived as waiting until the last minute to bring the claim. The obvious solution for petitioner is to bring the claim sooner. But the sooner this particular claim is brought, the weaker the case for relief. As a freestanding claim for relief, it does not make sense to present the Eighth Amendment argument during the early stages of the appellate process. Throughout the

330. See Aarons, *Getting out of this Mess*, *supra* note 263, at 53 (“[Arguments] that a death row prisoner invariably benefits from the inordinate delay in carrying out a death sentence . . . ignore[] the psychological impact associated with death row detention, which is probably exacerbated by the elusive hope of eventual release.”).

331. See Christy Chandler, *Voluntary Executions*, 50 STAN. L. REV. 1897 (1998).

332. Liebman, *The Overproduction of Death*, *supra* note 193.

333. Aarons, *Getting Out of This Mess*, *supra* note 263, at 1.

appellate process, the petitioner's right to be free from cruel and unusual punishment is somewhat in tension with the petitioner's due process right to appeal his conviction until his appeals are exhausted. This is the substantive obstacle identified in Section A, above.

The need to recognize the significance of the time associated with the course of the judicial process does not suggest that the time spent under sentence of death during the early stages of the appeal would be devoid of any Eighth Amendment implications. Indeed, if the judgment has been obtained illegally, in violation of the petitioner's constitutional rights, then the period of time spent anticipating his own execution could itself amount to an Eighth Amendment violation. The enhanced retributive nature of death row confinement is even more troubling when someone is subjected to it because of an unconstitutional judgment.

In this context, then, the petitioner who is confined on death row should submit that, to the extent his conviction and sentence are unconstitutional, the duration of his incarceration on death row violates his Eighth Amendment rights. The petitioner could include this argument in his appellate briefs as early as the direct appeal and thereby avoid the ripeness and retroactivity problems associated with the freestanding claim.

The petitioner would recognize, in this context, that the delay itself would not be sufficient to sustain relief. In order to remedy this problem, the reviewing courts would have to determine that the conviction or sentence was invalid on other constitutional grounds. This is similar to the framework that the Supreme Court has set up for assessing claims of factual innocence in *Herrera v. Collins*.³³⁴ There, the Court held that claims of factual innocence, divorced from any other constitutional claim, are an insufficient basis to grant federal habeas corpus relief. When connected to another alleged constitutional violation, the allegation of innocence is simply another factual consideration that the court must consider as it determines the weight of the claims and the demands of the case. Similarly, when the Eighth Amendment claim of delay is connected to another alleged constitutional violation, it should be a factor in the grant of relief. If a court does not find merit in the petitioner's other arguments, then the Eighth Amendment cannot sustain relief in this context.

When a citizen is incarcerated on death row pursuant to an unconstitutional judgment, the state should be precluded from seeking for a second time to execute that person. The case for relief is strengthened when the constitutional violation was negligent or deliberate action by the state. At present, when prosecutorial overreaching is detected and corrected, the result for the defendant is at best a new trial and sentencing hearing. This type of relief ignores the period of time the accused has already spent incarcerated in anticipation of his execution under a constitutionally invalid conviction or sentence. Extending the

334. 506 U.S. 390 (1993).

minimal relief of precluding a death sentence—which is never mandatory—to capital petitioners in this context would recognize the Eighth Amendment problem with incarceration on death row.

In the context of a capital petitioner who is already going to be granted relief on a constitutional violation independent of appellate delays, Chief Judge Chambers' substantive critique, that "the prisoner never really had any good points," disappears.³³⁵ The prisoner has made a "good point," and so the state has been revealed as enforcing a 'bad judgment' against him. Permitting the state to retry him does not pose an Eighth or Fourteenth Amendment problem. Permitting the state to resentence him to death under these circumstances, however, does. The resentencing process begins anew the entire appellate procedure, leaving the defendant likely to suffer from yet a longer delay owing solely to the state's inability to secure a constitutional judgment against him in the first instance.

Precluding the state from seeking a death sentence in these circumstances would not significantly undermine the state's interest in enforcing its criminal laws. At first blush, it would appear that such a measure could drastically undermine the state's effective enforcement of its criminal laws. Preventing a second death sentence after a reversal because of state misconduct might seem nearly tantamount to an acquittal. But this initial impression evaporates under closer scrutiny. First, as a practical matter, the vast majority of people who have their death sentences overturned on appeal are not resented to death under the current system. Professor Liebman's comprehensive study reveals that eighty-two percent of the cases sent back for retrial ended in sentences less than death, with nine percent of those cases ending in jury verdicts of not guilty.³³⁶ Hence, foreclosing the state from seeking a second death sentence would only have effectively prevented eighteen percent of those whose sentences were reversed from being sentenced to death a second time. Second, the death penalty is never a mandatory punishment. No law can constitutionally require any state to sentence any individual to death for any crime, even in response to the most gruesome and calculated of murders. Unlike in the Fifth and Sixth Amendment contexts, where similar interests mandate that potentially guilty citizens be released into society, this type of relief would only prohibit the state from seeking a second death sentence. Third, prohibiting a second death sentence in instances where state misconduct requires reversal has the potential to improve the state's criminal justice system. In the current system, there are no incentives that prevent the state from blurring the boundaries of constitutional behavior in capital cases; indeed, as noted above, the state can and does blur those boundaries. If there was a risk that its own misconduct could preclude the state from executing the defendant, it might encourage more ethical behavior throughout the criminal process.

335. *Chessman v. Dickson*, 275 F.2d 604, 607 (9th Cir. 1960).

336. LIEBMAN & FAGAN, *A BROKEN SYSTEM*, PART II, *supra* note 125, at i.

Foreclosure of death as a sentencing option is a just and appropriate remedy for death-sentenced inmates who obtain relief on claims of negligent or deliberate state misconduct. At the time the Eighth Amendment was adopted, seeking to execute someone after they had been granted a reprieve was anathema. As one lawyer put it in 1774, "The cruelty of an execution after respite is equal to many deaths, and therefore there is rarely an instance of it."³³⁷ To prohibit death as an option under these circumstances vindicates the citizen's Fifth, Sixth, Eighth, and Fourteenth Amendment rights while generating appropriate incentives for the state to behave more ethically in the conduct of criminal proceedings. As Professor Liebman's work has demonstrated, those incentives are clearly missing, and they are desperately needed.

B. The Independent Eighth Amendment Claim for Relief

While the dependent claim resolves the Eighth Amendment problems for certain death-sentenced inmates, it does little to address the central premise of the Eighth Amendment argument that the delays themselves constitute cruel and unusual punishment. The contours of the Eighth Amendment claim are sketched out above in Parts I & II; there is no need to rehash them here.

The central premise is that after an inordinate period of incarceration on death row, the state no longer has any legitimate interest in the execution of the prisoner. One essential question that continues to plague the claim concerns the duration of incarceration that would be sufficient to sustain relief. How long is too long? Is McKenzie's twenty years too long? This question, pondered on its own, defies a simple solution. But courts need not consider this delay in a vacuum. The Sixth Amendment speedy trial framework is a familiar tool to assess delays in this context.

When courts are considering periods of delay in the appellate process using the *Barker* factors, they have tended to set a baseline length of time that is presumptively unreasonable. What the courts do, then, is create a rebuttable presumption that a certain period of delay is unnecessary and unjustifiable, but the presumption is sufficiently flexible to account for a wide variety of factors that contribute to the delay. In the Tenth Circuit, for example, a two-year delay in bringing direct appeals was considered presumptively excessive.³³⁸ The presumption afforded the court sufficient flexibility to determine whether longer or shorter periods of delay on direct appeal might also violate the defendant's due process rights.³³⁹ The flexibility that a rebuttable presumption offers gives it a distinct advantage over a bright line rule that a given period of time is

337. PRETTYMAN, *supra* note 169.

338. *Harris v. Champion*, 15 F.3d 1538, 1546-47 (10th Cir. 1994) ("[T]here is a rebuttable presumption that the State's process is not effective . . . if a direct criminal appeal has been pending for more than two years without final action by the State [D]elay in finally adjudicating a direct criminal appeal beyond two years is presumptively excessive.").

339. *Id.* at 1546.

unreasonable.³⁴⁰ A bright line rule would create a system in which all parties are racing against the clock, one that would generate perverse incentives. It would encourage dilatory tactics from the defense and discourage reasoned judicial decision-making as the deadline approaches. One of the purposes of this article is to suggest a system with improved, not degraded, incentive structures.

Obviously, a two-year delay in carrying out a sentence of death would not be presumptively excessive. The point at which a delay becomes presumptively excessive in the death penalty context may vary somewhat from jurisdiction to jurisdiction. Each death penalty state has different appellate processes, and they consume different amounts of time. The most obvious baseline for a nationwide standard would be the national average length of the appeal process—11.6 years. Eleven years remains a long time to anticipate one's own death, but judicial decisions take time to reach, so we must afford the appellate process the necessary time to make considered decisions. If a nationwide standard were needed, a fair declaration of a presumptively unreasonable delay would be fifty percent above the average, somewhere between seventeen and eighteen years. Again, since it would be a rebuttable presumption, it should be flexible enough to account for the variables each case presents.

The independent claim of delay would benefit procedurally from claims being brought earlier in the dependent delay context. To the extent that the defendant or inmate's "assertion of the right" to be free from unreasonable delay is a factor in the analysis, as it would be using the *Barker* factors,³⁴¹ his persistent litigation of the claim as the delay became longer would be strong supporting evidence for his claim. Additionally, the courts would become more familiar with the claim and presumably would be more willing to address it on the merits. If the dependent claim were recognized as part of a direct appeal, it could potentially eliminate many of the questions about retroactivity.

The danger of litigating the claim sooner under AEDPA, of course, is that it will be strictly foreclosed from consideration under the section of the statute governing successive petitions. If the claim were presented in an initial federal habeas petition, the period of incarceration on death row is unlikely to approach an unreasonable length. Even in McKenzie's drawn-out case, his initial federal habeas petition was fully resolved after thirteen years and seven months—a considerably shorter time than the presumptively unreasonable period suggested in this article. The Eighth Amendment problem with delay still exists, but it is in tension with the due process requirement to provide adequate time for the judicial process to proceed. Under the successive petition provision, the federal courts appear to be precluded from considering any claim that has previously surfaced in the federal courts.³⁴² The Supreme Court, in keeping with the

340. Aarons, *supra* note 12, at 211 (proposing a bright line rule for inordinate delay as double the national average of time spent on death row by executed inmates).

341. *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

342. 28 U.S.C. § 2244(b) (Supp. V 1999).

history of habeas corpus as an equitable remedy, has overlooked compelling arguments of statutory construction to interpret the AEDPA somewhat flexibly to avoid unnecessary or potentially unconstitutional restrictions on the writ.³⁴³ Whether the Court would treat the delay claim with the same flexibility is uncertain.

If the Supreme Court does not afford this claim a flexible statutory interpretation, courts presented with the dependent delay claim that do not find any other constitutional violations to sustain relief could dismiss the claim as prematurely filed. In so doing, the courts could potentially hold the petition in abeyance until sufficient time has passed to sustain the independent delay claim. This could avoid the sticky problem with AEDPA's successive petition requirements.

As the question of inordinate delay awaiting execution gets filtered through the Sixth Amendment framework, a note of caution is in order. The Sixth Amendment delay framework recognizes three types of prejudice: oppressive incarceration, anxiety due to the pendency of unresolved charges, and diminished ability to present defensive evidence. As courts consider the claim, they should be reluctant to impose strict subjective prejudice requirements. A subjective prejudice showing would reward death row inmates who are possessed of particularly weak constitutions. It should not be difficult to find a more generalized prejudice arising from spending years incarcerated in repressive isolation under a sentence of death. As in the Sixth Amendment context, "affirmative proof of particularized prejudice" should not be required in every case.³⁴⁴

IV. CONCLUSION

The claim that inordinate delays associated with the capital appeals processes violate the Eighth Amendment attracts strange bedfellows. Those who are concerned with the health and well-being of inmates are rarely aligned with those who are concerned with accelerating the pace of executions, yet on this issue they can find common cause. This issue can draw committed opponents of capital punishment to arguments that moratoria generate constitutional problems for death row inmates precisely because they prevent and delay their executions. It is unclear what the practical effect on the system of executions will be when

343. *Compare, e.g.,* I.N.S. v. St. Cyr, 121 S. Ct. 2271 (2001), *with id.* at 2298 (Scalia, J., dissenting) ("To excuse the violence it does to the statutory text, the Court invokes the doctrine of constitutional doubt, which it asserts is raised by the Suspension Clause, U.S. CONST., Art. I, § 9, cl. 2."); *compare* Hohn v. United States, 524 U.S. 236 (1998) *with id.* at 254 (Scalia, J., dissenting) ("Today's opinion permits review where Congress, with unmistakable clarity, has denied it. To reach this result, the Court ignores the obvious intent of the Antiterrorism and Effective Death Penalty Act of 1996, distorts the meaning of our own jurisdictional statute, 28 U.S.C. § 1254(1), and overrules a 53-year-old precedent.") (internal citations omitted).

344. *Doggett v. United States*, 505 U.S. 647, 655 (1992).

courts begin to accept this claim on the merits, but several potential outcomes seem possible.

One outcome could be a change in the administration of America's prisons. A central component of the Eighth Amendment argument is that the conditions of incarceration on death row are tangibly different and more restrictive than the conditions of incarceration under a term of years, or even a term of life without parole. The cause of this differential treatment is presumably a perceived greater need to prevent death-sentenced prisoners from committing further crimes, or from committing *hara-kiri*.³⁴⁵ Whether this is empirically proven is well beyond the scope of this article. A change in prison conditions that diminished the retributive nature of death row confinement would substantially erode the argument that inordinate delays are unconstitutionally cruel and unusual.

Another conceivable outcome is that appellate decisions in capital cases are issued on a more regulated timetable to avoid some of the delays altogether. It is difficult to inform anyone with a stake in the outcome of a death penalty case what the timetable for decision will be once the direct appeal stage is over. Affording inmates, victims, and state representatives more certainty in the decision-making timetable would not be a bad outcome in and of itself. The fear, of course, is that a more limited timetable would result in an erosion in the standard of care given to death penalty cases in the American criminal justice system. While there are cynics on both sides of the debate who believe that the standard of care has already eroded to the point where the political inclinations of the decision-maker dictate the outcome, those criticisms are unduly harsh. The lengthy period of time capital cases spend receiving judicial review actually is, in many cases, reflective of deliberate and searching assessment of the constitutional questions the cases present. No one wins when the quality of judicial decision-making erodes.

The claim that lengthy periods of incarceration on death row awaiting execution violate the Eighth Amendment deserves careful attention. The theories of relief on the Eighth Amendment delay claim have deep roots in other due process rights. The rationales for relief on the basis of the Double Jeopardy Clause, the Due Process Clause when state misconduct is implicated, and the Speedy Trial Clause are directly analogous to the relief being sought on the Cruel and Unusual Punishment Clause in the *Lackey* claim. With careful parsing of the causes of the delay in execution, it is realistic to expect that capital post-conviction petitioners who find themselves with claims of inordinate delay will be able to obtain relief in state and federal courts.

345. *Hara-kiri* is an ancient Japanese practice of suicide by ritual disembowelment that was historically offered as an alternative to the death penalty in Japanese courts. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 552 (1990).