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## COMMENT

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### DELAY IN CONSIDERING THE CONSTITUTIONALITY OF INORDINATE DELAY: THE DEATH ROW PHENOMENON AND THE EIGHTH AMENDMENT

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## INTRODUCTION

On September 28, 2011, after thirty-three years on death row, Manuel Valle, age sixty-one, was executed by the State of Florida.<sup>1</sup> In 1987, Valle shot and killed police officer Louis Pena during a routine traffic stop.<sup>2</sup> At the time, Valle was twenty-seven years old.<sup>3</sup>

Why did it take Florida over three decades to execute Manuel Valle? During the first thirteen years after Pena's murder, Florida prosecutors struggled to obtain a constitutionally sound conviction and sentence. The Florida Supreme Court reversed Valle's initial conviction and sentence because the trial court forced him to stand trial within twenty-four days of his arraignment, in violation of his right to effective assistance of counsel.<sup>4</sup> On retrial, Valle was again sentenced to death, but this second sentence was vacated because the trial court improperly excluded mitigating testimony.<sup>5</sup> The Florida Supreme Court upheld Valle's third death sentence on appeal in 1991, and the Supreme Court of the United States denied certiorari.<sup>6</sup> For the next twenty years, however, Valle continued to litigate from death row. He filed a motion for state postconviction relief and federal petitions for a writ of habeas corpus, all of which were denied.<sup>7</sup>

<sup>1</sup> See Adam Liptak, *Lifelong Death Sentences*, N.Y. TIMES, Nov. 1, 2011, at A16 (discussing Valle's crime and the delay prior to his execution); see also Patricia Mazzei, *Florida Executes Cop Killer Manuel Valle*, 61, by *Lethal Injection*, TAMPA BAY TIMES (Oct. 9, 2011), <http://www.tampabay.com/news/publicsafety/crime/article1194149.ece> (describing Valle's final moments).

<sup>2</sup> See *Valle v. State*, 474 So. 2d 796, 798 (Fla. 1985) (describing the testimony of a police officer who witnessed the murder and testified that he saw Valle approach Officer Pena and fire a single shot at him), *vacated*, 476 U.S. 1102 (1986); see also Patricia Mazzei, *Manuel Valle to Be Executed Wednesday for Killing Officer Louis Pena*, TAMPA BAY TIMES (Sept. 27, 2011), <http://www.tampabay.com/news/publicsafety/crime/article1193954.ece> ("Pena was about to let Valle go when Valle, standing next to the patrol car, asked if he could walk back to [his] Camaro to get a cigarette. Pena said yes. Valle returned with a hidden .380-caliber automatic pistol.").

<sup>3</sup> See Liptak, *supra* note 1.

<sup>4</sup> *Valle v. State*, 394 So. 2d 1004, 1005 (Fla. 1981).

<sup>5</sup> See *Valle v. Florida*, 476 U.S. 1102, 1102 (1986) (vacating Valle's sentence pursuant to *Skipper v. South Carolina*, 476 U.S. 1 (1986)); *Skipper*, 476 U.S. at 8 (holding that mitigating testimony proffered by disinterested witnesses regarding the defendant's good behavior in prison could not be excluded).

<sup>6</sup> See *Valle v. State*, 581 So. 2d 40, 49 (Fla.), *cert. denied*, 502 U.S. 986 (1991).

<sup>7</sup> See Initial Brief of Appellant at 5-8, *Valle v. State*, 70 So. 3d 530 (Fla. 2011) (No. SC11-1387), 2011 WL 3319905 (detailing the procedural history of Valle's case). After his death sentence was upheld, Valle filed a motion for postconviction relief in 1997. *Id.* at 6. The Florida Supreme Court remanded for an evidentiary hearing on Valle's assertion that his counsel during his 1988

When Florida Governor Rick Scott signed Valle's death warrant in June 2011,<sup>8</sup> Valle sought last-minute relief from the courts. He raised a new argument—that execution after such a lengthy delay would violate the Eighth Amendment's ban on cruel and unusual punishment.<sup>9</sup> Specifically, Valle asserted that his execution was unconstitutional because the State "added to [his] death sentence the morbid additional sentence of being taunted with death for three decades—the greater part of his life."<sup>10</sup> Ultimately, however, Florida executed Valle by lethal injection after the United States Supreme Court refused his petition for stay of execution and writ of certiorari.<sup>11</sup>

The Supreme Court has repeatedly declined to address the validity of the unconstitutional delay claim raised by Valle and other death row inmates before him. The issue first came to the Court's attention over fifteen years ago, in *Lackey v. Texas*.<sup>12</sup> Justice Stevens issued a memorandum respecting the Court's denial of certiorari in which he acknowledged that although "the importance and novelty of the question . . . are sufficient to warrant review by this Court, those factors also provide a principled basis for postponing consideration of the issue until after it has been addressed by

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resentencing hearing was ineffective for deciding to present model prisoner evidence, which allowed for the State, in turn, to produce damaging rebuttal evidence; his claim was eventually rejected. *See Valle v. State*, 778 So. 2d 960, 967 (Fla. 2001) (per curiam). Valle then filed a state habeas petition raising four claims of ineffective assistance of counsel, which the Florida Supreme Court denied in 2002. *Valle v. Moore*, 837 So. 2d 905, 907, 911 (Fla. 2002) (per curiam). Following the United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), Valle filed a second state habeas petition in 2003, which was also rejected. *Valle v. Crosby*, 859 So. 2d 516 (Fla. 2003) (unpublished table opinion). Valle then filed a habeas petition in federal court in 2003, raising a total of fourteen different claims, all of which were denied. *See Valle v. Crosby*, No. 03-20387, 2005 WL 3273754, at \*2, \*77 (S.D. Fla. Sept. 13, 2005). In 2006, the Eleventh Circuit affirmed the denial of Valle's federal habeas petition, and the Supreme Court subsequently denied certiorari. *See Valle v. Sec'y for the Dep't of Corr.*, 459 F.3d 1206, 1209 (11th Cir. 2006), *cert. denied*, 552 U.S. 920 (2007).

<sup>8</sup> *See* Mark Caputo & David Ovalle, *Scott Signs First Death Warrant as Florida Governor*, TAMPA BAY TIMES (June 30, 2011), <http://www.tampabay.com/incoming/scott-signs-first-death-warrant-as-florida-governor/1178173>; *see also* Initial Brief of Appellant, *supra* note 7, at 69 (describing how "[f]or three years and nine months, the Governor of Florida exercised his standardless discretion to decline to sign Mr. Valle's death warrant," before changing his mind in June 2011).

<sup>9</sup> *See* Initial Brief of Appellant, *supra* note 7, at 9.

<sup>10</sup> *Id.* at 64-65.

<sup>11</sup> *See Valle v. Florida*, 132 S. Ct. 1, 1 (2011); Mazzei, *supra* note 1 (detailing Valle's final words and the moments leading up to his execution).

<sup>12</sup> *See* 514 U.S. 1045, 1045 (1995) (memorandum of Stevens, J., respecting the denial of certiorari) ("Petitioner raises the question whether executing a prisoner who has already spent some 17 years on death row violates the Eighth Amendment's prohibition against cruel and unusual punishment.").

other courts.”<sup>13</sup> Justice Stevens emphasized that denial of certiorari provided an important opportunity for state and lower federal courts to “serve as laboratories in which the issue receives further study before it is addressed by this Court.”<sup>14</sup> Since *Lackey*, the Supreme Court has denied certiorari to every petitioner asserting this argument (hereinafter referred to as a “*Lackey* claim”), including Manuel Valle, and thus has not ruled on whether—or when—executions after inordinate delays on death row constitute cruel and unusual punishment.

Several Justices, however, have spoken out both in favor of and against recognizing an Eighth Amendment claim based on inordinate delay on death row. Justice Breyer and Justice Stevens have long urged the Court to address a *Lackey* claim, which, they suggest, has merit. Indeed, Justice Breyer has dissented from every one of the Court’s refusals to grant certiorari to an inmate raising a *Lackey* claim.<sup>15</sup> In *Valle v. Florida*, Breyer noted that he had “little doubt about the cruelty of so long a period of incarceration under sentence of death” and further observed that three decades of “confinement followed by execution would also seem unusual.”<sup>16</sup> Similarly, since issuing the *Lackey* memorandum, Justice Stevens has opined that execution after decades-long delays on death row is “without constitutional justification.”<sup>17</sup> In contrast, Justice Thomas has repeatedly rejected *Lackey* claims by refuting “the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed.”<sup>18</sup> He has consistently maintained that the *Lackey* claim lacks a basis in the Court’s Eighth Amendment jurisprudence.<sup>19</sup>

Despite the considerable amount of time it takes to develop a *Lackey* claim, the issue continues to present itself, particularly as the length of time prisoners spend on death row increases. According to a 2010 Bureau of Justice Statistics report, from 1984 to 2010, the average elapsed time between

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<sup>13</sup> *Id.* at 1045.

<sup>14</sup> *Id.* at 1047 (quoting *McCray v. New York*, 461 U.S. 961, 963 (1983) (opinion of Stevens, J., respecting the denial of certiorari)).

<sup>15</sup> See *Valle*, 132 S. Ct. at 2 (Breyer, J., dissenting from the denial of stay of execution). For a discussion of the arguments that Justices Breyer and Stevens have raised in support of the *Lackey* claim, see also *infra* Section III.A.

<sup>16</sup> 132 S. Ct. at 1 (Breyer, J., dissenting from the denial of stay of execution).

<sup>17</sup> *Johnson v. Bredesen*, 130 S. Ct. 541, 544 (2009) (memorandum of Stevens, J., respecting the denial of stay of execution and certiorari).

<sup>18</sup> *Knight v. Florida*, 528 U.S. 990, 990 (1999) (Thomas, J., concurring in the denial of certiorari).

<sup>19</sup> See *id.* (asserting that there is no “support in the American constitutional tradition or in this Court’s precedent” for the *Lackey* claim); see also, e.g., *Johnson*, 130 S. Ct. at 544 (Thomas, J., concurring in the denial of stay of execution and certiorari) (citing *Knight*, 528 U.S. at 990 (Thomas, J., concurring in the denial of certiorari)); *Thompson v. McNeil*, 129 S. Ct. 1299, 1301 (2009) (Thomas, J., concurring in the denial of certiorari) (quoting *Knight*, 528 U.S. at 990).

sentence and execution for all death row inmates more than doubled, increasing from 74 months in 1984 to 178 months in 2010.<sup>20</sup> With the *Lackey* issue still unresolved, and with over 3100 people currently on death row in the United States,<sup>21</sup> courts can anticipate an increasing number of claims that execution after inordinate delay on death row violates the Eighth Amendment. Therefore, it is time for the Court to confront the issue and definitively determine the constitutionality of inordinate death row delays.

Notwithstanding the benefits of the highest court's resolution of the issue, the Supreme Court is unlikely to take a *Lackey* case in the near future. Since Justice Stevens issued the *Lackey* memorandum over fifteen years ago, procedural roadblocks have emerged that have prevented lower courts from addressing the merits of *Lackey* claims.<sup>22</sup> I argue that in certain circumstances, execution after lengthy confinement on death row does violate the Eighth Amendment and the "evolving standards of decency"<sup>23</sup> by which the Amendment is measured. Therefore, states must implement workable solutions that are carefully calibrated to address both the *Lackey* claim and the countervailing policy considerations.

Part I of this paper summarizes the bedrock principles that guide the Court in analyzing capital sentences challenged on Eighth Amendment grounds. Part II describes the substance of the *Lackey* claim and focuses on the causes of delay on death row and the psychological effect of this delay, known as the "death row phenomenon."<sup>24</sup> Part III traces the ongoing debate over the *Lackey* claim among the Justices of the United States Supreme Court. Then, Part IV assesses the experiment taking place in the "laboratories" of lower state and federal courts, and concludes that it has been lackluster, mostly because of the procedural issues that have limited courts' opportunities to address the merits of *Lackey* claims. Finally, in recognition that the Court is unlikely to grant certiorari and rule on the validity of *Lackey* claims, Part V focuses on alternative solutions to the problem of inordinate death row delays.

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<sup>20</sup> See TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT, 2010—STATISTICAL TABLES 12 tbl.8 (2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cp10st.pdf>.

<sup>21</sup> See NAACP LEGAL DEF. & EDUC. FUND, INC., DEATH ROW U.S.A. 1 (Fall 2012) (stating that, as of October 1, 2012, there were estimated to be 3146 death row inmates in the United States).

<sup>22</sup> For a discussion of two of the most common procedural issues encountered when inmates raise *Lackey* claims, see *infra* Part IV.

<sup>23</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

<sup>24</sup> See *infra* text accompanying note 84.

## I. THE DEATH PENALTY AND THE EIGHTH AMENDMENT: AN OVERVIEW

The Eighth Amendment of the United States Constitution states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>25</sup> In 1958, the Court observed in *Trop v. Dulles* that “[t]he exact scope of the constitutional phrase ‘cruel and unusual’ has not been detailed by this Court.”<sup>26</sup> Despite the vague contours of the Eighth Amendment, from the time of the Framers until the 1970s, courts accepted the death penalty as constitutional.<sup>27</sup>

In 1972, however, the longstanding approach to the death penalty began to shift. First, in a brief per curiam opinion in *Furman v. Georgia*, the Court declared that the “imposition and carrying out of the death penalty [pursuant to Georgia’s and Texas’s capital punishment statutes] constitute[d] cruel and unusual punishment.”<sup>28</sup> Concurring, Justice Brennan articulated four principles inherent in the Eighth Amendment’s ban on cruel and unusual punishment: first, a punishment must not be “degrading to human dignity”; second, it must not be arbitrarily inflicted; third, a “punishment must not be unacceptable to contemporary society”; and finally, the “punishment must not be excessive.”<sup>29</sup>

Although Justices Brennan and Marshall each opined in *Furman* that the death penalty was per se unconstitutional,<sup>30</sup> the other concurring opinions cited narrower reasons for striking it down. Specifically, several of the Justices found that the Georgia statute facilitated this most severe punishment in an unconstitutionally arbitrary manner.<sup>31</sup> For those Justices, it was not capital

<sup>25</sup> U.S. CONST. amend. VIII. The Eighth Amendment’s ban on cruel and unusual punishment applies to the states by incorporation through the Fourteenth Amendment. See *Robinson v. California*, 370 U.S. 660, 667 (1962).

<sup>26</sup> 356 U.S. at 99.

<sup>27</sup> See *Gregg v. Georgia*, 428 U.S. 153, 177-78 (1976) (plurality opinion) (“For nearly two centuries, this Court, repeatedly and often expressly, has recognized that capital punishment is not invalid *per se*.”). The *Gregg* Court referenced early cases in which the Court had upheld execution by public shooting and electrocution. See *id.* at 178 (citing *Wilkerson v. Utah*, 99 U.S. 130, 134-35 (1878), and *In re Kemmler*, 136 U.S. 436, 447 (1890), respectively).

<sup>28</sup> 408 U.S. 238, 239-40 (1972) (per curiam). *Furman* consolidated three separate cases, two from Georgia and one from Texas. *Id.* at 239. All nine Justices wrote separate opinions in *Furman*. *Id.* at 240. Each of the five concurring opinions, written by Justice Douglas, Brennan, Stewart, White, or Marshall, was issued by a single Justice with no others joining. *Id.* at 240-375.

<sup>29</sup> See *id.* at 270-81 (Brennan, J., concurring).

<sup>30</sup> See *id.* at 286 (“[D]eath is today a ‘cruel and unusual’ punishment.”); *id.* at 358-59, 369-71 (Marshall, J., concurring) (concluding that capital punishment both is excessive and has become unacceptable to the American people).

<sup>31</sup> See, e.g., *id.* at 249 (Douglas, J., concurring) (“What the legislature may not do for all classes uniformly and systematically, a judge or jury may not do for a class that prejudice sets apart from

punishment itself that violated the constitution in *Furman*, but the unpredictability of its imposition under the Georgia statute.<sup>32</sup> According to Justice Douglas, the law gave sentencers “practically untrammelled discretion to let an accused live or insist that he die.”<sup>33</sup> Similarly, Justice Stewart concluded that because “this unique penalty [was] so wantonly and so freakishly imposed,” particularly on minority groups, its use was cruel and unusual.<sup>34</sup>

*Furman* effectively put a halt to the death penalty in the United States while legislatures revised their capital punishment statutes to meet the newly articulated constitutional requirements.<sup>35</sup> Four years later, the Court lifted its implied moratorium when it upheld Georgia’s, Florida’s, and Texas’s revised sentencing statutes.<sup>36</sup> These cases, along with two others decided the same day, are referred to as the “July 2 cases.”<sup>37</sup>

The July 2 cases outline the basic requirements a capital punishment scheme must satisfy to comport with the Constitution. Although the July 2 cases ended *Furman*’s effective ban on capital punishment, the four principles inherent in the Eighth Amendment, articulated by Justice Brennan in *Furman*, played an important role in the Court’s analysis. In the leading July 2 case, *Gregg v. Georgia*, Justices Stewart, Powell, and Stevens declared that Georgia could constitutionally execute the defendant because its revised capital punishment statute remedied the deficiencies identified in *Furman*.<sup>38</sup> Rather than providing the jury with unguided discretion, the new Georgia law required that the sentencer find and specifically articulate at

the community); *id.* at 309-10 (Stewart, J., concurring) (“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of 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.” (footnote omitted)).

<sup>32</sup> See Michael P. Connolly, Note, *Better Never Than Late: Prolonged Stays on Death Row Violate the Eighth Amendment*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 101, 103-04 (1997) (arguing that the Court held the death penalty unconstitutional because “there lacked statutory guarantees . . . to protect against the arbitrary imposition of the punishment”).

<sup>33</sup> *Furman*, 408 U.S. at 248 (Douglas, J., concurring).

<sup>34</sup> *Id.* at 310 (Stewart, J., concurring).

<sup>35</sup> Dwight Aarons, *Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?*, 29 SETON HALL L. REV. 147, 152-53 (1998).

<sup>36</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976) (leading case); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

<sup>37</sup> See James S. Liebman, *Slow Dancing With Death: The Supreme Court and Capital Punishment, 1963-2006*, 107 COLUM. L. REV. 1, 28-37 & nn.119-60 (2007). In the two other July 2 cases, *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Roberts v. Louisiana*, 428 U.S. 325 (1976), the Court invalidated the challenged state laws.

<sup>38</sup> See *Gregg*, 428 U.S. at 197 (plurality opinion) (“No longer can a Georgia jury do as *Furman*’s jury did: reach a finding of the defendant’s guilt and then, without guidance or direction, decide whether he should live or die.”).

least one statutory aggravating circumstance to justify imposing the death penalty.<sup>39</sup> The Georgia statute also mandated that the jury consider during sentencing any mitigating circumstances presented by the defense.<sup>40</sup> This revised statute satisfied the Court because it both limited the types of crimes that made an offender eligible for the death penalty and provided broad latitude, upon consideration of mitigating evidence, for the sentencer to recommend life imprisonment rather than death.<sup>41</sup> Thus the imposition of the death penalty was consistent with the principle that “the State must not arbitrarily inflict a severe punishment.”<sup>42</sup>

The *Gregg* Court was also satisfied that capital punishment was not, to use Justice Brennan’s words in his concurrence in *Furman*, “unacceptable to contemporary society.”<sup>43</sup> In *Trop v. Dulles*, the Court had declared that “[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>44</sup> Since then, the Court has measured society’s acceptance of a particular punishment based on “objective indicators,” such as legislative determinations, jury sentences, public opinion, and even international practices.<sup>45</sup> In *Gregg*, the plurality found not only that capital punishment was a long-accepted practice in this country, but also

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<sup>39</sup> *Id.* at 165-66.

<sup>40</sup> *See id.* at 164 (explaining that the judge must instruct the jury to consider mitigating circumstances as well as aggravating circumstances); *see also* *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (opinion of Burger, C.J.) (“[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” (footnote omitted)).

<sup>41</sup> *See Gregg*, 428 U.S. at 196-97 (plurality opinion). The plurality in *Gregg* also highlighted the additional safeguard of expedited review by the state supreme court of all death sentences to ensure that the punishment was appropriate. *Id.* at 166.

Although the statute in *Gregg* is demonstrative of a constitutionally valid capital punishment statute, it is not the only permissible scheme. For example, Texas’s capital sentencing structure, upheld by the Court in *Jurek*, differed from the system upheld in *Gregg* in that it did not involve consideration of statutory aggravating factors. Instead, it required that the jury answer three questions affirmatively before the death penalty could be imposed. *See Jurek*, 428 U.S. at 269 (plurality opinion) (“If the jury finds that the State has proved beyond a reasonable doubt that the answer to each of the three questions is yes, then the death sentence is imposed. If the jury finds that the answer to any question is no, then a sentence of life imprisonment results.”).

<sup>42</sup> *Furman v. Georgia*, 408 U.S. 238, 274 (1972) (Brennan, J., concurring).

<sup>43</sup> *Id.* at 277; *see Gregg*, 428 U.S. at 182 (plurality opinion).

<sup>44</sup> 356 U.S. 86, 101 (1958) (plurality opinion).

<sup>45</sup> *See Roper v. Simmons*, 543 U.S. 551, 564 (2005) (“The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question.”); *cf. Gregg*, 428 U.S. at 173 (plurality opinion) (“[A]n assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment.”);

that “[t]he most marked indication of society’s endorsement of the death penalty for murder is the legislative response to *Furman*”—over thirty-five states responded to the opinion in *Furman* not by abolishing the death penalty but by revising their statutes to make their schemes constitutional.<sup>46</sup>

Another core component of the Eighth Amendment is the mandate that the punishment not be excessive.<sup>47</sup> To meet this requirement, the sanction imposed cannot be disproportionate to the crime. Additionally, “[i]f there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary and therefore excessive.”<sup>48</sup> The Court therefore must assess the purposes for which the death penalty is inflicted and determine whether this punishment serves the goals of deterrence or retribution. As Justice White noted in *Furman*:

At the moment that [a proposed execution] ceases realistically to further these purposes, however, the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment. It is my view that it would, 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.<sup>49</sup>

In upholding the capital punishment statute in *Gregg*, the plurality deferred to the judgment of Georgia’s legislature that the execution of certain offenders did serve these social purposes.<sup>50</sup>

<sup>46</sup> *Gregg*, 428 U.S. at 179-80 (plurality opinion).

<sup>47</sup> *Furman*, 408 U.S. at 271-72 (Brennan, J., concurring); see also *id.* (noting that this command prohibits a punishment from inflicting severe physical or mental suffering, but that “[m]ore than the presence of pain, however, is comprehended in the judgment that the extreme severity of a punishment makes it degrading to the dignity of human beings”).

<sup>48</sup> *Id.* at 279 (citations omitted).

<sup>49</sup> *Id.* at 312 (White, J., concurring).

<sup>50</sup> See *Gregg*, 428 U.S. at 186 (plurality opinion) (“[W]e cannot say that the judgment of the Georgia Legislature that capital punishment may be necessary in some cases is clearly wrong.”).

The fourth principle inherent in the Eighth Amendment, according to Justice Brennan, is that a punishment not be “degrading to human dignity.” *Furman*, 408 U.S. at 291. He described this purpose as the “primary principle,” *id.* at 271, “which . . . supplies the essential predicate for the application of the others,” *id.* at 281; see also *id.* at 286 (“It is a denial of human dignity for the state to arbitrarily subject a person to an unusually severe punishment that society has indicated it does not regard as acceptable, and that cannot be shown to serve any penal purpose more effectively than a significantly less drastic punishment.”). Consideration of this principle therefore takes place through consideration of the other three principles.

Since these landmark decisions, the Court has continued to further define the constitutional limits of the death penalty. One way in which it has done so is by categorically banning the execution of certain classes of defendants.<sup>51</sup> In *Coker v. Georgia*, the Court declared that those convicted only of rape of an adult could not be executed,<sup>52</sup> and in *Enmund v. Florida*, the Court prohibited the execution of minor participants in felony murder who were not present for the killing and who did not “intend[] or contemplate[] that life would be taken.”<sup>53</sup> And most recently, the Court has declared the execution of insane,<sup>54</sup> mentally retarded,<sup>55</sup> and juvenile offenders<sup>56</sup> to be cruel and unusual punishment.

## II. THE SUBSTANCE OF A *LACKEY* CLAIM

How does a delay in execution fail to meet the Court’s Eighth Amendment standards, particularly given that the procedural safeguards that prolong the process are intended to benefit inmates by ensuring that only those deserving of execution will face this punishment? Before assessing the treatment of *Lackey* claims over the past fifteen years, I lay out the substantive argument asserted by the prisoners who have spent a good portion of their lives on death row.

A Justice of the Supreme Court first addressed the issue of whether inordinate delays on death row violate the Eighth Amendment when Clarence Allen Lackey, who spent seventeen years on death row prior to his execution, filed a petition for certiorari in 1995.<sup>57</sup> Lackey argued that the State of Texas had forfeited the right to execute him as a result of his

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<sup>51</sup> See Aarons, *supra* note 35, at 157-60 (explaining how, since the July 2 cases, the Court has “revisited the question of whether executing a particular class of defendants is consistent with the Eighth Amendment”).

<sup>52</sup> See 433 U.S. 584, 592 (1977) (plurality opinion) (“We have concluded that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.”).

<sup>53</sup> See 458 U.S. 782, 801 (1982).

<sup>54</sup> See *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986).

<sup>55</sup> See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

<sup>56</sup> See *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

<sup>57</sup> See Petition for Writ of Certiorari, *Lackey v. Texas*, 514 U.S. 1045 (1995) (No. 94-8262), 1995 WL 17904041. In a published memorandum, Justice Stevens noted the “importance and novelty” of this issue. *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (memorandum of Stevens, J., respecting the denial of certiorari). However, the argument had been raised by inmates long before *Lackey*. See, e.g., *In re Medley*, 134 U.S. 160, 172-74 (1890) (discussing a four-week delay on death row, but then granting the writ of habeas corpus on grounds that the conviction violated the Ex Post Facto Clause); *Chessman v. Dickson*, 275 F.2d 604, 607 (9th Cir. 1960) (rejecting the defendant’s argument that he was subjected to cruel and unusual punishment because of his imprisonment on death row for over eleven years).

protracted stay on death row.<sup>58</sup> He asserted that his execution would be cruel and unusual punishment because: (1) imposing the death penalty after an inordinate delay on death row would have been unacceptable to the Framers;<sup>59</sup> (2) execution after such a delay did not comport with “evolving standards of decency” and was contrary to international opinion;<sup>60</sup> and (3) Lackey’s delay on death row resulted in the infliction of unnecessary and gratuitous pain in the form of intense psychological suffering.<sup>61</sup>

*Lackey* claims exists because of the numerous delays ingrained in capital cases, and which result in the incarceration of prisoners for many years before their death sentences are carried out. As previously mentioned, the average death row inmate suffers in detention for nearly fifteen years before execution.<sup>62</sup> Some inmates whose petitions for certiorari have reached the Court since *Lackey* have spent nearly thirty years waiting for death.<sup>63</sup> Beyond the delays that accompany a capital trial, the appellate process is fraught with additional interruptions.

There are common causes for delay in capital appeals. The assembly of a complete record for appellate review, the wait for the delivery of an opinion by appellate courts, and the further procedures provided by most states for inmates to petition for postconviction relief account for much of the delay in the appeals process.<sup>64</sup> State postconviction relief statutes often provide

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<sup>58</sup> See Petition for Writ of Certiorari, *supra* note 57, at 8 (“This forfeiture has resulted both from the inordinate amount of time that Mr. Lackey has spent on Texas’ death row and the States’ [sic] unnecessary setting of repeated execution dates in this case.”).

<sup>59</sup> See *id.* at 18-19 (arguing that “if the Framers considered a punishment cruel and unusual in 1789, then *a fortiori* it is cruel and unusual today,” and quoting then-recent Supreme Court case law looking to whether, in the Court’s words, his death sentence was one of “those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted” (quoting *Stanford v. Kentucky*, 492 U.S. 361, 368 (1989) (quoting *Ford*, 477 U.S. at 405))).

<sup>60</sup> See *id.* at 20-21.

<sup>61</sup> See *id.* at 22-23. In addition to making the arguments listed above, inmates raising a *Lackey* claim also typically argue that their execution is cruel and unusual because it “does not further the penological goals of deterrence and retribution.” Erin Simmons, Comment, *Challenging an Execution after Prolonged Confinement on Death Row [Lackey Revisited]*, 59 CASE W. RES. L. REV. 1249, 1252 (2009).

<sup>62</sup> See SNELL, *supra* note 20, at 12 tbl.8 (depicting the increase in delays in executions over the past several decades).

<sup>63</sup> In addition to Manuel Valle, who was on death row for thirty-three years, the petitioner in *Thompson v. McNeil* for thirty-two years, 129 S. Ct. 1299, 1299 (2009) (Breyer, J., dissenting from the denial of certiorari); the petitioner in *Smith v. Arizona* for thirty years, 552 U.S. 985, 985 (2007) (Breyer, J., dissenting from the denial of certiorari); and the petitioner in *Foster v. Florida* for twenty-seven years, 537 U.S. 990, 991 (2002) (Breyer, J., dissenting from the denial of certiorari).

<sup>64</sup> See Jeremy Root, Comment, *Cruel and Unusual Punishment: A Reconsideration of the Lackey Claim*, 27 N.Y.U. REV. L. & SOC. CHANGE 281, 294-96 (2001) (noting that state postconviction

petitioners with the opportunity to present claims after the direct appeal process to a trial and an appellate court, and then to the state supreme court.<sup>65</sup> In fact, the requirement that a petitioner exhaust his claim in the state's highest court in order to file a petition for federal habeas corpus relief is another factor contributing to lengthy delays on death row.<sup>66</sup> Delays are further exacerbated by "the quest for [competent] counsel"<sup>67</sup> and by other factors such as frivolous filings by the petitioner and the setting of execution dates, which have the effect of "catalyz[ing] the litigation process into motion."<sup>68</sup>

A *Lackey* claim's concern extends beyond the fact of delay—the heart of the argument relates to the conditions of confinement on death row that inmates endure for so long as a result of the delays described above. Death row is characterized by isolation. Justice Stevens highlighted that one inmate who unsuccessfully asserted a *Lackey* claim "endured especially severe conditions" by "spending up to 23 hours per day in isolation in a 6-by 9-foot cell."<sup>69</sup> Although the administration of prisons varies by state, conditions are consistently bleak for death row inmates.<sup>70</sup> Many spend almost all of their time alone in small cells separated from the rest of the prison population and leave only for medical reasons, consultation with lawyers, media interviews, or limited opportunities to see visitors.<sup>71</sup> As one justice of the Florida Supreme Court noted, "These facilities and procedures were not designed and should not be used to maintain prisoners for years and years."<sup>72</sup>

The uncertainty of death that looms over prisoners for years prior to execution compounds the problem. Today, a number of death row inmates

procedures vary, with some sending petitions directly to the state's highest court and others providing numerous rounds of review).

<sup>65</sup> See *id.* at 295-96 (describing different postconviction schemes).

<sup>66</sup> 28 U.S.C. § 2254(b)(1) (2006). Federal law provides two exceptions to this requirement: for applicants to whom "there is an absence of available State corrective process," and in circumstances where "such process [would be] ineffective to protect the rights of the applicant." *Id.* § 2254(b)(1)(B).

<sup>67</sup> Root, *supra* note 64, at 294; see *id.* at 298-99.

<sup>68</sup> *Id.* at 299-301; see also Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 10 (1995) ("It should come as no surprise that death penalty cases take a long time to work through the system. It takes several minutes just to walk through the steps of a streamlined case, without even discussing the many ways in which the process can be deliberately prolonged.").

<sup>69</sup> *Thompson v. McNeil*, 129 S. Ct. 1299, 1299 (2009) (statement of Stevens, J., respecting the denial of certiorari).

<sup>70</sup> See *infra* notes 186-92 and accompanying text.

<sup>71</sup> See *Swafford v. State*, 679 So. 2d 736, 742 n.8 (Fla. 1996) (Wells, J., concurring in part and dissenting in part).

<sup>72</sup> *Id.*

awaiting execution die instead from natural causes.<sup>73</sup> The prospect of winning on appeal provides many inmates with a “false sense of hope” that they will not be put to death.<sup>74</sup> One justice of the Massachusetts Supreme Judicial Court noted that “[l]engthy delays, especially if punctuated by a series of last minute reprieves, intensify the prisoner’s suffering.”<sup>75</sup> Additionally, a study of inmates on Florida’s death row—where Valle spent three decades of his life—found that 42% of inmates had “seriously considered” suicide and 35% had attempted suicide.<sup>76</sup> Rather than commit suicide, some death row inmates instead have volunteered for execution by waiving appeals of their sentence.<sup>77</sup>

Unsurprisingly, then, Clarence Lackey described death row as “one of the loneliest, most miserable places on the earth.”<sup>78</sup> Willie Lloyd Turner, a death row inmate who was executed in 1995, described his experience in equally bleak terms:

It’s the unending, uninterrupted immersion in death that wears on you so much. It’s the parade of friends and acquaintances who leave for the death house and never come back, while your own desperate and lonely time drains away. It’s the boring routine of claustrophobic confinement, punctuated by eye-opening dates with death that you helplessly hope will be averted.<sup>79</sup>

Scholars agree with this depiction of death row. Professor William Schabas likened the “horror” of death row to a combination of “a hospital ward for the

<sup>73</sup> See SNELL, *supra* note 20, at 8 tbl.1 & n.a (listing the number of prisoners removed from death row in each state in 2009 and 2010 and noting that fifteen death row inmates died of natural causes in 2010).

<sup>74</sup> Dan Crocker, Note, *Extended Stays: Does Lengthy Imprisonment on Death Row Undermine the Goals of Capital Punishment?*, 1 J. GENDER RACE & JUST. 555, 563 (1998) (describing how appeals or temporary stays of execution often lead prisoners to believe that they will not be executed).

<sup>75</sup> Dist. Att’y v. Watson, 411 N.E.2d 1274, 1291 n.5 (Mass. 1980) (Liacos, J., concurring), *superseded by constitutional amendment*, MASS. CONST. pt. I, art. XXVI, *amended by amend. CXVI, as recognized in* Commonwealth v. Colon-Cruz, 470 N.E.2d 116 (Mass. 1984).

<sup>76</sup> Kate McMahon, *Dead Man Waiting: Death Row Delays, the Eighth Amendment, and What Courts and Legislatures Can Do*, 25 BUFF. PUB. INT. L.J. 43, 51-52 (2007).

<sup>77</sup> See State v. Ross, 873 A.2d 131, 133 (Conn. 2005) (finding that the defendant was competent and made a “knowing, intelligent and voluntary” waiver of his right to further appeal his death sentence); see also McMahon, *supra* note 76, at 50-55 (describing Ross as a powerful illustration of the psychological impact of death row confinement on inmates).

<sup>78</sup> Petition for Writ of Certiorari, *supra* note 57, at 6.

<sup>79</sup> Kathleen M. Flynn, Note, *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 (1997) (citation omitted).

terminally ill, an institution for the criminally insane, and an ultramaximum security wing in a penitentiary.”<sup>80</sup>

Many courts, including the United States Supreme Court, have long recognized—even before *Lackey*—that the conditions on death row are at best difficult to endure and at worst what the California Supreme Court has called “dehumanizing.”<sup>81</sup> As far back as 1890 the Supreme Court acknowledged, in reference to just a four-week delay on death row, that the uncertainty of living under a sentence of death is “one of the most horrible feelings” a person can experience.<sup>82</sup> Eighty years later, the California Supreme Court similarly noted that “the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.”<sup>83</sup>

The mental anguish and psychological torture that takes place while awaiting execution is often referred to as the “death row phenomenon” or “death row syndrome.”<sup>84</sup> This term traces back to *Soering v. United Kingdom*, a case decided by the European Court of Human Rights in 1989.<sup>85</sup> In *Soering*, the defendant, who fled to the United Kingdom after committing a double murder in Virginia, argued that his extradition to the United States, which would result in incarceration on death row, would be tantamount to subjecting him to psychological torture.<sup>86</sup> The court agreed.<sup>87</sup>

Since the term was coined, inmates and advocates have used it to describe the suffering that occurs on death row. And, as previously mentioned, judges, scholars, mental health experts, and prison officials agree that “a condemned prisoner’s mental ordeal approaches the limit of human endur-

<sup>80</sup> William A. Schabas, *Developments in Criminal Law and Criminal Justice: Execution Delayed, Execution Denied*, 5 CRIM. L.F. 180, 184 (1994).

<sup>81</sup> See *People v. Anderson*, 493 P.2d 880, 894 (Cal. 1972) (in bank), *superseded by constitutional amendment*, CAL. CONST. art. I, § 27, as recognized in *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

<sup>82</sup> *In re Medley*, 134 U.S. 160, 172 (1890).

<sup>83</sup> *Anderson*, 493 P.2d at 894; see also *Solesbee v. Balkcom*, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting) (“[T]he onset of insanity while awaiting execution of a death sentence is not a rare phenomenon.”), *abrogated by Ford v. Wainwright*, 477 U.S. 399 (1986).

<sup>84</sup> Amy Smith, *Not “Waiving” but Drowning: The Anatomy of Death Row Syndrome and Volunteering for Execution*, 17 B.U. PUB. INT. L.J. 237, 238 (2008). Although the terms are often used interchangeably, Smith distinguishes between “death row phenomenon” and “death row syndrome.” See *id.* at 242. She defines “death row phenomenon” as a term used to describe “the experience of living in the harsh conditions of death row for a long period of time under the sentence of death.” *Id.* at 238. “Death row syndrome,” on the other hand, is a term “used recently in the legal arena to describe the psychological effects of death row phenomenon on individuals.” *Id.*

<sup>85</sup> 161 Eur. Ct. H.R. (ser. A) (1989).

<sup>86</sup> See *id.* at 11, 41 (describing the murders and Soering’s fears of psychological trauma on death row).

<sup>87</sup> See *id.* at 44-45 (“[T]he legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration.”).

ance.”<sup>88</sup> However, despite the notion of medical legitimacy this terminology invokes, death row syndrome has not been formally recognized by mental health professionals.<sup>89</sup> Similarly, although the suffering on death row is widely recognized as problematic, inmates have not succeeded in obtaining relief from the courts when raising death row syndrome in a *Lackey* claim.

### III. THE COURT’S DEBATE

Although the Court has never granted certiorari in a case raising a *Lackey* claim, several Justices have engaged in a lively debate regarding the merits of the inordinate delay argument. Justice Breyer and Justice Stevens have consistently urged the Court to confront this issue, which, they claim, finds support in the Court’s Eighth Amendment jurisprudence.<sup>90</sup> Justice Thomas, however, has concurred on multiple occasions in the denial of certiorari and has vehemently rejected *Lackey* claims.<sup>91</sup>

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<sup>88</sup> Flynn, *supra* note 79, at 298; *see id.* at 298 n.36 (quoting a former warden at San Quentin prison who said, “[T]he length of time spent [on death row] by [some inmates] constitutes cruelty that defies the imagination” (second alteration in original) (quoting CLINTON T. DUFFY, EIGHTY-EIGHT MEN AND TWO WOMEN 254 (1988))); *see also supra* note 61 and accompanying text.

<sup>89</sup> *See* Smith, *supra* note 84, at 243 (noting that, as of 2008, the terms “death row syndrome” and “death row phenomenon” had not been accepted by the American Psychiatric or Psychological Associations).

<sup>90</sup> *See Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (memorandum of Stevens, J., respecting the denial of certiorari) (explaining that, “[t]hrough novel, petitioner’s claim is not without foundation,” because the rationale for the Court’s holding that the Eighth Amendment does not prohibit capital punishment arguably loses force when a prisoner is forced to spend so many years on death row).

<sup>91</sup> *See, e.g., Johnson v. Bredesen*, 130 S. Ct. 541, 544 (2009) (Thomas, J., concurring in the denial of stay of execution and certiorari) (stating that he is “unaware of any constitutional support for the [*Lackey*] argument”); *Thompson v. McNeil*, 129 S. Ct. 1299, 1301 (2009) (Thomas, J., concurring in the denial of certiorari) (“It makes ‘a mockery of our system of justice . . . for a convicted murderer, who, through his own interminable efforts of delay . . . has secured the almost-indefinite postponement of his sentence, to then claim that the almost-indefinite postponement renders his sentence unconstitutional.” (ellipses in original) (quoting *Turner v. Jabe*, 58 F.3d 924, 933 (4th Cir. 1995) (Luttig, J., concurring in the judgment))); *Foster v. Florida*, 537 U.S. 990, 990-91 (2002) (Thomas, J., concurring in the denial of certiorari) (“In the three years since we last debated this meritless claim . . . nothing has changed in our constitutional jurisprudence.”); *Knight v. Florida*, 528 U.S. 990, 990 (1999) (Thomas, J., concurring in the denial of certiorari) (“I am unaware of any support in the American constitutional tradition or in this Court’s precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed.”).

A. *In Support of Granting Certiorari and Recognizing a Valid Constitutional Claim Based on Inordinate Delay: Justices Stevens and Breyer*

Justices Stevens and Breyer contend that executing inmates who have long been incarcerated on death row can constitute cruel and unusual punishment for several reasons. They assert that the amount of time *Lackey* petitioners spend awaiting execution—usually between twenty and thirty years—is undoubtedly unusual when viewed in light of the average length of death row confinement.<sup>92</sup> Justices Stevens and Breyer also rely on the Court's previous acknowledgement of the horrors of the death row experience to support their conclusion that the combination of uncertainty of execution and lengthy delay is cruel.<sup>93</sup>

Although Justice Stevens, in his *Lackey* memorandum, found it proper to provide lower courts with an opportunity to consider the merits of the inordinate-delay claim, he also expressed his opinion that the execution of Clarence Lackey might fail to comport with established Eighth Amendment principles.<sup>94</sup> While the death penalty can be justified on the bases that it was considered an acceptable punishment by the Framers and that it serves retributive and deterrent purposes,<sup>95</sup> Justice Stevens suspected that “neither ground retains any force for prisoners who have spent some 17 years under a sentence of death.”<sup>96</sup>

In a later case, Justice Breyer echoed Justice Stevens's doubt as to whether the penological goals served by the death penalty retain their force after an inordinate delay. “[T]he longer the delay,” he noted, “the weaker the justifications for imposing the death penalty in terms of punishment's basic retributive or deterrent purposes.”<sup>97</sup> Justices Stevens and Breyer have

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<sup>92</sup> See *Foster*, 537 U.S. at 992 (2002) (Breyer, J., dissenting from the denial of certiorari) (“[Twenty-seven] years awaiting execution is unusual by any standard, even that of current practice in the United States, where the average executed prisoner spends between 11 and 12 years under sentence of death.”).

<sup>93</sup> See *id.* (“This Court has recognized that such a combination can inflict ‘horrible feelings’ and ‘an immense mental anxiety amounting to a great increase of the offender’s punishment.’” (quoting *In re Medley*, 134 U.S. 160, 172 (1890)) (citing *Furman v. Georgia*, 408 U.S. 238, 288-89 (1972) (Brennan, J., concurring))); see also *supra* Part II.

<sup>94</sup> See *Lackey*, 514 U.S. at 1045-47 (memorandum of Stevens, J., respecting the denial of certiorari).

<sup>95</sup> See *Gregg v. Georgia*, 428 U.S. 153, 176-84 (1976) (plurality opinion) (canvassing the factors that militate in favor of finding the death penalty constitutional).

<sup>96</sup> *Lackey*, 514 U.S. at 1045 (memorandum of Stevens, J., respecting the denial of certiorari); see also *id.* (“Such a delay, if it ever occurred, certainly would have been rare in 1789, and thus the practice of the Framers would not justify a denial of petitioner’s claim. Moreover, after such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted.”).

<sup>97</sup> *Knight v. Florida*, 528 U.S. 990, 995 (1999) (Breyer, J., dissenting from the denial of certiorari).

suggested that the punishment already inflicted on the inmates during their lengthy imprisonment on death row sufficiently serves states' interest in retribution.<sup>98</sup> Additionally, they agree that there is minimal incremental deterrent value in executing an inmate after a long delay on death row as opposed to simply continuing to incarcerate the prisoner for life.<sup>99</sup>

Three years after *Lackey*, petitioner William D. Elledge presented the same constitutional question to the Court, this time after a twenty-three year term on death row.<sup>100</sup> Justice Breyer, the sole dissenter from the denial of certiorari, declared, "[P]etitioner argues forcefully that his execution would be especially 'cruel.' Not only has he, in prison, faced the threat of death for nearly a generation, but he has experienced that delay because of the State's own faulty procedures and not because of frivolous appeals on his own part."<sup>101</sup> Justices Breyer and Stevens have acknowledged in several cases that identifying the actor responsible for the inmate's delayed execution—be it either the State or the petitioner himself—is important in determining the validity of a petitioner's *Lackey* claim. In his *Lackey* memorandum, Justice Stevens suggested that "[i]t 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."<sup>102</sup> Where most of the delay is attributable to the State, Justice Stevens suggests and Justice Breyer contends that the prisoner should not be held responsible, thereby giving greater force to the argument that death after inordinate delay is cruel and unusual.<sup>103</sup>

Justice Breyer has used international precedent to support his contention that execution after inordinate delay is inconsistent with the Eighth Amendment. In *Knight v. Florida*, he highlighted the fact that "[a] growing number of courts outside the United States—*courts that accept or assume the lawfulness*

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<sup>98</sup> See *id.*; *Lackey*, 514 U.S. at 1045 (memorandum of Stevens, J., respecting denial of certiorari).

<sup>99</sup> *Lackey*, 514 U.S. at 1046 (memorandum of Stevens, J., respecting denial of certiorari).

<sup>100</sup> *Elledge v. Florida*, 525 U.S. 944, 944 (1998) (Breyer, J., dissenting from the denial of certiorari).

<sup>101</sup> *Id.* at 945.

<sup>102</sup> 514 U.S. at 1047 (memorandum of Stevens, J., respecting the denial of certiorari).

<sup>103</sup> See *id.*; *Elledge*, 525 U.S. at 945 (Breyer, J., dissenting from the denial of certiorari). In *Elledge*, Justice Breyer recognized that the petitioner's execution would be especially cruel because the greater part of the prisoner's twenty-three-year term on death row was attributable to the State. *Id.* Justice Breyer calculated that the petitioner's three successful appeals of his sentence resulted in eighteen of the total twenty-three years of delay. See *id.*; see also *Knight v. Florida*, 528 U.S. 990, 993 (1999) (Breyer, J., dissenting from the denial of certiorari) ("Where a delay, measured in decades, reflects the State's own failure to comply with the Constitution's demands, the claim that time has rendered the execution inhuman is a particularly strong one."); *infra* Section V.D.

of the death penalty—have held that lengthy delay in administering a *lawful* death penalty renders ultimate execution inhuman, degrading, or unusually cruel.<sup>104</sup> For support, Justice Breyer cited decisions from the U.K.’s Privy Council,<sup>105</sup> India,<sup>106</sup> Zimbabwe,<sup>107</sup> as well as the decision of the European Court of Human Rights in *Soering*.<sup>108</sup> Justice Breyer maintained that international opinion is “useful even though not binding” in determining the constitutionality of such a punishment.<sup>109</sup>

In 2009, in *Thompson v. McNeil*, the Court again refused to hear a *Lackey* claim, this time raised by a petitioner who had spent thirty-two years on death row.<sup>110</sup> Justice Stevens acknowledged the inherent tension underlying the claim that execution after a lengthy incarceration on death row violates the Eighth Amendment. He noted that the due process requirements that must be observed before an execution may take place render “delays in state-sponsored killings . . . inescapable,”<sup>111</sup> but nevertheless concluded that

executing defendants after such delays is unacceptably cruel. This inevitable cruelty, coupled with the diminished justification for carrying out an execution after the lapse of so much time, reinforces my opinion that contemporary decisions “to retain the death penalty as a part of our law are the product of habit and inattention rather than an acceptable deliberative process.”<sup>112</sup>

Since Justice Stevens left the Court, Justice Breyer has continued to advocate, although unsuccessfully, that the Court grant certiorari to consider a *Lackey* claim.<sup>113</sup>

<sup>104</sup> 528 U.S. at 995 (Breyer, J., dissenting from the denial of certiorari).

<sup>105</sup> *Pratt v. Att’y Gen.*, [1994] 2 A.C. 1 (P.C.) (appeal taken from Jam.).

<sup>106</sup> *Singh v. State of Punjab*, A.I.R. 1983 S.C. 465 (India).

<sup>107</sup> Catholic Comm’n for Justice & Peace in Zimb. v. Att’y-Gen., [1993] 1 Zimb. L.R. 239, reprinted in 14 HUM. RTS. L.J. 323 (1993).

<sup>108</sup> *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989).

<sup>109</sup> *Knight*, 528 U.S. at 998 (Breyer, J., dissenting from the denial of certiorari); see *id.* at 997 (noting that the Supreme Court has often “found particularly instructive opinions of former Commonwealth nations insofar as those opinions reflect a legal tradition that also underlies our own Eighth Amendment”). Justice Breyer also observed that international opinion on this issue varies and cited countries, such as Canada, that do not necessarily condemn the practice of execution after inordinate delay. *Id.* at 996.

<sup>110</sup> 129 S. Ct. 1299, 1299 (2009) (statement of Stevens, J., respecting the denial of certiorari).

<sup>111</sup> *Id.* at 1300.

<sup>112</sup> *Id.* (quoting *Baze v. Rees*, 553 U.S. 35, 78 (2008) (Stevens, J., concurring in the judgment)).

<sup>113</sup> See *Valle v. Florida*, 132 S. Ct. 1, 2 (2011) (Breyer, J., dissenting from the denial of stay (voting to grant the application for stay of execution and to grant certiorari to petitioner)).

B. *Against Granting Certiorari and Recognizing a Valid Constitutional Claim Based on Inordinate Delay: Justice Thomas*

Justice Thomas entered the debate over the merits of the inordinate-delay claim in 1999.<sup>114</sup> In *Knight v. Florida*, the Court denied certiorari in two consolidated cases in which defendants challenged the constitutionality of their executions after spending nineteen and twenty-five years, respectively, on death row.<sup>115</sup> In this and every case since in which Justice Thomas has concurred in the denial of certiorari to petitioners raising a *Lackey* claim, he has emphasized his lack of awareness “of any support in the American constitutional tradition or in this Court’s precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed.”<sup>116</sup>

Unconvinced that the delay between sentencing and execution creates an Eighth Amendment problem—particularly when this delay is due to the inmate’s exercise of his right to appeal—Justice Thomas has argued that “[t]he issue is not whether a death-row inmate’s appeals ‘waive’ any Eighth Amendment right” but instead whether his “litigation strategy, which delays his execution, provides a justification for the Court to invent a new Eighth Amendment right. It does not.”<sup>117</sup> Justice Thomas has refused to accept the argument that a delay in execution can justify the commutation of a death sentence to life imprisonment. He has noted that the “Court’s vacatur of a death sentence because of constitutional error does not bar new sentencing proceedings resulting in a reimposition of the death penalty”: the Court would not grant such a remedy even “to a death-row inmate who had suffered the most egregious of constitutional errors in his sentencing proceedings.”<sup>118</sup>

Further, Justice Thomas views Justices Breyer and Stevens’s reliance on the international consensus regarding the unusual cruelty of inordinate delay as evidence underscoring the *absence* of support in American constitutional jurisprudence.<sup>119</sup> In response to the argument that the conditions of confinement on death row are “dehumanizing,” Justice Thomas cautions

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<sup>114</sup> 528 U.S. at 990 (Thomas, J., concurring in the denial of certiorari).

<sup>115</sup> *Id.* at 993-94 (Breyer, J., dissenting from the denial of certiorari).

<sup>116</sup> *Id.* at 990 (Thomas, J., concurring in the denial of certiorari).

<sup>117</sup> *Thompson*, 129 S. Ct. at 1301 (Thomas, J., concurring in the denial of certiorari).

<sup>118</sup> *Foster v. Florida*, 537 U.S. 990, 991 (2002) (Thomas, J., concurring in the denial of certiorari).

<sup>119</sup> *See Knight*, 528 U.S. at 990 (Thomas, J., concurring in the denial of certiorari) (“[W]ere there any such support in our own jurisprudence, it would be unnecessary for proponents of the claim to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council.”); *infra* note 91.

against second-guessing decisions regarding prison management.<sup>120</sup> He also emphasizes that there could be “legitimate penological reasons” for the conditions of death row confinement.<sup>121</sup> Justice Thomas stresses in *Thompson* the “gruesome nature” of the underlying crime for which the defendant was sentenced to death by three different juries.<sup>122</sup> He argues that the only cruel element in these cases is the defendant’s crime, not the resulting punishment or inevitable delay prior to execution.<sup>123</sup>

Justice Thomas also advances several arguments against recognizing a valid Eighth Amendment claim based on inordinate delay. First, he contends that delays in execution are an inherent consequence of the Court’s death penalty jurisprudence, which provides inmates with an “arsenal” of constitutional claims.<sup>124</sup> Providing death row inmates with *another* constitutional claim based on delay in execution would only lead to further delays, and would run the risk of creating perverse incentives for reviewing courts.<sup>125</sup> Despite Justice Stevens’s repeated assertion that the denial of a petition for a writ of certiorari is not a ruling on the merits,<sup>126</sup> the Court’s consistent refusal to consider a *Lackey* claim suggests that a majority of the Court is not persuaded that execution after lengthy incarceration on death row violates Eighth Amendment principles.<sup>127</sup>

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<sup>120</sup> See *Thompson*, 129 S. Ct. at 1301 (Thomas, J., concurring in the denial of certiorari) (contemplating the “disastrous consequences of th[e] Court’s recent foray into prison management” in *Johnson v. California*, 543 U.S. 499 (2005)).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 1302 (Thomas, J., concurring in the denial of certiorari); see also *id.* (admonishing Justice Stevens for “altogether refus[ing] to take into consideration the gruesome nature of the crimes that legitimately lead States to authorize the death penalty and juries to impose it”); *Foster*, 537 U.S. at 991 (Thomas, J., concurring in the denial of certiorari) (describing the petitioner’s crime in graphic detail).

<sup>123</sup> See *Thompson*, 129 S. Ct. at 1303 (Thomas, J., concurring in the denial of certiorari) (“It is the crime—and not the punishment imposed by the jury or the delay in petitioner’s execution—that was ‘unacceptably cruel.’” (quoting *id.* at 1300 (statement of Stevens, J., respecting the denial of certiorari))).

<sup>124</sup> See *Knight*, 528 U.S. at 992 (Thomas, J., concurring in the denial of certiorari) (arguing that it would be incongruous to permit inmates to complain of delay, given that their numerous opportunities to litigate their claims invariably result in that very delay).

<sup>125</sup> See *id.* (positing that courts may “give short shrift to a capital defendant’s legitimate claims so as to avoid violating the [suggested] Eighth Amendment right” by lengthening the delay and running afoul of the Eighth Amendment).

<sup>126</sup> *Lackey v. Texas*, 514 U.S. 1045, 1047 (1995) (memorandum of Stevens, J., respecting the denial of certiorari); see also *Knight*, 528 U.S. at 990 (statement of Stevens, J., respecting the denial of certiorari) (“It seems appropriate to emphasize that the denial of these petitions for certiorari does not constitute a ruling on the merits.”).

<sup>127</sup> Justices Stevens and Breyer seem to have conceded this point. See *Johnson v. Bredesen*, 130 S. Ct. 541, 544 (2009) (statement of Stevens, J., respecting the denial of certiorari) (“Most

#### IV. DOES INORDINATE DELAY ON DEATH ROW VIOLATE THE EIGHTH AMENDMENT? CHECKING IN ON THE EXPERIMENT

Five years after *Lackey* invited the “state and lower courts to serve as ‘laboratories’” to test the “viability” of the *Lackey* claim, the Supreme Court denied certiorari in *Knight*. Concurring in that denial, Justice Thomas boldly asserted that “[t]hese courts have resoundingly rejected the claim as meritless . . . [and therefore that] the Court should consider the experiment concluded.”<sup>128</sup> But is this really the case? In an opinion dissenting from the denial of certiorari, Justice Breyer vehemently disagreed. He argued that only eight of over twenty cases addressing the issue of inordinate delays in execution since 1995 were decided solely on the merits of the *Lackey* claim, and that most cases “involve[d] procedural failings that in part or in whole determined the outcome of the case.”<sup>129</sup> Further, Justice Breyer pointed out that the few cases that *did* address *Lackey* claims on its merits failed to consider that much of the delay is attributable to failings of the State rather than the petitioner.<sup>130</sup>

A survey of cases in which lower courts confront *Lackey* claims demonstrates that, in a sense, Justice Thomas is correct. Courts have overwhelmingly rejected *Lackey* claims over the past sixteen years. However, Justice Breyer is also correct that the reason for these rejections is mostly procedural. Lower courts have not considered the merits of this important issue enough to warrant the conclusion that the experiment is over.

In 2009, Justice Stevens remarked in *Johnson v. Bredesen*—another case in which the Court denied certiorari—that when he first discussed the claim of inordinate delay in *Lackey*, he did not foresee that procedure would prevent an individual from arguing that “nearly three decades of delay on death row, much of it caused by the State, [would] deprive[] a person of his Eighth Amendment right to avoid cruel and unusual punishment.”<sup>131</sup> And indeed, there have been numerous procedural obstacles barring lower courts from

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regrettably, a majority of this Court continues to find these issues not of sufficient weight to merit our attention.”)

<sup>128</sup> *Knight*, 528 U.S. at 992-93 (Thomas, J., concurring in the denial of certiorari); *see id.* at 992-93 & n.4 (citing eight state court cases in support of this assertion, and noting that he was “not aware of a single American court that has accepted such an Eighth Amendment claim”).

<sup>129</sup> *Id.* at 998-99 (Breyer, J., dissenting from the denial of certiorari); *see id.* at 999 (noting that the experiment had not yet concluded, considering the fact that none of the opinions in the lower courts “discuss the potential significance of that state responsibility at any length”).

<sup>130</sup> *See id.* at 998-99.

<sup>131</sup> 130 S. Ct. at 544 (statement of Stevens, J., respecting the denial of stay of execution and certiorari).

contemplating the merits of a *Lackey* claim. This Part will highlight two of the most common procedural issues encountered by petitioners.

A. *The Antiterrorism and Effective Death Penalty Act: Lackey Claims Are Barred If Presented in Second or Successive Habeas Petitions*

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)<sup>132</sup> presents procedural obstacles to death row inmates seeking to challenge their execution after long delays on death row. “[D]esigned to limit the role of the federal courts in what is essentially a state proceeding,” AEDPA dramatically reformed the process of federal habeas corpus.<sup>133</sup>

One component of AEDPA—a “gatekeeping” provision—restricts second or successive petitions for habeas corpus relief.<sup>134</sup> The Act provides that “a claim presented in a second or successive habeas corpus application . . . that was not presented in a prior application shall be dismissed.”<sup>135</sup> The Supreme Court noted in *Williams v. Taylor* that AEDPA was passed “to further the principles of finality, comity, and federalism.”<sup>136</sup> *Lackey* claims implicate AEDPA by their very nature. A petitioner’s *Lackey* claim is not ripe until the inmate has been confined on death row for many years. Thus, by the time the petitioner is able to assert a claim based on inordinate delay, he will have typically already filed his first habeas petition. He will therefore be forced to make his request for relief in a second or successive petition.<sup>137</sup>

Many states have similar prohibitions on second or successive habeas petitions. A similar gatekeeping provision in Utah’s postconviction-relief statute precluded a petitioner from raising a *Lackey* claim in state court in his third petition for postconviction relief.<sup>138</sup> In *Gardner v. State*, the Utah

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<sup>132</sup> Pub. L. No. 104-132, 110 Stat. 1214.

<sup>133</sup> Connolly, *supra* note 32, at 102.

<sup>134</sup> See 28 U.S.C. § 2244(b) (2006). Prior to AEDPA, “[t]he doctrine of abuse of the writ define[d] the circumstances in which federal courts decline[d] to entertain a claim presented for the first time in a second or subsequent petition for a writ of habeas corpus.” *McCleskey v. Zant*, 499 U.S. 467, 470 (1991). A petitioner who failed to raise a claim earlier needed to show “cause for failing to raise it and prejudice therefrom.” *Id.* at 494. AEDPA placed narrower restraints on when courts could entertain claims raised in second or successive petitions. See *United States v. Roberson*, 194 F.3d 408, 410-11 (3d Cir. 1999).

<sup>135</sup> *Id.* § 2244(b)(2).

<sup>136</sup> 529 U.S. 420, 436 (2000).

<sup>137</sup> See, e.g., *Ceja v. Stewart*, 134 F.3d 1368, 1369 (9th Cir. 1998) (affirming the district court’s holding that petitioner’s claims were covered by AEDPA’s prohibition on second or successive habeas petitions).

<sup>138</sup> *Gardner v. State*, 234 P.3d 1115, 1136 (Utah 2010) (“We conclude that Mr. Gardner could have raised these claims in his second state petition for post-conviction relief, filed in state court in May 2000, or at any other time in the year after this evidence was adduced in 1999, and that he is therefore barred from raising it in this successive petition.”).

Supreme Court concluded that the petitioner's claims could have been raised in his previous habeas petition and did not become ripe only upon the defendant's most recent death warrant.<sup>139</sup> Therefore, the court did not consider the merits of the claim.<sup>140</sup>

However, AEDPA and similar state provisions contain exceptions to the second-and-successive-petition rule and therefore do not constitute a complete bar to review of a *Lackey* claim. Scholars have suggested ways that courts can still consider the merits of a *Lackey* claim despite AEDPA. One has suggested applying the logic of *Panetti v. Quarterman*, a case involving claim of incompetency to be executed,<sup>141</sup> to a *Lackey* claim.<sup>142</sup> The *Panetti* Court stated that because a claim of incompetency does not become ripe until execution is imminent, AEDPA does not bar such a claim.<sup>143</sup> Similarly:

Since a federal court could not resolve an unripe *Lackey* claim when the first habeas petition would be filed, allowing this particular class of petitioners (those who have experienced a prolonged period of confinement prior to their proposed execution) to file second or successive habeas petitions would simply not implicate AEDPA's concern for finality.<sup>144</sup>

However, the *Panetti* approach has not been applied to a *Lackey* claim, and as a result AEDPA has prevented the consideration of the constitutionality of inordinate delay.

### B. *Retroactivity: Lackey Claims Are Teague-Barred*

In *Teague v. Lane*, the Supreme Court announced that the law at the time a petitioner's judgment became final is the law that should apply to the adjudication of his constitutional claims in habeas proceedings.<sup>145</sup> Writing for the Court in a part of the opinion joined by three other Justices in

<sup>139</sup> See *id.* at 1143-44 & nn.232-35; see *id.* at 1144 (determining that the defendant could have raised a *Lackey* claim in an earlier petition for postconviction relief because "at the time [he] filed his second state petition for post-conviction relief, he had been incarcerated for more than fourteen years").

<sup>140</sup> *Id.* at 1144.

<sup>141</sup> 551 U.S. 930 (2007).

<sup>142</sup> See Simmons, *supra* note 61, at 1266.

<sup>143</sup> *Panetti*, 551 U.S. at 945-48 (2007) ("We are hesitant to construe a statute, implemented to further the principles of comity, finality, and federalism, in a manner that would require unripe . . . claims to be raised as a mere formality . . .").

<sup>144</sup> Simmons, *supra* note 61, at 1266.

<sup>145</sup> See 489 U.S. 288, 316 (1989) (opinion of O'Connor, J.) ("[H]abeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review through one of the two exceptions we have articulated.").

*Teague*, Justice O'Connor articulated two narrow exceptions to this rule. A new rule of law *should* be retroactively applied if such a rule "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'"<sup>146</sup> Additionally, "a new rule should be applied retroactively if it requires the observance of 'those procedures that . . . "are implicit in the concept of ordered liberty.'" "<sup>147</sup>

In determining whether a petitioner's claim is *Teague*-barred, courts must first ascertain when the defendant's conviction and sentence became final.<sup>148</sup> Next, the court must assess whether a state court considering the defendant's claim at the time "would have felt compelled by existing precedent to conclude that the rule [defendant] seeks was required by the Constitution."<sup>149</sup> Finally, the court must determine whether the new rule falls within one of the narrow exceptions articulated in *Teague*.<sup>150</sup>

*Teague* appears to preclude *Lackey* claims automatically. It is almost inconceivable that a claim of inordinate delay could develop before an inmate's conviction and sentence becomes final, and there is no binding precedent for holding that an inordinate delay in execution violates the Eighth Amendment. A petitioner asserting a *Lackey* argument would require a new rule of constitutional law to be successful.<sup>151</sup>

Indeed, federal courts have read *Teague* to bar them from considering *Lackey* claims. For example, the Ninth Circuit dismissed a *Lackey* claim of a petitioner who spent twenty-five years on death row in Montana because "at the time his conviction became final [a court] would not have felt compelled by existing precedent to conclude that the rule [he] sought was required by the Constitution."<sup>152</sup>

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<sup>146</sup> *Id.* at 307 (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in two judgments and dissenting in a third)).

<sup>147</sup> *Id.* (alteration in original) (quoting *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in two judgments and dissenting in a third) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937))).

<sup>148</sup> See *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994) ("A state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied.").

<sup>149</sup> *Saffle v. Parks*, 494 U.S. 484, 488 (1990).

<sup>150</sup> See *Caspari*, 510 U.S. at 390.

<sup>151</sup> See *Simmons*, *supra* note 61, at 1263 (noting that at first blush the *Lackey* claim might appear to be *Teague*-barred "because it requests application of a new constitutional rule to a judgment that has long since become final").

<sup>152</sup> *Smith v. Mahoney*, 611 F.3d 978, 998-99 (9th Cir. 2010); see also *Allen v. Ornoski*, 435 F.3d 946, 955 (9th Cir. 2006) (determining that "[t]here is no clearly established federal law, as determined by the Supreme Court, to support" the petitioner's claim). The Fifth Circuit has also ruled that the *Lackey* claim—indeed, the original *Lackey* claim—is *Teague*-barred. That court vacated the district court's stay of Clarence Lackey's execution in 1995, noting that "*Teague*'s nonretroactivity doctrine bars Lackey's current claim." *Lackey v. Scott*, 52 F.3d 98, 100 (5th

But *Teague* need not serve as a bar to *Lackey* claims. One author suggests that the procedural hurdle posed in *Teague* does not apply if the petitioner characterizes his *Lackey* claim as a “demand for relief for a post-conviction constitutional violation” as opposed to a collateral attack on the petitioner’s final judgment.<sup>153</sup> If a court agrees with this argument, then *Teague* does not apply.<sup>154</sup> Alternatively, a petitioner could clear the *Teague* hurdle by claiming that one of *Teague*’s two exceptions applies. The new rule required by a *Lackey* claim arguably satisfies either exception.<sup>155</sup> A *Lackey* claim could satisfy the first *Teague* exception because it is supported by substantive constitutional law and “does not propose a new rule of criminal procedure.”<sup>156</sup> Further, a *Lackey* claim falls within the first exception to *Teague* given that it places a class of individuals—death row prisoners with lengthy delays—beyond the state’s power to execute.<sup>157</sup> In *Penry v. Lynaugh*, the Court determined that *Teague* did not prevent it from considering the merits of the defendant’s argument that his execution would violate the Eighth Amendment given that he had the “reasoning capacity of a 7-year-old.”<sup>158</sup> Writing for a unanimous Court,<sup>159</sup> Justice O’Connor explained that the defendant’s claim fell within the first *Teague* exception because “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.”<sup>160</sup> Alternatively, the *Lackey* claim might satisfy the second *Teague* exception because the claim rests on the fundamental constitutional principles underlying the Eighth Amendment’s ban on cruel and unusual punishment.<sup>161</sup> A court’s acceptance of either of these

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Cir.), cert. dismissed, 514 U.S. 1093 (1995); see also *Chambers v. Dretke*, 145 F. App’x 468, 472 (5th Cir. 2005) (declaring that the district court’s resolution that petitioner’s claim was *Teague*-barred was “not debatable.”).

<sup>153</sup> *Simmons*, supra note 61, at 1263; see *Flynn*, supra note 79, at 316 (“Although prisoners raise *Lackey* claims collaterally through habeas petitions, these claims do not attack the constitutionality of initial state court proceedings, but instead seek relief for the state’s postjudgment action.” (footnote omitted)).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 1264.

<sup>156</sup> *Id.*

<sup>157</sup> See *Flynn*, supra note 79, at 317 (“Because *Lackey* claims propose that lengthy death row incarceration renders a class of death row prisoners constitutionally ineligible for the death penalty, such claims should escape *Teague*’s bar under this exception.” (footnote omitted)).

<sup>158</sup> 492 U.S. 302, 328 (1989).

<sup>159</sup> All the Justices joined in Part IV-A of Justice O’Connor’s opinion. See *id.* at 306.

<sup>160</sup> *Id.* at 330. Justice O’Connor further noted that “[i]n both cases, the Constitution itself deprives the State of the power to impose a certain penalty, and the finality and comity concerns . . . have little force.” *Id.*

<sup>161</sup> *Simmons*, supra note 61, at 1264; see *Flynn*, supra note 79, at 318 (“*Teague* doctrine permits retroactive application of new rules concerning bedrock constitutional principles ‘implicit in the

arguments would provide an opportunity to consider the substantive merits of the *Lackey* claim.

Thus, although *Teague* has prevented some courts from reaching the merits of a *Lackey* claim, it is possible for a court to review a *Lackey* claim by construing *Teague*'s limits as inapplicable.

Overall, procedural issues dispose of a number of *Lackey* claims without consideration of the claim's substantive arguments. The procedural issues have been compounded by Justice Thomas's declaration in *Knight* that the experiment in the lower courts had "concluded"<sup>162</sup>—an assertion that has further discouraged lower court judges from considering petitioners' arguments in support of their *Lackey* claims.<sup>163</sup> Justice Thomas's assertion has become somewhat of a self-fulfilling prophecy—not because courts have agreed with his assessment of the *Lackey* claim after careful consideration, but because procedure has stood in the way of a careful review of the claim by state and lower federal courts.

In lieu of lower courts, academics have stepped in to undertake an in-depth analysis of the *Lackey* claim. Several authors have persuasively argued that despite the limited treatment of the *Lackey* claim in the lower courts, an inordinate delay between death sentences and execution *does* violate established Eighth Amendment principles.<sup>164</sup> Many have urged the Supreme Court to declare such delays unconstitutional, and their arguments closely track those raised by Justice Stevens and Justice Breyer.<sup>165</sup> Execution after long delays on death row violates the Eighth Amendment and fails to meet the standard set forth in *Furman* and *Gregg*, because execution under these circumstances would have been unacceptable to the Framers and lacks a robust retributive or deterrent justification.<sup>166</sup>

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concept of ordered liberty.' The *Lackey* claim rests on the Eighth Amendment's prohibition of cruel and unusual punishment, a fundamental constitutional guarantee." (footnotes and citation omitted)).

<sup>162</sup> See *Knight v. Florida*, 528 U.S. 990, 993 (1999) (Thomas, J., concurring in the denial of certiorari).

<sup>163</sup> See, e.g., *Bieghler v. State*, 839 N.E.2d 691, 697 (Ind. 2005) ("We also noted Justice Thomas's subsequent observation in *Knight v. Florida* that *Lackey* claims had been rejected by the courts that have considered them." (citations omitted)).

<sup>164</sup> See, e.g., Aarons, *supra* note 35, at 206; Dwight Aarons, *Getting Out of this Mess: Steps Toward Addressing and Avoiding Inordinate Delay in Capital Cases*, 89 J. CRIM. L. & CRIMINOLOGY 1, 40 (1998) (noting that a capital defendant's "Eighth Amendment . . . claim is analogous to a claim based on the Sixth Amendment right to a speedy trial"); Root, *supra* note 64, at 316-17 ("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.").

<sup>165</sup> See, e.g., Connolly, *supra* note 32, at 116-30; Flynn, *supra* note 79, at 332-33.

<sup>166</sup> Jessica Feldman, Comment, *A Death Row Incarceration Calculus: When Prolonged Death Row Imprisonment Becomes Unconstitutional*, 40 SANTA CLARA L. REV. 187, 199 (1999) ("If the

## V. SOLUTIONS

As Justice Stevens and Justice Breyer suggest, inordinate delay on death row can run afoul of the Eighth Amendment's ban on cruel and unusual punishment.<sup>167</sup> However, numerous procedural obstacles have stunted the "experiment" which began in the lower courts over fifteen years ago. As a result, the Supreme Court has been hesitant to consider the arguments raised by death row inmates challenging delayed executions.

Scholars have proposed solutions to facilitate courts' consideration of the merits of a *Lackey* claim. For example, one author recommended that courts treat the *Lackey* claim as a matter of first impression, because so few courts have actually substantively opined on the constitutionality of inordinate delay.<sup>168</sup>

While litigants should continue to seek validation of *Lackey* claims in the courts, legislative solutions are also available. This Part briefly discusses three broad solutions that, although not wholly responsive to the *Lackey* problem, could provide relief to inmates or prevent future inordinate delays. It then outlines more narrowly tailored measures that legislatures should adopt to solve the *Lackey* problem.

### A. Abolishing the Death Penalty

One obvious way to dispose of the inordinate delay problem is to eliminate capital punishment altogether. As scholars Carol Steiker and Jordan Steiker observe, "[T]he significance of the [issue raised by the *Lackey* claim] is the way in which it highlights the 'American capital punishment phenomenon'—the prevailing fragility of the death penalty in this country given the ongoing, pronounced inability of states to consummate death sentences with executions."<sup>169</sup>

Framers did not intend prisoners to sit on death row for years awaiting execution, and if neither retribution nor deterrence is served by executing prisoners after a lengthy delay, then an execution after such a delay fails the *Gregg* test and conflicts with the Eighth Amendment.<sup>167</sup>

<sup>167</sup> See *Thompson v. McNeil*, 129 S. Ct. 1299, 1299 (2009) (statement of Stevens, J., respecting the denial of certiorari) ("[B]oth Justice Breyer and I have noted that substantially delayed executions arguably violate the Eighth Amendment's prohibition against cruel and unusual punishment.")

<sup>168</sup> See McMahan, *supra* note 76, at 59-62 ("The simple reality is that more states than not haven't encountered this issue and are now barred from seriously considering it.")

<sup>169</sup> Carol S. Steiker and Jordan M. Steiker, *Capital Punishment: A Century of Discontinuous Debate*, 100 J. CRIM L. & CRIMINOLOGY 643, 685-86 (2010).

Opponents of state-sanctioned killing have long advocated abolition of capital punishment for reasons beyond those behind the *Lackey* problem. Several Supreme Court Justices—including Marshall, Brennan, and Stevens—have concluded that capital punishment is *per se* unconstitutional.<sup>170</sup> Additionally, popular support for the death penalty has waned in recent years; in 2011, it dropped to its lowest level since 1972, the year that Georgia's capital punishment scheme was declared unconstitutional in *Furman*.<sup>171</sup>

Recently, several states have initiated legislation to repeal the death penalty. In 2011, Illinois Governor Pat Quinn signed legislation abolishing the death penalty and commuted fifteen death sentences to life without parole following a decade-long moratorium on executions.<sup>172</sup> Following on the heels of states like New Jersey and New Mexico, Illinois became the sixteenth state to eliminate capital punishment.<sup>173</sup> Quinn's belief is that "[i]t is impossible to create a perfect system, free of all mistakes . . . [and that] it's the right and just thing to abolish the death penalty and punish those

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<sup>170</sup> See *Furman v. Georgia*, 408 U.S. 238, 305 (1972) (Brennan, J., concurring); *id.* at 369-72 (Marshall, J., concurring) (concluding that "capital punishment cannot stand"). In *Gregg v. Georgia*, Justice Stewart wrote for a plurality of the Court:

Although this issue [of whether capital punishment is *per se* unconstitutional] was presented and addressed in *Furman*, it was not resolved by the Court. Four Justices [Burger, Blackmun, Powell, and Rehnquist] would have held that capital punishment is not unconstitutional *per se*; two Justices [Brennan and Marshall] would have reached the opposite conclusion; and three Justices [Douglas, Stewart, and White], while agreeing that the statutes then before the Court were invalid as applied, left open the question whether such punishment may ever be imposed.

428 U.S. 153, 169 (1976) (plurality opinion) (footnotes omitted). Justice Stevens has voiced this opinion more recently. See *Baze v. Rees*, 553 U.S. 35, 86 (2008) (Stevens, J., concurring in the judgment) ("I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents 'the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.'" (quoting *Furman*, 408 U.S. at 312 (White, J., concurring))). "With his concurring opinion in *Baze*, Justice Stevens became the fifth *Gregg* Justice to declare that capital punishment violates the Eighth Amendment." Elisabeth Semel, *Reflections on Justice John Paul Stevens's Concurring Opinion in Baze v. Rees: A Fifth Gregg Justice Renounces Capital Punishment*, 43 U.C. DAVIS L. REV. 783, 791 (2010).

<sup>171</sup> See Frank Newport, *In U.S., Support for Death Penalty Falls to 39-Year Low*, GALLUP (Oct. 13, 2011), <http://www.gallup.com/poll/150089/support-death-penalty-falls-year-low.aspx> (noting that this poll was taken soon after the controversial execution of Troy Davis in Georgia, although "high-profile executions" in previous years were not accompanied by similar decreases in support for capital punishment).

<sup>172</sup> See *Illinois Abolishes the Death Penalty*, NPR (Mar. 9, 2011), <http://www.npr.org/2011/03/09/134394946/illinois-abolishes-death-penalty>.

<sup>173</sup> *States with and without the Death Penalty*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Jan. 11, 2013).

who commit heinous crimes—evil people—with life in prison without parole or any chance of release.”<sup>174</sup>

In 2012, legislators introduced abolition bills in eleven states, including Connecticut, Georgia, Nebraska, Missouri, Maryland, Kentucky, and Kansas, although only one successfully passed.<sup>175</sup> On April 25, 2012, Connecticut became the seventeenth state to abolish the death penalty.<sup>176</sup> Governor Dannel P. Malloy signed into law legislation that repealed capital punishment for future crimes—although this law does not apply to the eleven men currently imprisoned on death row in the state.<sup>177</sup> Malloy stated that he “came to believe that doing away with the death penalty was the only way to ensure it would not be unfairly imposed.”<sup>178</sup> Malloy cited the fact that the eleven men currently on death row in Connecticut “are far more likely to die of old age than be put to death” to underscore the unworkability of the state’s death penalty law.<sup>179</sup> Abolition bills have also been proposed in Maryland and Texas for 2013, and legislators in several other states plan to introduce similar bills this session.<sup>180</sup>

While this trend is gaining momentum, it is extremely unlikely that the thirty-three states that still impose the death penalty will all abolish the practice.<sup>181</sup> Even still, the repeal of capital punishment and commutation of death sentences to life sentences could provide relief to prisoners who have suffered as a result of their lengthy confinement on death row.

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<sup>174</sup> Ray Long & Todd Wilson, *Gov. Pat Quinn Turned to Bible and Writings of Late Cardinal Joseph Bernardin for Difficult Death Penalty Decision*, CHI. TRIB. (Mar. 10, 2011), [http://articles.chicagotribune.com/2011-03-10/news/ct-met-illinois-death-penalty-bill-si20110309\\_1\\_death-penalty-pat-quinn-families-of-murder-victims](http://articles.chicagotribune.com/2011-03-10/news/ct-met-illinois-death-penalty-bill-si20110309_1_death-penalty-pat-quinn-families-of-murder-victims).

<sup>175</sup> 2012—*Legislation*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/2012-Legislation> (last visited Jan. 11, 2013) (listing state-by-state legislation (proposed and/or passed in 2012) regarding the death penalty).

<sup>176</sup> Daniela Altimari, *Without Fanfare, Malloy Signs Bill Abolishing Death Penalty*, HARTFORD COURANT (Apr. 25, 2012), [http://articles.courant.com/2012-04-25/news/hc-death-penalty-signing-0426-20120425\\_1\\_death-penalty-gail-canzano-capital-punishment](http://articles.courant.com/2012-04-25/news/hc-death-penalty-signing-0426-20120425_1_death-penalty-gail-canzano-capital-punishment).

<sup>177</sup> *Id.*

<sup>178</sup> *Recent Legislation: Governor’s Signature Makes Connecticut Fifth State in Five Years to End Death Penalty*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/recent-legislation-governors-signature-makes-connecticut-fifth-state-five-years-end-death-penalty> (last visited Jan. 11, 2013).

<sup>179</sup> *Id.*

<sup>180</sup> *See Recent Legislative Activity*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/recent-legislative-activity> (last visited Jan. 11, 2013) (listing recent state-by-state legislation (proposed and passed) regarding the death penalty).

<sup>181</sup> This scenario is particularly unlikely, as some of the remaining states—such as California, Texas, and Florida—have the largest populations on death row. *See* DEATH ROW U.S.A., *supra* note 21, at 32-61 (listing the number of death row inmates per state).

### B. *Reforming the Capital Appeals and Habeas Processes*

There are numerous countervailing policy considerations that caution courts and legislatures against adopting bright-line rules or quick fixes to solve the problems associated with inordinate delays on death row.<sup>182</sup> Unlike those who advocate abolishing the death penalty, other scholars who favor capital punishment propose reforms to streamline the capital appeals and habeas process out of the recognition that this part of the litigation cycle accounts for much of the delay on death row.

Some scholars have proposed alternatives that could prevent future *Lackey* violations by making the system more efficient. State legislatures should consider implementing some of these suggestions in order to help avoid future *Lackey* claims. For example, a provision providing funding, training, and resources for those who represent indigent defendants could reduce the likelihood of ineffective assistance. However, Professor Eve Brensike Primus argues that such reforms are unlikely to occur—or if they were to occur, that they would be unlikely to wholly solve the problem.<sup>183</sup>

Instead, Professor Primus suggests a structural reform that would help alleviate the problems associated with ineffectiveness of counsel, an issue which many inmates raise in collateral challenges to their conviction and sentences.<sup>184</sup> Specifically, she recommends allowing the issue of ineffective assistance to be raised by attorneys on direct appeal, rather than requiring defendants to make this claim only on postconviction review.<sup>185</sup> Although this change could ensure that future prisoners do not spend the staggering amount of time on death row that many do now, these suggestions will not help those currently raising *Lackey* claims find recognition of their constitutional challenge or relief from their suffering.

### C. *Improving Death Row Conditions*

Although it is not a complete solution, another way to partially resolve the problems underlying the *Lackey* claim is to improve the conditions of confinement on death row. Around the time that Justice Stevens issued his *Lackey* memorandum, scholars Robert Johnson and John L. Carroll observed

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<sup>182</sup> For example, there are perverse incentives for reviewing courts (raised by Justice Thomas in *Knight*), as well as incentives for inmates to file frivolous claims purposefully to delay incarceration on death row as a predicate for raising a *Lackey* claim later. See *supra* notes 124-26 and accompanying text.

<sup>183</sup> See Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 684, 706 (2007).

<sup>184</sup> *Id.* at 706-09.

<sup>185</sup> *Id.* at 706.

that “the treatment of death-row prisoners has not kept pace with the development of their rights on appeal. . . . What formerly was a brief but debilitating experience has now become a seemingly endless and agonizing one.”<sup>186</sup> Conditions are uniformly stark on death rows across the country.<sup>187</sup> In addition to the emotional stress that stems from awaiting execution, death row inmates further suffer in “a prison within a prison, physically and socially isolated from the prison community and the outside world.”<sup>188</sup> Professor Melvin Urofsky posited that “[i]f one is going to argue that even condemned murderers retain some spark of humanity, some rights of individual autonomy, then something must be done to either improve death row conditions, or permit those who wish to terminate that existence through execution of sentence the right to do so.”<sup>189</sup>

Despite the political unpopularity of providing additional resources and funding to death row inmates, some states have initiated successful reforms to improve conditions on death row. An example of early reform took place in Tucker, Arkansas, in 1968, prior to the *Furman* decision.<sup>190</sup> Death row inmates were provided with the opportunity to integrate with the rest of the prison population during meals and other activities, and were also given extended recreational, visitation, and other privileges.<sup>191</sup> In the mid-1980s, the Texas Department of Corrections began classifying death row inmates as either “death row work-capable” or “death row segregation,” and members of the former category were permitted to work in a factory or as janitors or orderlies during their period of incarceration.<sup>192</sup> And the Missouri Department of

<sup>186</sup> Robert Johnson & John L. Carroll, *Litigating Death Row Conditions: The Case for Reform*, in PRISONERS AND THE LAW 8-3 (Ira P. Robbins ed., Release no. 31, 2004); see also Melvin I. Urofsky, *A Right to Die: Termination of Appeal for Condemned Prisoners*, 75 J. CRIM. L. & CRIMINOLOGY 553, 568-73 (1984) (detailing the horrid conditions of death row that often lead prisoners to waive their appeals).

<sup>187</sup> See Johnson & Carroll, *supra* note 186, at 8-4 (“Death-row living conditions vary little from state to state.”); see also *supra* notes 69-71 and accompanying text. *But see* Mary A. Fischer, *The Appeal of Death Row*, ATLANTIC MONTHLY, Nov. 2011, at 21 (discussing how one prisoner would prefer to be sentenced to death as he knows that an actual execution is unlikely, and living conditions on death row are better).

<sup>188</sup> Urofsky, *supra* note 186, at 571 (quoting ROBERT JOHNSON, CONDEMNED TO DIE: LIFE UNDER SENTENCE OF DEATH 47 (1981)).

<sup>189</sup> *Id.* at 573.

<sup>190</sup> See George Lombardi, Richard D. Sluder & Donald Wallace, *The Management of Death-Sentenced Inmates: Issues, Realities, and Innovative Strategies* 6 (Mar. 1996) (unpublished manuscript), available at <http://doc.mo.gov/documents/DeathSentencedInmates.pdf> (discussing dramatic death row reforms under the leadership of Warden Tom Murton).

<sup>191</sup> See *id.* (discussing this successful but brief reform, which was eventually dismantled by the Arkansas Board of Corrections).

<sup>192</sup> See *id.* (“Although the program was initially met with skepticism by staff, no serious incidents were reported following implementation of reforms.” (citations omitted)).

Corrections reformed its management of death row inmates following a class action suit alleging constitutional deprivations. After entering into a consent decree, the department began classifying death row inmates into one of three custody levels with corresponding levels of privileges: regular custody, close custody, or no-contact custody.<sup>193</sup>

In determining appropriate legislative responses to this problem, policy-makers should balance considerations of institutional safety and security, the penological purposes that underlie the current structure of death row, and the fundamental needs of prisoners. Policymakers should also engage in an evaluation of the appropriate conditions on death row in light of the statistical data about the length of time inmates currently spend awaiting execution. Implementing even minor changes could provide significant benefits to death row inmates and alleviate some of the concerns that lie at the heart of the *Lackey* claim. However, such reforms provide only limited relief of the problem posed by inordinate delay, because “the mental suffering and anxiety caused by uncertainty of the final disposition of the sentence is an inherent characteristic of death row.”<sup>194</sup>

#### D. Model Lackey Legislation

With the exception of eliminating the death penalty altogether, the other alternatives presented here provide only limited help to current inmates or serve to prevent inordinate delays in the future. Although these reforms and proposals merit careful consideration by state legislatures, I propose a more narrowly tailored solution that precisely identifies which inmates are eligible for relief based on inordinate delay on death row and provides relief by commuting their death sentences to sentences of life without parole in certain circumstances.

Professor Dwight Aarons proposes setting a date—twice the national average amount of time spent on death row—at which point an inmate’s *Lackey* claim becomes ripe, and his execution may run afoul of the Eighth Amendment.<sup>195</sup> I propose adopting Aarons’s timeframe, but for a slightly different purpose. Incarceration for twice the national average, which today would be around twenty-nine years,<sup>196</sup> should trigger an automatic review of the inmate’s time on death row by the state supreme court. The court

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<sup>193</sup> *Id.*

<sup>194</sup> Feldman, *supra* note 166, at 209 n.197.

<sup>195</sup> See Aarons, *supra* note 35, at 207 (“While inordinate delay need not be strictly defined as twice the national average, this proposed bright line rule represents a choice that provides a ready reference point for capital cases.”).

<sup>196</sup> See SNELL, *supra* note 20, at 12 tbl.8 (178 months times two).

should then determine if continued incarceration and execution would violate the Eighth Amendment. The court would be tasked with creating a report that breaks down the procedural history of the prisoner's case and details the inmate's time on death row.<sup>197</sup> This review should not burden the court, as the relevant information is readily available in court dockets and filings and requires minimal independent investigation.

This analysis is critical to my further proposal operationalizing Justice Stevens's recommendation in *Lackey* that the court consider the meaningful differences among delays caused by the inmate's frivolous filings, the legitimate exercise of an inmate's rights, and negligence or error by the state.<sup>198</sup> The leading cause of the inmate's delay should be the determinative factor in considering whether a constitutional violation has occurred.<sup>199</sup>

### 1. Delay Caused by the Inmate's Abuse of the Judicial System

If the leading cause of a prisoner's delay is, to use Justice Stevens's language, "a petitioner's abuse of the judicial system by escape or repetitive, frivolous filings,"<sup>200</sup> then no Eighth Amendment violation has occurred. This inquiry will focus on the petitioner's abuse of the legal system by escape or repetitive filings, as it is unlikely that a court would characterize a claim, even a claim that may ordinarily be considered far-fetched, as frivolous.<sup>201</sup> This is due to the fact that a lawyer's ethical obligations to her client in a capital case require her to assert a claim based on "any conceivable error."<sup>202</sup> Further, while this provision serves as an important safeguard,

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<sup>197</sup> While this task can be delegated to administrative staff or another body, the court needs to assess the constitutional issue.

<sup>198</sup> See *Lackey v. Texas*, 514 U.S. 1045, 1047 (1995) (memorandum of Stevens, J., respecting the denial of certiorari) (noting how English jurists have made similar distinctions based on the cause of delay) (citing *Pratt v. Att'y Gen.*, [1994] 2 A.C. 1 (P.C.) 33 (appeal taken from Jam.)).

<sup>199</sup> The leading cause of delay is to be determined by the judge based on the report which will detail each inmate's time on death row. This inquiry is akin to the type of causation determinations judges make on a regular basis. Judges are therefore best suited to inquire into which cause accounts for more years of delay than any other.

<sup>200</sup> *Lackey*, 514 U.S. at 1047 (memorandum of Stevens, J., respecting the denial of certiorari).

<sup>201</sup> A frivolous claim has been defined by the court as one that is "clearly baseless"—this definition "encompass[es] allegations that are 'fanciful,' 'fantastic,' and 'delusional.'" *Denton v. Hernandez*, 504 U.S. 25, 32-33 (1992) (citations omitted). Although this definition is already a narrow one, especially in criminal cases "courts are loath to impose sanctions [for filing frivolous claims] against lawyers in any case in which the defendant's liberty is at stake." Monroe H. Freedman, *The Professional Obligation to Raise Frivolous Issues in Death Penalty Cases*, 31 HOFSTRA L. REV. 1167, 1177-78 (2003).

<sup>202</sup> *Id.* at 1177-79 ("Counsel in a capital case must, as a matter of professional responsibility, raise every issue at every level of the proceedings that might conceivably persuade even one judge in an appeals court, or in the Supreme Court . . .").

frivolous filings are unlikely to be the leading cause for many inmates who have experienced delays of twenty-nine years. “[F]rivolous petitions account for an infinitesimal fraction” of delays in comparison to other causes of delay in the criminal justice system.<sup>203</sup> The system has mechanisms in place to prevent frivolous claims from being filed, including procedural rules and sanctions.<sup>204</sup> In any case, the filing of a frivolous petition is unlikely to cause a delay of any significant length. One author notes that “[w]hen petitions that appear to be frivolous are filed, they are either dismissed without comment . . . or they are resoundingly condemned.”<sup>205</sup>

Ensuring that an Eighth Amendment claim is not available to an inmate who caused his own delay would address Justice Thomas’s fear that recognizing a *Lackey* claim would incentivize inmates to abuse the system so that they could later raise a claim based on the resulting delay. Indeed, it is critically important to distinguish between delays caused by the inmate and delays caused by other factors in order to ensure that relief granted to *Lackey* petitioners goes only to those who are deserving. A rigorous inquiry to this effect will prevent capital defense lawyers from purposefully dragging out the postconviction litigation process.<sup>206</sup>

## 2. Delay Caused by the Process of Judicial Review

If the leading cause of a prisoner’s delay is the prisoner’s “legitimate exercise of his right to review,”<sup>207</sup> then no constitutional violation has occurred. This measure also accounts for the inherent delays that result from the Court’s death penalty jurisprudence and the modern capital appeals process. It reflects the fact that thorough and sometimes repeated review of a prisoner’s claims is an integral part of the system which serves the compelling interest of ensuring accuracy. This time is essentially “neutral”—while death row inmates should not be “punished” by delays if they pursue appeals to which they are entitled, neither should this time be

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<sup>203</sup> Root, *supra* note 64, at 299.

<sup>204</sup> See Aarons, *supra* note 35, at 46-47 (suggesting that frivolous filings are rare in capital cases, and noting that “[s]ignificantly, it is hard to find reported cases imposing such sanctions”); Root, *supra* note 64, at 299 (“There is an extensive network of procedural rules in place that discourages the filing of frivolous, premature, or otherwise inappropriate petitions.”).

<sup>205</sup> *Id.*

<sup>206</sup> See David Margolick, *At the Bar: Death Row Appeals Are Drawing Sharp Rebukes from Frustrated Federal Judges in the South*, N.Y. TIMES, Dec. 2, 1988, at B9 (“Unable to abolish capital punishment de jure, they are attempting it de facto, by making the process so protracted that it will ultimately be abandoned.”).

<sup>207</sup> *Lackey v. Texas*, 514 U.S. 1045, 1047 (1995) (memorandum of Stevens, J., respecting the denial of certiorari).

counted against the state by a court assessing a *Lackey* claim. Additionally, this proposition further alleviates concerns that recognizing a *Lackey* claim would incentivize the judiciary to hastily review a prisoner's claim lest the delay cause a constitutional violation.<sup>208</sup>

### 3. Delay Caused by the State's Misconduct or Negligence

If the leading cause of a prisoner's delay is the state's "negligence or deliberate action,"<sup>209</sup> then the prisoner's sentence should be commuted to life without parole. Undoubtedly, the most compelling case for relief based on a *Lackey* claim arises when the State has protracted a prisoner's stay on death row.<sup>210</sup> For example, a *Lackey* claim would be recognized in cases with facts similar to those of *Johnson v. Bredesen*. In *Johnson*, a change in state law gave the petitioner access to evidence undermining eyewitness testimony against him eleven years after his conviction.<sup>211</sup> Justice Stevens, dissenting from the denial of certiorari, explained that "[t]his evidence calls into question the persuasive force of the eyewitness' testimony, and, consequently, whether Johnson's conviction was infected with constitutional error."<sup>212</sup> He observed that "[w]e cannot know as a definitive matter whether, if the State had not withheld exculpatory evidence, Johnson would have been convicted of these crimes. We do know that Johnson would not have waited for 11 years on death row before the State met its disclosure obligations."<sup>213</sup>

But what players or institutions constitute "the State"? This term would incorporate those directly involved with the prosecution of the case, such as the district attorneys. Additionally, it would include the executive branch.<sup>214</sup> Therefore, moratoria imposed by governors would count against the state in the assessment of a *Lackey* claim, as they usually reflect a state's inability—albeit a temporary one—to execute inmates constitutionally. In California, for example, state officials requested more time before judicial review of a

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<sup>208</sup> See *Knight v. Florida*, 528 U.S. 990, 992 (1999) (Thomas, J., concurring in the denial of certiorari).

<sup>209</sup> *Lackey*, 514 U.S. at 1047 (memorandum of Stevens, J., respecting the denial of certiorari).

<sup>210</sup> See, e.g., *Johnson v. Bredesen*, 130 S. Ct. 541, 542 (2009) (statement of Stevens, J., respecting the stay of execution and denial of certiorari) ("[S]tate-caused delay in state-sponsored killings can be unacceptably cruel.").

<sup>211</sup> See *id.*

<sup>212</sup> *Id.* (citing *Brady v. Maryland*, 373 U.S. 83 (1963)).

<sup>213</sup> *Id.*

<sup>214</sup> The term would not include the Judiciary insofar as the action by the state is simply judicial decisionmaking. Intentional misconduct on the part of the Judiciary that results in an inmate's delay, however, would be counted against the state in assessing a *Lackey* claim.

new lethal injection procedure, so the state was unable to seek any executions in 2011.<sup>215</sup>

Finally, as one last safeguard to assure relief to inmates deserving a commutation to a life sentence, I propose including a safety valve that enables courts to grant relief to a petitioner whose leading cause of delay is not negligence or deliberate action by the state. This procedure would be used, for example, in a circumstance where the petitioner's legitimate exercise of his right to review is the leading cause of delay, but state misconduct also played a substantial role or was particularly egregious. This very narrow carve-out would permit courts to grant relief based on equitable principles, and—in keeping with the Court's consideration of equitable principles—would only be used sparingly.<sup>216</sup>

### CONCLUSION

Just as the process of consummating a death sentence is fraught with complicated issues that lead to numerous delays, so the *Lackey* claim itself is inextricably bound up with difficult procedural and policy questions. Because the Court remains unwilling to confront this issue head on, it is critical that states seek alternative solutions to the problems posed by inordinate death row delays. States must take action to address the concerns related to the *Lackey* claim. But they have many options for doing so, whether by reforming the prison system or their postconviction-relief processes, or even by eliminating capital punishment altogether. By using Justice Stevens's framework as a model for crafting legislation to address the growing problem of death row delays, it is possible, at long last, to balance the competing concerns surrounding the *Lackey* claim and to provide a workable solution for both states and inmates.

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<sup>215</sup> See Carol J. Williams, *State Won't Execute Anyone in 2011*, L.A. TIMES, May 4, 2011, at A1 (“The California Department of Corrections and Rehabilitation requested more time because San Quentin State Prison’s new warden, Michael Martel, wants to recruit a new execution team to replace the one that was assembled and trained last year . . .”).

<sup>216</sup> See *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96 (1990) (“Federal courts have typically extended equitable relief only sparingly.”). Kate McMahon has also recommended legislation to address the problems that arise from the “death row syndrome”; in addition to the proposals outlined in this paper, I recommend following McMahon’s suggestion that legislation support appropriate alternatives, such as clemency. See McMahon, *supra* note 76, at 74-75 (“[L]egislation should nonetheless continue to provide a clemency appeal option for that very narrow set of cases that might be able to benefit from it, but it should not presume that clemency adequate [sic] fulfills the function that an Eighth Amendment inordinate delay challenge does.”).