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COMMENT

CHALLENGING AN EXECUTION AFTER PROLONGED CONFINEMENT ON DEATH ROW [LACKEY REVISITED]

INTRODUCTION

According to the Bureau of Justice, the average death row inmate spends nearly thirteen years on death row awaiting execution. Largely attributable to the procedural safeguards implemented after the reinstatement of capital punishment in 1976, the average delay between sentencing and execution has nearly doubled within the past two decades.

Prolonged confinement, commonplace for today’s capital defendant, potentially gives rise to a “novel . . . [and] legally complex” claim. The so-called Lackey claim challenges the combination of an execution with a significant period of confinement under sentence of death as a violation of the Eighth Amendment


3 See DOJ Tables, supra note 1 (the average time between sentencing in execution in 1987 was approximately 86 months as compared with the current delay of 153 months).


5 Named after the litigant who gained notoriety as the first to assert the claim, or at least, the first to attract a Supreme Court justice’s attention.
prohibition against cruel and unusual punishment.\textsuperscript{6} While the novelty of the claim may have worn off over the past decade,\textsuperscript{7} the question, whether prolonged confinement on death row violates the Eighth Amendment, remains unanswered by the lower courts and the Supreme Court alike.

This past year, an inmate petitioned the Supreme Court for certiorari to consider whether his impending execution, after well-over thirty years on death row, violated the Eighth Amendment.\textsuperscript{8} The Court denied the inmate’s request for certiorari, re-igniting an ongoing debate\textsuperscript{9} between three of the justices about the merits of this potential Eighth Amendment claim and the legitimacy of a capital punishment system that inevitably imposes a prolonged period of confinement under sentence of death prior to the actual execution.\textsuperscript{10}

Is it possible for prolonged confinement to go from simply an unavoidable consequence of extensive appellate procedure to a form of cruel and unusual punishment? In other words, is there a tipping point in time where the courts must step in and say “enough is enough”? With over three thousand inmates on death row nationwide,\textsuperscript{11} the answer to this question has the “potential for far-reaching consequences.”\textsuperscript{12}

Part I of this Comment briefly describes the landscape of capital punishment in the United States. Part II summarizes the arguments supporting the claim that prolonged confinement on death row constitutes cruel and unusual punishment. Part III discusses the Supreme Court’s treatment of the \textit{Lackey} claim over the past decade. Part IV then analyzes the common obstacles that prevent inmates from successfully bringing \textit{Lackey} claims and suggests possible arguments for overcoming those obstacles. This Comment concludes

\textsuperscript{6} \textit{Id.}

\textsuperscript{7} The claim has been unsuccessfully asserted by inmates across the county. On at least five occasions, the Supreme Court has considered (and denied) certiorari petitions dealing with the \textit{Lackey} claim. \textit{See infra Part III.}


\textsuperscript{10} \textit{Thompson}, 129 S. Ct. 1299, 1299-3101 (2009) (Stevens, J., respecting the denial of certiorari); \textit{id.} at 1301-03 (Thomas, J., concurring in denial of certiorari); \textit{id.} at 1303-04 (Breyer, J., dissenting from denial of certiorari).


\textsuperscript{12} \textit{Lackey}, 514 U.S. at 1047.
that it is necessary for the Supreme Court to conclusively resolve the Lackey issue.

I. THE CURRENT STATE OF CAPITAL PUNISHMENT IN AMERICA

According to a recent study by the NAACP, there are currently 3,297 inmates on death row nationwide.\textsuperscript{13} Thirty-five states and the federal government permit capital punishment.\textsuperscript{14} In 2009, fifty-two executions occurred in the United States,\textsuperscript{15} as compared to a high of ninety-eight executions in 1998.\textsuperscript{16} The Death Penalty Information Center projected 106 new death sentences in 2009,\textsuperscript{17} also down from a high of more than 300 in 1998.\textsuperscript{18} To eliminate the death row population, the states would have to execute one inmate every single day for the next twelve years.\textsuperscript{19}

The Death Penalty Information Center reports that inmates awaiting execution typically spend up to twenty-three hours per day alone in their cells.\textsuperscript{20} Prisons often exclude death row inmates from prison education and employment programs.\textsuperscript{21} During this period of isolated confinement, inmates experience a pervasive state of uncertainty about their pending execution.\textsuperscript{22}

A recent summary of death row policies and conditions based on a survey of thirty-seven state and federal facilities noted:

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`. . .while there is some variability in policy from state to state, death row conditions nationally are characterized by 'rigid security, isolation, limited movement, and austere conditions.' Not surprisingly, there is evidence that these bleak conditions impact the psychological adjustment of
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\textsuperscript{13} Fins, \textit{supra} note 11, at 1.
\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} As stated, the current death row population nationwide is 3,297 persons. Assuming a conservative average of 100 new death sentences per year, the state could potentially reduce the total number of inmates by approximately 265 inmates per year. To eliminate the backlog, then, the state would have to execute an inmate every single day for twelve years.
\textsuperscript{21} Id.
\textsuperscript{22} Id.
death row inmates—many of whom spend years in this status.”

The Supreme Court has remarked that the time spent awaiting death is generally characterized by a general state of uncertainty about when and how the execution will take place, and is “one of the most horrible feelings to which [a person] can be subjected.” Justice Stephen Breyer recently argued that “it is difficult to deny the suffering inherent in a prolonged wait for execution—a matter which courts and judges have long recognized.”

As the number of prisoners on death row rises, the delay between sentencing and execution will likely also continue to increase. As the delay increases, so too does the potential for a constitutional violation. The following section describes the potential Eighth Amendment violation that might arise when a state attempts to execute an inmate following a period of prolonged confinement.

II. THE LACKEY-STYLE ARGUMENT

Inmates asserting a Lackey claim argue that execution following prolonged confinement on death row violates the Eighth Amendment prohibition against cruel and unusual punishment. Simply stated, the claim challenges the combination of an execution with a period of prolonged confinement on death row (generally not the execution or the period of confinement alone). Even if capital punishment and prolonged confinement are both constitutionally permissible, the combination of the two may nonetheless be unconstitutional. Inmates typically assert four basic arguments in support of their Lackey claim: (1) an execution after prolonged confinement is contrary to society’s evolving standards of decency; (2) an execution after prolonged confinement is contrary to the Framers’ intent; (3) an execution after prolonged confinement does not further the penological goals of deterrence and retribution; and (4) an execution after prolonged confinement is inconsistent with international norms.

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24 In re Medley, 134 U.S. 160, 172 (1890) (holding that a four-week delay between sentencing and execution constituted cruel and unusual punishment).
A. Contrary to Society’s Evolving Standards of Decency

The Eighth Amendment explicitly prohibits the infliction of “cruel and unusual punishments.” The phrase “cruel and unusual,” however, is not subject to a specific definition. In *Trop v. Dulles*, the Court stated:

The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The words of the Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the *evolving standards of decency* that mark the progress of a maturing society.

Whether a particular punishment violates the Eighth Amendment must be judged by the standards that “currently prevail,” not those of the past. In recent years, the Court has referenced society’s “evolving standards of decency” when assessing whether a punishment violates the Eighth Amendment. In two recent Death Penalty cases, *Atkins v. Virginia* and *Roper v. Simmons*, the Supreme Court evaluated the propriety of executing mentally retarded and juvenile offenders respectively by determining whether a national consensus existed against executing these types of offenders.

If a federal court considered a *Lackey* claim on its merits, it would likely consider society’s “evolving standards of decency” to resolve the question. While the analysis would not be as straightforward as the analysis in *Atkins* or *Roper*, a court could still engage in a similar inquiry to assess whether execution after prolonged confinement under sentence of death violates the Eighth Amendment. While society’s increasing reluctance to impose and carry out capital punishment might generally suggest evolution away from the use of capital punishment, there is little evidence to suggest that a national consensus exists against executing persons who spend a prolonged period of time on death row specifically.

27 U.S. Const. amend. VIII.
30 Id. (holding that executing a mentally retarded person violates the “cruel and unusual” clause of the Eighth Amendment); *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the Eighth Amendment prohibits the execution of juvenile offenders).
31 536 U.S. 304
32 543 U.S. 551
33 See *Roper*, 543 U.S. at 563; *Atkins*, 536 U.S. at 313.
34 See *Roper*, 543 U.S. at 560; *Atkins*, 536 U.S. at 313.
To date, no state prohibits the execution of an inmate after a period of prolonged confinement. In fact, few states have actually considered the Lackey claim. Since the Lackey claim depends on a prolonged period of incarceration on death row, only a small handful encounter the claim in the first place. In practice, the claims predominately come from California, Florida, and Texas, states with the largest death row populations. Likewise, no federal court has found a violation of the Eighth Amendment to execute an inmate after a prolonged period of time on death row.

The more persuasive argument may be that society’s acceptance of the death penalty seems to be waning. In 2009, only fifty-two executions occurred in the United States, down from a high in 1998 of ninety-eight executions. Fifteen states have abolished the death penalty entirely. Of the states that still permit the use of the death penalty, the vast majority employ the practice infrequently. Even the number of death sentences issued has dropped dramatically since 1999. If for no other reason than the enormous costs that capital punishment imposes on cash-strapped states, the push for a blanket abolition of the death penalty appears to be gaining strength.

Since a litigant could not effectively establish a national consensus against executing persons who have spent a prolonged period of time on death row, he or she would likely have to rely on this argument in combination with the arguments that follow.

B. Framers’ Intent

The Framers based the Eighth Amendment upon the Virginia Declaration of Rights of 1776, which was itself derived directly from the English Bill of Rights of 1689. Reference to the English Bills of Rights provides insight into the Framers’ intention when enacting the Eighth Amendment.

35 Fact Sheet, supra note 14 (Death Row Inmates by State).
36 Id. (Number of Executions Since 1976).
37 Id. (Number of Executions as a bar graph).
38 Id. (States Without the Death Penalty).
39 Id. (Number of Executions Since 1976). Out of the thirty-five states that permit the use of capital punishment, twenty-eight of the states have executed two or fewer persons within the past two years. Id.
40 Id. (Death Sentencing as a table). In 2008, the Death Penalty Information center projected 111 death sentences nationwide. Id. By comparison, more than 300 death sentences were issued in 1998. Id.
41 Justice Stevens has argued that the “time for a dispassionate, impartial comparison of the enormous costs that death penalty litigation imposes on society with the benefits that it produces has surely arrive.” Baze v. Rees, 128 S. Ct. 1520, 1548 (2008) (Stevens, J. concurring).
Evidence suggests that the English Bills of Rights would have prevented execution after a prolonged period of confinement. The English courts would not permit the government to hold a condemned prisoner for years prior to his or her execution.

Early American courts also prohibited prolonged death row incarceration, instead advocating for the “swift infliction of the death penalty to further penological goals and to prevent the condemned prisoner from suffering unnecessarily.” In one frequently cited case from the nineteenth century, the Supreme Court observed that because a condemned prisoner experiences horrible feelings of “uncertainty during the whole of it,” holding the prisoner in solitary confinement for a period of four weeks constituted cruel and unusual punishment. While this is not to suggest that holding an inmate for four weeks on death row would amount to a violation of the Eighth Amendment, there is arguably a point at which the periodic and regular apprehension of one’s execution becomes its own form of punishment independent of the execution itself, a principle the Framers were at least cognizant of when they drafted the Eighth Amendment.

The Supreme Court has upheld the constitutionality of the death penalty, in part, because the Framers considered it permissible. At minimum then, the Eighth Amendment must be construed to prohibit those punishments that the Framers considered unconstitutional when they adopted the Bill of Rights. While this is not to suggest that the converse is true, the Framers’ understanding of the Eighth Amendment lends some support to the argument that prolonged confinement on death row prior to execution might amount to a violation of the Eighth Amendment.

44 See Pratt v. Attorney General of Jamaica, 4 All E.R. 769, 774 (P.C. 1993) (en banc) (holding that “prolonged delay in carrying out a sentence of death after that sentence had been passed could amount to ‘inhuman . . . punishment or other treatment’ contrary to s 17(1) of the Jamaican Constitution irrespective of whether the delay was caused by the shortcomings of the state or the legitimate resort of the accused to all available appellate procedures”).
46 In re Medley, 134 U.S. 160, 172 (1890) (finding that solitary confinement for a period of only four weeks constituted cruel and unusual punishment).
C. Penological Goals of Retribution and Deterrence

The Supreme Court stated in *Gregg v. Georgia* that capital punishment is constitutionally permissible in part because it might serve "two principle social purposes: retribution and deterrence."\(^4^9\) Assuming that capital punishment furthers these penological goals, the combination of prolonged confinement and execution may not. If a punishment fails to meet the penological goals it was designed to address, the punishment is unconstitutional.\(^5^0\)

In his *Lackey* memorandum, Justice John Paul Stevens questioned whether these penological purposes have "any force" for inmates who spend a prolonged period of time under sentence of death."\(^5^1\) Justice Breyer echoed this argument in *Knight v. Florida*: "the longer the delay, the weaker the justification for imposing the death penalty in terms of punishment's basic retributive or deterrent purposes."\(^5^2\)

1. Retributive Theory of Capital Punishment

Under the retributive theory of punishment, a person who commits a crime should be punished simply because he has done wrong.\(^5^3\) Retributive punishment aims to impose a sanction proportional to the offender's culpability.\(^5^4\) Prolonged confinements undermine the retributive value of capital punishment by imposing a disproportionate punishment. Executing an inmate after prolonged confinement on death row subjects him to two punishments: prolonged solitary confinement under sentence of death, and execution. Society's desire for retribution could be met by imposing either execution or a prolonged period of solitary confinement. The combination of the two, however, is gratuitous and unnecessary.

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\(^4^9\) *Gregg*, 428 U.S. at 183 (opinion of Stewart, Powell, and Stevens, JJ.).

\(^5^0\) See *Coker v. Georgia*, 433 U.S. 584, 592 n.4 (1977) (plurality opinion) (finding that capital punishment would be unconstitutional if it did not "measurably serve the legitimate ends of punishment"); *Gregg*, 428 U.S. at 183–87 (opinion of Stewart, Powell, and Stevens, JJ.); *Furman v. Georgia*, 408 U.S. 238, 312–13 (1972) (White, J., concurring).


2. Deterrence Theory of Capital Punishment

Under the deterrence theory, punishment (or the possibility of punishment) discourages potential criminals from committing future crimes.55 The deterrent value of capital punishment, though, depends upon the promptness with which the state inflicts it.56 The longer the delay between sentencing and execution, the lower the deterrent effect.

According to a recent survey of criminological societies, however, nearly 84 percent of the nation's experts reject the argument that the death penalty deters murder.57 Additional evidence suggests that the Southern states, which account for more than 80 percent of all executions, also have the highest murder rates in the country as compared with the Northern states, which account for less than 1 percent of all executions and have the lowest murder rates in the country.58

If the death penalty has a minimal deterrent effect when administered without lengthy delay, then an execution following a period of significant prolonged confinement would arguably have even less deterrent effect.

D. International Norms

Though international norms are not binding on the United States, "the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of 'cruel and unusual punishments.'"59 In Foster v. Florida, Justice Breyer argued that the Court should consider international opinion in deciding a Lackey claim: "Just as attention to the judgment of other nations can help Congress determine the justice and propriety of America’s measures, so it can help guide this Court when it decides whether a particular punishment violates the Eighth Amendment."60

55 Von Hirsch, supra note 53, at 37–44 (describing the argument that punishment is necessary to deter future crimes).
57 Fact Sheet, supra note 14 (citing Michael L. Radelet & Ronald L. Akers, Deterrence and the Death Penalty: The Views of the Experts, 87 J. CRIM. L. & CRIMINOLOGY 1, 10 (1996)).
While the use of foreign precedent remains controversial, three of the Justices in the *Atkins* and *Roper* majority are still seated on the Court and would likely entertain foreign precedent if the Court were to consider a *Lackey* claim on its merits. Furthermore, international precedent is arguably relevant to the *Lackey* issue because (a) several foreign courts with similar constitutional provisions have directly addressed the issue in more detail than any American court; and (b) an increasing number of countries refuse to extradite offenders to the United States precisely out of concern that prolonged confinement on death row violates international standards of human rights. While the federal courts need not follow international precedent, these particular developments suggest that executing an inmate after a prolonged period of confinement on death row may not be consistent with society's evolving standards of decency.

The Supreme Court has explicitly validated the use of English precedent, "insofar as those opinions reflect a legal tradition that also underlies our own Eighth Amendment." In *Riley v. Attorney General of Jamaica*, British jurists agreed that inordinate delays awaiting execution invariably violate the prohibition against cruel and unusual punishment in the English Declaration of Rights. Since the language of the Eighth Amendment comes directly from the corresponding provisions of the English Declaration of Rights of 1698, it is relevant that England has banned unreasonable delays in execution.

International precedent surrounding this issue has created some problems with respect to American extradition requests. In *Elledge v. Florida*, Justice Breyer argued that the Court should grant certiorari

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62 Justices Breyer, Stevens, Kennedy, Souter, and Ginsburg composed the *Atkins* and *Roper* majorities, agreeing that that Eighth Amendment imposed certain restrictions on capital punishment. Justice Souter retired from the Supreme Court in June 2009 and was replaced by Justice Sonia Sotomayor. Justice Sotomayor's position on the death penalty is thought to be unknown, but she has endorsed the use of foreign sources to inform judicial opinions. See Sonia Sotomayor, Speech to the ACLU of Puerto Rico (April 2009), available at http://www.heritage.org/research/legalissues/wm2525.cfm#-ftnl2. Justice Stevens has also recently announced his retirement, but presumably he will also be replaced by a Justice with comparable ideology.


and consider a *Lackey* claim on its merits to “ease the practical anomaly created when foreign courts refuse to extradite capital defendants to America for fear of undue delay in execution.”\(^6\) In *Soering v. United Kingdom*, the European Court of Human Rights ("ECHR") considered whether the United Kingdom would violate Article 3 of the European Convention of Human Rights, which provides that “[n]o one shall be subjected to torture or to inhuman degrading treatment or punishment,” if it extradited a criminal defendant to the United States (knowing that he would likely face execution).\(^6\) While the ECHR stated that American capital punishment could be squared with democratic ideals, the Court refused to extradite based on the fact that “the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death.”\(^6\) Likewise, the Supreme Court of Canada also recently ruled that the possibility of prolonged incarceration on death row was a “relevant consideration” in deciding whether or not extradition to the United States would violate “principles of ‘fundamental justice.’”\(^7\)

By considering international precedent, a federal court could draw upon the analysis other courts have used to decide this issue and simultaneously address the practice problems surrounding extradition requests.

### III. Prior Treatment of the *Lackey* Claim

In the years following the reinstatement of capital punishment,\(^7\) the *Lackey*-style claim has only been considered by a handful of courts. No federal court has affirmatively recognized that an execution following prolonged confinement under sentence of death violates the Eighth Amendment. The following section focuses predominately on the Supreme Court’s treatment of the *Lackey* issue.

In 1995, Clarence Lackey asked the Supreme Court to consider “whether executing a prisoner who has already spent seventeen years on death row violates the Eighth Amendment’s prohibition against

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\(^6\) Id.

\(^7\) Foster v. Florida, 537 U.S. 990, 992–93 (2002) (Breyer, J., dissenting from denial of certiorari) (quoting United States v. Burns, [2001] 1 S. C. R. 283, 353, ¶123 (holding that extradition of an individual to a country where they may face the death penalty is a breach of fundamental justice under Section 7 of the Canadian Charter of Rights and Freedoms)).

\(^7\) See Gregg v. Georgia, 428 U.S. 153, 169 (1976) (holding that the practice of capital punishment does not invariably violate the U.S. Constitution).
cruel and unusual punishment.” The Supreme Court denied certiorari, but Justice Stevens issued a memorandum remarking that Lackey’s claim was “novel” and “not without foundation.” While Justice Stevens went on to describe the underlying claim, he ultimately concluded that Lackey’s claim, “with its legal complexity and its potential for far-reaching consequences, seems an ideal example of [a claim] which would benefit from further study” in the lower courts.

Three years later, William Elledge, a Florida inmate, asked the Supreme Court to consider whether execution after twenty-three years on death row constituted cruel and unusual punishment. The Supreme Court denied certiorari. Justice Breyer dissented and argued that the Court should have granted certiorari to address Elledge’s claim. “An execution may well cease to serve the legitimate penological purposes that otherwise provide a necessary constitutional justification for the death penalty,” Justice Breyer wrote, and “a reasoned answer to the ‘delay’ question could help ease the practical anomaly created when foreign courts refuse to extradite capital defendants.”

The Court had occasion to consider the Lackey claim again in Knight v. Florida and its companion case, Moore v. Nebraska. Again, the Court denied certiorari. Justice Clarence Thomas wrote a concurrence to the denial, commenting that there is no American 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.” Thomas also claimed that the lower courts had considered the Lackey claim and had “resoundingly rejected the claim as meritless.” Justice Breyer dissented and responded to Justice Thomas’s claim that the delays were the inmates’ own fault by noting that both cases involved “astonishingly

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73 Id.
74 Id. at 1047.
75 Id.
77 Id.
78 Id. at 944 (Breyer, J., dissenting from denial of certiorari).
79 Id. at 945.
80 Id. (citing Soering v. United Kingdom, 11 Eur. H. R. Rep. 439 (1989)).
82 Id.
83 Id. at 990 (Thomas, J., concurring in denial of certiorari).
84 Id. at 992.
long delays flowing in significant part from constitutionally defective
death penalty procedures."85

In 2002, Charles Kenneth Foster, another Florida inmate, asked the
Court to consider his Lackey claim after spending more than twenty-
seven years on death row.86 The Court denied certiorari.87 Justice
Thomas wrote to say that nothing had changed since the Court last
"debated this meritless claim in Knight v. Florida."88 Justice Breyer
reiterated his earlier position that the Court should hear these types of
claims, if for no other reason than the "27 years awaiting execution is
unusual by any standard, even that of current practice in the United
States."89 According to Justice Breyer, Foster would be "punished
both by death and also by more than a generation spent in death row's
twilight. It is fairly asked whether such punishment is both unusual
and cruel."90

Five years later, Joe Clarence Smith asked the Court to consider
whether execution after thirty years on death row constituted cruel
and unusual punishment.91 The Supreme Court denied certiorari.92
Justice Breyer again argued that the Court should consider the
claim.93

In late 2008, William Lee Thompson, another Florida inmate,
asked the Court to consider whether execution after thirty-two years
on death row constitutes cruel and unusual punishment.94 The
Supreme Court denied certiorari,95 reigniting the debate between
Justices Breyer, Stevens, and Thomas.96

For the first time, all three Justices contemporaneously offered
their perspectives on the Lackey claim.97 "Today, condemned inmates
await execution for an average of nearly 13 years," Stevens wrote in
his opinion respecting the denial of certiorari.98 "This figure," he
continued, "underscores the fundamental inhumanity and
unworkability of the death penalty as it is administered in the United
States."99

85 Id. at 993 (Breyer, J., dissenting from denial of certiorari).
87 Id.
88 Id. at 990 (Thomas, J., concurring in denial of certiorari).
89 Id. at 992 (Breyer, J., dissenting from denial of certiorari).
90 Id. at 993.
92 Id.
93 Id. (Breyer, J., dissenting from denial of certiorari).
95 Id. at 1299.
96 Id. at 1299-1304.
97 Id.
98 Id. at 1300 (Stevens, J., concurring).
99 Id.
Justice Thomas argued that Thompson himself caused the delay through his legal efforts to overturn his death sentence.\(^\text{100}\) “It makes a mockery of our system of justice . . . for a convicted murder, 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,” Thomas wrote.\(^\text{101}\) “It is incongruous to arm capital defendants with an arsenal of ‘constitutional’ claims with which they may delay their executions, and simultaneously to complain when executions are inevitably delayed,” he concluded.\(^\text{102}\)

Justice Breyer emphasized that the issue is over the “punishment, not the gruesome nature of the crime,”\(^\text{103}\) and noted that the “the delay [in Thompson’s case] resulted in significant part from constitutionally defective death penalty procedures for which petitioner was not responsible.”\(^\text{104}\) Breyer argued that a petitioner should not lose his Eighth Amendment claim simply because he exercises his Fourteenth Amendment right to appellate review.\(^\text{105}\)

IV. COMMON OBJECTIONS TO THE LACKEY CLAIM

For fourteen years, Justice Stevens has urged the Supreme Court and the lower courts alike to consider the Lackey claim on its merits.\(^\text{106}\) And yet the federal courts consistently refuse to hear the Lackey claim, citing any number of procedural or substantive barriers that purportedly prevent adjudication of the claim. The following section describes some of the most common objections to the Lackey claim as well as counter-arguments that may overcome these objections.

A. Procedural Barriers

Lackey claimants face considerable obstacles to a favorable adjudication of their claims. Before a federal court will consider the substantive issues underlying the Lackey claim, the inmate must overcome two significant procedural barriers that arise essentially because the claim only ripens after a significant period of time has

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\(^{100}\) Id. at 1301–02 (Thomas, J., concurring).
\(^{101}\) Id. at 1301.
\(^{102}\) Id.
\(^{103}\) Id. at 1304 (Breyer, J., dissenting).
\(^{104}\) Id. at 1303.
\(^{105}\) Id.
\(^{106}\) See Lackey v. Texas, 514 U.S. 1045, 1047 (Stevens, J., respecting denial of certiorari) (suggesting that the Lackey claim raises a substantive Eighth Amendment claim that the lower courts should consider on its merits).
elapsed: (1) the Court’s holding in *Teague*; and (2) the procedural requirements of the Antiterrorism and Effective Death Penalty Act ("AEDPA").


In *Teague v. Lane*, the Supreme Court decided that federal courts may not retroactively apply new constitutional rules of criminal procedure in cases where judgment is final. In practice, a court must first determine when the judgment became final, typically when the inmate has exhausted his direct appeals or when the time limits for filing an appeal have expired. Once the court determines that date, it must compare it with the date the new constitutional rule of procedure was announced. If the rule was announced after the date when the judgment became final, then the claim must be rejected as *Teague*-barred.

On its face, *Teague* might appear to prevent a *Lackey* claim because it requests application of a new constitutional rule to a judgment that has long since become final. By definition, the factual predicate for a *Lackey* claim only develops after a significant period of time. The inmate will certainly have exhausted his direct appeals by the time he decides to bring a *Lackey* claim for unnecessary delay. And since there is no binding precedent for the *Lackey* claim, it would by necessity rely on a new rule of constitutional law.

But federal courts have disagreed over the *Teague* doctrine’s application in the *Lackey* context. If the court treats the claim as a collateral attack on a final judgment, then *Teague* applies and the claim is barred. However, if the claim is treated as a demand for relief for a post-conviction constitutional violation, then *Teague* does not apply.

The Court has also recognized two exceptions to *Teague* that may apply to a *Lackey* claim. The first exception is when the announced

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107 *See* *Teague v. Lane*, 489 U.S. 288, 316 (1989) (determining that courts cannot retroactively apply new constitutional rules of criminal procedure to cases on collateral review).


109 *Compare* *McKenzie v. Day*, 57 F.3d 1461, 1468 n.15 (9th Cir. 1995) (finding application of *Teague* to *Lackey* claim inappropriate because *Lackey* claims "cannot be raised on direct appeal because much of the delay complained of arises in post-conviction proceedings"), *with* *Lackey v. Scott*, 52 F.3d 98, 100 (5th Cir. 1995) (determining that petitioner’s Eighth Amendment delay claim proposed a new constitutional rule of criminal procedure and finding the claims barred on collateral review by *Teague*).
constitutional law changes the criminal law substantively. The second exception occurs when the new rule of constitutional law concerns fundamental constitutional principles “implicit in the concept of ordered liberty.” The new rule of constitutional law that a Lackey claim would create could satisfy either exception. First, the Lackey claim does not propose a new rule of criminal procedure; instead, substantive constitutional law provides the underlying basis for the Lackey claim. Second, the Lackey claim relies on the Eighth Amendment prohibition against cruel and unusual punishment, a fundamental constitutional principle.

By making these arguments, defendants may be able to overcome the Teague rule, clearing the first procedural barrier to a Lackey claim.

2. AEDPA: The Prohibition Against Second or Successive Habeas Petitions

The second procedural barrier facing a Lackey claimant is the bar on second or successive habeas petitions created by the Antiterrorism and Effective Death Penalty Act (“AEDPA”). Since a litigant with a viable Lackey claim will inevitably bring the claim in a second or successive habeas petition, long after exhausting his direct and collateral appeals, AEDPA is implicated.

Under AEDPA’s gate-keeping provision, “[a] claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed” except under certain, narrow circumstances. To fall into these narrow circumstances, the habeas petitioner must demonstrate that his claim either “relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court,” or relies on new facts which could not have been discovered previously and which, if proven, “establish by clear and convincing evidence that, but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.”

A strict interpretation of AEDPA’s gate-keeping provisions places inmates with potential Lackey claims in a difficult position: either they must assert their Lackey claim in their first habeas petition (even

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10 Teague, 489 U.S. at 307 (citing Mackey v. United States, 401 U.S. 667, 692 (1971)).
11 Id. (citing Mackey, 401 U.S. at 693).
12 See Lackey, 514 U.S. at 1045-47 (Stevens, J., respecting denial of certiorari) (arguing that the Lackey claim rests on the Eighth Amendment).
14 Id.
15 Id.
though the inmate may continue to remain on death row years after submitting his first habeas petition) or they risk losing the opportunity to raise the claim in federal court altogether.

Requiring a petitioner to include a potential *Lackey* claim in their first petition could be described as "[a]n empty formality . . . [that] neither respects the limited legal resources available to the States nor encourages the exhaustion of state remedies. Instructing prisoners to file premature claims, particularly when many of these claims will not be colorable even at a later date, does not conserve judicial resources, 'reduc[e] piecemeal litigation,' or 'streamlin[e] federal habeas proceedings.'"[16]

Since a *Lackey*-style claim, or a claim challenging the actual length of confinement under sentence of death, by definition considers the length of time between conviction or sentencing and the date of execution, the claim only becomes ripe when execution is imminent. Requiring the petitioner to submit his *Lackey* claim in his original habeas application "would add to the burden imposed on courts, applicants, and the States, with no clear advantage to any."[17] A federal court faced with a *Lackey* claim in the original habeas petition would have to dismiss the claim as unripe and factually unsupported. The petitioner could very well continue to remain in confinement under sentence of death for years and years after the district court originally adjudicated his habeas petition. That additional delay, often attributable to the state, creates the factual predicate for a *Lackey* claim, a factual predicate that the petitioner cannot anticipate when he files his original habeas petition.

The alternative, permitting petitioners to file a successive petition for constitutional claims that only become ripe when execution is imminent, preserves judicial resources by ensuring that district courts only consider factually-supported, ripe constitutional claims. In fact, the Supreme Court has expressed hesitance in construing AEDPA "in a manner that would require unripe (and, often, factually unsupported) claims to be raised as a mere formality, to the benefit of no party."[18]

The Court has consistently declined to interpret "second or successive" as referring to all §2254 applications filed second or successively in time, even when the later filings address a state-court

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[18] *Panetti* v. Quarterman, 551 U.S. 930, 947 (2007) (holding that AEDPA's bar on "second or successive" petitions does not prevent an inmate from filing a second §2254 application raising a *Ford*-based incompetency claim, so long as the claim is filed as soon as it becomes ripe).
judgment already challenged in a prior §2254 application. To that end, construing AEDPA to foreclose review of the Lackey claim does not further the goals of the statute, but would “produce troublesome results,” “create procedural anomalies,” and “close [the] doors to a class of habeas petitioners seeking review without any clear indication that such was Congress’ intent.”

Construing AEDPA to foreclose review of a Lackey claim produces the same absurd results that the Supreme Court expressed concern over in Panetti v. Quarterman. There, the Court held that, because an incompetency claim was not ripe until the defendant’s execution was imminent, it was unreasonable to construe AEDPA as barring such a claim when raised in a second habeas petition. While the Panetti holding was confined to competency to be executed claims, the underlying justifications for permitting the claim in spite of AEDPA’s requirements should arguably apply to any claim that by definition only becomes ripe long after the first habeas petition is filed. This, of course, would include Lackey claims, which by their very nature are not ripe until the inmate has spent a significant period of time on death row and the execution is imminent.

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. If the district court could not have adjudicated the claim because it was unripe at the time of the first habeas petition, then there is no risk that a petitioner will assert the same claim over and over, as AEDPA is intended to prevent.

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119 See id. (holding that AEDPA’s bar on “second or successive” petitioners did not prevent petitioner from filing a second §2254 application raising a Ford-based incompetency claim, filed as soon as the claim became ripe); Slack v. McDaniel, 529 U.S. 473, 486 (2000) (concluding that a second §2254 application was not “second or successive” after petitioner’s first application, which had challenged the same state-court judgment, had been dismissed for failure to exhaust state remedies); see also Stewart v. Martinez-Villareal, 523 U.S. 637, 645 (1998) (holding petitioner’s request for habeas relief on the basis of reopening a claim that had been dismissed as premature was not subject to the bar on “second or successive” petitions).


122 Id.

123 See Martinez-Villareal, 523 U.S. at 644-45 (acknowledging that that district court was unable to resolve the prisoner’s incompetency claim at the time of his initial habeas filing).
B. Substantive Barriers

Even if a litigant successfully overcomes the procedural barriers discussed above, the litigant must still convince the court to consider the claim on its merits, despite the noticeable lack of precedent. To adjudicate the claim, a court would have to consider when and under what circumstances the punishment moves from constitutionally permissible to constitutionally impermissible.

To date, no American court has affirmatively recognized that an execution following a prolonged period on death row violates the Eighth Amendment. But the federal courts have also neither extensively considered the claim nor dismissed it on its merits. The following section proposes that federal courts should consider the Lackey claim as a matter of first impression and then apply a formula similar to that used in Sixth Amendment speedy trial claims. This would allow the federal courts to reach the merits of the Lackey claim and filter out those situations where the inmate caused the delay by engaging in frivolous litigation.

In Knight v. Florida, Justice Thomas claimed that the lower courts had “resoundingly rejected the [Lackey] claim as meritless,” citing eight cases that purportedly demonstrate that the Lackey claim is not viable. However, the cited cases come from only six states, and at least one of those cases explicitly rejected the Lackey claim because of the lack of precedent, not on its own constitutional merits. Since the Lackey claim arises only after a significant period of incarceration on death row, a relatively small number of cases will present a viable Lackey claim in the first place. Practically speaking, the vast majority of Lackey claims come directly from the states with the largest death row populations: California, Florida, and Texas.

\footnote{See supra Part III.}

\footnote{Knight v. Florida, 528 U.S. 990, 990 (1999) (Thomas, J., concurring in denial of certiorari).}


\footnote{Id.}

\footnote{See Stafford v. Ward, 59 F.3d 1025, 1028 (10th Cir. 1995); Stafford v. State, 899 P.2d 657, 659-60 (Okla. Crim. App. 1995) (refusing to review the Lackey claim because there was no prior precedent and the inmate failed to raise the claim in prior proceedings).}

\footnote{Prisoners routinely assert Lackey claims through their habeas petitions; however, practically speaking, the strongest Lackey claims involve significant periods of delay—most common in states with the largest death row populations. The cases that have attracted the attention of at least one Supreme Court Justice have predominately come from Texas and Florida. See supra Part IV.}
Since most states will not be in a position to adjudicate a Lackey claim, the Supreme Court should treat the issue as a matter of first impression rather than relying on the limited number of lower court opinions.

And while the lower courts have expressed some reluctance to adjudicate the Lackey claim on its merits (particularly after Justice Thomas declared in Knight v. Florida that the issue had been resolved\textsuperscript{130}), the problem that produces the foundation for the Lackey claim is unlikely to resolve itself. Since all evidence suggests that the average time between sentencing and execution will continue to increase,\textsuperscript{131} the Supreme Court should grant certiorari and consider the Lackey claim as a matter of first impression.

If the Supreme Court grants certiorari to consider the claim, the Court must consider if, when, and under what circumstances an inmate’s prolonged confinement transitions from constitutionally permissible and necessary to ensure due process to constitutionally impermissible and violative of the Eighth Amendment. Several commentators have proposed setting a threshold time period of required confinement upon which claimants could bring Lackey claims and requiring claimants to attribute the time to the various parties involved to determine if the delay resulted from the inmate’s own efforts to delay the proceedings or from the state’s (or court’s) actions.\textsuperscript{132} This proposal borrows from the rules established under the Supreme Court’s Sixth Amendment speedy trial jurisprudence.\textsuperscript{133}

The first step to resolving the Lackey claim is to establish when an inmate may bring a Lackey claim. When the inmate reaches this particular point, a rebuttable presumption is created that executing the inmate is constitutionally impermissible. Consequently, the “threshold” must be sufficiently high so as to address only those situations where the delay between sentencing and execution is abnormally long. In his article, Getting Out of This Mess: Steps

\textsuperscript{130}See McMahon, supra note 63, at 59 (citing McKinney v. State, 992 P.2d 144 (Idaho 1999); Russell v. State, 849 So. 2d 95 (Miss. 2003); Jordan v. State, 786 So. 2d 987 (Miss. 2001); People v. Simms, 736 N.E.2d 1032 (Ill. 2000); Moore v. State, 771 N.E.2d 46 (Ind. 2002); State v. Lafferty, 20 P.3d 342 (Utah 2001)).

\textsuperscript{131}DOJ Tables, supra note 1.

\textsuperscript{132}See Dwight Aarons, Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?, 29 SETON HALL L. REV. 147, 207–08 (1998) (arguing that an inordinate delay claim should be ripe for review when an “inmate has been under a sentence of death for twice as long as the national average of time spent on death row”); McMahon, supra note 63, at 62–70 (adapting the Speedy Trial Analog for Eighth Amendment delay analysis); Jeremy Root, Cruel and Unusual Punishment: A Reconsideration of the Lackey Claim, 27 N.Y.U. REV. L. & SOC. CHANGE 281, 320–24 (2001) (analagizing Sixth Amendment Speedy Trial procedures to the Eighth Amendment delay claim).

\textsuperscript{133}See Barker v. Wingo, 431 U.S. 514 (1972) (considering whether it was unconstitutional to bring a defendant to trial five years after the initial arrest).
Toward Addressing and Avoiding Inordinate Delay in Capital Cases, Dwight Aarons proposed a “threshold” time when the delay reaches twice the national average for persons executed in the United States. Applying Aarons’s proposal to the current statistics, an inmate could bring a Lackey claim after spending twenty-five years and six months on death row. By establishing a “threshold” number where the Court will presume constitutionally impermissible delay, the Court would respond to the delay problem while still permitting states to use the death penalty (albeit carefully so as to avoid inordinate delays).

The second step to considering the Lackey claim will be to attribute the time in the particular case to the parties involved. In his Lackey memorandum, Justice Stevens proposed distinguishing between “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 actions by the state.” By attributing time in these cases, the Court could ensure that inmates who intentionally delay proceedings will not then benefit by having their death sentence commuted. Aarons suggested that, “when there has been an inordinate delay between the imposition of the sentence and the pending execution, the state is usually directly responsible for a great part of the delay.”

In those cases where the petitioner has reached the threshold time period and where the delay is attributable to the state, either through negligent or deliberate actions, the petitioner should be entitled to a commuted sentence. And where the delay is attributable to the petitioner’s own repetitive or frivolous filings, then no relief should be available.

CONCLUSION

Prolonged incarceration under sentence of death should be cause for concern. As one court has stated:

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135 DOJ Tables, supra note 1 (establishing that the average delay between sentencing and execution is approximately 153, twice that number is 306 months, or twenty-five years and six months).
137 Aarons, supra note 134, at 48.
There must be a point . . . at which the court steps in and says enough is enough. Beyond a certain number of years and a certain number of failed attempts by the State to secure a constitutionally valid sentence of death, the litigation becomes a form of torture in and of itself. It's as if the State were holding a defective pistol to the defendant's head day and night for years on end and the weapon kept misfiring. It may eventually go off, but then again, it may not, and the defendant has no way to be sure.  

The Supreme Court recently balked at an opportunity to resolve the Lackey issue and, in so doing, continued to exacerbate the situation by leaving litigants and lower courts alike in a state of uncertainty. As the period of time between sentencing and execution steadily increases, the Lackey issue will continue to come up until the Court issues a definitive ruling on the matter.

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† The author wishes to thank those who have reviewed this comment and offered their own perspectives and contributions.