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Getting out of this Mess: Steps Toward Addressing and Avoiding Inordinate Delay in Capital Cases

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GETTING OUT OF THIS MESS: STEPS TOWARD ADDRESSING AND AVOIDING INORDINATE DELAY IN CAPITAL CASES

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I. INTRODUCTION

Recently a number of state capital defendants have claimed that after their lengthy stay on death row their pending executions will make no measurable contribution to acceptable goals of punishment, will be nothing more than the imposition of needless pain and suffering, and therefore violate the Eighth Amendment. Elsewhere I have essentially agreed that when an inmate has been on death row for an inordinate period—that is, twice the national average of other executed inmates—the pending execution may constitute cruel and unusual punishment.[1] This Article deals with the procedural morass surrounding the inordinate delay claim.

Part II details a few of the cases in which inordinate delay was asserted. It concludes that a defendant is more likely to be on death row for an inordinate period when the case is on the margins of death eligibility and errors occur during the state's processing of the case. Part III reviews the processing of capital

* Associate Professor of Law, The University of Tennessee College of Law. I thank Judy Cornett who again provided exceptional assistance and wonderful company. Fran Ansley and Neil P. Cohen commented on an earlier draft. Jerry Phillips gave me the benefit of his agile mind and sharp eye with a careful read on a later draft. Kelly Browne of The University of Tennessee College of Law Library was courteous with her assistance in finding otherwise inaccessible information. A conversation with Stephen B. Bright prompted me to wrestle with my understanding of federal habeas law. I remain responsible for any errors.

[1] *See* Dwight Aarons, *Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?*, 29 SETON HALL L. REV. 147 (1998). As discussed more fully in my previous article, inordinate delay need not be strictly defined as twice the national average, but such a period provides a ready reference point for death row cases in general.

cases in California, Florida and Texas—the three states with the largest death row populations—and in a number of other jurisdictions. Despite a firm commitment to capital prosecutions, the states have not established effective and efficient capital case processing systems. Consequently, most of the delay that elapses between the imposition of a death sentence and the execution of a capital defendant is the responsibility of state officials.

Part IV outlines the procedural posture under which federal habeas courts will address the issue and proposes how courts should address inordinate delay claims. State capital defendants will likely rely on the procedure outlined in the Antiterrorism and Effective Death Penalty Act (AEDPA) to litigate their inordinate delay claims in federal court. Under the AEDPA, a capital defendant is entitled to a hearing on the merits of his or her habeas corpus petition if the petition credibly alleges that his or her detention violates the Constitution or federal law. A capital defendant asserting inordinate delay can rely on his or her post-sentencing conduct as a basis for challenging the appropriateness of his or her death sentence. Part V addresses common objections expressed against recognizing inordinate delay as a substantive limit on death eligibility. These objections do not withstand scrutiny because they do not reflect the actual dynamics of the capital litigation process. Therefore, courts should no longer continue to rely on these objections as reasons for not considering the merits of inordinate delay claims.

Finally, Part VI contains suggestions on how to avoid inordinate delay in capital cases. The issue of inordinate delay implicates how the death penalty is administered. Therefore, inordinate delay can possibly be avoided if the capital litigation process is refocused to ensure that only defendants most deserving of death are prosecuted for capital crimes. This refocusing should include reconsidering the roles of prosecutors, judges, defense attorneys, and the public at large in capital cases.

II. CAPITAL CASES THAT TYPICALLY LEAD TO INORDINATE DELAY

Inordinate delay between the imposition of a death sentence and the execution is most likely to occur when a serious

error occurs during the prosecution of the case, and that error is discovered while the case is being processed. This Part[2] reviews—in some detail—a few of the fairly representative cases in which a capital defendant was on death row for twice as long as the national average, and asserted before a subsequent court that the state had forfeited the right to execute him.

A. CARYL WHITTIER CHESSMAN

In 1948, Caryl Whittier Chessman was convicted and sentenced to death for crimes committed by a man dubbed the "Red Light Bandit."[3] For the next twelve years, Chessman claimed that his conviction should be reversed because he was denied due process, based on the manner by which his trial transcript was constructed.[4] He had mixed success.[5] By 1959, Chessman was also asserting that his continued confinement

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[2] This Part is based largely on Aarons, *supra* note 1, at 168-76.

[3] *See* EDMUND G. BROWN & DICK ADLER, PUBLIC JUSTICE, PRIVATE MERCY: A GOVERNOR'S EDUCATION ON DEATH ROW 20-52 (1989); ERIC CUMMINS, THE RISE AND FALL OF CALIFORNIA'S RADICAL PRISON MOVEMENT 33-62 (1994); WILLIAM M. KUNSTLER, BEYOND A REASONABLE DOUBT? THE ORIGINAL TRIAL OF CARYL CHESSMAN (1961).

[4] The court reporter died soon after the jury returned with its verdict, but before his notes had been transcribed into a trial transcript. *See* People v. Chessman, 341 P.2d 679, 684 (Cal. 1959). A substitute court reporter prepared a trial transcript using the original reporter's notes, the trial judge's notes and the prosecutor's assistance. *Id.* Chessman received a copy in prison and he objected, claiming that the transcript was inaccurate and incomplete. *Id.* Based on these objections, the trial judge made some corrections Chessman suggested. *Id.* at 685.

[5] In 1957, on appeal from the denial of a federal habeas corpus petition, he persuaded a majority of the United States Supreme Court that he should have had a hearing on whether the preparation of the state court record accorded with federal due process. *See* Chessman v. Teets, 354 U.S. 156 (1957). By that time, Chessman had discovered that the substitute reporter was related by marriage to the trial prosecutor, and had worked in close collaboration with the prosecutor and two police officers with their trial testimony. *Id.* at 161. In remanding the case the Court wrote:

> All we hold is that, consistently with procedural due process, California's affirmance of petitioner's conviction upon a seriously disputed record, whose accuracy petitioner has had no voice in determining, cannot be allowed to stand. Without blinking the fact that the history of this case presents a sorry chapter in the annals of delays in the administration of criminal justice, we cannot allow that circumstance to deter us from withholding relief so clearly called for .... This Court may not disregard the Constitution because an appeal in this case, as in others, has been made on the eve of execution.

Id. at 164-65 (footnotes omitted).

subjected him to cruel and unusual punishment. He persuaded neither the courts nor the governor and on May 2, 1960, California executed him.[6]

B. CHARLES TOWNSEND

Charles Townsend was prosecuted for murder in 1955. The key issue in his case was the admissibility of a confession he gave while under the influence of drugs administered by a police physician. Over Townsend's objection, the confession was admitted and he was convicted and sentenced to death. After his conviction was affirmed in state court,[7] the United States Supreme Court, on federal habeas review, ordered the district court to hold a hearing to determine the voluntariness of the confession.[8] The district judge later found that the confession was voluntary, but nonetheless ordered a retrial within four months because of "evidentiary defects" in the trial.[9] That judgment was reversed by the Seventh Circuit Court of Appeals because erroneous evidentiary rulings were not a basis for granting federal habeas corpus relief;[10] the writ can issue only when a prisoner is being held in custody in violation of federal laws or the Constitution. Townsend filed a second federal habeas petition in 1967. In 1971, by the time the district court held another hearing and addressed the merits of the second petition, Townsend was thought to be this nation's longest inhabitant of death row.[11] This time the district court ruled that the statement was involuntary and its admission violated Townsend's

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[6] KUNSTLER, *supra* note 3, at 286-88.

[7] People v. Townsend, 141 N.E.2d 729 (Ill. 1957).

[8] Townsend v. Sain, 372 U.S. 293 (1963), *overruled in part by* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

[9] United States *ex rel.* Townsend v. Ogilive, 334 F.2d 837, 841-42 (7th Cir. 1964).

[10] *Id.*

[11] Townsend argued that a 15-year, nine-month delay on death row was unconstitutional. United States *ex rel.* Townsend v. Twomey, 322 F. Supp. 158, 159 (E.D. Ill.), *rev'd*, 452 F.2d 350 (7th Cir. 1971). The district court did not directly rule on that argument, but noted that the delay was "due principally to the skillful, persistent and conscientious efforts on petitioner's behalf by his own counsel to save him from the death penalty and secure his release from confinement." *Id.* at 174. Apparently interpreting Townsend's argument as a challenge to the method of execution, the district court stated that it was bound by stare decisis to declare that execution by electrocution was not cruel and unusual punishment. *Id.*

constitutional rights.[12] That judgment, too, was reversed by the Seventh Circuit.[13] The appellate court ruled that the district court had abused its discretion in adjudicating the merits of the second petition because there had been no change in the factual or legal background of Townsend's claim since it had been rejected by the appellate court three years earlier.[14] However, the death sentence was vacated on a different ground.[15]

C. WILLIE LEE RICHMOND

In 1974, Willie Lee Richmond was convicted of robbery and first degree murder. The jury was instructed on both premeditated murder and felony murder, but in returning with a general verdict, it did not indicate which theory it adopted.[16] The trial judge imposed a death sentence.[17] That sentence was later vacated after the Arizona Supreme Court, following the then-recently decided United States Supreme Court decisions in *Lockett v. Ohio*[18] and *Bell v. Ohio*,[19] held that the Arizona state law

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[12] *Townsend*, 322 F. Supp. at 176. As an alternative basis for its ruling, the court found the confession involuntary because of the physical and psychological coercion used to secure the statement.

[13] United States *ex. rel* Townsend v. Twomey, 452 F.2d 350 (7th Cir. 1971).

[14] *Id.*

[15] The court ruled that Townsend's rights under *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (death sentence cannot be carried out if prospective jurors are excluded from the venire because they voiced general objections, conscientious or religious scruples against its infliction), were violated and that the death sentence could not be imposed. The case was remanded to the district court with instructions that the state had to exercise its choice of either (1) resentencing Townsend, (2) vacating the conviction and death sentence and retrying him, or (3) releasing Townsend. *Townsend*, 452 F.2d at 360-63.

This remand order did not end the litigation. In an appeal after the remand, Townsend argued that Illinois failed to comply with the court's mandate. The circuit panel did not fully agree. Nearly two years after the remand order Townsend had been sentenced to 14 to 50 years' imprisonment. The Seventh Circuit stated that its 1971 mandate was for Illinois to decide within four months how it would proceed. The delay in resentencing appeared to be due, in part, to Townsend's counsel obtaining several continuances before the resentencing was held. *See* United States *ex rel.* Townsend v. Twomey, 493 F.2d 1325 (7th Cir. 1974).

[16] State v. Richmond, 666 P.2d 57, 62 (Ariz. 1983).

[17] State v. Richmond, 560 P.2d 41, 44 (Ariz. 1976).

[18] 438 U.S. 586 (1978) (due process requires in all but rarest capital case sentencer not be precluded from considering as mitigating factor any aspect of defendant's character or record and any of circumstances of crime that is proffered as basis for sentence less than death).

unconstitutionally restricted mitigating circumstances evidence that capital defendants could present.[20] At a subsequent sentencing hearing, Richmond was again sentenced to death. Though it disagreed over which aggravating circumstances supported the death sentence, a divided Arizona Supreme Court affirmed the sentence.[21]

Richmond later asserted that the state's twelve-year delay in executing him, coupled with the conditions of his confinement, violated his Eighth Amendment rights. The federal courts rejected his claim. The district court judge noted that Richmond had made good use of his time on death row—in no longer being exposed to drugs and undergoing a religious conversion—and that the delay was initiated by him to challenge his conviction and sentence.[22] In affirming that ruling, the Ninth Circuit Court of Appeals added that a capital defendant should not be penalized for his legitimate exercise of his right to appeal, but that the delay caused by such appeals could not itself ripen into

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[19] 438 U.S. 637 (1978) (reversing death sentence under *Lockett*).

[20] State v. Watson, 586 P.2d 1253 (Ariz. 1978).

[21] State v. Richmond, 666 P.2d 57 (Ariz. 1983).

[22] In relevant part, the district court stated:

> In a case such as this one, where the death penalty is being imposed, the need for a careful review of the issues is clear.
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> The time on death row has not been completely harmful to Richmond. He has been able to develop better skills in communicating with others. He is no longer exposed to the combination of drugs that he was taking at the time of the murder. Richmond has also developed religious beliefs that he did not have before he went to prison.
>
> Richmond has been under a death sentence for approximately twelve years. He has been subject to the current sentence of death for only six years. Although the conditions on death row may not be ideal, there is no evidence of cruel and unusual punishment presented sufficient to warrant the relief Richmond seeks here.
>
> The delay in execution was prompted by Richmond's request, through his attorneys, to have his challenges to the state court proceedings and the constitutional challenges to the sentence of death heard by several courts. The fact that this review has taken a long time does not indicate that the delay is unwarranted. The careful review of the issues raised by Richmond is time consuming. However, it is the opinion of this court that it is better to take the time to consider each issue thoroughly rather than quickly dispatching someone to the gas chamber. Richmond has presented nothing to this court which would support the relief he seeks under this allegation.

Richmond v. Ricketts, 640 F. Supp. 767, 803 (D. Ariz. 1986), *aff'd*, 921 F.2d 933 (9th Cir. 1990), *rev'd on other grounds*, 506 U.S. 40 (1992), and *vacated*, 986 F.2d 1583 (9th Cir. 1993).

a substantive claim.[23] In 1994, after twenty years on death row, the Arizona Supreme Court modified Richmond's death sentence to life imprisonment without parole.[24] The court based its decision on Richmond's rehabilitation on death row, the possibility of additional years of delay in the event that a new death sentence was imposed, and certain changes in Arizona's capital sentencing laws.[25]

D. DUNCAN PEDER MCKENZIE, JR.

In 1975, a jury convicted Duncan Peder McKenzie, Jr. of aggravated kidnapping and deliberate homicide by means of torture. The Montana Supreme Court affirmed his conviction and sentence and rejected his numerous claims on appeal, including his assertion that the jury instructions unconstitutionally shifted to him the burden of proving his state of mind.[26] The United States Supreme Court twice granted McKenzie's petitions for certiorari and each time remanded the case to the Montana Supreme Court for further consideration.[27] In 1980—its fourth re-

[23] According to the Ninth Circuit:

> A defendant must not be penalized for pursuing his constitutional rights, but he also should not be able to benefit from the ultimately unsuccessful pursuit of those rights. It would indeed be a mockery of justice if the delay incurred during the prosecution of claims that fail on the merits could itself accrue into a substantive claim to the very relief that had been sought and properly denied in the first place. If that were the law, death-row inmates would be able to avoid their sentences simply by delaying proceedings beyond some threshold amount of time, while other death-row inmates—less successful in their attempts to delay—would be forced to face their sentences. Such differential treatment would be far more "arbitrary and unfair" and "cruel and unusual" than the current system of fulfilling sentences when the last in the line of appeals fails on the merits. We thus decline to recognize Richmond's lengthy incarceration on death row during the pendency of his appeals as substantively and independently violative of the Constitution.

Richmond, 921 F.2d at 950.

[24] State v. Richmond, 886 P.2d 1329 (Ariz. 1994).

[25] The court noted its "expectation and strong recommendation that he remain incarcerated for the remainder of his natural life and never receive parole." *Id.* at 1338.

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

[27] The Court granted the first petition for certiorari, vacated the judgment, and remanded the case for further consideration in light of the then-recently decided *Patterson v. New York*, 432 U.S. 197 (1977) (due process not violated in requiring defendant prove an affirmative defense). McKenzie v. Montana, 433 U.S. 905 (1977). When the United States Supreme Court granted McKenzie's second petition for cer-

view of the case on direct appeal—the Montana Supreme Court ruled that any error regarding the jury instructions was harmless beyond a reasonable doubt.[28]

McKenzie was then unsuccessful in each of his federal habeas petitions. While litigating his first federal habeas corpus petition, McKenzie discovered that a week after the jury verdict and a month before his sentencing hearing, the trial prosecutor had a forty-five minute *ex parte* meeting with the trial judge.[29] He alleged in his second habeas petition that this meeting violated his rights under *Gardner v. Florida*.[30] After holding a hearing on the claim, in 1992, the federal district court ruled that there was no credible proof that the 1975 conference could have influenced the sentencing decision, and the Ninth Circuit later affirmed that judgment.[31] In a third federal habeas petition filed on the eve of his execution, McKenzie challenged his execution after his twenty-year stay on death row. He claimed, on appeal from the district court's denial of his petition, that the state should be held responsible for the almost fifteen-year period in which no court proceeding was held to resolve the *Gardner* claim. Montana countered that it should be considered responsible only for five years and nine months of his twenty-year stay on death row because that was the time his case had

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tiorari, it vacated the judgment and remanded the case for further consideration in light of *Sandstrom v. Montana*, 442 U.S. 510, 512 (1979) (due process violated when jury instructed that "the law presumes that a person intends the ordinary consequences of his voluntary acts" because it relieves prosecution of proving defendant's intent and defendant is forced to rebut presumption), a case decided in the period between his first and second certiorari petitions. McKenzie v. Montana, 443 U.S. 903 (1979).

[28] *See* State v. McKenzie, 608 P.2d 428 (Mont. 1980).

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

[30] 430 U.S. 349 (1977) (due process violated when death sentence imposed on the basis of information which defendant had no opportunity to deny or explain). Both the prosecutor and judge should have been more conscientious. Even though *Gardner* had not been decided, the Court had previously held that the sentencing proceeding was a critical stage of the adjudication process to which a defendant was entitled to the assistance of counsel. *See* Mempa v. Rhay, 389 U.S. 128 (1967). Thus the absence of both the defendant and defense counsel should have made it apparent that their meeting could raise serious legal questions. Ex parte conversations between the prosecutor and the judge have been the basis for granting of a habeas petition. *See, e.g.*, Yohn v. Love, 76 F.3d 508 (3d Cir. 1996).

[31] *See* McKenzie v. McCormick, 27 F.3d 1415 (9th Cir. 1994).

spent on direct appeal. The appellate panel dismissed the petition on procedural grounds,[32] and McKenzie was executed two days later.[33]

E. CLARENCE ALAN LACKEY

In 1983, Clarence Alan Lackey was retried, convicted and sentenced to death for a killing that had occurred six years earlier.[34] In June, 1989, a divided Texas Court of Criminal Appeals affirmed the conviction and sentence.[35] The Court of Criminal Appeals rejected Lackey's claim that Texas' special circumstances statute was unconstitutional because it did not provide a carefully detailed instruction on the consideration of mitigating evidence, such as the instruction he had proffered at trial, and that the absence of such an instruction precluded the jury's appropriate consideration of the mitigating evidence he submitted.[36] Lackey successfully moved for a rehearing. In May, 1991, the Court of Criminal Appeals again affirmed the conviction and death sentence.[37] According to the majority, despite the

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[32] *See* McKenzie v. Day, 57 F.3d 1461, 1470 (9th Cir.), *aff'd en banc*, 57 F.3d 1493 (9th Cir. 1995).

[33] Bob Anez, *Montana Executes Killer While He Listens to Music*, PHOENIX GAZETTE, May 10, 1995, at A5.

[34] Lackey's first conviction and death sentence for the murder were reversed because a prospective juror was removed from the jury pool after expressing reservations about the death penalty, without further inquiring into whether these views were so strong that he would disregard the evidence and the law in deciding the case. State v. Lackey, 638 S.W.2d 439 (Tex. Crim. App. 1982).

[35] State v. Lackey, 819 S.W.2d 111 (Tex. Crim. App. 1989).

[36] Quoting from a plurality opinion of the United States Supreme Court, the majority concluded that the Court had already rejected Lackey's interpretation of the Texas statute and that the trial court's instructions sufficiently guided the jury's deliberations. *Id.* at 118-20 (quoting Franklin v. Lynaugh, 487 U.S. 164, 171 (1988) (plurality opinion)).

The dissent maintained that the majority had given undue weight to a passage in the United States Supreme Court plurality opinion and that the majority's analysis was not the application of the actual law, but was rather in anticipation of how the Court would rule on a similar issue then pending before the United States Supreme Court in *Penry v. Lynaugh*, 492 U.S. 302 (1989). *Lackey*, 819 S.W.2d, at 122-23 (Clinton, J., dissenting).

[37] Lackey v. State, 819 S.W.2d 111, 128 (Tex. Crim. App. 1989). This rehearing was prompted by the United States Supreme Court's decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989), which had been decided a day after the Court of Criminal Appeals'

trial judge's failure to adopt Lackey's requested instruction, the jury instructions did not prevent the jury from making an individualized assessment of his character and background and giving a reasoned moral response on the appropriateness of the death penalty for his crime.[38]

Lackey's first execution date was in July, 1992.[39] Twice the execution date was changed to allow him to investigate and unsuccessfully litigate a state habeas corpus petition. He was also unsuccessful in a subsequent federal habeas petition, and a second state habeas petition. Lackey then petitioned the United States Supreme Court for a writ of certiorari, claiming that it was cruel and unusual punishment for the state to execute him because of the seventeen-year delay between his conviction and date of his proposed execution. Though the Court denied his petition, Justice Stevens noted that the claim seemed an ideal example of one that would benefit from further study in the state and federal courts.[40] Lackey's inordinate delay claim was ultimately unsuccessful[41] and he was executed on May 20, 1997, after nineteen years on death row.[42]

F. WILLIAM LLOYD TURNER

In 1978, William Lloyd Turner, an African American, killed a white store owner during a robbery. During jury selection, the trial judge precluded Turner's counsel from questioning prospective jurors on their attitudes about race. A jury convicted Turner of capital murder and other charges, and sentenced him to death. On appeal, he argued that the trial court's refusal to

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affirmance. The Court's analysis in *Penry* was similar to Lackey's construction of the law and contrary to the approach taken by the Court of Criminal Appeals.

[38] *Lackey*, 819 S.W.2d at 134-35. Three judges dissented, arguing that the majority had misinterpreted the existing case law to affirm the conviction and sentence, despite the seeming uncertainty of the law upon which they rested. *Id.* at 139 (Clinton, J., dissenting); *id.* at 141 (Baird, J., dissenting). Lackey's second motion for rehearing was later denied. *Id.* at 128-41.

[39] The litigation history of Lackey's case is detailed in *Lackey v. Scott*, 885 F. Supp. 958, 962-64 (W.D. Tex. 1995).

[40] Lackey v. Scott, 514 U.S. 1045 (1995) (Stevens, J., memorandum on the denial of certiorari).

[41] *See* Lackey v. Johnson, 83 F.3d 116 (5th Cir.), *cert. denied*, 117 S. Ct. 276 (1996).

[42] Michael Graczyk, *Murderer on Death Row for 19 Years is Executed for Lubbock Slaying*, AUSTIN AMERICAN-STATESMAN, May 21, 1997, at B2.

inquire into the issue of racial bias denied him a fair and impartial jury. The state courts rejected that claim on direct appeal and in post-conviction proceedings. In 1986, on federal habeas review, the United States Supreme Court used his capital case to apply standards developed in noncapital cases on inquiring into the racial prejudice of prospective jurors.[43] The Supreme Court remanded the case for further proceedings because it ruled that Turner's right to select an impartial jury had been violated. After a new sentencing hearing before a different jury, Turner received another death sentence.[44] He then began another round of unsuccessful post-conviction proceedings in state and federal court.[45] In April, 1995, in his fourth federal habeas petition and days before his scheduled execution, Turner alleged that after fifteen years on death row, while confined under allegedly torturous conditions, it was unconstitutional for the state to execute him.[46] As in *McKenzie,* the federal appellate court dismissed the petition on procedural grounds, and Turner was executed the next day.[47]

G. JOSE JESUS CEJA

In 1976, Jose Jesus Ceja was convicted and sentenced to death.[48] The Arizona Supreme Court affirmed the conviction and death sentence, concluding that the two murders were "committed in an especially cruel, heinous and depraved manner."[49] Later, due to a change in the law,[50] another sentencing

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[43] Turner v. Murray, 476 U.S. 28 (1986). The trial judge refused the request, stating that it "had been ruled on by the Supreme Court," which may have been a reference to Ristaino v. Ross, 424 U.S. 589 (1976). *Turner,* 476 U.S. at 31 n.2. In *Turner,* the Court ruled that *Ristaino* did not control, partly because Turner was being prosecuted for a capital offense. *Id.* at 33.

[44] Turner v. Commonwealth, 364 S.E.2d 483 (Va. 1988).

[45] Turner v. Williams, 35 F.3d 872 (4th Cir. 1994) (recounting litigation history and affirming denial of federal habeas petition).

[46] Turner v. Jabe, 58 F.3d 924 (4th Cir. 1995).

[47] June Arney & Laura Lafay, *Turner Executed After 15 Years,* VIRGINIAN-PILOT (NORFOLK), May 26, 1995, at A1.

[48] This was Ceja's second trial and convictions for two killings. The first convictions for the killings were reversed because of improper jury instructions and improper admission of evidence. State v. Ceja, 546 P.2d 6 (Ariz. 1976).

[49] State v. Ceja, 565 P.2d 1274, 1278 (Ariz. 1977).

hearing was held, which again resulted in a death sentence for Ceja.[51] Ceja was unsuccessful in his state collateral proceedings, as well as in a federal habeas petition.[52] The day before his scheduled execution, the Ninth Circuit rejected Ceja's motion for permission to file a successive habeas petition in which he asserted that because of his twenty-three-year stay on death row his pending execution violated the Eighth Amendment's prohibition against cruel and unusual punishment.[53] Ceja was executed on January 21, 1998; his stay on death row is the longest for any modern capital defendant.[54]

H. SUMMARY

These seven cases—from different jurisdictions and arising from prosecutions that began in the 1940s through the 1970s—not only have the common feature that each defendant spent an inordinate length of time on death row, but each case was questionable as a capital prosecution. Even though each defendant was sentenced to death, the state continued to argue in support of the death penalty even after defects in the processing and trial of the defendant were uncovered. Despite the defects

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[50] The next year the state supreme court, after ruling that its capital sentencing law was unconstitutional, ordered the resentencing of all of Arizona's capital defendants. State v. Watson, 586 P.2d 1253 (Ariz. 1978).

[51] State v. Ceja, 612 P.2d 491 (Ariz. 1980).

[52] Ceja v. Stewart, 97 F.3d 1246 (9th Cir. 1996), *cert. denied*, 118 S. Ct. 422 (1997). In a partial dissent, one Ninth Circuit judge argued that the death sentence was improper. *Id.* at 1255-59 (Fletcher, J., concurring in part and dissenting in part). Her principal concern was that the sole aggravating circumstance that was the basis for his sentence had not been proven. *Id.* at 1255-56. The dissent noted that one month after Ceja's sentence was affirmed the Arizona Supreme Court first held that aggravating circumstances had to be proven beyond a reasonable doubt. *Id.* The dissent was unwilling to presume that the state courts applied a legal standard that had yet to be announced when they concluded that the aggravating circumstance had been established. *Id.*

The dissent also maintained that the death sentence should not be affirmed because there was insufficient evidence to support the aggravating circumstance, because at the time of Ceja's sentencing the state courts had not narrowly construed the language of the aggravating circumstance that was the basis for Ceja's death sentence, and because the Arizona Supreme Court failed to determine independently whether the death sentence was appropriate. *Id.* at 1257-61.

[53] Ceja v. Stewart, 134 F.3d 1368 (9th Cir. 1998).

[54] Barry Graham, *Curtains for Ceja*, PHOENIX NEW TIMES, Feb. 5, 1998, at 15.

in these cases, substitute trial proceedings were held only pursuant to an appellate court's order.

III. PROCESSING OF CAPITAL CASES IN SELECTED JURISDICTIONS

In addition to the above seven cases, the processing of capital cases in many states is flawed. This section reviews how capital cases are processed in California, Texas and Florida, the states that have the most inmates on death row.[55] This review suggests that the capital litigation process itself presents many occasions for delay that are neither necessary nor indispensable for the adjudication or processing of the case.

A. CALIFORNIA

For many years California has had difficulty in finding qualified lawyers willing to handle death penalty direct appeals; defendants receive death sentences at a faster pace than the courts can find lawyers to handle the existing cases. As of mid-1992, seventy-three of California's 320 death row inmates did not have legal representation.[56] The California Appellate Project (CAP), an agency created to enlist and advise lawyers in death penalty cases, was given the responsibility of recruiting and appointing counsel in capital cases. Prompted by criticism that CAP was purposely moving slowly in appointing lawyers and that it was approving only attorneys philosophically opposed to the death penalty, in June, 1992 the California Supreme Court appointed one of its administrative officers to the task. Despite the reassignment, by late 1993, 106 of the 375 death row inmates did not have an attorney, and estimates were that the wait for counsel for some inmates could take up to four years.[57] There are

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[55] As of October 1, 1998, California had 513 inmates on death row, NAACP LEGAL DEF. & EDUC. FUND, INC., DEATH ROW U.S.A. 18 (Fall 1998) [hereinafter DEATH ROW U.S.A.], Texas had 436 capital defendants, *id.* at 43, and Florida had 387, *id.* at 23.

[56] Philip Hager, *Counsel for the Condemned*, CAL. LAW., Dec. 1993, at 33.

[57] Indeed, as of February 1, 1995, none of the 60 inmates that had arrived on death row in the past three years had been assigned an appellate lawyer. Steve Albert, *Condemned, Without Counsel*, THE RECORDER, May 26, 1995, at 1. A more recent report states that 136 of the 450 death row inmates are without legal representation. Mike Kataoka, *Lawyers Scarce as Death Row Cases Mount*, PRESS-ENTERPRISE (Riverside, Cal.), Sept. 21, 1996, at B1; *see also* David G. Savage, *State's Legal Morass Numbs Death Penalty*,

several reasons for the lack of available attorneys. Eligible attorneys must have practiced four years, attended appellate training and handled at least seven appellate cases, including one homicide. An additional source of possible delay is that years may pass before the court reporter, court clerk, trial attorneys, and trial judge review the transcript and certify it for appellate review.[58] Thus, it can take up to nine years before a capital defendant's first appeal of right is perfected. Other obstacles include limits on the reimbursement of fees and expenses for appellate attorneys, and the seeming difficulty in obtaining a reversal due to the state supreme court's high affirmance rate in capital cases.[59]

B. TEXAS

As with many issues, capital punishment is *sui generis* in Texas.[60] Since 1976, Texas has executed the most capital defendants in the United States.[61] Texas routinely provides indigent

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L.A. TIMES, May 31, 1998, at A1 (detailing changes in California and federal laws that have failed to speed up executions in California).

One issue raised by this delay between the conviction and the adjudication of the direct appeal is whether the inmate's due process rights are violated. *See generally* Marc M. Arkin, *Speedy Criminal Appeal: A Right Without a Remedy*, 74 MINN. L. REV. 437 (1990).

[58] *See* Mack Reed, *An Even Longer Wait on Death Row*, L.A. TIMES, Apr. 3, 1996, at A1.

[59] Aside from these important administrative issues, even if California is able to timely appoint appellate counsel in capital cases, those attorneys will likely need some inspiration for their role beyond the institutional perspective of providing an able defense. Towards this end, Charles Ogletree has suggested that empathy and heroism should be promoted in criminal defense organizations. *See* Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993).

[60] According to Brent Newton, there is "pervasive unfairness in the modern Texas death penalty," including

> inherent and overt racism, prosecutorial misconduct, hanging judges and hanging juries, the crisis in providing indigent capital defense, the injustice of subjecting the young and persons with serious mental disorders to capital punishment, and Texas' record of sending innocent persons to death row.

Brent E. Newton, *A Case Study in Systemic Unfairness: The Texas Death Penalty, 1973-1994*, 1 TEX. F. ON C.L. & C.R. 1, 2-3 (1994). *See also* AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: DEATH PENALTY IN TEXAS: LETHAL INJUSTICE (March 1998) [hereinafter LETHAL INJUSTICE].

[61] *See* DEATH ROW U.S.A., *supra* note 55, at 14.

capital defendants with a lawyer at trial and on direct appeal. Until 1995, upon the conclusion of the appeal, a Texas death row inmate generally had to "fac[e] death alone"[62] because the state did not have an organization that represented indigent death row inmates and there was no state right to post-conviction counsel. The lack of a post-conviction attorney is a significant impediment because many defendants sentenced to death have routinely had their death sentences reversed on collateral attack.[63] Thus, not providing post-conviction attorneys increases the possibility that the state may execute a defendant not truly deserving of death.

In the late 1980s, the number of unrepresented Texas death row prisoners was increasing as the number of private attorneys willing to represent these inmates began declining. The problem arose largely because Texas state trial judges rarely exercised their discretion to appoint and compensate counsel in state habeas proceedings.[64] Moreover, the state courts routinely refused to grant stays of execution when the execution was imminent. In an apparent effort to facilitate executions, Texas trial judges began setting execution dates only months after either the denial of the last petition to appeal or the expiration of

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[62] The phrase is from Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U.L. REV. 513 (1988), which describes the issue on a national level and explores Florida's legislative approach to the issue.

[63] *See generally* Jack Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 918 (1982) (considering period between 1972 and 1982); James S. Liebman, *More Than "Slightly Retro:" The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 537, 541 n.15 (1990-1991) (considering available material through July 1991); *see also* Karen M. Allen et al., *Federal Habeas Corpus and Its Reform: An Empirical Analysis*, 13 RUTGERS L.J. 675, 732-55 (1982).

According to the most recent figures, from 1992 to 1995, 1147 defendants were sentenced to death; 156 executions occurred; 449 defendants were removed from death row other than by execution (dismissal of indictment, reversal of judgment of conviction, commutation, resentencing, an order of new trial or death) and the death row population increased by 479 persons. In short, a defendant is nearly three times as likely to be removed from death row for a reason other than the execution. U.S. DEP'T OF JUST., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1996, at tbl. 6.67 (1997); *see also* David Von Drehle, *When Harry Met Scalia: Why the Death Penalty Is Dying*, WASH. POST, Mar. 6, 1994, at C3 (stating death row inmates have to fear old age more than electrocution, gas chamber or lethal injection).

[64] *See* THE SPANGENBERG GROUP, A STUDY OF REPRESENTATION IN CAPITAL CASES IN TEXAS vii (1993).

the time in which to file an appeal. This practice seemed to exacerbate the difficulty capital inmates encountered in securing pro bono representation because attorneys were generally reluctant to volunteer to provide representation under the strain created by a pending execution date.[65] One consequence of this entire process was that some unrepresented inmates faced the prospect of being executed without availing themselves of either state or federal post-conviction procedures. To forestall this possibility and to preserve the right to challenge their convictions and death sentences under the federal habeas corpus statutes, Texas capital inmates began to seek stays of execution and appointment of counsel from federal courts.

In 1990, a report prepared for the State Bar of Texas made several recommendations, including paying private attorneys to represent death row prisoners in state habeas proceedings, establishing an organization of full-time attorneys to represent death row prisoners in state habeas proceedings, and having the state courts defer issuing execution warrants until a prisoner had completed one full round of state and federal habeas corpus proceedings.[66] Neither the state legislature nor the courts adopted these recommendations. The Texas Resource Center, a Community Defender Organization authorized to provide representation, assistance, and related services to eligible persons in federal habeas corpus death penalty cases, tried to recruit volunteer counsel and failing that, if the execution was imminent, it helped the inmate in preparing and filing a perfunctory habeas petition in federal court. Accompanying the petition often were motions for appointment of counsel and stay of execution to allow appointed counsel sufficient time to review the record, conduct appropriate research and investigation, and prepare a more thorough habeas petition. Inmates stopped this practice in September, 1993, after a Texas federal district judge treated a perfunctory petition as if it were a complete petition, raising all the constitutional claims available to the capital defendant. That district judge denied the petition

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[65] *See generally* Edith H. Jones, *Death Penalty Procedures: A Proposal for Reform*, 53 TEX. BAR J. 850 (1990).

[66] THE SPANGENBERG GROUP, *supra* note 64, at 166-68.

on the merits and the motion for a stay.[67] The judge dismissed a second habeas petition filed by that inmate, in part, as an abuse of the writ. Inmates resumed the filing of perfunctory writs after *McFarland v. Scott*,[68] a June, 1994 decision that gave a tortured reading of 21 U.S.C. § 848(q)(4)(B), allowing the appointment of and payment for counsel and other defense services before the filing of a federal writ of habeas corpus.[69]

Since *McFarland*, Texas has changed its practice. In 1995, the state reformed its habeas corpus laws.[70] The 1995 legal changes, however, cannot reduce the time that most Texas capital defendants have already spent on death row. Part of this previous delay arose from the time that it takes for the appointment of counsel, both on direct appeals and in collateral proceedings.[71] The new laws provide for the appointment and compensation of counsel in state habeas corpus proceedings. Capital defendants now litigate their habeas corpus petitions concurrent with their direct appeals.[72] If at the conclusion of both processes, the inmate has not obtained the requested relief, he usually may then seek federal habeas corpus relief.[73] There is no evidence that these reforms will appreciably reduce the delay between the imposition of a death sentence and the execution. Nor is there evidence that the legal changes will allow the courts meaningful appellate review of death sentences.

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[67] Gosch v. Collins, No. SA-93-CA-731 (W.D. Tex. Sept. 15, 1993), *aff'd*, 8 F.3d 20 (5th Cir. 1993).

[68] 512 U.S. 849 (1994).

[69] According to the majority, when an indigent capital defendant files a motion for appointment of counsel before filing a legally sufficient habeas petition, the habeas proceeding has "commenced" for purposes of 28 U.S.C. § 2251, and the federal court is authorized to order a stay of the execution. This practice was approved so the right to counsel for capital defendants provided by 21 U.S.C. § 848(q)(4)(B) would not become a nullity. The principle announced in *McFarland* has been incorporated into the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See* 28 U.S.C. § 2254(h) (Supp. 1998).

[70] *See* TEX. CODE CRIM. P. ANN. art. 11.071 (West 1998).

[71] *See* Oral Argument at 36-37, McFarland v. Collins, No. 93-6497, 1994 WL 665012 (U.S. Mar. 29, 1994) (prosecutor asserted delay can vary from two to eight years for appointment of counsel to capital cases).

[72] *See generally* James C. Harrington & Anne More Burnham, *Texas' New Habeas Corpus Procedure for Death-Row Inmates: Kafkaesque—and Probably Unconstitutional*, 27 ST. MARY'S L.J. 69, 72 (1995).

[73] *Id.* at 72-73.

From the laws' enactment until December, 1996 there were few executions because the courts had to rule on legal challenges to the law.[74]

C. FLORIDA

Like Texas and California, Florida is another state that has been serious about prosecuting death-eligible defendants. After *Furman* was decided, Florida was the first state to enact a death penalty statute.[75] The Court upheld that law in *Proffitt v. Florida.*[76] By the mid-1980s the Florida Supreme Court had decided more than 300 capital cases, which meant that there was a growing body of state death penalty law. As further evidence of its commitment to capital punishment, Florida led the nation in carrying out the death penalty in the post-*Furman* era: it was the first state to commit a non-consensual execution—that is, the defendant did not terminate his legal appeals—when it executed John Arthur Spinkellink on May 25, 1979; and until 1986, it had the largest number of defendants on death row and led the nation in the number of executions.[77]

The state was not always conscientious in respecting the rights of capital defendants, however. Florida, which presently has the third largest death row population, has had some difficulty in finding adequate representation for indigent capital defendants. It took until mid-1985 before Florida adopted a formal system of providing counsel in post-conviction capital cases. Before then inmates and concerned defense attorneys had to find attorneys for these cases.[78] From the mid-1970s until the mid-1980s, the only formal mechanism for locating pro

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[74] *See* Christi Harlan, *Law Stalls Death-Row Appeals,* AUSTIN AMERICAN-STATESMAN, Apr. 11, 1996, at A1; Kathy Walt, *Execution Pace Slows in Texas,* HOUSTON CHRONICLE, Aug. 10, 1996, at A1. After *Ex Parte Davis,* 947 S.W.2d 216 (Tex. Crim. App. 1996), upheld the laws against constitutional challenges, the moratorium ceased, and Texas officials made up for lost time by executing several defendants in a relatively short period of time. *See* Sue Anne Pressley, *Texas Picks Up the Pace of Capital Punishment Concurrent State, U.S. Appeals Speed Process,* WASH. POST, May 20, 1997, at A3.

[75] *See* Mello, *supra* note 62, at 517.

[76] 428 U.S. 242 (1976).

[77] Mello, *supra* note 62, at 518.

[78] Three of the five appellate defender offices in Florida handled post-conviction capital representation. *Id.* at 559.

bono lawyers for Florida death row inmates was the Florida Clearinghouse on Criminal Justice.[79] As in Texas, during the 1980s, in Florida the number of death warrants increased dramatically while the pool of available volunteer counsel decreased. Frequently, inmates were unrepresented when the governor signed death warrants, setting an execution date. In several cases, attorneys were forced to litigate the post-conviction claims within short deadlines.[80] In one instance a Florida lawyer traveled to New York City and went from law firm to law firm, seeking assistance for a case in which the execution was in twelve days.[81] One firm agreed, and, days later, the Florida Supreme Court reversed the death sentence.[82]

Prompted by litigation challenging the operation of the system, and stays of two executions because of the inability to locate volunteer counsel, in 1985, the Florida legislature established the Office of the Capital Collateral Representative (CCR), to provide representation to Florida's death row inmates.[83] CCR's office opened in October 1985, employing a capital representative and nine attorneys. Partly because some private lawyers declined to continue representing capital inmates and because the governor signed more death warrants, CCR's attorneys were soon overwhelmed. Nevertheless, critics have claimed that CCR reduced the frequency of executions.[84]

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[79] *See id.* at 567-68. The Clearinghouse relied on contributions from private citizens, religious groups, and foundations for financial support. It generally had a three-person staff, none of whom were lawyers, and recruited and helped volunteer counsel in capital cases already affirmed by the Florida Supreme Court. *See id.* at 567.

[80] *See* Mello, *supra* note 62, at 569-85 (discussing six representative cases).

[81] Saundra Torry, *Lawyers Scramble to Fill Void in Death Row Appeals*, WASH. POST, July 24, 1988, at A11.

[82] *Id.*

[83] Mello, *supra* note 62, at 600.

[84] *Id.* at 605-06. One critic has the opposite assessment—that CCR has made it possible for Florida to execute only nominally represented inmates. Michael Mello, an early member of the Center's staff, has claimed that death row inmates who were represented by the Center were worse off than those who did not have legal representation. Mello suggests that Florida replace the Center with an entity that provides logistical support for pro bono counsel. Michael Mello, *Death and His Lawyers: Why Joseph Spaziano Owes His Life to the Miami Herald—And Not to Any Defense Lawyer or Judge*, 20 VT. L. REV. 19, 19, 48-50 (1995).

D. OTHER STATES

Other jurisdictions have faced issues similar to the ones confronted by California, Texas, and Florida in the administration of the death penalty. For instance, in the early 1980s it seemed that Missouri adopted a policy of scheduling executions before capital defendants had availed themselves of federal court review. That practice abated after Justice Blackmun declared that a stay should issue in each case.[85] In Pennsylvania, which has a substantial death row population, a 1989 task force reported that that state's capital litigation process had problems of major proportions.[86] Delays marred Pennsylvania's capital litigation process because there were too few lawyers with capital expertise, and there was no mechanism for tracking capital cases to monitor their progress.[87]

Prosecutors are responsible for some delay, too. Delay occurs when courts have to consider issues that are not necessarily germane to the defendant's guilt. One such example is the time taken by courts in ruling on a state's motion to disqualify a defense attorney from representing the defendant.[88] On occasion, prosecutors have litigated whether they have to release public records and documents that a defendant seeks in order to cast doubt on the investigation and prosecution of the case.[89] Prosecutors also allow cases to remain idle for long periods. Sometimes, this idleness is because an office different from the one that conducted the trial is responsible for the appeal or post-conviction work.[90] Court records, such as transcripts and motions, are sometimes missing from court files and time is

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[85] *See* McDonald v. Missouri, 464 U.S. 1306 (Blackmun, Circuit Justice 1984).

[86] *See* Bob Whittman, *Legal Last Defense or Wasted Tax Dollars?*, MORNING CALL (Allentown, Pa.), May 14, 1995, at B1.

[87] *Id.* A more recent study asserts that in Philadelphia, African American defendants are more likely than other defendants to be sentenced to death, even when the circumstances of the killing are the same. Fox Butterfield, *New Study Adds to Evidence of Bias in Death Sentences*, N.Y. TIMES, June 7, 1998, § 1, at 22.

[88] *See* Penelope Lemov, *Long Life on Death Row*, GOVERNING, Mar. 1996, at 30.

[89] *See* Janet Elliott & Robert Elder Jr., *High Courts: DA's Closed Files Ruled Exempt from Open Records Disclosure*, TEX. LAW., June 24, 1996, at 4; Alan Johnson, *Executions are Costly, Studies Find*, COLUMBUS DISPATCH, Apr. 2, 1995, at 1A.

[90] *See* Andy Sher, *Crime Fears, Death Penalty Debate Stirring Furor Over Judge Election*, NASHVILLE BANNER, July 22, 1996, at A1.

spent searching for replacement copies or reconstructing the testimony.[91] Delay also occurs when defense attorneys and prosecutors, burdened by their caseload, seek extensions in which to file their legal papers.[92] Time also elapses before either the retrial or resentencing of capital defendants whose prior conviction or sentence has been reversed.[93] In sum, the adversarial nature of the death penalty process, the number of capital cases and the lack of systematic oversight of the capital litigation process foster delays.

After their direct appeals, death row inmates have little incentive to prod along the process of further judicial review. The truth is that for the most part neither do most prosecutors. Even those prosecutors who have ambitions beyond their present office can rely on the number of death sentences imposed, no matter the actual number of executions, to further their careers.[94] Moreover, political considerations influence when, if ever, the state tries to get the case moving toward execution. Governors sign death warrants to show that they are "tough on crime" or to spur the court or the parties into processing the

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[91] *See, e.g.*, Dobbs v. Turpin, 142 F.3d 1383, 1385 (11th Cir. 1998) (reversal of 24-year-old death sentence for new hearing because of ineffective assistance of counsel, supported by once-stored court reporter's stenographic notes of defense attorney's closing argument).

[92] Apparently it mattered to one federal judge whether the request for extensions of time to file papers is made by the defendant or the state. In Madden v. Texas, 498 U.S. 1301, 1305 (Scalia, Circuit Justice 1991) Justice Scalia, as the Circuit Justice for the United States Court of Appeals for the Fifth Circuit, declared that henceforth the withdrawal of appellate counsel prior to the filing of a certiorari petition would not automatically constitute sufficient "good cause" to extend the period in which to file a petition for a writ of certiorari. Prosecutors, when asserting that their workload necessitates the extension of time, however, have obtained several extensions in which to file their response. *See* Christine M. Wiseman, *Representing the Condemned: A Critique of Capital Punishment*, 79 MARQ. L. REV. 731, 749 (1996). This disparate treatment for extensions of time to file court papers is perhaps defensible if one believes that the prosecutor acts in the state's best interests. Similarly, for purposes of calculating the period of inordinate delay, the time period of such extensions should be attributed to the state.

[93] *See* Tracy Thompson, *Delays in Death Row Appeals Keep Inmates in Judicial Limbo*, ATLANTA J. & CONST., Sept. 27, 1986, at A1.

[94] *See* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital* Cases, 73 B.U. L. REV. 759, 781-84 (1995).

case.[95] These warrants often result in satellite litigation on whether to stay the death warrant. Moreover, various state officials have to decide the number of executions that should occur, the time between executions, and the order of executing the inmates.[96] It is thus incorrect to assume that the state is ready and willing to execute any capital defendant once that inmate has completed his direct or post-conviction challenges. In actuality, there are two reasons for an inordinate delay between the imposition of a death sentence and an execution: first, the state's failure to vigorously respect the rights of capital defendants; second, the state's failure to carry out the execution as aggressively as it sought and obtained the death sentence. Death penalty cases receive the greatest amount of attention at the beginning of the process—when the crime occurs and during the trial—and at the end of the process—on the eve of execution.[97] It is the time between these events during which the complained-of delay occurs, and in which the case fades from public discussion and concern.[98]

In short, despite the commitment of substantial resources toward, and a fair amount of success in obtaining death sentences, the states have not established effective post-trial capital case processing systems. These defective processing systems are the true cause of most of the delay in capital cases. The states have had a difficult time developing a cadre of qualified trial and appellate capital defense attorneys. In addition, few states have a central authority or office responsible for monitoring

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[95] *See* CRIMINAL JUSTICE SECTION, AMERICAN BAR ASSOCIATION, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES, A REPORT CONTAINING THE AMERICAN BAR ASSOCIATION'S RECOMMENDATIONS CONCERNING DEATH PENALTY HABEAS CORPUS AND RELATED MATERIALS FROM THE AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION'S PROJECT ON DEATH PENALTY HABEAS CORPUS 119 (Ira Robbins, Project Director 1990).

[96] *Id.* at 137 n.531.

[97] Rhonda Cook & Bill Rankin, *The Death Game: Appeal, Counterappeal, Motion, Countermotion—Carrying Out the Death Penalty Means Playing the System, But What About Justice?*, ATLANTA J. & CONST., July 23, 1995, at 1N.

[98] This is not a recent occurrence. *See* Leonard D. Savitz, *A Study in Capital Punishment*, 49 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 338, 338 (1958) (reporting that since 1944 executions that occurred within a year of imposition of death sentence received perfunctory newspaper coverage).

and coordinating the processing of capital cases. As a result, the processing of capital cases is haphazard and subject to the machinations of lax prosecutors and litigious defendants.

IV. HABEAS CORPUS ISSUES

Though most capital prosecutions occur in the state court system, federal habeas corpus has historically served an important role in the capital litigation process.[99] Capital defendants can obtain federal habeas court review of their convictions and sentences by alleging that their detention violates the federal Constitution. If the federal court concludes that the defendant's federal rights were violated, it issues the writ, ordering the state by a certain time to either conduct appropriate proceedings or to release the defendant. Accordingly, a capital defendant who has been on death row for an inordinate period of time would have to allege that his pending execution violates the Constitution. Although it is presently unclear under the recently amended federal habeas corpus statute whether an inordinate delay claim is cognizable, and, if so, in which federal forum, the issue should be cognizable to ensure that the death penalty is not meted out for murders and murderers for whom such a penalty is excessive, and that the death penalty is administered within the rule of law.[100] This Part outlines the federal habeas law under which most inordinate delay claims will arise. I will show that in certain instances the inordinate delay claim should be cognizable, and that some defendants should have a substitute sentencing hearing once they have been on death row for an inordinate length of time.

A. BRIEF HISTORY OF THE WRIT OF HABEAS CORPUS

Since the founding of this nation until the mid-twentieth century, the law of federal habeas corpus was captured in a few

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[99] Most notably, a high percentage of capital convictions and sentences have been reversed on habeas review. *See* sources cited in note 63.

[100] Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1784-98 (1970); Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 844-47 (1969); Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 955, 1047-64 (1978).

statutes and many more federal court decisions interpreting those laws. The first Judiciary Act authorized the issuance of habeas petitions.[101] Though its reach was twice broadened by Congress,[102] the most expansive extension of the statute occurred in 1867, when the statute was amended to cover prisoners detained by state officials.[103] Under the 1867 amendments, a federal court could examine the legality of the prisoner's detention and if the detention was found to be in violation of the federal Constitution or laws, the court could order the release of the prisoner. The courts interpreted the 1867 amendments as authorizing habeas courts to conduct an inquiry into both the factual and legal bases for the prisoner's detention.[104] During the next ninety-nine years, and with one relatively minor statutory amendment,[105] the federal courts interpreted the writ as being functionally more available. These courts typically used the pretense that the prisoner was essentially challenging the trial court's jurisdiction. In 1942, the Court quit "kissing the jurisdictional book" as a prerequisite to the availability of the writ,[106] and subsequent cases explicitly established that the writ was available to determine whether the state court process satisfied the standards that the Fourteenth Amendment imposed on the states.[107] A judicially created rule of comity was codified in 1948 by Congress' requirement that prisoners present the federal

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[101] First Judiciary Act. ch. 20, § 14, 1 Stat. 73, 81-82 (1789).

[102] The federal courts were twice granted authority to issue the writ to a limited class of state prisoners. *See* Act of Mar. 2, 1833, ch. 57, § 7, 4 Stat. 632 (authorizing habeas jurisdiction for prisoners confined for acts committed "in pursuance of a law of the United States"); Act of Aug. 29, 1842, ch. 257, 5 Stat. 539 (authorizing habeas jurisdiction for prisoners in United States or state custody who are citizens of a foreign state). *See also Ex parte* Dorr, 44 U.S. 103 (1845) (federal courts cannot issue writ to release state prisoner).

[103] Judiciary Act, ch. 28, § 1, 14 Stat. 385, 385 (1867).

[104] *See* Max Rosenn, *The Great Writ—A Reflection of Societal Change*, 44 OHIO ST. L.J. 337, 341 (1983).

[105] Between 1911 to 1925 circuit court judges lacked the authority to grant the writ without being specially assigned to a district court. *See* Craig v. Hecht, 263 U.S. 255, 271 (1923). This was corrected by the Judiciary Act of 1925, 43 Stat. 940 (1925).

[106] *See* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 151 (1970).

[107] PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1502 (3d ed. 1988).

claim to the state courts or "exhaust their state court remedies" before applying for habeas relief.[108] Exhaustion occurs by presenting the constitutional claim to the state courts at least once, provided there is a process by which the prisoner can raise the claim.[109]

From about 1953 to 1976 the Court interpreted the habeas laws in an expansive manner, broadening the scope and availability of the writ. During this period the Court virtually eliminated most procedural impediments to the relitigation of the manner by which state prisoners were prosecuted.[110] A petitioner could file more than one habeas petition and generally have the courts adjudicate the merits of the claims in his or her petition. The prisoner also did not have to worry about having

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[108] Act of June 25, 1948, 62 Stat. 869, 964-68 (codifying exhaustion requirement at 28 U.S.C. § 2254). *See generally* Larry W. Yackle, *The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles*, 44 OHIO ST. L. J. 393, 401-13 (1983).

[109] Brown v. Allen, 344 U.S. 443, 447-50 (1953) (plurality opinion). If no such procedure exists, then the exhaustion requirement is excused and the prisoner can raise the claim in the federal habeas court.

[110] *Brown* established that a federal habeas court is not to attach any significance to the United States Supreme Court's denial of a petition for a writ of certiorari containing the same constitutional claims; that principles of *res judicata* did not apply to the state court's findings; and that if the state courts provided a process for the development of facts underlying the claim, the habeas court could rely on the trial and appellate court records in deciding whether to grant the writ, provided that there was not a "vital flaw" in the state court process. *See also* Hensley v. Municipal Court, 411 U.S. 345, 351-53 (1973) (petitioner released on own recognizance with collateral consequences for violating court order is "in custody"); Fay v. Noia, 372 U.S. 391, 398-99 (1963) (petitioner's failure to avail himself of an available state court process could not serve as an independent and adequate ground precluding federal habeas review, unless petitioner had "deliberately by-passed" the state court process), *overruled in part by* Wainwright v. Sykes, 433 U.S. 72 (1977) (discussed in note 111, *infra*); Sanders v. United States, 373 U.S. 1 (1963) (habeas court should adjudicate the merits of claims raised in a second or successive petition unless determination in prior petition was on the merits and the same grounds were presented; if earlier claims had not been rejected on the merits, or if a different claim is now presented, then habeas court should address the merits of claims in second or successive petition, unless it finds that the petitioner has abused the writ); Jones v. Cunningham, 371 U.S. 236, 241-42 (1963) (expanding notion of "in custody" requirement to cover petitioner on parole).

Rarely did Congress respond to the Court's various interpretations of the habeas laws. The notable exception was in 1966, when Congress prescribed when evidentiary hearings should be held, which was somewhat different from the circumstances outlined in *Townsend*, 372 U.S. at 313, and *Sanders*, 373 U.S. at 15-18. *See* Act of Nov. 2, 1966, 80 Stat. 1105.

his or her claims precluded by prior state court factual or legal determinations. Starting in 1977, the Court consistently began to reinterpret the writ, insisting more on giving preclusive effect to state court rules and the finality of state court convictions, without similarly overruling its precedents that had expansively interpreted the writ.[111] In this period the Court placed the burden on the petitioner to show that the federal court should address the merits of claims asserted in a second or successive petition,[112] and considered giving more deferential review to state court legal rulings.[113] Just as importantly, during this period, more than half of all capital defendants had their convictions or sentences reversed on federal habeas review.[114]

For the most part, by 1990, there were only two substantive limitations on the availability of the writ. First, under *Stone v.*

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[111] The primary cases, in chronological order, were Wainwright v. Sykes, 433 U.S. 72 (1977) (requiring that petitioner establish "cause" and "prejudice" arising therefrom as test for failing to comply with state procedural rule; failure to satisfy test permits state procedural rule to serve as an independent and adequate ground for the judgment, precluding federal habeas review of federal claim); Rose v. Lundy, 455 U.S. 509 (1982) (court should dismiss entire petition when it contains both exhausted and unexhausted claims); Engle v. Isaac, 456 U.S. 107 (1982) (repeated rejections of similar claims or undeveloped legal theory are not cause for not employing state court procedure); United States v. Frady, 456 U.S. 152 (1982) (to constitute prejudice, petitioner must show actual and substantial disadvantage infecting entire trial arising from trial error); Murray v. Carrier, 477 U.S. 478, 492 (1986) (counsel's error, short of ineffective assistance, does not constitute cause for procedural default); Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (successive writ should be reviewed only when petitioner "supplements his claim with colorable showing of factual innocence"); McCleskey v. Zant, 499 U.S. 467, 495 (1991) (petitioner must establish cause and prejudice or show fundamental miscarriage of justice to overcome claim of abuse of writ when filing second or successive habeas petition).

After 1990, the Court has been more willing to overrule its habeas precedents, when giving greater deference to state court criminal decisions. *See* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992) (petitioner must show cause and prejudice for failure to develop material fact in state court proceedings, with "narrow exception" where he can show fundamental miscarriage of justice resulting from failure to consider claim) (*overruling in part Townsend*); Coleman v. Thompson, 501 U.S. 722 (1991) (failure to utilize state court procedural rules bars federal habeas court review unless petitioner can show cause and actual prejudice for failure to consider the claim or demonstrate miscarriage of justice).

[112] McCleskey v. Zant, 499 U.S. 467 (1991).

[113] Wright v. West, 505 U.S. 277, 295 (1992) (plurality opinion) ("We need not decide such far-reaching issues in this case.").

[114] *See* sources cited in note 63.

Powell[115] Fourth Amendment violations were not cognizable on habeas if the state court system provided a full and fair opportunity for the resolution of Fourth Amendment claims. Second, *Teague v. Lane*[116] held that prisoners could not rely on a "new rule" of constitutional law to collaterally attack their criminal convictions. A legal ruling is new "if the result was not dictated by precedent existing at the time the [habeas petitioner]'s conviction became final."[117] The new rule would apply retroactively "if it places certain kinds of primary private individual conduct beyond the power of the criminal law-making authorities to proscribe"[118] or if it "establishes new procedures without which the likelihood of an accurate conviction is seriously diminished."[119] In 1996, the habeas corpus laws were amended in several respects by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The extent of change wrought by the amendments is unclear because Congress employed language different from that used in the Court's decisions that seemed to address similar principles.[120]

B. ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT

The AEDPA amends §§ 2241 to 2255 of Title 28, governing federal habeas corpus petitions filed by state and federal prisoners. Sections 2241 to 2255, among other things, allow for expedited review of the habeas petition and restrict the federal court's scope of review of the merits of the habeas petition.[121]

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[115] 428 U.S. 465 (1976).

[116] 489 U.S. 288, 306-08 (1989).

[117] *Id.* at 301.

[118] *Id.* at 307.

[119] *Id.*

[120] The growing commentary explores this issue from several perspectives. *See, e.g.*, Marshall J. Hartman & Jeanette Nyden, *Habeas Corpus and the New Federalism After the Anti-Terrorism and Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV. 337 (1997); Evan Tsen Lee, *Section 2254(d) of the New Habeas Statute: An (Opinionated) User's Manual*, 51 VAND. L. REV. 103 (1998); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1 (1997); Larry W. Yackle, *Developments in Habeas Corpus, Parts I-III*, THE CHAMPION, Sept./Oct. 1997, at 14; Nov. 1997, at 16; Dec. 1997, at 16.

[121] *See* 28 U.S.C. §§ 2264, 2254(e) (Supp. 1998).

The AEDPA also added §§ 2261 to 2266 to Title 28, which deal with habeas corpus petitions filed by state prisoners who have been sentenced to death[122] in states that have certain state post-conviction procedures.[123] To take advantage of the expedited review provisions, states have to either establish mechanisms for the appointment, compensation and payment of reasonable litigation expenses of competent counsel in state post-conviction proceedings brought by indigent capital prisoners or allow indigent prisoners to litigate on direct review claims that previously could be raised only in collateral attacks.[124] The prisoner is required to file a habeas petition, subject to certain tolling provisions, "not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review."[125] One consequence of not complying with the limitations period is that any late-filed petition is treated as if it were a second or a successive petition rather than an initial petition.[126] In such instances, the petitioner must first obtain an order from the appropriate court of appeals authorizing the district court to consider the late-filed petition.[127] Also, federal district courts have to dispose

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[122] This is the first time that Congress has distinguished between capital and non-capital habeas corpus cases.

[123] Sections 2261 to 2266 apply only if a state "opts in" and qualifies under either the post-conviction procedures set forth in 28 U.S.C. § 2261 or under the "unitary review" process described in 28 U.S.C. § 2265. *See* 28 U.S.C. § 2261(a) (Supp. 1998).

[124] *See id.* §§ 2261(a)-(b), 2264(a).

[125] *Id.* §§ 2263(a)-(b), 2265(c). In return for the accelerated review of habeas petitions, an automatic stay of execution issues with the filing of the petition. The stay terminates if a timely habeas petition is not filed; the prisoner waives the right to pursue habeas corpus review; or the prisoner fails to make a substantial showing of the denial of his federal right or is denied habeas relief. *See id.* § 2262(b)-(c).

[126] *See id.* § 2262(c).

[127] The court of appeals may issue an order authorizing the petition only if the petitioner makes a prima facie showing that the claim:

> (A) . . . relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
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> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

of habeas petitions within prescribed time limits.[128] If the district court's judgment is appealed, the court of appeals must issue a final decision "not later than 120 days" after the filing of the last appellate brief.[129]

The key substantive provisions of the AEDPA are §§ 2254 and 2264. Section 2254 applies to (1) all noncapital habeas petitions filed by state prisoners after April 24, 1996, its date of enactment; and (2) capital habeas petitions that were pending on April 24, 1996 in jurisdictions that have been deemed to have satisfied the "opt in" requirements.[130] Section 2264 applies to all capital petitions filed after April 24, 1996 in "opt in" jurisdictions, and it incorporates by reference the standards imposed by § 2254(a), (d)-(e).

A district court can consider only claims in the petition that have been raised and decided on the merits in the state courts.[131] As to cognizable claims, the writ cannot issue unless the state court decision was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court, or the decision denying the writ was based on an unreasonable determination of the facts in light of the evidence presented at the state court

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28 U.S.C. § 2244(b)(2) (Supp. 1998).

[128] The district court is required to "render a final determination and enter a final judgment on any application for a writ of habeas corpus brought under this chapter in a capital case not later than 180 days after the date on which the application is filed." *Id.* § 2266(b)(1)(A). The district court may extend this time period, once, for 30 days, for specified reasons. *See id.* § 2266(c)(i)-(iii). The district court is required to give priority to capital habeas petitions "over all noncapital matters." *Id.* § 2266(a). If the district court does not comply with the time limitations, the state may apply for writ of mandamus from the appellate court, which has to be acted on within 30 days of its filing. *See id.* § 2266(b)(4)(B).

[129] *See id.* § 2266(c)(1)(A). The court of appeals has 30 days to decide whether to grant a petition for rehearing or request for rehearing en banc and, if rehearing is granted, must render a final decision "not later than 120 days after the date on which the order granting rehearing or rehearing en banc is entered." *Id.* § 2266(c)(1)(B)(i)-(ii). The state may apply to the United States Supreme Court for a writ of mandamus to enforce the time limitations governing review by the appellate court. *See id.* § 2266(c)(4)(B).

[130] 1 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.7a-b (2d ed. Supp. 1997).

[131] *See* 28 U.S.C. § 2264(a) (Supp. 1998).

proceeding.[132] Claims that have not been decided on the merits in state courts can be litigated if the previous failure to raise the claim was because (1) of state action in violation of federal law; (2) the United States Supreme Court has recognized a new federal right that has been made retroactively applicable; or (3) the claim is based on factual information that could not have been discovered though due diligence in time to present the claim for prior state or federal post-conviction consideration.[133]

In limited instances the habeas court can hold an evidentiary hearing. It may do so to develop the factual basis of the claim, if the claim relies on a new rule of constitutional law that the United States Supreme Court has made retroactive to cases on collateral review,[134] or when the factual predicate could not have been previously discovered through the exercise of due diligence and the facts underlying the claim are sufficient to establish by clear and convincing evidence that but for a constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.[135]

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[132] *See id.* §§ 2264(b), 2254(d).

[133] *See id.* § 2264.

[134] *See id.* § 2264(a)(2).

[135] *See id.* § 2254(e)(2). Requiring the petitioner to prove that he is not guilty of the underlying offense is inappropriate for capital cases because it does not provide for consideration of both the guilt and sentencing proceedings. *See* Sawyer v. Whitley, 505 U.S. 333, 356 (1992) (Blackmun, J., dissenting); *id.* at 368 (Stevens, J., dissenting). A death verdict is ordinarily the product of several factors. *See* Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 LAW & CONTEMP. PROBS. 205, 223-24 (1989); William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote for Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 53 (1988); Lawrence T. White, *Juror Decision Making in the Capital Penalty Trial*, 11 LAW & HUM. BEHAV. 113 (1987). Moreover, it is generally impossible to isolate the factors that resulted in a death sentence because even though a defendant could be within the class of persons who may be sentenced to death, a sentencer could still exercise mercy and not return with a death sentence. *California v. Brown*, 479 U.S. 538 (1987), has been read as permitting sentencing on this basis. *See* Franklin v. Lynaugh, 487 U.S. 164, 185-88 (1988) (O'Connor, J., concurring); *see also* Stephen P. Garvey, *"As the Gentle Rain from Heaven": Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989, 992 (1996) (arguing sentencing phase of capital trial ought to incorporate mercy).

Indeed, a failure to consider both the question of culpability for the offense and the "death eligibility" of the defendant increases the risk that a death sentence may be imposed on a defendant not deserving of death. *See* Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21, 25 n.10, 79-85 (1997).

The procedural and substantive changes in the AEDPA will make it more difficult for capital prisoners to obtain federal habeas corpus relief.[136] A capital defendant asserting an inordinate

[136] It is questionable whether the AEDPA will apply to all capital cases. A court might rule that the AEDPA is "inapplicable to cases in which it would upset reliance interests in prior law" because it modifies the elements of a federal claim for relief or establishes a new defense to such a claim. Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFFALO L. REV. 381, 404 n.78 (1996). If a court determines that the standards outlined in the AEDPA do not apply to a petition asserting an inordinate delay claim, the petition would have to be judged under the pre-AEDPA habeas law.

Under pre-AEDPA habeas law, a petitioner would first have to convince the federal court that the nonretroactivity rules of *Teague v. Lane*, 489 U.S. 288 (1989), are not a bar to the federal court's consideration of the inordinate delay claim. The petitioner should be able to overcome this limitation. The Court has held that a ruling precluding a certain category of punishment for a class of defendants, based on their status or the nature of the offense, falls under the first exception to *Teague*. *See* Penry v. Lynaugh, 492 U.S. 302, 329 (1989) (considering, on federal habeas review, whether mentally retarded capital defendants can be executed). Similarly, the contention that the substantive principles of the Eighth Amendment prohibit the execution of capital defendants who have spent an inordinate amount of time on death row calls for a determination of whether these inmates should, as a class, be exempted from execution.

The petitioner might also have to overcome the successive writ and abusive writ doctrines. Under the successive writ doctrine a federal habeas court will not consider claims that could have been raised in an earlier petition. *See Sawyer*, 505 U.S. at 338. A capital defendant cannot raise an inordinate delay claim until it ripens, which occurs only after the defendant has been on death row for an excessive period. This ripeness requirement serves to ease the feared friction between state criminal law enforcement processes and the review of those processes by federal judges because the federal judges acquire authority to review long-delayed death penalty cases only after a substantial lapse of time. Conceivably, by this point, state officials will have had several opportunities to review the case. Moreover, the constitutional and prudential principles of Article III—such as the prohibition against a litigant's raising another's legal claim, the rule barring the litigation of general grievances that are better addressed in the other branches of government and the requirement that the gravamen of the complaint fall within the zone of interests protected by the law invoked—dictate that the petitioner can bring the claim only after he has suffered a distinct injury. *See* Allen v. Wright, 468 U.S. 737 (1984).

The abuse of the writ doctrine "defines the circumstances in which federal courts decline to entertain a claim presented for the first time in a second or subsequent petition for a writ of habeas corpus." McCleskey v. Zant, 499 U.S. 467, 470 (1991). As with the successive petition doctrine, the concerns that prompted the abuse of the writ doctrine are less prevalent when habeas courts consider inordinate delay claims. If the death row inmate could not raise the claim in an earlier habeas petition—because, for instance, he had not been on death row for the presumptive period—then the abuse of the writ doctrine should not bar consideration of the merits of the petition, as the inmate, in raising the issue later, is raising the claim at the appropriate time. Another procedural bar that might be raised is whether Rule 9 of the Rules

delay claim is likely to argue that his or her pending execution violates the Constitution, specifically, the Eighth Amendment's prohibition against cruel and unusual punishment.[137] The habeas petition would essentially challenge the basis on which the death sentence was imposed. As I have argued elsewhere, under the test established by the United States Supreme Court, this argument does have merit.[138] Most importantly, the delay in carrying out the death sentence may indicate that going forward with the execution at this late date would not achieve a valid penological purpose.

Due to the present administration of capital punishment, my suggested prerequisite that the prisoner show that an inordinate length of time has been spent on death row—that is, twice the national average—and the short filing periods established by the AEDPA, it is highly unlikely that in a first habeas petition a petitioner will be able to allege that there has been an inordinate delay in his or her case.[139] Consequently, under the AEDPA the petitioner will have to convince the appropriate

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Governing Section 2254 Cases has been violated. The concerns emanating from Rule 9—intentional delay by the petitioner, prejudice to the state in defending the claim, and the possibility that the claim could have been discovered earlier—are generally addressed when considering whether the petition is successive or abusive and therefore independent analysis is unnecessary. Nonetheless, a first habeas petition cannot be automatically dismissed due to the passage of time from the commission of the crime to the filing of the petition. *See* Lonchar v. Thomas, 517 U.S. 314 (1996).

To overcome either the successive petition or abuse of the writ defense, a habeas petitioner has to establish either (1) cause for not raising the claim earlier and prejudice as a result of that failure; or (2) that a miscarriage of justice would occur by refusing to consider the underlying claim. An inordinate delay claim satisfies the cause requirement due to the novelty of the claim. Previously, there has been little chance of success of the claim. *See* 2 LIEBMAN & HERTZ, *supra* note 130, § 28.3c at 921-23. The petitioner is prejudiced because he or she is not able to litigate the appropriateness of his or her pending execution *after* an inordinate delay. *See* United States v. Frady, 456 U.S. 152, 170 (1982).

Defaulted claims and claims in otherwise abusive or successive petitions can be considered to prevent a miscarriage of justice. As detailed *infra*, capital defendants have the equivalent of newly discovered evidence based on their lengthy death row stay, which qualifies as a narrow exception to proving that they are "innocent of a death sentence." *See Sawyer*, 505 U.S. at 368.

[137] 28 U.S.C. §§ 2264(b), 2254(a) (Supp. 1998).

[138] Aarons, *supra* note 1, at 205.

[139] *But see* White v. Johnson, 79 F.3d 432 (5th Cir. 1996) (under pre-AEDPA law denying, without ordering evidentiary hearing, first federal habeas petition, which asserted that 17-year stay on death row was unconstitutional).

court of appeals that the factual predicate for the claim could not have been discovered previously through the exercise of due diligence and that the facts underlying the claim, if proven and viewed in light of the evidence as a whole, are sufficient to establish by clear and convincing evidence that, but for a constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.[140]

C. NEWLY DISCOVERED EVIDENCE UNDERMINING DEATH SENTENCE

The most frequently articulated rationale for not considering the inordinate delay claim pre-AEDPA is that the death sentence was proper when it was imposed.[141] This same reason is likely to surface under the AEDPA, particularly when a court relies on § 2264(a)—the claim was not raised in a prior state proceeding—as the basis for not considering the claim. However, due to his or her inordinate stay on death row, the petitioner is now in possession of newly discovered evidence that may undermine the validity of the death sentence. Therefore, the capital prisoner is entitled to a hearing on whether his or her death sentence is in violation of federal law.

In a subsequent or late filed first habeas petition, a capital petitioner has to rely on § 2264(a)(3) to establish that the factual predicate for asserted claims could not have been estab-

[140] *See* 28 U.S.C. § 2264(a)(3) (Supp. 1998). Alternatively, a capital defendant can petition the United States Supreme Court under § 2241, asserting that his or her pending execution violates the Constitution and that the Court should announce a new rule of constitutional law that retroactively applies to cases on collateral review. *See id.* §§ 2241, 2264(a)(2).

[141] *See, e.g.*, Stafford v. Ward, 59 F.3d 1025 (10th Cir. 1995) (rejecting claim based on 15-year delay because of lack of precedent in prisoner's favor and under abuse of writ doctrine); Fearance v. Scott, 56 F.3d 633 (5th Cir. 1995) (rejecting claim based on 17-year delay between trial and proposed execution date under abuse of writ doctrine); Free v. Peters, 50 F.3d 1362 (7th Cir. 1995) (rejecting claim based on 12-year delay from conclusion of direct appeal); Porter v. Singletary, 49 F.3d 1483, 1485 (11th Cir. 1995) (rejecting 17-year delay under abuse of writ doctrine and that there were insufficient facts to warrant a hearing); United States *ex rel.* DelVecchio v. Illinois Dep't. of Corrections, 1995 WL 688675 (N.D. Ill. Nov. 17, 1995) (relying on *Free* to reject claim based on 16-year delay).

State courts presented with the issue have summarily ruled against the defendant. *See, e.g.*, Porter v. State, 653 So. 2d 374, 380 (Fla. 1995); State v. Smith, 931 P.2d 1272, 1287-88 (Mont. 1996); State v. McKenzie, 894 P.2d 289, 293 (Mont. 1995); Stafford v. State, 899 P.2d 657, 660 (Okla. Crim. App. 1995).

lished with the exercise of due diligence and that but for a constitutional error the petitioner would not have been *convicted* of the offense.[142] This standard addresses only the guilt phase of the capital trial; consequently it is an open question whether § 2264(a)(3) eliminates the "innocent of death" exception to successive or abusive petitions and otherwise defaulted claims.[143] Conceivably, it does not. If the United States Supreme Court's prior approaches to interpreting the AEDPA are indicative,[144] the federal courts are to apply a "commonsense practice to the statutory scheme."[145]

Habeas courts considering "innocent of death" claims focus on the aggravating circumstances or other conditions of death eligibility.[146] To obtain federal habeas review in an inordinate

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[142] 28 U.S.C. § 2262(a)(3) (Supp. 1998) (emphasis added).

[143] Sawyer v. Whitley, 505 U.S. 333 (1992) (petitioner entitled to relief if she can show by clear and convincing evidence that but for constitutional error at sentencing hearing reasonable juror would not have imposed death sentence).

[144] *See* Hohn v. United States, 118 S. Ct. 1969 (1998) (Supreme Court can review denial of application for certificate of appealability in § 2255 cases by writ of certiorari); Stewart v. Martinez-Villareal, 118 S. Ct. 1618 (1998) (petition containing previous claim dismissed as premature is not barred as a second or successive petition under § 2244(b) when asserted later when ripe); Lindh v. Murphy, 521 U.S. 320 (1997) (AEDPA does not apply to noncapital cases filed before its date of enactment); Felker v. Turpin, 518 U.S. 651, 658-62 (1996) (Supreme Court retains jurisdiction to entertain original habeas petitions under § 2241, notwithstanding AEDPA's other limitations on availability of habeas petitions); *see also* Kimberly Woolley, Note, *Constitutional Interpretations of the Antiterrorism Act's Habeas Corpus Provisions*, 66 GEO. WASH. L. REV. 414 (1998) (suggesting AEDPA should be interpreted to avoid serious constitutional questions); Note, *The Avoidance of Constitutional Questions and the Preservation of Judicial Review: Federal Court Treatment of the New Habeas Provisions*, 111 HARV. L. REV. 1578 (1998) (discussing federal court's interpretation of AEDPA).

[145] *Hohn*, 118 S. Ct. at 1971; *see also* West Va. Hosp. v. Casey, 499 U.S. 83, 100-01 (1991) ("Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law. We do so not because that precise accommodative meaning is what the lawmakers must have had in mind . . . but because it is our role to make sense rather than nonsense out of the *corpus juris*.") (citation omitted).

[146] Professor Stephen Garvey has provided a useful schema for analyzing "innocent of death" claims. Stephen P. Garvey, *Death-Innocence and the Law of Habeas Corpus*, 56 ALB. L. REV. 225 (1992). He divides the concept into two categories: death-ineligibility and "desert innocence." Desert-innocence claims explore the moral appropriateness of sentencing the defendant to death, whereas death-ineligibility cases focus on the legal prerequisites for a death sentence. *Id.* at 244-45. A case falls within the death-ineligibility category if there is insufficient evidence that the defendant

delay case, the inmate could contend that he is in possession of newly discovered or otherwise unavailable evidence he could not have raised at his trial or in a prior habeas petition. The newly discovered evidence is his post-sentence conduct. It is newly discovered or otherwise unavailable evidence because the inmate's conduct on death row did not exist when the sentencer imposed the death sentence. Each day that the inmate spent on death row, this evidence was not only developing, but it also was becoming more relevant and probative of the moral inappropriateness of the death penalty. The inmate might proffer to the habeas court his prison disciplinary record to substantiate his adjustment to prison and to show that a sentence other than death sufficiently punishes him. Provided the inmate can establish that this newly discovered or otherwise unavailable evidence has some bearing on the inappropriateness of the death sentence—that is, there was a federal constitutional error in the capital sentencing proceeding that prevented the sentencer from rendering an accurate sentence—federal habeas courts must hold a hearing on the merits of the constitutional claim.[147]

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committed the capital crime or insufficient evidence to establish the required aggravating circumstances warranting a death sentence. *Id.* at 243-44. The desert-innocence category is broader. It includes death-ineligibility cases and cases in which defendants assert that they are innocent of death. *Id.* at 244. Federal courts ought to focus on the desert-innocent component when adjudicating claims of capital defendants who assert that they are "innocent of death." This would have the salutary effect of ensuring that the moral issue of "just desert," which is the essence of retribution, is considered.

Inordinate delay petitioners would likely assert desert-innocence-type claims. They might argue that in securing the death sentence, the prosecution sought to establish that executing the defendant best served the state's penological interests, as opposed to a sentence other than death. In concluding that a death sentence was the appropriate punishment, the sentencer was led to believe that at some date in the future the execution would occur. Thus, the prosecution misled the sentencer as to the future, namely, that the defendant would not spend twice the period of other executed capital inmates. In submitting this false or misleading information to the sentencer, the state corrupted the sentencer's consideration of the appropriateness of the death sentence.

[147] *See* 28 U.S.C. § 2254(e)(2) (Supp. 1998). *See also* Schlup v. Delo, 513 U.S. 298 (1995); Herrera v. Collins, 506 U.S. 390, 400 (1993); Townsend v. Sain, 372 U.S. 293, 317 (1963). In making this determination, the judge's consideration will include the number of aggravating circumstances that were proven, the strength of those aggravating circumstances, and whether the sentencer was required to weigh the aggravating circumstances against the proven mitigating circumstances. This would all be appropriate to ensure that the death sentence would be the appropriate "reasoned

The defendant probably will argue that the sentencer relied on false or misleading information when it decided to impose the death sentence.[148] That is, the prosecution persuaded the sentencer that nothing less than a death sentence was necessary to adequately punish the defendant. The state, in continuing to rely on this evidence, the probative value of which has now been seriously undermined by the defendant's exemplary conduct on death row, commits an error of sufficient constitutional magnitude to invalidate the death sentence.[149] Adequate proof of a

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moral response." *See* California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

[148] Justice Douglas once noted:

> It is well settled that to obtain a conviction by the use of testimony known by the prosecution to be perjured offends due process. While the petition did not allege that the prosecution knew that petitioner's codefendants were lying when they implicated petitioner, the State now knows that the testimony of the only witnesses against petitioner was false. No competent evidence remains to support the conviction. Deprivation of a hearing under these circumstances amounts in my opinion to a denial of due process of law.

Durley v. Mayo, 351 U.S. 277, 290-91 (1956) (Douglas, J., dissenting) (citing Mooney v. Holohan, 294 U.S. 103 (1935); Pyle v. Kansas, 317 U.S. 213 (1942)); *see also* Sanders v. Sullivan, 863 F.2d 218 (2d Cir. 1988).

[149] *See* Johnson v. Mississippi, 486 U.S. 578 (1988) (death sentence vacated because sentencer relied on aggravating factor later determined to be inaccurate); *cf.* Dugger v. Adams, 489 U.S. 401, 412 n.6 (1989) (suggesting that capital habeas petitioner's procedural default would be excused if defendant demonstrated he was actually innocent of death). As Bruce Ledewitz notes, *Dugger* "seems to concede that [improperly instructing the jury] is the kind of error that 'might' lead to a death sentence for a defendant who would not have received death without the error and perhaps does not deserve it, but [the *Dugger* majority] insists that the defendant must show that this in fact occurred . . . " Bruce Ledewitz, *Habeas Corpus as a Safety Valve for Innocence*, 18 N.Y.U. REV. L. & SOC. CHANGE 415, 437 (1990-1991); *see also* Spaziano v. Florida, 468 U.S. 447, 476-77 (1984) (Stevens, J., concurring).

Commentators who addressed the issue before Whitley v. Sawyer, 505 U.S. 333 (1992), were confident that the habeas court should be able to hear the merits of the claim. *See* J. Skelly Wright & Abraham D. Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L.J. 895, 958 n.223 (1966) ("It is arguably a violation of due process if the state refuses to vacate a conviction entirely based upon evidence later shown to be untrue, though not necessarily suppressed or withheld. In effect, there is no probative evidence left supporting such convictions."); Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 322-24 (1988); Ledewitz, *supra*, at 440-49; Bruce S. Ledewitz, *Procedural Default in Death Penalty Cases: Fundamental Miscarriage of Justice and Actual Innocence*, 24 CRIM. L. BULL. 379, 421-23 (1988). *See also* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 509 (1963); Friendly, *supra* note 106, at 151-52.

desert-innocence claim[150] would provide additional support for the defendant's contention that the first death sentencing hearing was legally inadequate.

The post-sentencing conduct of several death row inmates suggests that a sentence less than death would have been sufficient to punish those defendants.[151] Moreover, the post-sentencing lives of these defendants suggest that a death row inmate can undergo a character metamorphosis, despite his or her confinement on death row. Consider the case of Paul Crump.[152] Crump had an ornery temperament during his early years of incarceration. That attitude began to change when Crump came to believe that Jack Johnson, the new warden, was serious about treating death row inmates with a measure of dignity. After that, Crump sought out the prison chaplains, began to work on his formal education, and tried to understand the world and his role in it. In February 1958, Illinois abolished its death row. Crump then supervised the convalescent tier of the new jail hospital. According to one guard, Crump became "mother, father, priest and social worker" to fifty inmates, including problem prisoners and inmates who needed protection from other prisoners.[153] Throughout this time, Crump continued to challenge the procedure by which he was convicted. In 1962, Warden Johnson said,

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[150] Garvey, *supra* note 146.

[151] *See* Royal Brightbill, *Why Does a Pardon Still Elude 'The Most Rehabilitated Prisoner in America'?*, ATLANTA J. & CONST., Feb. 2, 1992, at M1; Tracy Thompson, *Once "Unfit to Live": Ex-Death-Row Inmates Winning Parole*, ATLANTA J. & CONST., March 12, 1987, at A1; Bill Torpy, *Special Update: Georgia's Death Row, Waiting to Die*, ATLANTA J. & CONST., Nov. 17, 1996, at G8.

[152] *See* Ronald Bailey, *Rehabilitation on Death Row*, *in* THE DEATH PENALTY IN AMERICA 556 (Hugo Adam Bedau ed., 1967).

In 1953, a jury convicted Crump of killing a security guard during a robbery, and sentenced him to death. *See* People v. Crump, 125 N.E.2d 615 (Ill. 1955). Three of four accomplices received a sentence of 199 years' imprisonment. The Illinois Supreme Court reversed Crump's conviction because the trial judge did not allow him to cross-examine a prosecution witness, one of Crump's accomplices during the robbery, as to his drug addiction. Crump was retried and again received a death sentence. *See* People v. Crump, 147 N.E.2d 76 (Ill. 1957) (per curiam). That conviction and sentence were affirmed.

[153] Bailey, *supra* note 152, at 561.

> Paul Crump is completely rehabilitated. Should society demand Paul's life at this point, it would be capital vengeance, not punishment. If it were humanly possible, I would put Paul back on the street tomorrow. I have no fear of any antisocial behavior on his part. I would stake my life on it. And I would trust him with my life.[154]

On August 1, 1962, two days before the scheduled execution, Illinois Governor Otto Kerner, citing Crump's rehabilitation, commuted Crump's death sentence to 199 years' imprisonment without the possibility of parole.[155]

Caryl Whittier Chessman[156] also seems to have undergone a similar transformation. When he began serving his sentence, Chessman's personality did not win him many fond acquaintances among the prison staff. According to one prison official, Chessman was "the most arrogant and supercilious bastard in the world, and probably one of the brightest. He was also insidious and mean."[157] When the prison staff denied Chessman's request for special library privileges, he threatened legal action and bodily harm to the prison librarian. The inmates held Chessman in high regard, however. He was a jailhouse lawyer without peer, although he violated the institution's rules in providing legal assistance to other prisoners. Chessman also taught several subjects at the prison school. After Chessman secured his first stay of execution, prison officials encouraged him to write a book to deter him from further litigation and as a therapeutic device.[158] In 1954 Chessman produced *Cell 2455: Death Row*,[159] an autobiography in which he maintained that he was not the Red Light Bandit. In the book, Chessman claimed that

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[154] *Id.* at 562.

[155] *See* Michael B. Lavinsky, *Executive Clemency: Study of a Decisional Problem Arising in the Terminal Stages of the Criminal Process*, 42 CHIC.-KENT L. REV. 13, 43-44 (1965).

[156] *See* Part II.A., *supra*.

[157] CUMMINS, *supra* note 3, at 35.

[158] *Id.* at 36-37.

[159] *See* CARYL CHESSMAN, CELL 2455: DEATH ROW (1954). *See* CUMMINS, *supra* note 3, at 39. The book was a critical success and a best seller. It even led one criminologist to wonder whether experts should study Chessman instead of executing him. *See* CUMMINS, *supra* note 3, at 39.

his stay on death row had reformed him.[160] By 1960 Chessman was not claiming that he was innocent of the crimes; instead he maintained that he would be more useful to society alive than executed.[161]

Like Chessman, Jose Jesus Ceja[162] made productive use of this time while incarcerated. During his twenty-three years of incarceration Ceja earned his high school equivalency diploma, passed several college courses, worked in several prison jobs, and had no major incidents in prison.[163] At a clemency hearing, the sentencing judge submitted an affidavit in which he stated that if he "had realized that the criminal justice system would make (Ceja) serve a life sentence under such harsh conditions before putting him to death, I would have never entered the order of death and, if empowered, would without hesitation, change my ruling to life imprisonment."[164]

The passage of time and various life experiences affect an individual's character. Though she did not spend an inordinate time on death row, Karla Faye Tucker underwent a religious

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[160] CHESSMAN, *supra* note 159, at 359. At least one former death row inmate has questioned Chessman's sincerity and suggested that the book was a ploy to avoid the death penalty. *See* CUMMINS, *supra* note 3, at 40.

Chessman used some proceeds from the sales to hire attorneys. The prison officials responded by eliminating some of Chessman's privileges, with the hope of making it more difficult for him to write. Nonetheless, he eventually wrote three other books while incarcerated: TRIAL BY ORDEAL (1955), THE FACE OF JUSTICE (1957), and THE KID WAS A KILLER (1960). Chessman achieved international fame from the publication of these books. One historian has noted that Chessman's supporters argued that his life should be spared because he was a changed man, as demonstrated by his intelligence. According to that historian,

> It wasn't that he was not guilty of his crime, his public insisted; rather, the erudition, reason, and humane tone of his writing redeemed him. In an odd way, the public's embrace of Chessman makes him seem rather remarkably like the accused in the Middle Ages, who could avoid hanging by demonstrating that they could read.

See CUMMINS, *supra* note 3, at 52.

[161] CUMMINS, *supra* note 3, at 57.

[162] *See* Part II.G., *supra.*

[163] Graham, *supra* note 54, at 17.

[164] E.J. Montini, *Kill Him Once or Kill Him Twice?*, ARIZ. REPUBLIC, Jan. 20, 1998, at B1; Graham, *supra* note 54, at 17.

conversion, but it was not sufficient to prevent her execution.[165] The years that Crump, Chessman, Ceja, and Tucker spent on death row resulted in their becoming different persons from the ones who committed the capital offenses that led to their convictions. Although rehabilitation is hardly the objective of capital punishment,[166] the present death penalty system, which permits execution after an inordinate delay, does not demonstrably serve deterrence when a reformed death row prisoner is executed. Moreover, to the extent retribution is achieved under the present death penalty system, that system provides little recourse for a reformed convicted murderer.

D. ADDRESSING INORDINATE DELAY CLAIMS

In light of all of the above, a capital defendant who has spent an inordinate period on death row awaiting execution, and now faces a serious execution date, should have the opportunity to establish that his or her pending execution violates the Eighth Amendment. Such a claim is analogous to a claim based on the Sixth Amendment right to a speedy trial or to the due process right to a speedy criminal appeal.[167] As established in *Barker v. Wingo*,[168] under the Sixth Amendment, in determining whether a defendant's right to a speedy trial has been violated, courts are to balance the length of delay, reason for the delay, the defendant's assertion of the right, and prejudice to the defendant caused by the delay.[169] The federal courts have also at-

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[165] *See* Mike Ward & Rebecca Rodriguez, *Tucker's Life Ends Amid Prayers for Forgiveness, Demands for Justice*, AUSTIN AMERICAN-STATESMAN, Feb. 4, 1998, at A1. For an account of Tucker's life and crime see BEVERLY LOWRY, CROSSED OVER: A MURDER, A MEMOIR (1992).

[166] *See* Gregg v. Georgia, 428 U.S. 153, 183-86 (1976).

[167] *See* Arkin, *supra* note 57, at 456-61.

[168] 407 U.S. 514 (1972).

[169] *See id.* at 530. Today, after *Barker* and the enactment of the Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1994), the federal courts routinely adjudicate speedy trial claims. *See, e.g.*, United States v. Giambrone, 920 F.2d 176 (2d Cir. 1990). Research suggests that after the Speedy Trial Act became effective, the delay between the defendant's indictment and prosecution has been modestly reduced. *See* George S. Bridges, *The Speedy Trial Act of 1974: Effects on Delays in Federal Criminal Litigation*, 73 J. CRIM. L. & CRIMINOLOGY 50, 53 (1982) (analyzing data from cases terminated from 1971 to June 30, 1981).

tempted to give content to the meaning of a state court defendant's right to a speedy criminal appeal, although the four *Barker* factors are not necessarily applicable.[170] Nonetheless, similar to the right to speedy criminal appeal, upon the showing that the defendant has been under a death sentence for an inordinate period, a capital defendant should be entitled to a new sentencing hearing.[171] This sentencing hearing would substitute for the prior sentencing hearing that resulted in the death sentence. At this substitute hearing, both the state and the defense could argue over the propriety of imposing a death sentence, based on the law as of the date of the substitute hearing.[172] In addition, the defendant should be able to present to the sentencer post-conviction evidence, such as his adjustment to prison, and to plead to the sentencer's mercy for a sentence less than death.[173] In this regard, the delay in carrying out the execution could benefit the death row inmate.[174] This remedy should provide a further incentive for the state to devise a capital punishment case processing system that provides both meaningful and relatively punctual resolution of capital appeals.

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[170] *See* Arkin, *supra* note 57, at 461-73 (discussing cases from 1960 through 1990).

[171] *Id.* at 486-90.

[172] The defendant should be sentenced according to the law on the date of the substitute hearing to ensure that the defendant is "deathworthy," *see* Aarons, *supra* note 1, at 187 n.157, and to ensure that the prosecution has to meet the same standard in that defendant's case that it would have to meet in every other capital sentencing proceeding conducted that day. In this regard, neither the defendant nor the state has a sufficient interest in applying the capital sentencing laws, as of the date of the initial sentencing hearing, to the facts that likely are developed at the substitute sentencing hearing. *See* Gilmore v. Taylor, 508 U.S. 333, 341-42 (1993) (habeas petitioner can rely on cases decided after conviction and sentence became final if they do not change the law in favor of the criminal defendant). To allow the state to ignore legal developments favorable to the defendant disregards the goals served by the writ. *See* Liebman, *supra* note 63, at 595-613, 626-30.

[173] *See* Skipper v. South Carolina, 476 U.S. 1, 4 (1986); California v. Brown, 479 U.S. 538, 545-46 (1987) (O'Connor, J., concurring).

[174] When adjudicating inordinate delay claims, courts should probably consider only minimally whether the prisoner suffered prejudice. More weight should be given to the reason for the delay. Brian P. Brooks, Comment, *A New Speedy Trial Standard for* Barker v. Wingo: *Reviving a Constitutional Remedy in an Age of Statutes*, 61 U. CHI. L. REV. 587, 608 (1994). Delay attributable to prosecutorial bad faith or misconduct or a defective capital processing system should be held against the state. *Id.* at n.104; Arkin, *supra* note 57, at 497.

V. OBJECTIONS TO RECOGNIZING INORDINATE DELAY AS A SUBSTANTIVE LIMIT ON DEATH ELIGIBILITY

A few federal courts have heard death row inmates argue in a successive habeas petition that their pending execution, which would occur after the petitioner had spent years on death row, violates the Eighth Amendment's prohibition against cruel and unusual punishment.[175] None of these courts has ruled in favor of a petitioner.[176] Moreover, the courts have generally refused to consider the merits of the argument,[177] ruling that the prisoner

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[175] *See* Aarons, *supra* note 1, at 205.

[176] Two judges, both in dissent, have sketched some of the parameters of the claim. *See* Ceja v. Stewart, 134 F.3d 1368, 1372-78 (9th Cir. 1998) (Fletcher, J., dissenting); McKenzie v. Day, 57 F.3d 1461, 1484-89 (9th Cir. 1995) (Norris, J., dissenting). Another judge has expressed belief that the inordinate delay claim may have merit, but questions where the line should be drawn for establishing inordinate delay. *See* State v. Smith, 931 P.2d 1272, 1292 (Mont. 1996) (Leaphart, J., specially concurring).

[177] There are three exceptions: the Ninth Circuit in *McKenzie*, 57 F.3d at 1466-68; the Fifth Circuit in *White v. Johnson*, 79 F.3d 432 (5th Cir.), *cert. denied*, 117 S. Ct. 275 (1996); and the Fourth Circuit in *Turner v. Jabe*, 58 F. 3d 924 (4th Cir. 1995). Technically, *McKenzie* and *Turner*, though they discuss the issue, do not adjudicate the merits of the claim. In *McKenzie*, the Ninth Circuit gave "preliminary consideration" to the issue to determine McKenzie's likelihood of success on the merits in determining whether it should stay the execution. In *Turner*, the Fourth Circuit, because of the non-retroactivity rules of *Teague v. Lane*, 489 U.S. 288, 299 (1989), considered the merits of the claim to determine whether not adjudicating the merits would result in a miscarriage of justice. For a discussion of how *Teague* requires federal courts to assess the merits of a claim, while asserting that they are not ruling on that claim, see John Blume & William Pratt, *Understanding* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 325 (1990-1991); Mark Dirk Dubber, *Prudence and Substance: How the Supreme Court's New Habeas Retroactivity Doctrine Mirrors and Affects Substantive Constitutional Law*, 30 AM. CRIM. L. REV. 1 (1992).

The Fifth Circuit's discussion of the merits of a delay of 17 years in *White* is both dicta and novel. The ruling is dicta because prior to reaching the merits, the Fifth Circuit ruled that it was bound by circuit precedent to reject the claim under *Teague*, but that even if that precedent did not exist it would rule that the claim was precluded by *Teague* because White did not fall under either of *Teague*'s exceptions. According to the appellate court, the first exception to *Teague* did not apply because announcing a rule in White's favor would neither place any primary conduct beyond prohibition nor would it prohibit any category of punishment currently in use for specific offenses. White's argument failed for two additional reasons. First, the defendants in his proposed class did not have an innate characteristic, such as insanity or mental retardation, which precluded imposition of the death penalty. Second, the proposed class was not made up of individuals whose conduct was not eligible for punishment by death at the time of sentencing.

should have raised the claim earlier. This latter rationale seems dubious, since the very basis of the inordinate delay claim is the passage of time, and an earlier filed claim would be based on a correspondingly weaker case.

More questionable, however, are later cases that rely on the absence of precedent in any inmate's favor as the reason for rejecting the claim in the case before it.[178] These later decisions

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This is a novel construction of the exception. Under *Teague*, a new rule will be retroactive if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague*, 489 U.S. at 307 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971)). The court in *Penry* ruled that a new rule placing a certain class of individuals beyond the state's power to punish by death was analogous to a new rule placing certain conduct beyond the state's power to punish at all. Penry v. Lynaugh, 492 U.S. 302, 330 (1989). "Therefore, the first exception set forth in *Teague* should be understood to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Penry*, 492 U.S. at 330. After *Penry*, it is not proper to ask only whether the defendant could legally engage in certain conduct after the pronouncement of the new rule, but one must also inquire into whether the new rule would prohibit the state from executing a certain class of defendants. Recognition of the inordinate delay claim would prevent the state from executing those defendants who had been on death row for too long. Moreover, application of the first *Teague* exception does not require that that class of defendants possess anything other than the characteristic that disqualifies them from being death eligible. An inordinate delay between the death sentence and the scheduled execution would be sufficient; *Teague* does not mandate that the defendant have possessed that characteristic before the death sentence was imposed.

The Fifth Circuit, nonetheless, addressed the merits of White's claim. It noted that there were substantial reasons for the delay, namely, the ability of capital defendants to challenge their convictions in court to insure that the conviction was obtained within the requirements of the law. White had not only invoked this review process but he had benefited from having the courts review his arguments and determine the validity of the conviction. Therefore, according to the court, he was in no position to complain. Moreover, White had not made any effort to inform the state courts that their delay was detrimental to him or to ask for an expedited review of his case. White failed to assert that the delay was due to anything other than court backlog, that the state acted with culpability in delaying the consideration of his petition, or that he had been subjected to the inevitable anxiety of waiting for an execution date. Thus, despite White's having raised the issue in his first federal habeas petition, the court concluded that White was not entitled to relief.

[178] *See, e.g., Turner*, 58 F.3d at 932; Fearance v. Scott, 56 F.3d 635, 637 (5th Cir. 1995); State v. Schackart, 947 P.2d 315, 336 (Ariz. 1997); Janecka v. State, 937 S.W.2d 456, 476 (Tex. Crim. App. 1996), *cert. denied*, 118 S. Ct. 86 (1997).

display the power of an idea to regenerate itself, without substantial questioning of the validity of the underlying idea.[179]

Under the pre-AEDPA law, the federal courts considering inordinate delay claims have relied on four general reasons in concluding that inordinate claims are not cognizable: (1) the inmate caused the delay; (2) it would be unfair to other death row inmates to recognize the claim; (3) recognition of the claim would disrupt the administration of capital punishment either because it would create an incentive for states to rush executions or because habeas courts cannot fashion a proper remedy for the asserted violation; and (4) the appropriate remedy for inordinate delay is to apply for executive clemency. These common objections do not truly fathom the actual operation of the capital litigation process. This Part addresses these objections and posits that under both pre-AEDPA habeas law and the AEDPA, the inordinate delay claim should be cognizable. Cases are typically delayed for an inordinate period because the defendant is marginally death eligible or because state officials, who have substantial control over the processing of capital cases, are indifferent to processing the cases with due dispatch. Executive clemency, for various political and other reasons, is not a meaningful option.

A. REASON FOR THE DELAY

Perhaps prompted by the distinctions made by Justice Stevens in his memorandum regarding the denial of Lackey's certiorari petition,[180] some courts have suggested that one

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[179] *Cf.* Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.").

[180] Justice Stevens posited that some types of delays may be constitutionally different from other types of delays. He suggested that the defendant might be responsible for delays caused by abusing the judicial system, such as prison escapes or repetitive frivolous filings. However, the delay occasioned by a legitimate exercise of a right to review or arising from negligence or deliberate action by the state was to be considered in calculating the length of the delay. Justice Stevens' last characterization of "the state" is a bit ambiguous. For instance, does it include the judiciary, which is an appendage of the state; or does it include the legislature, which may not have provided adequate funding for defense services; or does it just include state officials who

consideration for the granting of relief for inordinate delay is whether the inmate caused the delay. At first blush this paradigm appears attractive, but it does not fully capture the dynamics of death penalty litigation.

In some sense all capital defendants delay their execution when they present legal reasons why it should not occur. Yet, in another sense it is the prosecutorial system itself that fosters the delay in the execution of capital defendants, as approximately half of the capital convictions or death sentences have been reversed.[181] A more thorough analysis of each case, focusing on the case's actual litigation history, is likely to uncover the actual reason for the delay. If that history shows that the capital defendant or defense counsel has engaged in a systematic plan of thwarting the enforcement of the sentence—such as through piecemeal litigation of previously available claims—then the writ of habeas corpus should not be available. If, however, the litigation record suggests that there has been no "sandbagging" and that the defendant and defense counsel have been deliberate, even cautious,[182] in their responses to the litigation tactics of the state, then the defendant should not be held solely responsible for the time spent on death row.[183]

The courts that have reviewed inordinate delay claims seem to suggest that capital defendants and their lawyers are engaged

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have some formal role in prosecutorial decisions? *See* Lackey v. Texas, 514 U.S. 1045, 1047 (1995)(mem.) It may be that "the state" should be limited to individuals who played a direct role in the prosecution of this particular defendant.

[181] *See* sources cited in note 63 *supra*. It is possible that there are many other death sentences that never should have been imposed or should have been reversed on appeal due to inadequacies in the judicial and political process. These cases typically are not the concern of this Article.

[182] The defense would evidence its apprehension and proper selectivity if "as to a legal claim that was known or accessible to the petitioner and his counsel at the time of the earlier petition, but had previously been rejected so routinely by the relevant district and circuit courts (and, perhaps, the United States Supreme Court)" it would have been both reasonable and diligent to omit the claim in the prior petition. 2 LIEBMAN & HERTZ, *supra* note 130, § 28.3c, at 921-22.

[183] An inmate could experience inordinate delay by the state's failure to seek an execution date, notwithstanding the conclusion of all litigation over the conviction and sentence. In this circumstance it could be more readily declared that the state no longer had an interest in going forward with the execution. The period in which there was a lack of interest is attributable to the state, and the state should be estopped from later going forward with the execution.

in a wholesale effort to prevent executions by raising almost any conceivable legal issue.[184] Undoubtedly there are defense attorneys who take satisfaction in preventing any executions by clogging up the judicial system.[185] However, one must keep in mind that the most effective way that a capital defendant can prevent his execution from taking place is not by asserting *any* reason for a delay, but by raising at least *colorable* reasons for not carrying out his execution.[186] Frivolous or insubstantial bases for reversal of capital sentences should not long delay an execution.

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[184] One of the most virulent statements to make it into a published opinion is included in a separate concurrence in *Turner*:

> It is a mockery of our system of justice, and an affront to law-abiding citizens who are already disillusioned with that system, for a convicted murderer, who, through his own interminable efforts of delay and systemic abuse has secured the almost-indefinite postponement of his sentence, to then claim that the almost-indefinite postponement renders his sentence unconstitutional. This is the crowning argument on behalf of those who have politicized capital punishment even within the judiciary. With this argument, we have indeed entered the theater of the absurd, where politics disguised as "intellectualism" occupies center stage, no argument is acknowledged to be frivolous, and common sense and judgment play no role. And while this predictable plot unfolds with our acquiescence, if not our participation, we lament the continuing decline in respect for the courts and for the law.
>
> Petitioner does not contest his guilt. He concedes, as he says he must, that his death sentence was constitutionally permissible when imposed. He even concedes that, until a month and a half ago, he himself did not wish to pursue further appeals. He has brought four state habeas petitions and this is his fourth federal habeas petition. His various claims have now been reviewed in at least twenty different federal and state proceedings. He has been accorded every possible opportunity to test the legitimacy of his conviction and sentence. The delay of which he now complains is a direct consequence of his own litigation strategy, coupled (ironically, although not surprisingly) with the customary leniency allowed him by the courts to press his claims as effectively as possible.
>
> This is not—or at least it should not be—a political game. The object is to apply the law, not to defeat it through subterfuge. Petitioner's claim should be recognized for the frivolous claim that it is, and his delay in raising it, for the manipulation that it is. As long as the courts indulge such sophistic arguments, then such arguments will be made, and the politicalization of capital punishment within the courts will continue.

Turner v. Jabe, 58 F.3d 924, 933 (4th Cir. 1995) (Luttig, J., concurring) (citation omitted). Among other items, Judge Luttig ignores that appointment to the bench has more recently become "a political game." Bright & Keenan, *supra* note 94, at 784-91.

[185] David Margolick, *Death Row Appeals Are Drawing Sharp Rebukes from Frustrated Federal Judges in the South*, N.Y. TIMES, Dec. 2, 1988, at B9 (suggesting some capital defense attorneys take "quiet pride" in the "national logjam on death row").

For a brief portrait of some capital defense lawyers see David G. Stout, *The Lawyers of Death Row*, N.Y. TIMES MAG., Feb. 14, 1988, at 46.

[186] *See* 28 U.S.C. § 2243 (1992).

Moreover, the courts can sanction attorneys for this conduct.[187] Significantly, it is hard to find reported cases imposing such sanctions.

One court has made a further distinction between the types of delays in capital cases.[188] The United States Court of Appeals for the Seventh Circuit noted that most of the fifteen-year delay that capital defendant James P. Free, Jr. complained of in his federal habeas petition occurred "in discretionary state and federal actions" filed by Free, but that in *Lackey* the delay was attributable largely to mandatory direct appeals in state court, with federal collateral review accounting for a modest part of the delay. Based on this difference the Seventh Circuit refused to issue a stay.[189]

The distinction between direct and collateral review is illusory because a direct criminal appeal is nondiscretionary on the part of the state only if the state constitution or laws provide a right to appeal. Arguably, a state could eliminate the right to appeal a criminal conviction without violating the federal constitution.[190] More importantly, the distinction between time

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[187] For instance, Rule 11 of the Rules Governing Section 2254 Cases states that the Federal Rules of Civil Procedure may be applied to habeas petitions. *See also* FED. R. CIV. PROC. 11 (providing for sanctions for frivolous pleadings).

[188] In 1979, an Illinois jury convicted James P. Free, Jr. of murder and attempted rape of Bonnie Serpico and of the attempted murder and attempted rape of Lori Rowe. Free killed Serpico after she tried to flee. As aggravating circumstances in support of the death penalty, the jury found that Serpico's murder occurred during a burglary and a rape. People v. Free, 447 N.E.2d 218 (Ill. 1983). Three of the seven justices voted to vacate the death sentence. They maintained that because Free was not convicted of rape or burglary, the jury could not rely on the murder occurring during the commission of those felony crimes as the basis for the death sentence. *See id.* at 244 (Clark, J., dissenting). The dissenters also contended that the prosecution submitted and relied on improper evidence at the sentencing hearing.

While incarcerated, Free continued to litigate the propriety of his conviction. At one point, a federal district judge granted Free a writ of habeas corpus based on the inadequacy of the jury instructions. *See* Free v. Peters, 12 F.3d 700, 702 (7th Cir. 1993) (brief recount of litigation history). That decision was reversed on appeal. *Id.* at 706. Over 15 years later, in March 1995, on the eve of his pending execution, Free moved the United States Court of Appeals for the Seventh Circuit to stay his execution, in light of *Lackey*. Free v. Peters, 50 F.3d 1362 (7th Cir.) (per curiam).

[189] *Free*, 50 F.3d at 1362.

[190] *See, e.g.*, Pennsylvania v. Finley, 481 U.S. 551, 555-56 (1987) (citing McKane v. Durston, 153 U.S. 684, 687-88 (1894)). *But see* Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503 (1992) (suggesting that constitu-

spent on state court review and time spent on federal habeas review is normally not significant because in most capital cases the delay between the imposition of a death sentence and the execution of a capital defendant is largely attributable to the state court system.[191]

The individual states are largely responsible for the administration of capital punishment. According to a 1990 American Bar Association Report:

> The sources of delay are numerous. They include, for example: delays in appointing counsel; delays from less than adequate competence of counsel; delays in processing state transcripts and records; delays from reviewing records that are ordinarily longer than in noncapital cases; delays from state policies and procedures; delays from uncertainty concerning the substantive criminal law and eighth amendment law; delays from the application of, and uncertainty about the interpretation of, threshold inquiries for federal habeas corpus review; delays from discovery of new facts; delays from developments in the law; and delays from the understandable inclination of both litigants and their attorneys to postpone the ultimate sanction. In short, much of the delay in the carrying out of the death sentences occurs at the state level; other aspects of the "delay" are both indispensable and desirable to allow for solemn and studied scrutiny.[192]

In short, 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.

The cases discussed in Part II all involved delay attributable to the state that was neither indispensable nor desirable. While courts should generally carefully consider all the defendant's claims, a thorough determination by the courts that a claim lacks merit usually means that the conviction or sentence cannot be reversed later based on that claim.

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tional due process developments since *McKane* support a right to appeal criminal conviction).

[191] *See* Robbins, *supra* note 95, at 138. Even when a federal court issues a writ of habeas corpus the inmate ordinarily is not released immediately. Rather, the state is instructed to either perform certain judicial functions, such as a retrial or a new hearing within a specific period of time or to release the prisoner. Consequently, once again the processing of the case is in the hands of state officials.

[192] *Id.* at 138-39.

Unfortunately some courts do not address thoroughly the claims raised by capital defendants, thus prompting these defendants to try to litigate these same issues years later. For instance, Chessman's strongest argument for reversing his death sentence was the absence of an adequate, contemporaneous trial transcript. This error coupled with an ill-designed state court process only exacerbated the perception that due process was violated. Noncapital defendants often have a right to appeal to an intermediate appellate court with discretionary review of their conviction in a higher court. Chessman, however, was only able to have his case reviewed by the seven justices on the California Supreme Court on direct appeal. Eliminating the intermediate appellate court from reviewing his conviction and sentence may have prolonged his case. There is no guarantee that the intermediate appellate court would have ruled differently from the California Supreme Court, but the availability of that forum would have allowed the judges on the state supreme court to consider the views of other appellate judges in that case. When the United States Supreme Court reviewed his case eleven years later, it said that the manner of reconstructing the transcript did not comport with due process as it existed at the time of his trial.[193] Thus, after more than a decade of litigation, only the United States Supreme Court enforced established federal law—partly because the California Supreme Court did not give full effect to that law when it affirmed Chessman's conviction. In this sense, the conduct of some state officials, including the trial and appellate prosecutors, contributed to Chessman's prolonged stay on death row.

As in *Chessman*, Townsend's prosecution was flawed. The conviction rested on an involuntary confession. At the prosecution's request, the state court admitted the confession, even though the United States Supreme Court had previously disapproved of interrogation techniques that brought about involuntary confessions.[194] In *Turner*, the Court changed the law by permitting the voir dire of prospective jurors on their racial atti-

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[193] Chessman v. Teets, 354 U.S. 156, 162 (1957).

[194] The Court itself noted that the medical community was divided on the validity of "truth serums." Townsend v. Sain, 372 U.S. 293, 308-09 & n.5 (1963).

tudes. In light of this change, Turner could have expected to be on death row for an extended period, as subsequent courts had these newly enunciated issues to address.

The delay resulting in McKenzie's two decades on death row was of a different sort; it involved state courts disregarding the dictates of emerging federal law. McKenzie's delay was partly attributable to state court judges who were resistant—if not hostile—to applying the developing law on jury instructions, which was favorable to criminal defendants. And it was partly due to a seemingly determined effort by the trial judge and the prosecutor to impose the death sentence. After the United States Supreme Court remanded the case, the Montana Supreme Court first ruled that there was no error. After a second remand, it concluded that there was error, but it was harmless. Only years later, during federal post-conviction proceedings, were *ex parte* communications between the judge and prosecutor discovered. If the Montana Supreme Court had reversed the conviction or remanded the case for a new sentencing hearing in either of its first two considerations of the case because of the newly announced federal rulings, a subsequent prosecution of McKenzie should have resulted in another death sentence—were the evidence against McKenzie truly as convincing as the state's high court had ruled. Appeals from that second conviction and sentence should have been largely error free and would have eliminated McKenzie's most promising legal argument. Instead, McKenzie's prosecution contained errors, the review of which prolonged judicial review of the case.

Lackey suggests a third type of delay: a change in capital sentencing law that is favorable to the defendant. The 1989 Texas Court of Criminal Appeals' affirmance of Lackey's conviction and sentence rested on a disputed interpretation of the law. The court majority rationalized its decision as within the bounds of the law. The Court of Criminal Appeals, however, could just as easily have reversed Lackey's conviction, if its focus was on applying *established* law to the proceedings. *Penry*, which essentially agreed with Lackey's argument,[195] underscored that the

[195] Penry v. Lynaugh, 492 U.S. 302, 320-28 (1989).

Court of Criminal Appeals' decision was not a foregone conclusion. Had the Court of Criminal Appeals followed the analysis in *Penry*, Lackey's death sentence would have been vacated because the jury had not been adequately instructed on its consideration and use of Lackey's mitigating evidence. Proper use of that evidence could have led the jury to decline to impose a death sentence.

Richmond's case involves a similar application of unsettled law in a capital case, in a jurisdiction with truncated direct appellate review of the trial process. In his direct appeal the state courts determined that its laws were unconstitutional, and in a subsequent appeal of another death sentence, the Arizona Supreme Court could not agree which aggravating circumstances supported the death sentence. In light of this, it is not surprising that Richmond was able to raise nonfrivolous arguments challenging his conviction and sentence for more than twenty years.

The capital nature of each of these cases undoubtedly affected judicial review and the litigation tactics of both the prosecution and defense.[196] If these cases had not involved the death penalty, it is likely that the state, faced with a remand from the United States Supreme Court (as in *Chessman*, *McKenzie* and *Turner*) or an extension of the law in the defendant's favor (as in *Lackey*, *Richmond* and *Turner*) would have reached a plea bargain. Thus, the sentence imposed affected the handling of the cases, and may have distorted both the state's and the defendant's decisions to continue litigating each case. More generally, these cases suggest the true nature of inordinate delay cases: all cases involved a legal ruling favorable to the defendant at some point in the litigation.[197] This turn of events undermined arguments by the prosecution that prior case law had already resolved disputed legal issues in the state's favor. In actuality, a definitive ruling on the issue did not exist, and the

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[196] *See* Samuel R. Gross, *The Romance of Revenge: Capital Punishment in America*, 13 STUD. L. POL. & SOC'Y 71 (1993).

[197] In *Lackey*, *McKenzie* and *Townsend* an intervening United States Supreme Court case dictated the change, and in *Chessman* and *Turner* the Court itself granted certiorari and ruled in the capital defendant's favor.

lack of such a ruling became apparent while the case was under appellate court review. Consequently it may be doubtful that, when the prosecution decided to seek the death penalty based on the legally provable facts known to the prosecutor when the charges were filed, each defendant was within the "core" class of death eligible defendants.[198]

Today the parameters of death eligibility have been more narrowly defined than at the time of *Chessman* and *Townsend.* Now, a death sentence can be imposed on a defendant only if it accords with the evolving standards of decency as measured by history, judicial precedent, statutes, and jury verdicts in capital cases; and the execution must achieve deterrence or retribution.[199] It is likely that the belief that the defendant did not fit within the established category of capital defendants provided each of the defendants discussed in Part II, and their attorneys, with the incentive to continue litigating their case. Furthermore, some judges on the courts that reviewed these cases expressed such reservations, which, in turn, may have accounted for the defendants' continued litigiousness and eventual lengthy stays on death row.

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[198] *Chessman, McKenzie* and *Ceja* arguably were substantively defective. Chessman did not kill anyone; he was convicted of kidnapping under California's "Little Lindbergh Law," but was sentenced to death. The California State Supreme Court later declared that law unconstitutional. *In re* Matson, 109 Cal. Rptr. 164 (1973). Subsequent developments under the Eighth Amendment suggest that kidnappers who did not kill their victims are not deserving of death. Governor Pat Brown has described the "Little Lindbergh Law," which was the basis for Chessman's death sentences, as a "legal swamp." BROWN & ADLER, *supra* note 3 at 94; *see also* People v. Wein, 326 P.2d 457, 475-84 (Cal. 1958) (Carter, J., dissenting) (discussing history and construction of kidnapping statute and its possible constitutional infirmities).

As to *McKenzie,* there was never a judicial determination that McKenzie had the appropriate *mens rea* for the murder for which he was executed. In Ceja's case, Eloy Ysasia, the primary homicide investigator, stated that he thought Ceja's crime would be prosecuted as second degree murder, a noncapital crime. Graham, *supra* note 54, at 15.

Townsend and *Turner* had procedural defects. At the time of Townsend's prosecution in 1955, the United States Supreme Court had disapproved of coercive and suggestive identification and interrogation techniques similar to those employed against Townsend. The defect in *Turner*—prohibiting an inquiry into race—was arguably cured by granting him a new sentencing hearing.

[199] *See* Aarons, *supra* note 1, at 157-60.

In short, if an inmate has been on death row for an inordinate length of time that delay may suggest that the initial decision to prosecute the defendant as a capital offender was questionable. The delay in carrying out the death penalty also may reflect a consensus by several actors in the capital litigation process—such as subsequent prosecutors, juries, state and federal judges, and governors—that the defendant is not truly deserving of death. Ultimately, in initiating (and continuing) the prosecution of these cases, the trial prosecutor's office risked that others in the capital processing system might be troubled by extending the law to apply to these defendants. One could argue that a death row prisoner invariably benefits from the inordinate delay in carrying out a death sentence. This ignores the psychological impact associated with death row detention, which is probably exacerbated by the elusive hope of eventual release.

B. UNFAIRNESS TO OTHER CAPITAL INMATES

In *Turner*, the Fourth Circuit suggested that unfairness to other death row inmates is a reason for not recognizing inordinate delay as a substantive violation of the Eighth Amendment. According to that court, "If petitioners A and B were sentenced to death on the same date but A's collateral review happened to end one year earlier than B's, A could be put to death while B would be spared."[200] This is an insufficient reason to refuse to recognize the claim on habeas review.

Turner is objecting to the seemingly arbitrary line between inordinate and ordinary delay in capital cases. Throughout the law, however, such demarcations exist. These lines mark the difference between, for instance, what facts state a cause of action or by when a party has to file his legal claim. The criminal law is not exempt from this line-drawing. Consider the common-law rule that the death of the victim must occur within a year and a day of the defendant's conduct.[201] This limitation essentially declared a temporal point at which a person was no

[200] Turner v. Jabe, 58 F.3d 924, 931 n.8 (4th Cir. 1995).

[201] *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.12(i), at 299-300 (2d ed. 1986).

longer legally accountable for the death of another human being. Suppose that on the same day, A assaulted C, intending to kill her, and B assaulted D, intending to kill him. C dies within a year and a day from injuries suffered in the assault, but D dies of the injuries he received a year and two days after the assault. Under the common law, the state may prosecute A for homicide while B would face only attempted homicide charges. Although there is today generally no statute of limitation within which a state has to prosecute a homicide, having inordinate delay as a cognizable claim in death penalty litigation would not undermine that rule. Only after the inmate receives a death sentence is the seed of an inordinate delay claim planted; other legal principles apply to the pre-conviction delay, which may foreclose a capital prosecution.[202]

Moreover, *Turner*'s hypothetical suggests that a capital defendant who delayed his execution for several years could prevent an execution. First, if the prisoner succeeds in doing so, the inmate's success does not render another defendant's failure to avoid death arbitrary.[203] Significantly, making inordinate delay claims cognizable will not necessarily preclude the state from executing an inmate who has been on death row for a lengthy period. As discussed above,[204] when an inmate establishes that there has been an inordinate delay between the pronouncement of death sentence and his scheduled execution, a court should order a new sentencing hearing. At this subsequent hearing, the state could still seek a death sentence.

Recognizing inordinate delay claims will not reward inmates for being dilatory or litigious. If the prosecution has been diligent in prosecuting the capital case, the issue of inordinate delay usually will not arise. It is when the case is on the margins of

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[202] *See, e.g.*, Doggett v. United States, 505 U.S. 647 (1992) (delay of eight and one-half years between indictment and prosecution may violate sixth amendment right to speedy trial); Barker v. Wingo, 442 F.2d 1141 (6th Cir. 1971), *aff'd*, 407 U.S. 514 (1972) (outlining criteria for determining whether right to speedy trial violated).

[203] *See* McCleskey v. Kemp, 481 U.S. 279, 307 n.28 (1987) (death penalty not unconstitutionally arbitrary or violative of equal protection principles if some death eligible defendants either do not receive the sanction or if those sentenced to death are not executed); Gregg v. Georgia, 428 U.S. 153, 199 (1976) (same).

[204] *See* Part IV.D., *supra*.

death eligibility (coupled with an intervening change in law in the defendant's favor), and the state has been lax in moving the case through the litigation process, that the question of inordinate delay arises. In short, a capital case may be delayed for an inordinate length of time not simply because the inmate or his or her attorney is litigious, but because of the strength of the claims asserted, which, in turn, may raise the question of whether the defendant deserves death. More important than the litigiousness of the parties is that courts exist to scrutinize carefully convictions and death sentences. If, because of that scrutiny, a court invalidates a conviction or death sentence, it may be partly attributable to good lawyering by the defense, but it may also be because of inadequate legal or factual support for the conviction or sentence.[205]

C. DISRUPTION OF THE ADMINISTRATION OF CAPITAL PUNISHMENT

Another reason proffered against recognizing inordinate delay claims is that such a ruling would create a disincentive for courts to grant stays of execution. Conceivably, this concern would be more pronounced as the length of the delay approached the presumptive period for establishing a prima facie claim of inordinate delay. Under the present law, in deciding whether to grant a stay of execution a federal court can consider the last-minute nature of the request.[206] Thus, a "preliminary inquiry" into the actual causes of the delay should suggest whether granting a stay is appropriate.[207] This is appropriate because, in considering whether to grant a stay, courts generally

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[205] It is generally believed that in some circumstances under the present capital litigation process, death row inmates are often represented by attorneys who are hairbreadths away from rendering ineffective assistance of counsel. *See generally* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433 (1993).

[206] Gomez v. United States Dist. Court, 503 U.S. 653, 654 (1992) (per curiam).

[207] *See* McKenzie v. Day, 57 F.3d 1461, 1464-66 (9th Cir. 1995); *see also* Nicole Veilleux, Note, *Staying Death Penalty Executions: An Empirical Analysis of Changing Judicial Attitudes*, 84 GEO. L.J. 2543 (1996) (surveying federal courts' approach to granting stays in capital cases).

consider the movant's likelihood of success on the merits.[208] Though a habeas court can consider the timing of the filing when deciding whether to stay an execution, that issue is not determinative.[209] Due to the delay between the pronouncement of the death sentence and the pending execution, and the great likelihood that the state retained substantial control of the case, the courts should require the state to prove why its need for carrying out the execution *now* should prevail.[210]

One habeas federal court expressed concern about whether there is an appropriate remedy for an inordinate delay claim.[211] In capital cases, when there is a constitutionally reversible error in the sentencing hearing, federal courts typically remand the case to state court, with a conditional order directing the state either to resentence the defendant in a constitutionally valid proceeding or to vacate the death sentence and impose a permissible lesser sentence.[212] This is the appropriate remedy in inordinate delay cases, too. It seems logical to treat successful inordinate delay claimants like capital defendants who successfully establish that they have become insane while awaiting execution. In insanity cases, the enforcement of the death sentence is suspended until the inmate regains his sanity.[213] Ar-

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[208] *See* Hilton v. Braunskill, 481 U.S. 770, 776 (1987) (stay pending appeal in federal habeas case).

[209] *See Gomez*, 503 U.S. at 654; *see generally* Williams v. Chrans, 50 F.3d 1358 (7th Cir. 1995) (per curiam).

[210] *See* John T. Noonan, *Should State Executions Run on Schedule?*, N.Y. TIMES, Apr. 27, 1992, at A17.

[211] *See McKenzie*, 57 F.3d at 1467.

[212] *See, e.g.*, Richmond v. Lewis, 506 U.S. 40, 52 (1992) (remand to district court with instructions to grant habeas petition unless state within a reasonable time corrects constitutional error in death sentence or imposes lesser sentence); Parker v. Dugger, 498 U.S. 308, 322-23 (1991) (remand to district court with instructions to order state to initiate appropriate state court proceedings so death sentence may be reconsidered); Cabana v. Bullock, 474 U.S. 376, 392 (1986) (remand to district court with instructions to grant habeas petition vacating death sentence and leaving choice to state courts of either imposing sentence of life imprisonment or within reasonable time obtaining determination of constitutionally required factual predicate).

[213] Ford v. Wainwright, 477 U.S. 399, 425 n.5 (1986) (Powell, J., concurring) ("[I]f petitioner is cured of his disease, the State is free to execute him."); Kristen Wenstrup Crosby, Comment, State v. Perry: *Louisiana's Cure-to-Kill Scheme Forces Death Row Inmates to Choose Between a Life Sentence of Untreated Insanity and Execution*, 77 MINN. L. REV. 1193, 1200 n.36 (1993) (citing statutes).

guably, the state can medicate the defendant so the status of insanity may be merely temporary.[214] Similarly to insane capital defendants, inordinate delay claimants are challenging a legal classification into which they entered after the commission of the capital offense. The state should prove that the defendant is no longer within that class of defendants before it executes him.[215] It is true that the state cannot turn back the hands of time for those inmates who have been under a death sentence for an inordinate length of time. But the state should provide a constitutionally valid sentencing hearing after the inmate has experienced inordinate delay. The main issue at this later sentencing hearing would be whether the death penalty is the appropriate punishment for this defendant at this time, notwithstanding the passage of time that he had already spent on death row.

Double jeopardy principles do not preclude the prosecution from seeking a death sentence in this subsequent sentencing hearing.[216] The Court ruled in *Bullington v. Missouri*[217] and *Arizona v. Rumsey*[218] that the Double Jeopardy Clause bars the state from seeking a death sentence at any resentencing hearing if a death sentence was not imposed upon the initial conviction. In the Court's view, by declining to sentence the defendant to death, the sentencer had effectively "acquitted" the defendant of the death penalty. In contrast, a successful inordinate delay claimant cannot assert that the jury acquitted him of the death sentence in the first sentencing proceeding; his likely argument would have been that the sentencer relied on incomplete information when imposing the death sentence. Even if the de-

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[214] The Court has not ruled on whether involuntarily medicating a capital defendant, to render the inmate competent to be executed, violates due process. *See* Perry v. Louisiana, 498 U.S. 38 (1990) (remand to state court in light of Washington v. Harper, 494 U.S. 210, 227 (1990), which held that forcibly treating inmate with antipsychotic drugs does not violate substantive due process if prisoner is dangerous and treatment is in prisoner's medical interest).

[215] *See supra* note 173.

[216] *See* Hitchcock v. Dugger, 481 U.S. 393, 399 (1987) (remanding for sentencing hearing that is constitutionally valid); Skipper v. South Carolina, 476 U.S. 1, 8 (1986) (same).

[217] 451 U.S. 430, 446 (1981).

[218] 467 U.S. 203, 212 (1984).

fendant's conduct on death row undermined the sole aggravating circumstance, the state can again seek to impose the death penalty.[219]

Another facet of supposed disruption of the capital punishment system arises out of institutional roles. Since the mid-1980s, concerns about finality of state court convictions, federalism, preserving judicial resources, and fairness have been the ostensible animating concerns of the Supreme Court in habeas cases.[220] These interrelated objectives should not prevent consideration of an inordinate delay claim. In the death penalty context, it seems that the two paramount concerns are finality and federalism. The finality doctrine is premised on the notion that the capital trial is such a momentous event that defendants should raise and litigate all pertinent issues relating to the conviction and sentence in that proceeding. Direct appeals are the state-provided mechanisms for correcting most trial errors. Toward this end, the Court has generally precluded federal habeas petitioners from litigating federal issues raised or that should have been raised in the state courts. Barring criminal defendants from raising these claims ensures that criminal judgments are more likely to be truly final. Similarly, federalism concerns arise from the perceived tension in having federal courts review federal constitutional questions after the state processes have not only provided a forum for the resolution of those questions, but have invariably ruled against the petitioner. Federalism and comity are both given their full measure of respect if a state official's treatment of federal constitutional issues is accorded respect equal to a federal official's resolution of these issues.[221] In turn, preservation of judicial resources occurs if only rarely are federal courts permitted to consider issues that should have been litigated at trial.

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[219] Poland v. Arizona, 476 U.S. 147 (1986) (second death sentence did not violate Double Jeopardy Clause because appellate court when vacating first death sentence found insufficient evidence to support aggravating circumstance, but did not find evidence insufficient to support death penalty).

[220] *See* Barry Friedman, *Failed Enterprise: The Supreme Court's Habeas Reform*, 83 CAL. L. REV. 485, 487-92 (1995).

[221] *Id.* at 535-41.

If the state does not provide a forum in which a capital defendant can meaningfully litigate his or her inordinate delay claim, then there is no denigration of the principles of finality, federalism, and comity when a federal court reviews the claim.[222] Paul Bator, whose work provides the philosophical basis for the Court's recent reinterpretation of the writ of habeas corpus, recognized this principle. Bator acknowledged that a federal forum should be available if the "states frequently fail[ed] to provide a fair and rational setting for the litigation of claims of federal constitutional right[s]."[223] He took issue with the proposition that a federal forum should be available when there was "no reasoned basis to suspect failure to provide a rational trial of the federal question, before an unbiased tribunal and through fair procedures."[224] Considering the continued number of errors that federal courts uncover in capital cases and the increased public criticism of state court decisions in capital cases, however, a serious question now exists whether state courts are forums in which a capital defendant's rights may receive a fair adjudication.[225] In any event, it would take a fair amount of temerity for a state, which has violated the established rights of a capital defendant in securing a death sentence and which has confined that defendant on death row for more than twice as long as the national average, to claim that *its* interest in a final

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[222] *See* Ford v. Wainwright, 477 U.S. 399, 410-11 (1986). *See also* Stewart v. Martinez-Villareal, 118 S. Ct. 1618, 1622 (1998) (interpreting 28 U.S.C. § 2244(b)(3) restriction on second or successive habeas petitions as not precluding consideration of a claim that ripens after adjudication of first habeas petition). I read Judge Fletcher's dissent in *Ceja* as essentially relying on this principle because she intimates that a challenge to a long stay on death row ("long stay") might be raised sooner in the post-conviction process, but that a challenge asserting that a long-delayed execution ("long-delayed") does not serve a valid penological purpose can be adjudicated in the federal courts on the eve of execution. *See* Ceja v. Stewart, 134 F.3d 1368, 1376-78 (9th Cir. 1998) (Fletcher, J., dissenting). Her distinction has greater force if "long stay" claims can be raised in some state forum, but there is no similar forum in which to raise a "long-delayed" claim.

[223] *See* Bator, *supra* note 149, at 521-22. *But see* Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579 (1982) (arguing that historical, institutional and jurisprudential values allow for relitigation of claims on habeas review).

[224] Bator, *supra* note 149, at 522.

[225] *See* Thomas E. Plank, *The Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia*, 5 WM. & MARY BILL OF RTS. J. 1, 10-13, 23-28 (1996).

criminal judgment and the principles of federalism absolutely precludes consideration of the merits of the inordinate delay claim.[226]

In sum, the most frequently proffered reasons for not considering the merits of inordinate delay claims are not valid when considered in light of the actual operation of the capital litigation process.

D. AVAILABILITY OF CLEMENCY

One might argue that if an inmate has been on death row for an inordinate length of time, and during that time has had a marked change in character, that inmate is a prime candidate for executive clemency. Generally, under the clemency power, the governor or an institution acting in an executive capacity, such as a parole board or pardon board, has the authority to issue pardons, invalidate convictions, and commute or reduce sentences. In light of executive clemency, the argument goes, it is preferable to have death row inmates use the clemency power because it would leave the decision of sparing the defendant's life to the judgment of state political officials and not detract

[226] Notwithstanding debates on the availability of habeas corpus, it is worth keeping in mind that it takes approximately five years from the date of the conviction to the filing of a federal habeas petition. *See* Roger A. Hanson & Henry W. K. Daley, *How Federal Courts Handle Habeas Corpus Petitions: Is the Process Effective?*, 34 JUDGES' J., Fall 1995, at 4,6. It is even possible that finality concerns, which purportedly motivated the Court's reconstruction of the federal writ of habeas corpus, actually foster delay and undermine finality, particularly in capital cases. Rather than addressing seemingly defaulted claims on the merits the first time they are raised, present habeas doctrine seems to foster delay by telling habeas petitioners, "Not now," when it could just as well answer the question on the merits. One commentator has surveyed these changes in habeas law and concluded that they are a failure, in part because they result in the Court's preoccupation with procedural rather than substantive issues. *See* Friedman, *supra* note 220, at 527, 533-34.

When a federal district court is able to reach the merits of the claims, it takes on average 494 days (about 16 months) to resolve a death penalty habeas petition, but this time is more a measure of case complexity—that is, the number of issues, whether the petition is decided on the merits, appointment of counsel, and the holding of an evidentiary hearing—than the type of sentence. On average, in death penalty cases, the federal district courts take less than a year and a half to decide the case. Hanson & Daley, *supra*, at 10-11 & tbl.9.

from the important work of the federal courts.[227] Further, commentators have suggested that executive clemency should be reserved for rehabilitated offenders[228] or when there have been other changes in the prisoner's character or condition.[229]

While the clemency power exists in theory, the sharp decline of its use in capital cases suggests that clemency is not a meaningful option for capital defendants. Professors Michael Radelet and Barbara Zsembik have documented seventy cases since 1972 in which capital defendants had their death sentences commuted through executive clemency.[230] In only one of those cases was rehabilitation the most important reason for commuting the death sentence to life imprisonment.[231]

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[227] Over the years, such sentiments have been proffered by members of the Court in reasoning why the writ of habeas corpus should not issue in a particular capital case. *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 411 (1993) (In rejecting petitioner's claim based on actual innocence of the capital crime, the Court noted, "petitioner may file a request for executive clemency."); *id.* at 428 (Scalia, J., concurring) ("[I]t is improbable that evidence of innocence as convincing as today's opinion requires would fail to produce an executive pardon."); Thompson v. Oklahoma, 487 U.S. 815, 876 (1988) (Scalia, J., dissenting) (suggesting governor could use pardon power if citizens of Oklahoma thought it improper to execute juvenile); Fay v. Noia, 372 U.S. 391, 472-76 (1963) (Harlan, J., dissenting) (suggesting proper course for relief from conviction from which no appeal was taken was not by expanding scope of review in habeas corpus, but through the governor's exercise of clemency).

[228] *See* Hugo Adam Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255, 261 (1990-1991).

[229] *See* Bruce Ledewitz & Scott Staples, *The Role of Executive Clemency in Modern Death Penalty Cases*, 27 U. RICH. L. REV. 227, 236-37 (1993). Neither physical nor mental disability has proven to be a universally sufficient ground for granting executive clemency. For example, despite receiving over 1800 letters supporting clemency and 47 against, in 1993, Virginia Governor L. Douglas Wilder declined to grant clemency to Charles Sylvester Stamper to avert Stamper's execution. Stamper, a multiple murderer, was confined to a wheelchair after he was involved in a prison fight in 1988. Bill Miller, *The Execution of a Disabled Killer Rekindles the Debate on Capital Punishment*, WASH. POST, Feb. 2, 1993, at Z10.

[230] *See* Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. RICH. L. REV. 289, 290-92 (1993).

[231] The inmate was William Neal Moore. In 1974, Moore pleaded guilty to armed robbery and murder. *See* Moore v. State, 213 S.E.2d 829, 830 (Ga. 1975). The day before his execution, in 1990, the Georgia Board of Pardons and Paroles commuted his sentence. Among the factors the Board cited were Moore's exemplary prison record, remorse for the crime, his religious conversion, and requests for clemency by the victim's mother, Reverend Jesse Jackson, and Mother Teresa. *See* Radelet & Zsembik, *supra* note 230, at 302, 313.

In addition, rehabilitation was reportedly a factor in Montana Governor Schwinden's 1988 commutation of David Cameron Keith's death sentence and Virginia Governor Allen's 1997 commutation of William Allen Sanders' death sentence. *See* Lethal Injustice, *supra* note 60, at 18 & n.15; Radelet & Zsembik, *supra* note 230, at 302, 311.

The prospects for clemency in capital cases were not always so bleak. It seems that nearly one-fourth of the defendants sentenced to death in the early 1940s had their sentences commuted. *See* Bedau, *supra* note 228, at 262. The available data suggest that in the 1960s, commutations occurred once for every 6.3 capital sentences. *See id.* at 264. Since then, however, commutations of death sentences have become increasingly rare. From 1979 to 1988, out of the 2,535 death sentences imposed, there were 63 commutations, which yields a ratio of one commutation for every 40.2 death sentences. *See id.* Hugo Bedau has offered some explanations for this apparent decline. *See id.* at 264-70. In the late 1960s, the NAACP Legal Defense Fund was having moderate success in its litigation campaign to have the death penalty declared unconstitutional. It is likely that there were few clemency petitions filed because few inmates were subject to a serious risk of being executed. For the commutations granted in the mid-1960s through 1976, governors could assure those seeking an explanation for their actions that in commuting the death sentence, the governor was conscientiously following the emerging consensus on the inappropriateness of capital punishment. After 1976, with the widespread public support for the death penalty, and the Court's ruling that capital punishment was an appropriate sanction for some murders, under guided discretion statutes, governors became more reluctant to exercise clemency. Professor Bedau has postulated that because of the guidelines approved in the 1976 cases, the public may believe that the judicial process ensures that only the most deserving criminals receive death sentences and that clemency is no longer necessary. *See id.* at 268-69. In the past, governors sometimes granted pardons when there had been some judicial disapproval of how the state obtained the conviction. *Id.* at 260. Today, even when there are questions regarding the prosecution's tactics, clemency is largely unavailable. Warren McCleskey's case is perhaps a good example of this phenomenon. Over the course of his many appeals several judges concluded that his constitutional rights had been violated. Nonetheless, the Georgia Board of Pardons and Parole, under apparent pressure from the state Attorney General, declined to commute his death sentence to a sentence of life imprisonment. Mark Curriden, *Execution of McCleskey Spurs Outrage: 2 Trips to Chair, Hours of Delay Precede Death of Officer's Killer, Inmate Asks Victim's Family to Forgive Him*, ATLANTA J. & CONST., Sept. 25, 1991, at A1.

Another by-product of the apparent popularity of capital punishment is that commutation of a death sentence is now considered politically infeasible, and a public official's "demonstrated enthusiasm for executions will ensure reelection or election to a higher office." Neal Walker, *Executive Clemency and the Death Penalty*, 22 AM. J. CRIM. L. 266, 270 (1994). Bill Clinton is a good example of this curiosity. In 1992, while campaigning for the presidency, out of an apparent concern for being labeled "soft on crime" and during the height of allegations of an extra-marital affair with Gennifer Flowers, Clinton refused to commute the death sentence of Ricky Ray Rector. Rector was mentally impaired and apparently did not realize that he was to about to be executed. On the way to the death chamber he reportedly claimed that he intended to vote for Clinton for president. *See* Marshall Frady, *Death in Arkansas*, THE NEW YORKER, Feb. 22, 1993, at 105. At the first presidential debate in his successful re-

Capital defendants who have been on death row for an inordinate length of time are not immune from the political aspects of the clemency decision.[232] Although Chessman was a capital inmate whom one would have thought was a prime candidate for clemency, an option alluded to in the denial of his last habeas petition,[233] that choice was politically unpalatable to Governor Edmund Brown, and perhaps was also legally unavailable.[234] More recent cases, such as *Lackey, McKenzie* and *Turner*, show that an inmate's inordinate stay on death row is not given significant weight in executive clemency decisions. In short, even for those capital defendants who have been on death row for an inordinate period and have an exemplary prison record there is no guarantee that their claims will receive full consideration at a clemency proceeding.[235] It is even less likely that the clemency outcome will be favorable toward the inmate. To think otherwise is like believing in UFOs and Bigfoot, that is, a "faith in fantasy."[236]

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election campaign in 1996, whenever summarizing his accomplishments Clinton mentioned on four occasions that he had signed legislation authorizing the death penalty. *See* Mark Kuhn ed., *Transcript from the Commission on Presidential Debates* (on file with author).

Continued service on the pardon board might be jeopardized by voting to grant clemency. *See* McCleskey v. Bowers, 501 U.S. 1281, 1282 (1991) (Marshall, J., dissenting from denial of stay of execution) (asserting Attorney General "threatened to 'wage a full scale campaign to overhaul the pardons and paroles board'" if it granted death row inmate relief); Victoria J. Palacios, *Faith in Fantasy: The Supreme Court's Reliance on Commutation to Ensure Justice in Death Penalty Cases*, 49 VAND. L. REV. 311, 350 (1996) (former member of Utah Board of Pardons describing safety precautions taken when considering petition of notorious capital defendant).

[232] It is noteworthy that Governor Kerner commuted Crump's death sentence in 1965, during a different phase of the history of capital punishment.

[233] Chessman v. Dickson, 275 F.2d 604, 610 n.1 (9th Cir. 1960) (quoting district judge).

[234] Brown believed that he could only grant a brief reprieve and that a majority of the California Supreme Court had to agree with any clemency decision. *See* BROWN & ADLER, *supra* note 3, at 48-50. That court had informally voted four to three against clemency. *Id.* at 34.

[235] *See, e.g., Ex parte* Tucker, 1998 WL 28104 (Tex. Crim. App. Writ No. 21159-03 Jan. 28, 1998) (Overstreet, J., concurring) ("I would say that clemency law in Texas is a legal fiction at best.")

[236] Palacios, *supra* note 231, at 348.

VI. AVOIDING INORDINATE DELAY

Alex Kozinski and Sean Gallagher have explored the issue of delay in executions.[237] According to them, it typically takes two years from the capital crime until imposition of the death sentence.[238] Once the post-conviction proceedings begin, it can take from seven to ten years before the case comes to some semblance of a conclusion.[239] Kozinski and Gallagher also note that capital cases impose burdens on the judicial system.[240] They suggest that there may be two apparent solutions: either wholesale judicial repudiation of Eighth Amendment case law or reservation of the death penalty for only the most depraved killers. They acknowledge that discarding Eighth Amendment jurisprudence is an unlikely prospect. Thus, the only real option is to narrow the class of defendants prosecuted for capital offenses. Kozinski and Gallagher apparently rely on the good faith of prosecutors to bring about this change. Under such a prosecution policy, the sentencer would consider imposing the death penalty only in those cases in which it is most likely that the execution would occur. Ideally, only the worst of the worst would suffer the death penalty, and their proposal would remove the issue of capital punishment from the courts and place it back into the more political branches of government.[241] Capi-

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[237] *See* Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1 (1995). Judge Kozinski also has recounted the unease he experiences as a judge in capital cases. *See* Alex Kozinski, *Tinkering with Death*, THE NEW YORKER, Feb. 10, 1997, at 48.

[238] *Id.* at 6.

[239] *Id.* at 10.

[240] Part of their cost is financial, and Kozinski and Gallagher rely on estimates that as much as $3.2 million is spent on each case. *See* Kozinski & Gallagher, *supra* note 237, at 11-15. There are also the less apparent lost opportunity costs that other litigants must bear due to the obligation of the state courts to hear the capital cases. From this they observe:

> So we are left in limbo, with machinery that is immensely expensive, that chokes our legal institutions so they are impeded from doing all the other things a society expects from its courts, that visits repeated trauma on victims' families, and that ultimately does not produce anything like the benefits we would expect from an effective death penalty.

Id. at 27-28.

[241] *Id.* at 29-32.

tal punishment might then become a greater general deterrent and rest more firmly on retribution.

Although the issue of inordinate delay seems to have prompted their thoughts on the issue,[242] Kozinski and Gallagher are not the first to suggest that the death penalty, as presently administered, fails to achieve its asserted goals. Carol Steiker and Jordan Steiker have argued that the death penalty is both over- and under-regulated, and that, twenty years after subjecting the death penalty process to constitutional strictures, we now have replicated the pre-*Furman* era of capital sentencing.[243] Former Justices Blackmun[244] and Powell[245] have also suggested abolishing capital punishment due to its improper administration. In light of the seemingly futile effort of both the courts and legislators to contain capital punishment within the rule of law, what is in order is a serious reconsideration of whether it is possible to have a fair and effective system of capital punishment. I presently believe that it is. Part of the solution lies in taking the death penalty seriously. Solutions to the issue of inordinate delay lie in reforming the present capital punishment process. Most of the delays occasioned between the pronouncement of a guilty verdict and the actual execution of a capital defendant occur while the case is in the state court system. Consequently, reducing the time that the case spends in state court, without also diminishing the quality of review, should result in a more just and efficient system of capital punishment.

The courts should return to the standards announced in the 1976 cases, when the Court ruled that the death penalty did not always violate the Eighth Amendment. *Lockett v. Ohio*,[246] a lead-

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[242] Kozinski wrote the majority decision in *McKenzie*, and Gallagher was his law clerk at that time. *See* Alex Kozinski & Sean Gallagher, *For an Honest Death Penalty*, N.Y. TIMES, Mar. 8, 1995, at A21.

[243] *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 358-59 (1995).

[244] Justice Blackmun expressed himself in *Callins v. Collins*, 510 U.S. 1141 (1994).

[245] Justice Powell's thoughts are captured in his biography. *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 405-54 (1994).

[246] 438 U.S. 586 (1978).

ing case on mitigating circumstances decided two years later, should be considered an amplification of the individualized sentencing principle recognized in the 1976 cases.[247] In *Gregg*, the Court ruled that the death penalty was an appropriate sanction if it achieved either deterrence or retribution.[248] Notwithstanding the inconclusive evidence that the death penalty served as a deterrent to crime by others, the Court opined that deterrence was most likely to have an influence in "carefully contemplated murders, such as murder for hire, where the possible penalty of death might enter the cold calculus that precedes the decision to act. And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate."[249] Thus, in actuality the Court approved the death penalty as a sentencing option—both legislatively and as a matter of prosecutorial policy—for a small category of crimes. The Court reserved the death penalty for contract killers and for defendants who would probably not be deterred from killing by any other punishment. Reserving the death penalty to this class of defendants might decrease the number of capital prosecutions and convictions. This is because, though the contract killer is the arguably most culpable murderer, rarely does he receive a death sentence. Few hired killers are apprehended,[250] and when caught, they can usually gain leniency in exchange for testifying against those who hired them and are felt to be even more morally blameworthy. Presently, however, death row contains many persons who "tend to be more impulsive, less foresighted, and far more willing to use personal violence to obtain their ends, even at considerable risk to themselves" than

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[247] *Lockett* held that in all but the rarest capital case a sentencer could 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 crime that is proffered as a basis for a sentence less than death. *Lockett*, 438 U.S. at 604 (plurality opinion). Though the Court was divided on this point, I believe *Jurek* anticipated the issue. *See* Jurek v. Texas, 428 U.S. 262, 303-05 (1976).

[248] *Jurek*, 428 U.S. at 183-85.

[249] Gregg v. Georgia, 428 U.S. 153, 186 (1976) (footnotes omitted).

[250] Furman v. Georgia, 408 U.S. 238, 354 n.124 (1972) (Marshall, J., concurring); Jack Greenberg, *Against the American System of Capital Punishment*, 99 HARV. L. REV. 1670, 1676 (1986).

most of society.[251] Executing these more impulsive murderers is not likely to deter other impulsive killers; conceivably, their execution may achieve some measure of retribution.

If inordinate delay is a cognizable issue in capital cases, it could require the state, after obtaining a conviction and death sentence, to choose which death row inmates were truly deserving of death. Suppose that in a given year fifty defendants receive death sentences in a state. After years of litigation, twenty-four of those inmates remain under a death sentence, with fifteen of those capital defendants having exhausted their direct appeals and litigated some of their claims in state and federal post-conviction proceedings. Assume further that at any moment the state could set an execution date for each of these inmates, and that, in all likelihood, the execution would occur as scheduled. If inordinate delay is a cognizable claim, the state, under the threat of being precluded from executing a particular inmate, would explicitly have to consider not only which of those fifteen inmates to execute, but also the scheduling order of the inmates. Such determinations would likely consider the details and circumstances of the murder, the character of the defendant, including his conduct after being sentenced to death, and the penological objectives served by carrying out the execution. In short, ruling that the Eighth Amendment prohibits inordinate delay could have the salutary effect of requiring a central state authority to decide which murderers were truly the most deserving of death. Having a state authority make this decision years after the crime and prosecution should allow for the dissipation of some of the outrage caused by the murder. It should also allow an assessment of the killing in light of other killings committed about the same time. The state should be put to this choice because the present administration of the death penalty does not meaningfully reserve the death sentence for either the most heinous crimes or the most incorrigible criminals.[252] Presently, who gets sentenced to death depends

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[251] John Kaplan, *The Problem of Capital Punishment*, 1983 U. ILL. L. REV. 555, 556.

[252] Technically, in some jurisdictions, the court are supposedly engaging in a similar inquiry when conducting comparative proportionality review. They are not typically doing so. *See* David Baldus et al., *Comparative Review of Death Sentences: An*

more on where the crime is committed,[253] the discretion of the prosecutor,[254] and the competence of defense counsel.[255]

It is unclear what impact the judicial recognition of inordinate delay claims would have on the number of executions. On the one hand, if after a certain period a state is forced to select more carefully the cases in which it will continue to seek the death penalty, then it is possible that, due to limited state resources, there would be fewer executions. On the other hand, to prevent inordinate delay a state could develop a capital punishment system that is financially expensive and requires a considerable investment of time and other resources, and results in a certain number of annual executions (some of which are of questionable penological and social validity).[256] It seems doubt-

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Empirical Study of the Georgia Experience, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983); Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts after* Gregg*: Only "The Appearance of Justice"?*, 87 J. CRIM. L. & CRIMINOLOGY 130 (1996). Several scholars have considered how the death penalty is imposed in various jurisdictions. *See, e.g.*, Samuel Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984); Raymond Pasternoster & Ann Marie Kazyaka, *The Administration of the Death Penalty in South Carolina: Experiences over the First Few Years*, 39 S.C. L. REV. 245 (1988); Raymond Pasternoster & Ann Marie Kazyak, *An Examination of Comparatively Excessive Death Sentences in South Carolina, 1979-1987*, 17 N.Y.U. REV. L. & SOC. CHANGE 475 (1989-90).

[253] Studies have shown that the death penalty is unevenly applied within states. William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination Under Post-*Furman *Capital Statutes*, 26 CRIME & DELINQ. 563, 601-07 (1980) (felony murderers more likely to be sentenced to death in northern Georgia than southern Georgia); Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 64 (1984) (rural homicides in Georgia and Florida nearly twice as likely to result in death sentence than urban homicides in those states).

[254] *See generally* BARRY NAKELL & KENNETH A. HARDY, THE ARBITRARINESS OF THE DEATH PENALTY (1987); Leigh B. Bienen et al., *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 RUTGERS L. REV. 27 (1988); Raymond Pasternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754 (1983). *See also* Jesse Katz, *Executions in Texas: No Big Deal*, L.A. TIMES, May 20, 1997, at A1 (Harris County, Texas sentences more people to death than most states); Tamar Lewin, *Who Decides Who Will Die? Even Within States, It Varies*, N.Y. TIMES, Feb. 23, 1995, at B1.

[255] *See generally* Bright, *supra* note 205.

[256] *See* Rupert Cornwell, *Death Row, Where Life Goes On and On*, S.F. EXAMINER, Apr. 3, 1995, at A19 (making similar characterization of present capital punishment, but as producing few executions); Craig Pittman, *Killing Time on Death Row*, ST. PETERSBURG TIMES, July 6, 1996, at 1A (same).

ful that supporters of capital punishment would consciously construct such a system.

In the past two decades, both the legislative and executive branches—with the later approval of the courts—have moved away from the premises of the 1976 cases. Critical changes have included modifying the capital sentencing process. For instance, *Gregg*, *Proffitt* and *Jurek* held that the sentencer had to weigh the aggravating circumstances against the mitigating circumstances, and could impose a death sentence only if the aggravating circumstances outweighed the mitigating circumstances. More recent cases have approved of sentencing procedures that only require the sentencer merely "to consider" the aggravating and mitigating circumstances.[257] These latter sentencing procedures provide the sentencer with less guidance in deciding when to impose the death sentence and conceivably allow for a more arbitrary imposition of death sentences. Also,

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Professor Robert Weisberg has suggested that one might cynically view the federal judiciary as having constructed a complex body of capital punishment laws to avoid having a large number of executions. According to him, this state of affairs tends to satisfy proponents of capital punishment by not completely prohibiting the sanction. Having relatively few executions also tends not to arouse too great an opposition to the death penalty, except when an execution occurs. He notes that after the pronouncement of a death sentence, most of the public does not pay further attention to the case or the defendant. *See* Robert Weisberg, *The New York Statute as Cultural Document: Seeking the Morally Optimal Death Penalty*, 44 BUFF. L. REV. 283, 286-87 (1996) (applying the analogy to California and New York).

In 1980, Justice Rehnquist expressed a similar thought when he wrote:

> Perhaps out of a desire to avoid even the possibility of a 'Bloody Assizes,' this Court and the lower federal courts have converted the constitutional limits upon imposition of the death penalty by the States and the Federal Government into arcane niceties which parallel the equity court practices described in Charles Dickens' 'Bleak House.'

Coleman v. Balkcom, 451 U.S. 949, 958 (1981) (Rehnquist, J., dissenting from denial of certiorari). This judicial scrutiny, the argument goes, has the effect of not only slowing down the pace of executions, but also providing that, "[g]iven so many bites at the apple, the odds favor [a death row inmate] finding some court willing to vacate his death sentence because in its view his trial or sentence was not free from constitutional error." *Id.* at 957 (Rehnquist, J., dissenting). Justice Powell later suggested that delay was attributable to the multiple levels of judicial review that a death case undergoes. *See* Lewis F. Powell, Jr., *Commentary: Capital Punishment*, 102 HARV. L. REV. 1035, 1045-46 (1989).

[257] *See* Lowenfield v. Phelps, 484 U.S. 231, 244 (1988) (defining rule of aggravating circumstances as narrowing the class of persons eligible for the death penalty and thereby channeling the jury's discretion).

upon proof of at least one aggravating circumstance, a state can require that the defendant convince the sentencer not to impose a death sentence, instead of having the prosecution prove to the sentencer that the defendant deserves death.[258] Another intractable component of the capital litigation process is the prevalence of discretion. Every exercise of discretion threatens consistent application of the death penalty. These changes taken together have likely increased the number of defendants on death row, without also guaranteeing that each capital defendant was, relatively speaking, deserving of death.

A. AREAS OF REFORM

1. State Court Systems

Inordinate delay between the imposition of a death sentence and an execution suggests that the capital litigation system should be reconstituted. There are various avenues for reform. Some state court systems, such as California and Florida, require that appellate review of a capital trial occur only once—in the state court of last resort. Though providing only one level of appellate review of capital cases might reduce the time that a capital case is in the state court appellate process on direct review, it is nonetheless problematic for several reasons. First, it requires that the state high court spend its resources on those cases, without the benefit that prior judicial review of the case normally affords appellate cases.[259] Additionally, appellate court review by only one court in the direct review phase means that collateral review proceedings become more important. That is, if a defendant cannot develop certain arguments on direct appeal, the state collateral review courts should allow the defendant to develop those facts and arguments so that it can

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[258] *See* Boyde v. California, 494 U.S. 370, 377 (1990) (holding that statutory language that sentencer "shall impose" death sentence if there are no mitigating circumstances does not prevent the sentencer from making individualized assessment of appropriateness of death sentence); Blystone v. Pennsylvania, 494 U.S. 299, 305 (1990) (same).

[259] *See* Bentley Orrick, *Justices Awash in Death Row Appeals*, TAMPA TRIBUNE, June 12, 1989, at 1A (Florida Supreme Court "spends between one-third and one-half of its working time on death cases"); Cornwell, *supra* note 256, at A19.

fairly adjudicate the case. Therefore, states that have many capital prosecutions need to consider whether not having multiple levels of direct review has diminished the quality of review of capital cases in direct and collateral proceedings. In jurisdictions that have a separate civil and criminal appellate court system, as in Texas, a better approach may be to authorize the right to appeal to an intermediate appellate court, with discretionary appeal to the state's highest court. One can defend having all capital appeals lie to the highest appellate court as an effort to ensure consistency in the judicial review of capital cases by having the same judges review all death cases. This consistency could perhaps be as effectively achieved by publishing the decisions of the intermediate appellate court. Moreover, after *Pulley v. Harris*,[260] the federal constitution does not require that courts ensure that defendants sentenced to death committed comparatively horrible crimes. A state could address some concerns about comparative proportionality review by adopting a court rule that requires that the intermediate appellate court engage in comparative proportionality analysis as part of its review of capital convictions and sentences.

2. *Defense Services*

Another area ripe for reform is in the training, appointment and compensation of defense attorneys and the provision of defense services. Reforming this area would likely eliminate some of the delay in the death penalty process.[261] Convicted capital defendants often question, years later, the adequacy of investigations and the sufficiency of defense services. If defense attorneys and defense services receive adequate compensation, the services that they provide are more likely to be sufficient to turn the capital trial and appeal process into the truly momentous event that others have frequently envisioned for them. Moreover, adequate trial and appellate attorneys should reduce

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[260] 465 U.S. 37, 44 (1984) (holding that the Eighth Amendment does not require that state appellate court compare sentence in case before it with penalties imposed in similar cases despite defendant's request that it do so).

[261] *See* Ruth E. Friedman & Bryan A. Stevenson, *Solving Alabama's Capital Defense Problems: It's A Dollars and Sense Thing*, 44 ALA. L. REV. 1, 40-59 (1992).

the most frequently litigated issue in post-conviction proceedings: ineffective assistance of counsel.[262] Conscientious trial and appellate attorneys would lay the groundwork for state and federal collateral review.

State courts should ensure that only qualified and competent attorneys handle post-conviction cases. This is because it is now a certainty that if a capital inmate has not secured relief in the state system, he will soon go to the federal courts, where, historically, the inmate has had a significantly greater chance of obtaining relief.[263] Further, considering the relative success that capital defendants have had in securing relief in the federal courts, federal habeas corpus should now be considered part of the ordinary course of the capital litigation process. However, the recent amendments to the federal habeas corpus law, designed to reduce the opportunities for delay in the federal habeas courts, may have the opposite effect as the courts must assess the meaning of the new law.

3. Protection Against Executing Factually or Legally Innocent Defendants

Courts have reasoned that if they ruled that inordinate delay claims are a substantive violation of the Eighth Amendment, such a ruling would have the perverse effect of speeding up the process of judicial review and increasing the probability of executing an innocent person on death row.[264] A partially incorrect factual premise provides the basis for this contention. The premise is that the reason for the delay in the processing of capital cases is the dilatory tactics of capital defense attorneys, and the belief that these attorneys are implicitly encouraged to engage in such tactics when courts—during both direct and collateral review—seriously consider their spurious arguments. Thus, in taking time to rule on mostly meritless issues, the argument goes, courts unnecessarily delay the execution of prop-

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[262] *See* Victor E. Flago, *Habeas Corpus Petitions in Death Penalty Litigation*, 35 JUDGES' J., Winter 1996, at 8, 10; Hanson & Daley, *supra* note 226, at 7.

[263] *See* Liebman, *supra* note 63, at 541 n.15.

[264] *See, e.g.*, White v. Johnson, 79 F.3d 432, 438 (5th Cir. 1996); McKenzie v. Day, 57 F.3d 1461, 1467 (9th Cir. 1995).

erly convicted defendants. There is no evidence, however, that a significant number of the legal claims asserted lack merit.

Some have cautioned that reducing the period between the imposition of a death sentence and the execution might increase the likelihood of executing an innocent person. According to Professors Bedau and Radelet, there have been at least 350 convictions of innocent persons for capital crimes or potentially capital crimes in the United States during the twentieth century.[265] They place the cases into four categories: (1) errors by the police before trial, (2) errors by the prosecution before or during trial, (3) false testimony against the defendant, and (4) "sundry other causes that enter in the proceedings." Injustices perpetrated by the police, such as coerced confessions and inadequate investigation of the crime, accounted for one-fourth of the errors. Prosecutors who suppressed or fabricated evidence were responsible for about one-seventh of the improper convictions. In more than half of the 350 cases a witness' false testimony helped secure the erroneous conviction. Someone other than the defendant uncovered these alleged errors. Sometimes the actual perpetrator confessed, an eyewitness recanted or revised his or her testimony, the trial judge pursued an investigation on his own accord, or the police or prosecutor later uncovered exculpatory evidence. It was "the dogged efforts of defense counsel"[266] that was by far the largest source of uncovering the error that resulted in the improper conviction. However, Bedau and Radelet note that "[t]here is no common or typical route by which an innocent defendant can be vindicated, and vindication, if it ever comes, will not necessarily come in time to benefit the defendant."[267] In more than half of the surveyed cases, the erroneous conviction was corrected within five years, but it took more than fifteen years to uncover the error in thirty-nine cases.

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[265] Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 27 (1987). *But see* Stephen J. Markman & Paul G. Cassell, Comments, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988) (critiquing Bedau and Radelet's methodology and conclusions).

[266] Bedau & Radelet, *supra* note 265, at 67.

[267] *Id.* at 70.

Bedau and Radelet's research suggests that an effectively administered capital litigation process might diminish the risk of executing innocent defendants. One possible reform is scrutinizing prosecutorial tactics. This is necessary because the principles announced in *Brady v. Maryland*,[268] *United States v. Agurs*,[269] and *United States v. Bagley*[270] are apparently not sufficiently inculcated to provide a safeguard so as to ensure that the defense receives all of the exculpatory evidence.[271] If a state decides not to authorize oversight of the prosecutorial and investigative stages of a capital case (such as judicial review of charging procedures), then it is more important that the defense have adequate resources to conduct its own investigation in order to put forth a sufficient trial defense.

4. Reconsidering the Roles of Prosecutors, Judges, Defense Attorneys, and the Public

Another area of reform is prosecutorial discretion. Despite the virtually unchecked discretion that prosecutors presently en-

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[268] 373 U.S. 83, 86 (1963) (holding that due process is violated when prosecution suppresses favorable material evidence requested by defendant); *see also* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987) (noting that disciplinary actions against prosecutors are infrequently brought and proposing remedial measures).

[269] 427 U.S. 97, 114 (1976) (holding that the prosecutorial duty under *Brady* is violated when defendant is denied fair trial by nondisclosure).

[270] 473 U.S. 667, 684 (1985) (holding that the conviction should be reversed for a *Brady* violation if the suppressed evidence might have affected the outcome of trial).

[271] *See* Kyles v. Whitley, 514 U.S. 419 (1995) (considering whether nondisclosure of evidence in capital case violated *Brady*).

Rolando Cruz's experience underscores this point. Three former Chicago area prosecutors and four sheriff's deputies were indicted for allegedly presenting false testimony and failing to disclose exculpatory evidence in prosecuting Cruz for the 1983 rape and murder of a 10-year-old girl. Cruz received a death sentence, but was freed in 1995 after a deputy testifying in Cruz's third trial contradicted his testimony from an earlier trial. Cruz's two prior convictions had been reversed.

Cruz had consistently maintained that an incriminating statement he allegedly gave was fabricated. In 1995, a convicted child killer had already told his lawyer that he committed the crime for which Cruz was charged. The indicted former prosecutors also allegedly presented perjured testimony in Cruz's trials and buried notes of an interview that could have exonerated him. *See* Ted Gregory & Maurice Possley, *Indictments Tear at Prosecutorial Teflon: DuPage Charges Outline Conspiracy Against Cruz*, CHICAGO TRIB., Dec. 13, 1996, at 1D; Mark Hansen, *How a Vision Failed: Indictment Calls Prosecution a Conspiracy Against Suspect*, 83 A.B.A. J., Feb. 1997, at 26.

joy, prosecutors should be more conscientious in seeking the death penalty. Prosecutors ought to consider whether the capital litigation system can effectively handle another case and whether it ought to handle *this* case instead of seeking to employ the sanction at every available opportunity. Prosecutors should consider seriously whether treating the case as a capital prosecution achieves justice for the individuals most intimately involved in the case—the defendant, the victim, and their families—and whether the prosecution is in the best interests of the local and state governments that the prosecutor serves.[272] Once the defendant receives the death sentence, prosecutorial offices should continue to monitor the case and make every effort to maintain court filings. The prosecutor's office should make proper—that is, with notice to the defense—inquiries regularly to appellate judges on the status of pending cases. Further, courts and other supervisory authorities should not tolerate prosecutorial misconduct. Such misconduct might become sufficiently unattractive if the authorities regularly disciplined—including criminal prosecution—those who initiate and maintain clearly defective capital prosecutions. It is a serious indictment of the capital litigation system when an experienced capital defense attorney can claim that in nearly every capital case there is evidence of prosecutorial misconduct or overreaching.[273]

Judges also have to remain very serious about the capital cases tried and argued before them. Jurists who have philosophical objections to capital punishment should recuse them-

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[272] *See* Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717 (1996) (suggesting that prosecutors make efficient use of prison resources when making charging decisions); *see also* E. Michael McCann, *Opposing Capital Punishment: A Prosecutor's Perspective*, 79 MARQ. L. REV. 649, 658-67 (1996) (discussing ethical and practical considerations of prosecuting capital cases); John A. Horowitz, *Prosecutorial Discretion and the Death Penalty: Creating a Committee to Decide Whether to Seek the Death Penalty*, 65 FORDHAM L. REV. 2571 (1995) (proposing committee independent of prosecutor's office to make charging decisions in potential capital cases); Robert Morganthau, *What Prosecutors Won't Tell You*, N.Y. TIMES, Feb. 7, 1995, at A11 (noting the impracticality of death penalty prosecutions).

[273] *See* Richard H. Burr, *Representing the Client on Death Row: The Politics of Advocacy*, 59 U.M.K.C. L. REV. 1, 2-3 (1990).

selves from capital cases.[274] Judicial manipulation of the law to achieve a certain result does not further justice. Judges who do not recuse themselves should be willing to hold the state to the established rules of law, and should be wary of invoking the harmless error doctrine in capital cases. Further, if the conviction or sentence falls outside the parameters of the law, the case should not proceed and, if that matter becomes apparent on appeal, the conviction or sentence should be reversed, regardless of the public outcry that is likely to occur.[275] Similarly, if the conviction and sentence are within the bounds of the law, the appellate court should affirm.

Defense attorneys have to be willing to abandon the notion that delay for its own sake is a permissible objective.[276] At some point, the public has to have its execution. It could be that after a series of executions the public will lose its taste for capital punishment. This seems to have occurred in Louisiana. In 1987, there were eight executions in that state. For nearly two years after that only two defendants received death sentences, although the homicide rate (and presumably the brutality of some killings) did not change.[277] While it does appear misguided to allow the extinction of several lives to prove that the present system of capital punishment does not achieve its articu-

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[274] *See* Richard J. Bonnie, *Dilemmas in Administering the Death Penalty: Conscientious Abstention, Professional Ethics, and the Needs of the Legal System*, 14 LAW & HUM. BEHAV. 67, 69 (1990).

[275] I do not mean to suggest that judges should not attempt to explain fully and truthfully to the public—in both their opinions and on other occasions—the rationale for their decisions. Rather, a judge's ruling on the propriety of the death sentence in a particular case should not be overly influenced by public opinion.

[276] *See* Mello, *supra* note 84, at 51 ("To win time is to win. For the near-dead, a lifetime can be lived in five extra, snatched minutes . . . "); Anthony V. Alfieri, *Mitigation, Mercy, and Delay: The Moral Politics of Death Penalty Abolitionists*, 31 HARV. C.R.-C.L. L. REV. 325, 334-37 (1996).

[277] Jason DeParle, *Abstract Death Penalty Meets Real Execution*, N.Y. TIMES, June 30, 1991, at § 4, p. 2; David A. Kaplan, *Anger and Ambivalence*, NEWSWEEK, Aug. 7, 1995, at 24, 29. It is difficult to determine the cause of this hesitancy. It is possible that the message of local abolitionists, such as Sister Helen Prejean, began to take hold. I am grateful to Jerry Phillips for this observation. *See also* Mike Williams, *Florida Gets Chair Ready for 4 Executions in 9 Days*, ATLANTA J. & CONST., Mar. 22, 1998, at 19A (detailing Florida's effort to resume executions after unsuccessful legal challenge to use of electric chair as method of execution).

lated goals,[278] at bottom, states have to be willing to consider whether the legal experiment to contain the death penalty within the rule of law is possible.[279]

Future challenges to the continued legality of the death penalty might not lie in skirmishes over the death sentence in particular cases, with the all but obligatory last minute protests over the imminent perpetration of an "injustice."[280] The next step for abolitionists may be a greater effort to educate the public on how capital punishment is presently administered.[281] That system is likely not in accord with the common perception. Jack Greenberg, former Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc., (LDF) has noted:

> Death penalty proponents have assumed a system of capital punishment that simply does not exist: a system in which the penalty is inflicted on the most reprehensible criminals and meted out frequently enough both to deter and to perform the moral and utilitarian functions ascribed to retribution. Explicitly or implicitly, they assume a system in which certainly the worst criminals, Charles Manson or a putative killer of one's parent or child, for example, are executed in an even-handed manner. But this idealized system is not the American system of capital punishment....
>
> Indeed, the reality of American capital punishment is quite to the contrary. Since at least 1967, the death penalty has been inflicted only

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[278] One of the objections to utilitarianism as a theory of punishment, particularly general deterrence, is that it permits the punishment of an individual as an instrument for the good of society. In this regard the dignity of the individual is subordinated to the interests of society at large. *See* IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 100 (J. Ladd trans. 1965).

[279] Justice Harlan did not think so. In *McGautha* he suggested judicial abdication: "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability." McGautha v. California, 402 U.S. 183, 204 (1971). It took twenty years, coupled with other developments in death penalty and habeas corpus decisions, before, in *Callins*, Justice Blackmun declared that he had reached the same conclusion. Callins v. Collins, 510 U.S. 1141, 1145 (1994) ("[T]he death penalty experiment has failed.").

[280] *See, e.g.*, Stephens v. Kemp, 464 U.S. 1027 (1983); *see also* Austin Sarat, *Narrative Strategy and Death Penalty Advocacy*, 31 HARV. C.R.-C.L. L. REV. 353, 359-64 (1996).

[281] *See* Michael D. Hintze, *Attacking the Death Penalty: Toward a Renewed Strategy Twenty Years After* Furman, 24 COLUM. HUM. RIGHTS L. REV. 395, 424-33 (1993) (suggesting practical and institutional arguments may result in abolition of death penalty).

> rarely, erratically, and often upon the least odious killers, while many of the most heinous criminals have escaped execution. Moreover, it has been employed almost exclusively in a few formerly slave holding states, and there it has been used almost exclusively against killers of whites, not blacks. It is this system, not some idealized one, that must be defended in any national debate on the death penalty.[282]

Justice Marshall, who served as the Director-Counsel of the NAACP LDF immediately before Greenberg, posed a similar challenge in *Furman*. Recognizing that public opinion polls were subject to great fluctuation on the issue, Justice Marshall suggested that such polls would be of greater use if they expressed the views of "people who were fully informed as to the purposes of the penalty and its liabilities."[283] In his view, once so informed, public support for the death penalty would markedly decrease.[284] Despite the efforts of abolitionists to have the death penalty declared unconstitutional, it continues, probably because most Americans who express support for capital punishment do not know how it actually operates.

If courts conclude that the Eighth Amendment does prohibit an inordinate delay between the pronouncement of a death sentence and the carrying out of that sentence, that ruling may result in further refinements in the administration of the death penalty. States would have a greater incentive to ensure that the defendant receives adequate legal assistance at the earliest moment, and when it matters most: at trial and on direct appeal.[285] One way for a state to address both concerns is by providing adequate training for capital defense attorneys. States would also have a greater incentive to eliminate the unnecessary

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[282] Greenberg, *supra* note 250, at 1670.

[283] Furman v. Georgia, 408 U.S. 238, 361 (Marshall, J., concurring).

[284] Marshall's thesis has been borne out by empirical evidence. Although they had only 181 valid responses, two researchers concluded that Marshall's intuition was basically correct. Austin Sarat & Neil Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171; *see also* William J. Bowers, et al., *A New Look at Public Opinion on Capital Punishment: What Citizens and Legislatures Prefer*, 22 AM. J. CRIM. L. 77, 82-92 (1994) (reviewing studies on public support for death penalty).

[285] The inadequacy of legal counsel is most severe in indigent capital cases. *See* Bright, *supra* note 205, at 1849-52; *see also* Marcia Coyne, et al., *Fatal Defense: Trial and Error in the Nation's Death Belt*, NAT'L L.J., June 11, 1990, at 30.

delay that occurs on direct appeal and during collateral attacks on the conviction and sentence. It would also provide the state with an increased motive to monitor death cases, instead of letting the cases languish in the system. Supporters of time limits by which capital defendants have to litigate their post-conviction challenges contend that time limitations will encourage inmates to bring forward their claims at the earliest occasion. The inordinate delay principle could place a similar incentive on the states for them to provide adequate resources—including judges and additional court personnel, if necessary—to adjudicate claims raised in capital cases. Most importantly, the issue of inordinate delay might invite proponents and opponents of the death penalty to examine the present administration of capital punishment. Until courts address the issue on its merits, however, the arguments over capital punishment will continue in a discussion that is devoid of reality.

VII. CONCLUSION

Some contemporary claimants have spent about twice as long as the average inmate on death row and have unsuccessfully claimed that their inordinate stays on death row violate their Eighth Amendment rights. This Article has considered the procedural issues that a federal court should address in a capital habeas petition asserting inordinate delay. If the previous cases are indicative, then a defendant is more likely to be on death row for an inordinate period when the case is on the margins of death eligibility and errors occur during in the state's processing of the case.

Despite a firm commitment to capital prosecutions, the states have not managed to establish effective and efficient capital case processing systems for cases in the post-trial stage. Consequently, most of the delay occurs after the imposition of a death sentence. This delay suggests that other actors in the capital litigation process have serious questions about the appropriateness of the death sentence. After experiencing inordinate delay, a capital defendant should be able to file a federal habeas petition and rely on his or her post-sentencing conduct as a basis for challenging the appropriateness the death sen-

tence. The most commonly voiced objections against recognizing inordinate delay as a substantive limit on death eligibility do not withstand hard scrutiny, when considered in light of the actual dynamics of the capital litigation process. In fact, recognizing inordinate delay as a basis for setting aside a death sentence might serve to bring about needed reforms in the administration of capital punishment. The suggested reforms should help reduce or eliminate inordinate delay between the imposition of a death sentence and a proposed execution, without diminishing the quality of review. Close attention to the process itself, moreover, may cause the public to reconsider the soundness of capital punishment.