

THE SLOW WHEELS OF *FURMAN'S* MACHINERY OF DEATH

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I. INTRODUCTION

Shortly after receiving my law license at the age of twenty-four, I served as co-counsel on the initial appeal of Carl Buntion, who had been sentenced to death for the 1990 capital murder of a Houston police officer. In 1995, the Texas Court of Criminal Appeals affirmed his conviction and sentence on direct appeal.¹ Buntion thereafter filed habeas corpus actions in the state and federal courts and, after fourteen years of post-conviction litigation, eventually was granted a new capital-sentencing hearing because of constitutionally defective jury instructions at his original sentencing.² Texas again sought, and ultimately obtained, the death penalty at Buntion's re-sentencing hearing in 2012.³

As I write this article, now in my mid-forties, Buntion has been under a sentence of death for nearly two decades. Based on

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1. *Buntion v. State*, No. AP-71,238 (Tex. Crim. App. May 31, 1995) (unpublished slip op.). My role as co-counsel for Buntion did not extend beyond his first appeal.

2. *Ex Parte Buntion*, 2009 WL 3154909 (Tex. Crim. App. Sept. 30, 2009); *see also Buntion v. Quarterman*, 524 F.3d 664 (5th Cir. 2008) (federal habeas litigation).

3. *See* Brian Rogers, *Cop Killer Buntion Sent Back to Death Row*, *Houston Chron.* (Mar. 6, 2012), <http://www.chron.com/news/houston-texas/article/Career-criminal-sent-back-to-death-row-for-3386707.php> (accessed Apr. 24, 2012; copy on file with *Journal of Appellate Practice and Process*).

the likelihood of delays resulting from his next round of appeals, I estimate that Buntion, who was nearly seventy-two when he was re-sentenced to death,⁴ will end up having lived for three decades on death row before eventually being executed (assuming that he does not die of natural causes first).

Buntion's extended time on death row is hardly aberrational. According to the Justice Department's Bureau of Justice Statistics, which collects and publishes data concerning both federal and state death-row inmates, the average condemned inmate in 2010 (the most recent year for which data are reported) spent nearly fifteen years under a sentence of death before being executed.⁵ Notably, the BJS's statistics significantly understate the actual average because the data are based solely on executed inmates' time on death row following their "most recent sentencing date[s]."⁶ The years that executed inmates spent on death row in connection with earlier death sentences that were reversed on appeal (followed by new death sentences at re-sentencing) are excluded from the BJS data in computing averages. Because half or more of all death sentences have been reversed on appeal in the modern era,⁷ often after many years of litigation, and because subsequent re-sentencings often result—as in Buntion's case—in new death sentences,⁸ the actual average likely is closer to twenty years than to fifteen.⁹

4. See Texas Department of Criminal Justice, *Offenders on Death Row*, http://www.tdcj.state.tx.us/stat/dr_offenders_on_dr.html (reporting that Buntion was born on March 30, 1940) (accessed Apr. 24, 2012; copy on file with Journal of Appellate Practice and Process).

5. See Bureau of Justice Statistics, *Capital Punishment 2010—Statistical Tables 12* (tbl. 8: *Average time between sentencing and execution, 1977–2010*), <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2236> (Dec. 20, 2011) (indicating that average time on death row for inmates executed in 2010 was 178 months) (click "PDF" on main page to reach tables; scroll down to Table 8 on page 12) [hereinafter "BJS Tables 2010"].

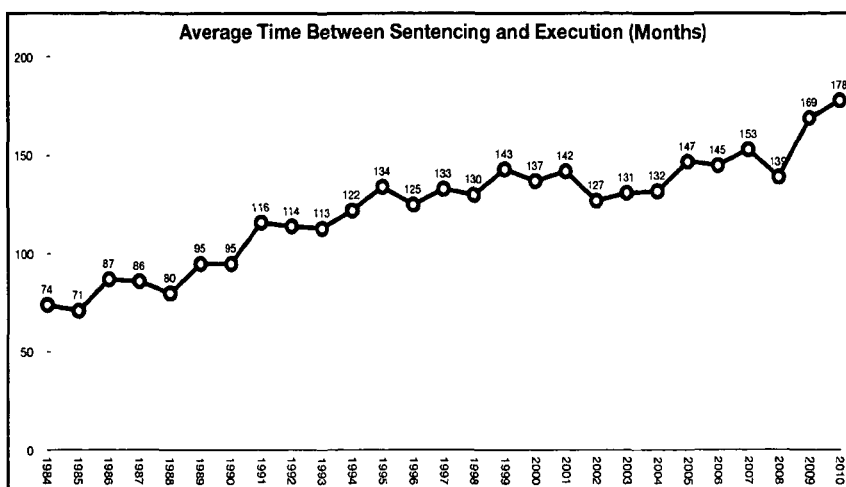
6. See *id.* at note (stating that "[a]verage time was calculated from the most recent sentencing date"); telephone interview with Tracy J. Snell, BJS statistician (Apr. 2, 2012) (confirming that author's understanding of the data is correct).

7. See n. 52, *infra*, and accompanying text.

8. See *e.g. Chambers v. Bowersox*, 157 F.3d 560, 562–63 (8th Cir. 1998) (capital defendant sentenced to death three times; two prior death sentences reversed on appeal and defendant re-sentenced to death on remand each time).

9. The longest-serving death-row inmate currently appears to be Gary Alvord in Florida; he had been on death row thirty-eight years as of mid-2012. See Florida Department of Corrections, *Death Row Fact Sheet*, *Death Row Notables*, <http://www.dc>

If current trends continue to hold, the average delay between sentencing and execution will not decrease and very well may increase. The figure below,¹⁰ based on BJS's annual data from 1984 through 2010, shows a trend line of increasing average times between imposition of a death sentence and execution during the past three decades. (As noted, these data under-represent the average total time that executed inmates spent on death row in connection with both initial and subsequent death sentences. The figure nevertheless offers a good depiction of the trend line.)



Some simple math concerning incoming and outgoing inmates on death row accounts for the growing delays. The size of death row in the United States has remained stable during the past fifteen years or so—between 3,000 and 3,600 inmates each year since 1995 (remaining at around 3,200 since 2005).¹¹ From 1995 through 2010, the number of inmates added to death row

.state.fl.us/oth/deathrow/#Statistics (accessed Apr. 27, 2012; copy on file with Journal of Appellate Practice and Process).

10. This figure originally appeared on the “Time on Death Row” portion of the website of the Death Penalty Information Center, <http://www.deathpenaltyinfo.org/time-death-row>, and is reproduced here with permission.

11. It reached a high point of 3,593 in 2000. See Death Penalty Information Center, *Size of Death Row—By Year (1968–present)*, <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year#year> (accessed Apr. 30, 2012; copy on file with Journal of Appellate Practice and Process).

annually always has substantially exceeded the annual number of executions.¹² The number of death sentences has ranged from a high of 315 in 1996 to a low of 104 in 2010.¹³ By comparison, the annual number of executions has been much smaller; in 1999, there were ninety-eight executions (the high point in the modern era), while the average from 2006 to 2010 was only forty-six per year.¹⁴ A stable population of death-row inmates—virtually all of whom are pursuing multiple rounds of appeal that postpone their execution dates¹⁵—and a decreasing number of annual executions necessarily means an increase in the average time between imposition of a death sentence and execution.

Additional BJS data also suggest the likelihood of increasing average delays. At the end of 2010, the average condemned inmate had been on death row for approximately thirteen years since the imposition of the most recent death sentence.¹⁶ Almost two thirds of death-row inmates had been on death row for a decade or more since their most recent death sentences.¹⁷ A substantial number had been on death row for over fifteen years since imposition of their most recent death sentences.¹⁸ Assuming a stable inmate population, it would take seventy years to execute the death sentences of the 3,200 or so

12. See BJS Tables 2010, *supra* n. 5, at 18 (tbl. 14: *Prisoners sentenced to death and the outcome of sentence, by year of sentencing, 1973–2010*). In 2011, seventy-eight new inmates were added to death row, and forty-three executions occurred. See Death Penalty Information Center, *Facts about the Death Penalty*, <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (Apr. 27, 2012) [hereinafter “Death Penalty Facts”]. The only reason that the death-row population has remained relatively stable—at around 3,200 inmates in recent years—is that substantial numbers of inmates either have been removed annually by judicial rulings vacating convictions or death sentences or have died from causes other than execution. For instance, in 2010, twenty inmates died other than by execution and forty-eight had their convictions or death sentences vacated by courts. See BJS Tables 2010, *supra* n. 5, at 11 (tbl. 7: *Inmates removed from under sentence of death, by method of removal, 2010*).

13. BJS Tables 2010, *supra* n. 5, at 18 (tbl. 14: *Prisoners sentenced to death and the outcome of sentence, by year of sentencing, 1973–2010*).

14. Death Penalty Facts, *supra* n. 12.

15. The protracted appellate process in death-penalty cases is discussed below in Section II.

16. BJS Tables 2010, *supra* n. 5, at 16 (tbl. 12: *Prisoners under sentence of death on December 31, 2010, by jurisdiction and year of sentencing*). This statistic significantly understates the average inmate’s cumulative time on death row. See text accompanying n. 6, *supra*.

17. *Id.* (indicating that 2,022 of 3,158 inmates were in this category).

18. *Id.* (indicating that 630 inmates were in this category).

inmates now on death row if executions continue at the current rate of forty-six per year.¹⁹

As discussed below in Part II, the underlying cause of the lengthy delays is the protracted appellate process in capital cases; the appellate delays, in turn, are a function of the elaborate legal “machinery of death”²⁰ created after the Supreme Court’s landmark decision in *Furman v. Georgia*.²¹ *Furman* and its progeny created an extremely complex body of constitutional rules in capital cases, which has made the wheels of that machine move very slowly. As discussed below in Parts III and IV, such systemic delays in the implementation of capital punishment raise serious constitutional doubts about the current death-penalty system. *Furman* created an Eighth Amendment paradox in which unconstitutional delays are caused by an elaborate capital-punishment jurisprudence that was intended to promote constitutional death sentences. In Part V below, I propose a possible solution to the *Furman* paradox—albeit one that would require the state and federal governments to rebuild the current death-penalty machine as they did after *Furman*.

II. *FURMAN* AND ITS ELABORATE MACHINERY OF DEATH

Forty years ago, the Court in *Furman* dismantled the death-penalty machine then in operation and gave the American justice system an opportunity to reconstruct the machine in order to

19. Of course, at the rate of forty-six executions per year, the vast majority of inmates—whose average age is forty-four years old—would die of natural causes well before they could be executed. See BJS, *Capital Punishment 2009—Statistical Tables* 9 (tbl. 5: *Demographic characteristics of prisoners under sentence of death, 2009*), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cp09st.pdf> (Dec. 2010) (showing that the average age of death-row inmates in 2009 (the last year in which age data were reported) was forty-four). Although some inmates will be removed every year for reasons other than executions or death by natural causes, recent trends indicate that inmates removed from death row every year for reasons other than executions will be replaced by an equal or greater number of new additions to death row. For instance, in 2009, ninety-seven death-row inmates were removed for reasons other than executions, but 112 new death-row inmates were added. See *id.* at 8 (tbl. 4: *Prisoners under sentence of death, by region, jurisdiction, and race, 2008 and 2009*).

20. Justice Blackmun used this now-famous phrase in his dissenting opinion in *Callins v. Collins*, 510 U.S. 1141 (1994), in which he announced that “[f]rom this day forward, I no longer shall tinker with the machinery of death.” *Id.* at 1145.

21. 408 U.S. 238 (1972).

comply with the Eighth Amendment's ban on cruel and unusual punishment. Because the members of the *Furman* majority did not speak with a single voice, however, the Court's proposed blueprint for rebuilding the machine was somewhat sketchy. Yet a few themes were evident in two or more of the five separate concurring opinions, including these:

- The death penalty was arbitrarily imposed in only a tiny fraction of eligible cases²² and thus failed to meaningfully promote governmental interests in retribution and deterrence;²³
- The death penalty was capriciously imposed at the unguided discretion of capital sentencers;²⁴
- It was disproportionately applied against the poor and persons of color;²⁵ and
- Capital punishment was an inherently cruel and unusual method of punishment.²⁶

22. *Id.* at 309–10 (Stewart, J., concurring) (noting that “[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual” because “the petitioners are among a capriciously selected random handful upon whom the sentence of death has been imposed”); *id.* at 310 (opining that the death penalty cannot be “so wantonly and so freakishly imposed”); *id.* at 293 (Brennan, J., concurring) (contending that the system of capital punishment then in effect “smack[ed] of little more than a lottery system”).

23. *Id.* at 310–12 (White, J., concurring) (characterizing the death penalty as so infrequently and randomly imposed that it ceased “measurably to contribute” to the governmental purposes of retribution and deterrence and, thus, concluding that executions were “pointless and needless” and thereby “cruel and unusual” punishment); *id.* at 331 (Marshall, J., concurring) (stating that capital punishment is “cruel and unusual” and “excessive” if it “serves no valid legislative purpose”).

24. *Id.* at 244–53 (Douglas, J., concurring) (discussing history and concluding that death sentences were imposed with “uncontrolled discretion”); *id.* at 295 (Brennan, J., concurring) (criticizing the process as one that allowed juries to make “the decision whether to impose a death sentence wholly unguided by standards governing that decision”).

25. *Id.* at 249–50, 253–57 (Douglas, J., concurring); *id.* at 364–66 (Marshall, J., concurring).

26. *Id.* at 269–91 (Brennan, J., concurring); *id.* at 342–69 (Marshall, J., concurring). Justices Brennan and Marshall were the only two members of the majority who viewed the death penalty as inherently unconstitutional in all circumstances. The remaining Justices in the majority based their conclusion on aspects of the death penalty system as it was then

Although the Court's short per curiam opinion simply stated that "the imposition and carrying out of the death penalty in [*Furman* and its companion cases, all from Georgia or Texas] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments,"²⁷ the clear import of the separate opinions of the five Justices in the majority was to invalidate the entire system of capital punishment then existing throughout the United States.²⁸ In other words, because of the systemic or structural flaws identified by the Justices, "any given death sentence" in the United States was constitutionally invalid, regardless of what specific error may have existed (or not existed) in individual cases.²⁹

Most states, and eventually the federal government, responded by creating new death-penalty statutes designed to avoid the defects identified by the members of the *Furman* majority.³⁰ They used different models, although the primary example—based on the Model Penal Code—created a bifurcated system with separate guilt and punishment phases, the latter involving the weighing of aggravating circumstances against mitigating circumstances in deciding whether to impose a death sentence.³¹

In 1976, the Supreme Court rejected facial challenges to the new death-penalty statutes in several states and, in the process, held that the core of the post-*Furman* death-penalty system

being applied. Only Justice Brennan also specifically noted that capital punishment was unconstitutional because of the "inevitable long wait between the imposition of sentence and the actual infliction of death" and the consequent mental anguish suffered by condemned persons during that time. *Id.* at 288 (Brennan, J., concurring).

27. *Id.* at 239–40 (per curiam).

28. This intent of the Court was made clear when, in response to certiorari petitions of death-row inmates in states other than Georgia and Texas, the Court summarily vacated the judgments affirming death sentences and remanded for re-sentencing in light of *Furman*. See e.g. *Crampton v. Ohio*, 408 U.S. 941 (1972) (per curiam); *Moore v. Ill.*, 408 U.S. 786, 800 (1972); see also *State v. Cain*, 377 S.E.2d 556, 565 (S.C. 1988) (noting that *Furman* invalidated "every state's capital punishment provisions").

29. *Pulley v. Harris*, 465 U.S. 37, 44 (1984).

30. See e.g. Ga. Code Ann. §§ 27-2503–2534 (Supp. 1973); Fla. Ann. Stat. § 921.141 (West Supp. 1985) (noting that the 1972 amendment "substantially re-wrote this section"); Tex. Pen. Code Art. 37.071 (1974); see also 18 U.S.C. §§ 3591–3598 (1994).

31. See *Gregg v. Ga.*, 428 U.S. 153, 193–95 (1976) (Stewart, Powell, & Stevens, JJ.) (joint opinion accompanying judgment of the Court) (discussing Model Penal Code's death-penalty provisions).

passed constitutional muster under the Eighth Amendment.³² In these landmark 1976 cases (some disapproving state procedures³³), the Court highlighted two Eighth Amendment requirements for a constitutional death-penalty system: First, to avoid the arbitrariness identified in *Furman*, a capital-sentencing scheme must rationally “narrow the class”³⁴ of eligible capital crimes by providing for the consideration of aggravating circumstances applicable to only a discrete class of murders and also must sufficiently “channel”³⁵ the capital sentencer’s discretion in deciding whether to impose the death penalty. Second, the scheme must permit mitigating evidence to be introduced by the defendant, and must ensure that it be given meaningful consideration by the sentencer during the punishment phase.³⁶

The Court also strongly endorsed what has come to be known as “meaningful appellate review”³⁷ in death-penalty cases.³⁸ After *Furman*, virtually all death-penalty jurisdictions created a mandatory direct appeal following imposition of a death sentence.³⁹ Therefore, it was not simply new post-*Furman* trial court procedures that caused the Court to approve the

32. See *Gregg*, 428 U.S. at 207 (upholding Georgia’s post-*Furman* death penalty statute); *Proffitt v. Fla.*, 428 U.S. 242, 260 (1976) (upholding Florida’s post-*Furman* death-penalty statute); *Jurek v. Tex.*, 428 U.S. 262 (1976) (upholding Texas’s post-*Furman* death-penalty statute).

33. The Court invalidated the mandatory death penalty statutes in Louisiana and North Carolina. See *Roberts v. La.*, 428 U.S. 325 (1976); *Woodson v. N.C.*, 428 U.S. 280 (1976).

34. *Gregg*, 428 U.S. at 196; see also *e.g. id.* at 196–98 (discussing provisions of new system).

35. See *e.g. Gregg*, 428 U.S. at 206; see also *e.g. id.* at 206–07 (summarizing operation of safeguards in new system).

36. See *e.g. Woodson*, 428 U.S. at 304 (concluding that “in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death”) (citation omitted).

37. *Parker v. Dugger*, 498 U.S. 308, 321 (1991).

38. *E.g. Gregg*, 428 U.S. at 207 (pointing out that “the review function of the Supreme Court of Georgia affords additional assurance that the concerns that prompted our decision in *Furman* are not present to any significant degree in the Georgia procedure”).

39. See Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L. Rev. 1, 6, 6 n. 21 (1995); see also *Pulley*, 465 U.S. at 44 (noting that, after *Furman*, the states that enacted new death penalty statutes all provided for “automatic” direct appeals).

modern death-penalty statutes; it also was the belief that the appellate courts would carefully review death-penalty cases to assure that those procedures were being followed. In the post-*Furman* era, the Court repeatedly has stressed the “duty [of an appellate court] to search for constitutional error with painstaking care,” an obligation that “is never more exacting than it is in a capital case.”⁴⁰

Yet the 1976 cases did not definitively settle all questions concerning the constitutionality of the post-*Furman* death penalty statutes. Every year since 1976, the Court, applying its gradualist, “common law” approach to appellate litigation,⁴¹ has

40. *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (quoting *Burger v. Kemp*, 483 U.S. 776, 785 (1987)). Although the Court has held for over a century that there is no constitutional right to any type of appellate review in criminal cases, *McKane v. Durston*, 153 U.S. 684, 688 (1894) (noting that “whether an appeal should be allowed, and, if so, under what circumstances, or on what conditions, are matters for each state to determine for itself”), virtually every death-penalty jurisdiction not only provides for such review in capital cases but indeed mandates it as a matter of state law. See n. 39, *supra*. Although the Supreme Court has never had occasion to so rule, the Court very likely would hold that there is a constitutional right to at least one level of direct appellate review in death penalty cases. See *Parker*, 498 U.S. at 321 (“We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally.”) (citations omitted).

A significant part of the current protracted review process occurs after the direct appeal process—on habeas (or “collateral”) review in the state and federal courts. See e.g. 28 U.S.C. § 2254 (available at <http://uscode.house.gov>); Tex. Code Crim. Pro. Art. 11.071; see also Kozinski & Gallagher, *supra* n. 39, at 7–10 (describing the protracted process of state and federal post-conviction habeas review in death-penalty cases). Although the Habeas Corpus Suspension Clause in the Constitution apparently creates a right to some type of federal habeas review of state prisoners’ constitutional claims, see Joseph L. Hoffman & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. Rev. 791, 838 (2009) (pointing out that “[s]everal habeas decisions of the Court lend indirect support to this conclusion, either by assuming it to be true for purposes of the case, alluding to it in dictum, or . . . by relying on habeas precedents involving both state and federal criminal defendants to interpret and apply the Suspension Clause to cases that it clearly covers”) (citations omitted), the Court has held that Congress may impose reasonable limits on such review, even in capital cases. See *Felker v. Turpin*, 518 U.S. 651, 664 (1996).

41. See *Rogers v. Tenn.*, 532 U.S. 451, 461 (2001) (noting “the incremental and reasoned development of precedent that is the foundation of the common law system”). The Supreme Court’s “incremental” approach is particularly slow because the Court often waits many years before granting certiorari to resolve legal questions that have either divided the lower courts or are otherwise worthy of review. See e.g. *McCray v. N.Y.*, 461 U.S. 961, 962–63 (1983) (Stevens, Blackmon & Powell, JJ., respecting denial of petitions for certiorari) (indicating that “further consideration of the substantive and procedural ramifications of the problem by other courts [would] enable [the Court] to deal with the

tweaked, and occasionally substantially rewritten, the blueprint for the death-penalty machine by creating many substantive and procedural constitutional rules and regulations applicable to capital cases.⁴²

The Court's post-*Furman* jurisprudence has significantly affected all stages of the judicial process in capital cases, from jury selection⁴³ through the guilt/innocence phase⁴⁴ and the capital sentencing phase,⁴⁵ and culminates in the appellate process.⁴⁶ The Court also has enforced two constitutional rules applicable to all types of criminal cases—one requiring the effective assistance of defense counsel⁴⁷ and the other

issue more wisely at a later date," and that there was then "no conflict of decision within the federal system").

42. See *Sochor v. Fla.*, 504 U.S. 527, 554 (1992) (Scalia, J., concurring in part & dissenting in part) (noting "the byzantine complexity of the death penalty jurisprudence we are annually accreting" with the issuance of new decisions).

43. See *Morgan v. Ill.*, 504 U.S. 719 (1992); *Turner v. Murray*, 476 U.S. 28 (1986); *Adams v. Tex.*, 448 U.S. 38 (1980).

44. See e.g. *Beck v. Ala.*, 447 U.S. 625 (1980).

45. See e.g. *Kennedy v. La.*, 554 U.S. 407 (2008); *Panetti v. Quarterman*, 551 U.S. 930 (2007); *Smith v. Tex.*, 550 U.S. 297 (2007); *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007); *Roper v. Simmons*, 543 U.S. 551 (2005); *Deck v. Mo.*, 544 U.S. 622 (2005); *Tennard v. Dretke*, 542 U.S. 274 (2004); *Ring v. Ariz.*, 536 U.S. 584 (2002); *Kelly v. S.C.*, 534 U.S. 246 (2002); *Penry v. Johnson*, 532 U.S. 782 (2001) [hereinafter "*Penry II*"]; *Shafer v. S.C.*, 532 U.S. 36 (2001); *Simmons v. S.C.*, 512 U.S. 154 (1994); *Stringer v. Black*, 503 U.S. 222 (1992); *McCoy v. N.C.*, 494 U.S. 433 (1990); *Penry v. Lynaugh*, 492 U.S. 302 (1989), *overruled on other grounds*, *Atkins v. Va.*, 536 U.S. 304 (2002); *Mills v. Md.*, 486 U.S. 367 (1988); *Johnson v. Miss.*, 486 U.S. 578 (1988); *Maynard v. Cartwright*, 486 U.S. 356 (1988); *Sumner v. Shuman*, 483 U.S. 66 (1987); *Skipper v. S.C.*, 476 U.S. 1 (1986); *Caldwell v. Miss.*, 472 U.S. 320 (1985); *Ake v. Okla.*, 470 U.S. 68 (1985); *Edmund v. Fla.*, 458 U.S. 782 (1982); *Eddings v. Okla.*, 455 U.S. 104 (1982); *Estelle v. Smith*, 451 U.S. 454 (1981); *Bullington v. Mo.*, 451 U.S. 430 (1981); *Godfrey v. Ga.*, 446 U.S. 420 (1980); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Gardner v. Fla.*, 430 U.S. 349 (1977).

46. See e.g. *Parker*, 498 U.S. at 321; *Clemons v. Miss.*, 494 U.S. 738 (1990).

47. See e.g. *Sears v. Upton*, ___ U.S. ___, 130 S. Ct. 3259 (2010) (per curiam); *Porter v. McCollum*, ___ U.S. ___, 130 S. Ct. 447 (2009) (per curiam); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2001). In *Strickland v. Wash.*, 466 U.S. 668 (1984), the Court initially took an extremely deferential approach towards defense counsel in capital cases, but in subsequent cases took a somewhat more demanding approach in assessing whether capital-defense counsel provided ineffective assistance. See Robert R. Rigg, *The T-Rex without Teeth: Evolving Strickland v. Washington and the Test for Ineffective Assistance of Counsel*, 35 Pepperdine L. Rev. 77, 104-05 (2007) ("It is clear that the United States Supreme Court has tightened counsel's duty to investigate. . . . This evolution was caused by the Court having to adapt to changing circumstances. The change to a more active use of the standard was needed because of counsel's [poor] performance documented over the years since *Strickland*."); see also *McFarland v. Scott*, 512 U.S. 1256 (1994) (Blackmun, J., dissenting from denial

proscribing certain types of prosecutorial misconduct⁴⁸—with special attention in capital cases. On a regular basis, the Court has issued decisions affecting substantial percentages of inmates' cases in leading death-penalty states.⁴⁹ And, despite the Court's repeated statements about the strong governmental interest in "finality" of criminal judgments (including death sentences),⁵⁰ the Court has issued several decisions that have significantly altered the legal landscape in death-penalty litigation after many years of countenancing the opposite

of certiorari) (discussing the many instances of ineffective defense counsel in post-*Furman* death penalty cases); Ruth Bader Ginsburg, Lecture, *In Pursuit of the Public Good: Lawyers Who Care* (Wash., D.C. Apr. 9, 2001), http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_04-09-01a.html ("I have yet to see a death case, among the dozens coming to the Supreme Court on eve of execution petitions, in which the defendant was well represented at trial."); see generally Welsh White, *Litigating in the Shadow of Death: Defense Attorneys in Capital Cases* (U. Mich. Press 2006). I am not aware of any specific data showing the percentage of death sentences that have been reversed on habeas review in the state and federal courts after a determination of ineffective assistance, but a cursory review of reported capital cases in the "allcases" file on Westlaw (using the basic query "ineffective assistance" and (sentence! /2 death)) reveals many such cases in recent years alone. See e.g. *James v. Ryan*, 2012 WL 639292 (9th Cir. Feb. 29, 2012); *Smith v. State*, 357 S.W.3d 322 (Tenn. 2011); *Sowell v. Anderson*, 663 F.3d 783 (6th Cir. 2011).

48. See e.g. *Cone v. Bell*, 556 U.S. 449 (2009); *Banks v. Dretke*, 540 U.S. 668 (2004); *Kyles*, 514 U.S. 419.

49. The Court's post-*Furman* decisions concerning Texas, the most active death-penalty state, are a prime example. See e.g. *Adams*, 448 U.S. 38; *Estelle*, 451 U.S. 454; *Penry v. Lynaugh*, 492 U.S. 302; *Penry II*, 532 U.S. 782; *Tennard v. Dretke*, 542 U.S. 274; *Smith v. Tex.*, 550 U.S. 297; *Abdul-Kabir v. Quarterman*, 550 U.S. 233. Reliance on one or more of these decisions has resulted in reversals of death sentences in a substantial number of Texas capital cases in the post-*Furman* era. For instance, my former client Clarence Lackey—whose case is discussed in Part III, *infra*—was granted a new trial because of a jury-selection error that violated the rule announced in *Adams*. See *Lackey v. State*, 638 S.W.2d 439 (Tex. Crim. App. 1982). And my former client Carl Buntion—discussed at the beginning of this article—was given a new sentencing hearing based on *Penry II* error in the jury instructions. See *Ex Parte Buntion*, 2009 WL 3154909 (Tex. Crim. App. Sept. 30, 2009). Although Texas has executed hundreds of inmates in the post-*Furman* era—either because no reversible error affected their original capital murder convictions and death sentences or because Texas obtained valid death sentences at retrials—the many reversible errors that have occurred have resulted in significant delays between impositions of sentence and executions. At the end of 2010, the average Texas death-row inmate (of those not yet executed) had spent 11.4 years on death row since his "most recent death sentence." See BJS Tables 2010, *supra* n. 5, at 16 (tbl. 12).

50. See *Herrera v. Collins*, 506 U.S. 390, 409 (1993) (discussing history of rules addressing finality); see also *Coleman v. Thompson*, 501 U.S. 722, 748 (1991) (acknowledging "the cost to finality in criminal litigation that federal collateral review of state convictions entails").

approach.⁵¹ Significant numbers of convictions or death sentences—in approximately half of all capital cases—have been overturned on direct or collateral review in the post-*Furman* era.⁵²

The elaborate set of cogwheels in the Court's post-*Furman* death-penalty machine causes it to move extremely slowly. Even though many death-row inmates ultimately lose their appeals, several factors have contributed to systemic delays of inordinate length:

- the significant percentage of inmates who have won, coupled with other inmates' hope that the Supreme Court may alter the legal landscape yet again in inmates' favor (thus motivating them and their attorneys to leave no appellate stone unturned);

51. See e.g. *Abdul-Kabir*, 550 U.S. at 283–84 (Scalia, Thomas & Alito, JJ., dissenting) (“As the Court’s opinion effectively admits, nothing of a legal nature has changed since *Johnson v. Tex.*, 509 U.S. 350 (1993)]. What *has* changed are the moral sensibilities of the majority of the Court. For those in Texas who have already received the ultimate punishment, this judicial moral awakening comes too late. *Johnson* was the law, until today. And in the almost 15 years in between, the Court today tells us, state and lower federal courts in countless appeals, and this Court in numerous denials of petitions for writ of certiorari, have erroneously relied on *Johnson* to allow the condemned to be taken to the death chamber.”) (citations omitted; emphasis in original); *Ring v. Ariz.*, 536 U.S. 584, 610 (2002) (Scalia & Thomas, JJ, concurring) (“I am . . . reluctant to magnify the burdens that our *Furman* jurisprudence imposes on the States. Better for the Court to have invented an evidentiary requirement that a judge can find by a preponderance of the evidence, than to invent one that a unanimous jury must find beyond a reasonable doubt.”); *Wiggins*, 539 U.S. at 543 (Scalia & Thomas, JJ., dissenting) (criticizing majority’s reliance on *Williams v. Taylor*, 529 U.S. 362, and noting that “[t]here was nothing in *Strickland v. Wash.*, 466 U.S. 668], or in any of our ‘clearly established’ precedents at the time of the Virginia Supreme Court’s decision, to support [the] statement [in *Williams*] that trial counsel had an ‘obligation to conduct a thorough investigation of the defendant’s background.’”).

52. See James Liebman, *Rates of Reversible Error and the Risk of Wrongful Execution*, 86 *Judicature* 78, 80–81 (Sept.–Oct. 2002) (reporting that study of 5,800 state death sentences imposed between 1973 and 1995 showed that sixty-eight percent were reversed on either direct appeal or federal habeas review); James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 *Tex. L. Rev.* 1839, 1846–49 (2000) (same); see also Andrew Gelman et al., *A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States*, 1 *J. Empirical Leg. Stud.* 209 (2004) (same). The high error rate in Professor Liebman’s study may have decreased for death sentences imposed from 1996 to the present because of restrictions in the scope of federal habeas review created by the Antiterrorism and Effective Death Penalty Act of 1996, see n. 54, *infra*; see also Daniel J. McGrady, *Whose Line Is It Anyway? A Retrospective Study of the Supreme Court’s Split Analysis of § 2254(d)(1) since 2000*, 41 *Seton Hall L. Rev.* 1599, 1600–01 (2011) (discussing AEDPA’s limitations on potential claims for relief).

- the multiple layers of direct and collateral appeals available to every condemned inmate;
- the substantive and procedural complexity involved in appeals;⁵³ and
- the sheer volume of capital appeals pending at any time.

Perhaps because of financial constraints, but also possibly because of a lack of political will, the states themselves have generally acquiesced in the delays caused by protracted appeals.⁵⁴ The capital appellate process has simply overwhelmed the machine's ability to process cases efficiently. Attempts to expedite capital appeals during recent decades have failed.⁵⁵ On the contrary, as noted above, the average delay between imposition and execution of death sentences has significantly increased during that time.

53. Federal habeas litigation, in particular, is subject to a complex body of procedural and substantive rules. *See generally e.g.* Randy Hertz & James Liebman, *Federal Habeas Corpus Practice & Procedure* (5th ed., LexisNexis/Michie 2006).

54. For instance, it is telling that sixteen years after the passage of the Antiterrorism and Effective Death Penalty Act of 1996, not a single state has "opted in" under its provisions requiring expedited federal habeas review in death-penalty cases. *See* John Blume, *AEDPA: The "Hype" and the "Bite"*, 91 *Cornell L. Rev.* 259, 260 (2006). The opt-in provision requires states to meet five requirements to trigger expedited review in capital habeas cases: (1) establish by statute or rule a mechanism for appointment of counsel for state habeas review proceedings brought by all capital prisoners; (2) ensure that appointed counsel are competent; (3) pay appointed counsel reasonable litigation expenses; (4) offer counsel to all capital prisoners seeking post-conviction relief, with actual appointment of counsel occurring upon a determination that the prisoner is indigent and has accepted the offer; and (5) comply with the mechanisms that the states have established. *See generally* Betsy Dee Sanders Parker, Student Author, *The Antiterrorism and Effective Death Penalty Act ("AEDPA")*: *Understanding the Failures of State Opt-In Mechanisms*, 92 *Iowa L. Rev.* 1969 (2007).

55. *See e.g.* Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214 (Apr. 24, 1996) (amendments to federal habeas statutory scheme intended to make obtaining federal habeas relief more difficult and also to expedite habeas review in death-penalty cases); Acts 1995, 74th Tex. Leg., ch. 319, § 1 (Sept. 1, 1995) (similar amendments to Texas Code of Criminal Procedure's post-conviction review provisions).

III. THE IMPLICATIONS OF *LACKEY*: THE CLAIM THAT SYSTEMIC DELAYS RENDER THE ENTIRE POST-*FURMAN* SYSTEM UNCONSTITUTIONAL

In early 1995, I assumed the legal representation of Texas death-row inmate Clarence Lackey, who at the time was facing an imminent execution date (his fourth by that time). Although he was originally sentenced to death in 1978, the Texas Court of Criminal Appeals reversed his capital murder conviction and death sentence on a mandatory direct appeal in 1982 because of a constitutional error during jury selection and ordered a new trial.⁵⁶ On the mandatory direct appeal following the second jury's capital murder conviction and death sentence, Lackey's case was before the state high court for nine more years before it ultimately affirmed his conviction and sentence in 1991.⁵⁷ He thereafter unsuccessfully pursued discretionary post-conviction appeals.⁵⁸ When I became his attorney in early 1995, I raised the claim that executing Lackey at that point—after he had spent nearly seventeen years living under a sentence of death, the vast majority of which on mandatory direct appeals⁵⁹—would constitute cruel and unusual punishment in violation of the Eighth Amendment.⁶⁰

Lackey's Eighth Amendment claim had two discrete components, both of which contended that his execution would be a "disproportionate" punishment and, thus, cruel and

56. *Lackey v. State*, 638 S.W.2d 439 (Tex. Crim. App. 1982).

57. *Lackey v. State*, 819 S.W.2d 111 (Tex. Crim. App. 1989) (motion for rehearing denied and mandate issued in 1991), *overruled on other grounds*, *Tennard v. Dretke*, 542 U.S. 274 (2004).

58. See *Lackey v. Scott*, 28 F.3d 486 (5th Cir. 1994).

59. A considerably shorter delay of the trial preceding a mandatory direct appeal in another Texas capital case caused Justice Scalia to lambast the Texas Court of Criminal Appeals for "didd[ling] around for three or four years" before bringing the defendant to trial. Transcr., *McFarland v. Scott*, 1994 WL 665012 at *37 (Mar. 29, 1994) (512 U.S. 849 (1994)) (argued as *McFarland v. Collins*).

60. I was not the first to raise this type of legal argument. It appears to have been first raised in a pre-*Furman* case, but was summarily rejected in that case because the inmate himself had caused the vast majority of the delay by repeatedly filing meritless discretionary appeals. See *Chessman v. Dickson*, 275 F.2d 604, 607–08 (9th Cir. 1960); *People v. Chessman*, 341 P.2d 679, 699–700 (Cal. 1959), *overruled on other grounds, sub nom. People v. Morse*, 388 P.2d 33 (Cal. 1964).

unusual:⁶¹ first, that the state's carrying out the execution after keeping Lackey under the extreme conditions of death row for such a lengthy period of time would exact more punishment than the state was entitled to under the Eighth Amendment;⁶² and second, that neither of the state's primary interests in capital punishment—retribution and deterrence—would be meaningfully served in Lackey's case after such a lengthy delay, particularly because it was primarily attributable to the state and not to Lackey.⁶³

The first component of the claim was supported by a wealth of historical evidence demonstrating that the Framers of the Eighth Amendment considered significant delays between imposition of a death sentence and its execution to be cruel and unusual punishment.⁶⁴ For instance, historical records concerning George Washington,⁶⁵ Thomas Jefferson,⁶⁶ James

61. See e.g. *Solem v. Helm*, 463 U.S. 277, 288 (1983) (citing numerous prior cases for the proposition that the Eighth Amendment's cruel and unusual punishments clause prohibits "disproportionate" punishments).

62. The physically restrictive confinement conditions on death row, combined with waiting among many other condemned persons to be executed, cause extreme psychological stress. See generally Caycie D. Bradford, Student Author, *Waiting to Die, Dying to Live*, 5 *Interdisc. J. Hum. Rts. L.* 77 (2010–11). Such conditions are inherently part of the death penalty. The Eighth Amendment issue raised by Lackey was not whether such conditions are cruel and unusual punishment per se; rather, the issue was whether an execution following such an excessive time on death row under such conditions amounts to cruel and unusual punishment, particularly when the state is responsible for the bulk of the delay.

63. See e.g. Br. of Appellant, *Lackey v. Scott*, 1995 WL 17014055 at *3–*4 (describing state-caused delays) (5th Cir. Nov. 24, 1995).

64. See e.g. *Ford v. Wainwright*, 477 U.S. 399, 405 (1986) ("There is now little room for doubt that the Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted.").

65. In 1777, Washington, then Commander in Chief of the Continental Army, stated that the execution of two soldiers "had better be done quickly." See *Letter to Colonel George Gibson* (Mar. 11, 1778), in *The Writings of George Washington from the Original Manuscript Sources, 1745–99* vol. XI at 64 (John C. Fitzpatrick ed., U.S. Govt. Printing Off. 1931–44). Later, Washington noted "[t]he benefit resulting from a promptitude of execution" in the case of a deserter. See *Letter from General George Washington to Brigadier General Peter Muhlenberg* (July 22, 1782), in Henry Augustus Muhlenberg, *The Life of Major-General Peter Muhlenberg of the Revolutionary Army* 416–17 (Carey & Hart 1849).

66. Jefferson's famous *Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital* included the following provision regarding capital punishment: "Whenever sentence of death shall have been pronounced against any person for treason or

Wilson,⁶⁷ and John Marshall⁶⁸ offer compelling evidence that

murder, execution shall be done on the next day but one after such sentence, unless it be Sunday, and then on the Monday following.” Importantly, an indentation written by Jefferson cited to “25 G.2.c.37. [.] Beccaria, § [i.e., chpt.] 19.” See University of Virginia Library, Scholars’ Lab, *Public Papers of Thomas Jefferson, 1743–1826, A Bill for Proportioning Crimes and Punishments*, <http://etext.virginia.edu/etcbin/toccer-new2?id=JefPapr.sgm&images=images/modeng&data=texts/english/modeng/parsed&tag=public&part=4&division=div1> (accessed May 21, 2012; copy on file with Journal of Appellate Practice and Process). Jefferson thus appears to have been influenced by a 1752 English statute requiring prompt executions, see e.g. *In Re Medley*, 134 U.S. 160, 170 (1890) (noting that solitary confinement preceding execution was in eighteenth-century England “considered as an additional punishment of such a severe kind that it is spoken of in the preamble [to the 1752 act] as ‘a further terror and peculiar mark of infamy’ to be added to the punishment of death,” and acknowledging that “[i]n Great Britain, as in other countries, public sentiment revolted against this severity, and . . . the additional punishment of solitary confinement was repealed [by] 25 Geo. 2 chpt. 37,” which is a reference to the “Act for better preventing the horrid Crime of Murder,” approved by the House of Lords in March 1752), as well as by Cesare Beccaria’s 1764 essay on crime and punishment. See Cesare Beccaria, *Of Crimes and Punishments* (Edward D. Ingraham, trans., 2d ed., Philip H. Nicklin 1819) (containing full text of 1764 essay) (available at http://www.constitution.org/cb/crim_pun.htm) (accessed May 22, 2012; copy on file with Journal of Appellate Practice and Process), in which Beccaria stated that

[t]he more immediately after the commission of a crime a punishment is inflicted, the more just and useful it will be. *It will be more just, because it spares the criminal the cruel and superfluous torment of uncertainty . . . ; and because the privation of liberty, being a punishment [itself], ought to be inflicted before condemnation [i.e., capital punishment] but for as short a time as possible. Imprisonment, I say, being only the means of securing the person of the accused until he be tried, condemned, or acquitted, ought not only to be of as short duration, but attended with as little severity as possible.*

Id. at ch. 19 (emphasis added). The remainder of Beccaria’s Chapter 19 makes essentially the same point, referring, for example, to the “painful anxiety” of a criminal defendant while awaiting punishment, and asserting that

[t]he degree of the punishment, and the consequences of a crime, ought to be so contrived, as to have the greatest possible effect on [society], with the least possible pain to the delinquent. If there be any society in which this is not a fundamental principle, it is an unlawful society; for mankind, by their union, originally intended to subject themselves to the least evils possible.

Id. These passages in Beccaria’s work comported with the views that Jefferson himself expressed in the *Bill for Proportioning Crimes and Punishments*, *supra* this note.

67. James Wilson, a leading Framer and one of the most influential Justices on the Supreme Court in its early era, echoed Beccaria by stating that

[t]he principles both of utility and of justice require, that the commission of a crime should be followed by a speedy infliction of the punishment.

After conviction, the punishment assigned to an inferiour offence should be inflicted with much expedition. This will strengthen the useful association between them; one appearing as the immediate and unavoidable consequence of the other. When a sentence of death is pronounced, such an interval should be permitted to elapse before its execution, as will render the language of political expediency consonant to the language of religion.

the Framers considered even delays of several months to be cruel and unusual⁶⁹—which reflected the prevailing view in England and the colonies at the time of America's independence.⁷⁰

Under these qualifications, the speedy punishment should form a part of every system of criminal jurisprudence.

The Works of James Wilson vol. 2, 628–30 (Robert Green McCloskey ed., Belknap Press 1967); see also *id.* at 629 (paraphrasing Beccaria's *Essay on Crimes and Punishments*: "imprisonment is . . . in itself a punishment"). Wilson, like Jefferson, was familiar with Beccaria's work, noting that Beccaria "led the way" in the study "of the theory of criminal law." *Id.* at 616.

68. Chief Justice John Marshall, in his prior capacity as a practicing member of the Virginia Bar, believed that executions should be carried out swiftly or not at all. A successful clemency petition filed by Marshall and numerous other members of the Virginia bar in 1793 includes the contention that the prisoner's death sentence should be commuted to a lesser sentence in part because she had been living under a sentence of death for five months:

[I]t is a Consideration of some weight with [the undersigned petitioners], that *the prisoner hath languished a long time* [from April to September 1793] *in jail* [awaiting execution], *in a situation which must have added to the miseries* [sic] *of imprisonment, & the horrors of an execution, which agony alone hath suspended.*

Petition to the Governor and Council of Virginia, in *The Papers of John Marshall* vol. II, 207, 208 (Charles T. Cullen and Herbert A. Johnson eds., U.N.C. Press 1977) (emphasis added).

69. In 1972, the four *Furman* dissenters pointed out that

although a man awaiting execution must inevitably experience extraordinary mental anguish, no one suggests that this anguish is materially different from that experienced by condemned men in 1791, even though protracted appellate review processes have greatly increased the waiting time on "death row." To be sure, the ordeal of the condemned man may be thought cruel in the sense that all suffering is thought cruel. But if the Constitution proscribed every punishment producing severe emotional stress, then capital punishment would clearly have been impermissible in 1791.

Furman, 408 U.S. at 382 (Burger, C.J., Blackmun, Powell & Rehnquist, JJ, dissenting) (footnote omitted). The *Furman* dissenters apparently were not aware of the compelling historical evidence indicating that the Framers believed that significant delays between imposition of a death sentence and execution would be cruel and unusual punishment. See nn. 65–68, *supra*.

70. *Pratt & Morgan v. Atty. Gen. for Jamaica*, 2 A.C. 1, All E.R. 769, 774 (Privy Council 1993) ("The Death Penalty in the United Kingdom has always been carried out expeditiously after sentence, within a matter of weeks or in the event of an appeal even to the House of Lords within a matter of months. Delays in terms of years are unheard of."); see also *id.* at 775 (noting "the pre-existing common law practice that execution followed as swiftly as practical after sentence"); *id.* at 783 ("[b]efore independence [from England] the law would have protected a Jamaican citizen from being executed after unconscionable delay") (available at <http://webarchive.nationalarchives.gov.uk/20101103140224/http://www.privy-council.org.uk/output/Page171.asp>) (accessed May 22, 2012; copy on file with Journal of Appellate Practice and Process); *Riley v. Atty. Gen. of Jamaica*, 1 A.C. 719,

The second component of Lackey's claim found support in Justice White's concurring opinion in *Furman*, in which he took the position that the death penalty is cruel and unusual if the primary purposes of capital punishment—retribution and deterrence—are not served by the manner in which it is implemented.⁷¹ This argument also found support in then-Justice Rehnquist's statement that lengthy delays between imposition of

734–35 (Privy Council 1983) (Lords Scarman & Brightman, dissenting) (taking position that “execution after inordinate delay would have infringed the prohibition against cruel and unusual punishments to be found in Section 10 of the Bill of Rights [of] 1689,” and concluding, after discussing cases decided by the United States Supreme Court, the California Supreme Court, the Indian Supreme Court, and the European Court of Human Rights, that “the jurisprudence of the civilized world, much of which is derived from common law principles and the prohibition against cruel and unusual punishments in the English Bill of Rights, has recognised and acknowledged that prolonged delay in executing a sentence of death can make the punishment when it comes inhuman and degrading”); *Abbott v. Atty. Gen. for Trinidad & Tobago*, 1 W.L.R. 1342, 1348 (Privy Council 1979) (recognizing that in capital cases involving “delay measured in years, rather than in months, it might be argued that the taking of the condemned man’s life was not ‘by due process of law’”); see also IV *Blackstone’s Commentaries on the Laws of England* 404–05 (5th ed. 1773) (“It has been well observed . . . that it is of great importance, that [capital] punishment should follow the crime as early as possible.”) (citing Beccaria, *supra* n. 66); Edgar J. McManus, *Law and Liberty in Early New England*, 182 (U. Mass. Press 1993) (noting that, in colonial New England, “[c]apital offenders were put to death without moral qualms, but they were dispatched swiftly without unnecessary suffering”); Barrett Prettyman, Jr., *Death and the Supreme Court* 307 (Harcourt, Brace & World 1961) (“Before the beginning of the twentieth century, substantial delay between trial and execution was almost unthinkable, in part because of the wear and tear on the defendant. As one lawyer put it in 1774: ‘The cruelty of an execution after respite is equal to many deaths, and therefore there is rarely an instance of it.’”).

71. *Furman*, 408 U.S. at 311–32 (White, J., concurring) (opining that the death penalty is cruel and unusual punishment if it fails to “measurably contribute” to the governmental purposes of retribution and deterrence). Notably, a treatise on the English criminal law, published in an American version during the post-Revolutionary era, likewise stated that “it is certainly desirable that . . . [capital] punishment should follow the sentence with as little delay as possible.” The articulated reason for this conclusion was that the goals of capital punishment would not be achieved without swift executions. See Joseph Chitty, *A Practical Treatise on the Criminal Law* vol. I, 783 (E. Merriman & Co. 1832); see also *Coppedge v. U.S.*, 369 U.S. 438, 449 (1962) (“When society acts to deprive one of its members of his life, liberty or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization have been judged. [In particular], the preference to be accorded to criminal appeals recognizes the need for speedy disposition of such cases. Delay in the final judgment of conviction, including its appellate review, unquestionably erodes the efficacy of law enforcement.”) (emphasis added).

death sentences and executions “frustrates” the purposes of retribution and deterrence.⁷²

A. Support for the Lackey Claim from Justices Stevens and Breyer

Although the lower courts rejected Lackey’s Eighth Amendment claim, the Supreme Court twice stayed his execution in response to our certiorari petitions raising it.⁷³ The Court ultimately denied certiorari (leading to Lackey’s eventual

72. *Coleman v. Balkcom*, 451 U.S. 949, 960 (1981) (Rehnquist, J., dissenting from denial of certiorari). Then-Justice Rehnquist made that point not in support of invalidating an inmate’s death sentence but, instead, as a reason for creating a system that expedited review of death sentences so as to reduce the delay between imposition of death sentences and execution. *See id.* at 960–63; *see also* Kozinski & Gallagher, *supra* n. 39, at 4 (“Whatever purposes the death penalty is said to serve—deterrence, retribution, assuaging the pain suffered by victims’ families—these purposes are not served by the system as it now operates [because of the systemic delays].”).

The retributive rationale for capital punishment focuses in part on the harm inflicted on murder victims’ family members. *See Payne v. Tenn.*, 501 U.S. 808, 830, 838 (1991) (O’Connor, White & Kennedy, JJ., concurring; Souter & Kennedy, JJ., concurring) (“A State may decide that the jury, before determining whether a convicted murderer should receive the death penalty, should know the full extent of the harm caused by the crime, including its impact on the victim’s family and community. . . . Just as defendants know that they are not faceless human ciphers, they know that their victims are not valueless fungibles; and just as defendants appreciate the web of relationships and dependencies in which they live, they know that their victims are not human islands, but individuals with parents or children, spouses or friends or dependents.”). The inordinate delays in executions also inflict mental anguish on victims’ families, who must endure uncertainties during the decades-long appellate process. Carol S. Steiker & Jordan M. Steiker, *Capital Punishment: A Century of Discontinuous Debate*, 100 J. Crim. L. & Criminology 643, 687 (2010) (“Outside of the courts, concerns about prolonged death-row incarceration have contributed to a powerful new policy argument against the death penalty: the claim that the death penalty disserves the families and loved ones of murder victims. For many years, the claim that the death penalty should be retained to ease the pain of the victim’s family went largely unchallenged and unanswered. Over the past two decades, though, coinciding with the dramatic expansion of the length of death-row incarceration, many opponents of the death penalty have highlighted the pain and frustration for victims’ families caused by extensive post-trial delays.”).

73. *See Lackey v. Tex.*, 514 U.S. 1001 (1995) (staying execution in order to consider the petition for writ of certiorari); *Lackey v. Scott*, 514 U.S. 1093 (1995) (staying execution a second time so that the federal district court could conduct an evidentiary hearing on the claim). On remand, the district court conducted a lengthy evidentiary hearing—at which we called several witnesses who testified about the mental, emotional, and spiritual impact of lengthy death-row stays and repeated execution dates—but ultimately denied the petition based on intervening Fifth Circuit precedent. *See Lackey v. Scott*, 83 F.3d 116 (5th Cir.), *cert. denied, sub nom. Lackey v. Johnson*, 519 U.S. 911 (1996).

execution in 1997), but Justices Stevens and Breyer stated that the claim was worthy of close judicial scrutiny and intimated that it had merit.⁷⁴ Justice Stevens believed that the case was cert-worthy but stated that its “novelty” was a valid basis for denying certiorari at that juncture.⁷⁵ He nevertheless suggested that the state’s interests in retribution and deterrence did not “retain[] any force” for a condemned inmate who had already spent seventeen years under a death sentence.⁷⁶ He also noted that such a delay would have been considered cruel and unusual punishment according to Anglo-American jurisprudence antedating the Eighth Amendment’s adoption in 1791.⁷⁷ Justice Breyer noted his agreement with Justice Stevens’s assessment that Lackey’s claim was an “important undecided” issue.⁷⁸

In the wake of the two Justices’ encouragement for the claim to be raised in other cases, a legion of death-row inmates raised what soon came to be known as “*Lackey* claims”⁷⁹ based on inordinate delays in their cases.⁸⁰ Although no federal court of appeals has granted relief on a *Lackey* claim to date, judges have suggested in dissenting or concurring opinions that at least some death-row inmates’ claims based on delay may have merit.⁸¹ Furthermore, in addition to the British Privy Council,⁸²

74. See *Lackey v. Tex.*, 514 U.S. 1045 (1995) (opinions of Stevens & Breyer, JJ., respecting the denial of certiorari); *Lackey v. Johnson*, 519 U.S. 911 (1996) (denying certiorari, but noting that Breyer, J., voted to grant certiorari).

75. *Lackey*, 514 U.S. at 1045 (memo. of Stevens, J.).

76. *Id.*

77. *Id.*

78. *Id.*

79. See *Lagrand v. Stewart*, 170 F.3d 1158, 1160 (9th Cir. 1999) (noting that “[c]laims that the Eighth Amendment would be violated by the execution of an inmate after many years [on death row] are called *Lackey* claims, after *Lackey v. Texas*”); *Gardner v. State*, 234 P.3d 1115, 1142 n. 229 (Utah 2010) (noting that “we . . . refer to the claims as ‘*Lackey* claims,’ given its now common usage”).

80. See e.g. *Turner v. Jabe*, 58 F.3d 924 (4th Cir. 1995); *Fearance v. Scott*, 56 F.3d 633 (5th Cir. 1995); *Free v. Peters*, 50 F.3d 1362 (7th Cir. 1995); *Chambers*, 157 F.3d 560; *McKenzie v. Day*, 57 F.3d 1461 (9th Cir. 1995); *Stafford v. Ward*, 59 F.3d 1025 (10th Cir. 1995); *Porter v. Singletary*, 49 F.3d 1483 (11th Cir. 1995); *Ex Parte Bush*, 695 So. 2d 138, 140 (Ala. 1997); *State v. Schackart*, 947 P.2d 315, 336 (Ariz. 1997); *People v. Massie*, 967 P.2d 29, 44–45 (Cal. 1998); *Booker v. State*, 773 So. 2d 1079, 1096 (Fla. 2000); *People v. Simms*, 736 N.E.2d 1092, 1141 (Ill. 2000); *State v. Smith*, 931 P.2d 1272, 1287–88 (Mont. 1996); *State v. Moore*, 591 N.W.2d 86, 93–95 (Neb. 1999).

81. See e.g. *Ceja v. Stewart*, 134 F.3d 1368, 1369–78 (9th Cir. 1998) (Fletcher, J., dissenting); *McKenzie*, 57 F.3d at 1484–89 (Norris, J., dissenting); cf. *Simms*, 736 N.E.2d

whose decisions were cited by Justices Breyer and Stevens,⁸³ courts in other countries have now held that capital punishment is categorically “cruel,” “inhumane,” or “degrading” (in violation of their constitutions or international treaties) in part because of the psychological stress associated with extended stays on death row.⁸⁴

In the seventeen years since the Supreme Court refused to review *Lackey*'s case, the Court has denied certiorari in many cases raising *Lackey* claims; however, some of these cases have occasioned a recurring dialogue between Justice Breyer (at times joined by former Justice Stevens) and Justice Thomas in dueling opinions issued in connection with the denials of certiorari or stays of execution.⁸⁵ In cases in which condemned men have

at 1143–45 (Harrison, C.J., dissenting); *Smith*, 931 P.2d at 1291–92 (Leaphart, J., specially concurring).

82. See *Pratt & Morgan*, All E.R. 769 (holding that Jamaica, from which appeals in capital cases were then still directed to the Privy Council, had forfeited its right to execute two inmates who had been on death row for fourteen years).

83. See e.g. *Lackey*, 514 U.S. at 1046–47 (memo. of Stevens, J., respecting denial of certiorari); *Knight v. Fla.*, 528 U.S. 990, 995 (1999) (Breyer, J., dissenting from denial of certiorari).

84. See e.g. *State v. Makwanyane & Mchunu*, (S. Afr. CCT3/94) [1995] at ¶¶ 26, 55, 78, 151 (finding that in the South Africa of the mid-1990s, “those who remain on death row are uncertain of their fate, not knowing whether they will ultimately be reprieved or taken to the gallows . . . and the legal processes which necessarily involve waiting in uncertainty for the sentence to be set aside or carried out, add to the cruelty,” while also noting that “[i]t is common for prisoners in the United States to remain on death row for many years, and this dragging out of the process has been characterised as being cruel and degrading” and that “long delays in carrying out the death sentence in particular cases have apparently been held in India to be unjust and unfair to the prisoner, and in such circumstances the death sentence is liable to be set aside,” and then invalidating South Africa’s death penalty in part because of delays between imposition of death sentences and executions); *Minister of Just. v. Burns & Rafay*, 2001 SCC 7 (Can.) (refusing to extradite Canadian citizens arrested in Canada for murders committed on U.S. soil to Washington state for trial in part because of “lengthy delays, and the associated psychological trauma to death row inhabitants”); see also Amnesty International, *4000 Kenyans on Death Row Get Life*, <http://www/amnesty.org/en/news-and-updates/good-news/4000-kenyans-death-row-get-life20090805> (Aug. 5, 2009) (noting that Kenya’s president Mwai Kibaki, when issuing mass commutations, stated that “extended stay on death row causes undue mental anguish and suffering, psychological trauma, anxiety, while it may as well constitute inhuman treatment”).

85. *Valle v. Fla.*, ___ U.S. ___, 132 S. Ct. 1, 1–2 (2011) (Breyer, J., dissenting from denial of stay); *Johnson v. Bredesen*, 558 U.S. ___, 130 S. Ct. 541, 542–44, 544–46 (2009) (statement of Stevens & Breyer, JJ., respecting denial of certiorari; opinion of Thomas, J., concurring in denial of certiorari); *Thompson v. McNeil*, 556 U.S. ___, 129 S. Ct. 1299, 1299–1304 (2009) (statement of Stevens, J., respecting denial of certiorari; opinion of

been on death row for periods ranging from nineteen to thirty-two years as a result of repeated re-sentencings following appellate reversals, Justice Breyer has opined that the inmates made out strong cases under the Eighth Amendment. He noted that the inmates' prolonged psychological suffering was caused by the states' own constitutional failings at their trials and retrials, and further pointed out that the states' interests in carrying out death sentences were greatly diminished after such inordinate delays.⁸⁶

B. Opposition to the Lackey Claim from Justice Thomas

Justice Thomas has responded to Justice Breyer's analysis by asserting that the *Lackey* claim categorically lacks merit because there is no basis in "American constitutional tradition" for the "proposition that a defendant can avail himself of the panoply of appellate and collateral procedures [permitted in the modern era] and then complain when his execution is delayed."⁸⁷ He has observed that "the delay in carrying out the prisoner's execution stems from this Court's Byzantine death penalty jurisprudence,"⁸⁸ and concluded that "those who accept our [post-*Furman*] death penalty jurisprudence as a given also

Thomas, J., concurring in denial of certiorari; opinion of Breyer, J., dissenting from denial of certiorari); *Smith v. Ariz.*, 552 U.S. 985, 985–86 (2007) (Breyer, J., dissenting from denial of certiorari); *Allen v. Ornoski*, 546 U.S. 1136, 1136 (2006) (Breyer, J., dissenting from denial of certiorari and stay of execution); *Foster v. Fla.*, 537 U.S. 990, 990–91, 991–93 (2002) (statement of Stevens, J., respecting denial of certiorari; opinion of Thomas, J., concurring in denial of certiorari; opinion of Breyer, J., dissenting from denial of certiorari); *Knight*, 528 U.S. at 990, 990–93, 993–99 (opinion of Stevens, J., respecting denial of certiorari; opinion of Thomas, J., concurring in denial of certiorari; opinion of Breyer, J., dissenting from denial of certiorari); *Elledge v. Fla.*, 525 U.S. 944, 944–46 (1998) (Breyer, J., dissenting from denial of certiorari).

86. See e.g. *Knight*, 528 U.S. at 993–99 (Breyer, J., dissenting from denial of certiorari); *Foster*, 537 U.S. at 991–93 (Breyer, J., dissenting from denial of certiorari); *Thompson*, 556 U.S. at 1119–21 (Breyer, J., dissenting from denial of certiorari). Shortly before he left the Court, Justice Stevens contended that the entire system of capital punishment was unconstitutional because of such delays. *Thompson*, 556 U.S. at 1116 (statement of Stevens, J., respecting denial of certiorari) ("[O]ur experience during the past three decades has demonstrated that delays in state-sponsored killings are inescapable and that executing defendants after such delays is unacceptably cruel.").

87. *Knight*, 528 U.S. at 990–93 (Thomas, J., concurring in denial of certiorari).

88. *Id.* at 991.

[should] accept the lengthy delay between sentencing and execution as a necessary consequence.”⁸⁹

Justice Thomas believes, then, that death-row inmates themselves are responsible for the delays in their cases. They pursue repeated direct and collateral appeals, which hold out the real potential of a new trial or even permanent removal from death row. Lengthy delay inheres in the capital appellate process, which they simply must accept.⁹⁰ His position, which seems conceptually related to the equitable doctrine of judicial estoppel,⁹¹ although superficially logical, ultimately fails for three reasons.

First, virtually all the death-penalty states have mandatory appeals to the states’ highest courts following imposition of death sentences.⁹² The time spent on such mandatory direct appeals often is extensive, particularly in the cases of inmates who have their original death sentences reversed and are re-sentenced to death on remand (sometimes on multiple occasions).⁹³

Second, even with respect to subsequent discretionary appeals, society itself has a strong interest in assuring that death sentences are executed only if they are untainted by constitutional error.⁹⁴ This explains our current direct and

89. *Id.* at 992.

90. *Id.* at 990–93 (Thomas, J., concurring in denial of certiorari); cf. *Simms*, 736 N.E.2d at 1141 (pointing out that “the delays generated by our system of appeals are a function of our courts’ desire to address any argument that might save the defendant’s life” and concluding that “a delay in the execution of the death sentence occasioned by the appeal process and/or post-conviction proceedings does not constitute cruel and unusual punishment”).

91. *Zedner v. U.S.*, 547 U.S. 489, 504 (2006) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895): “[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.”).

92. *See* n. 40, *supra*.

93. *See e.g. Foster*, 537 U.S. at 991–92, 993 (Breyer, J., dissenting from denial of certiorari and noting that eighteen of the twenty-seven years since *Foster* was initially sentenced to death were attributable to two appellate reversals of his original two death sentences followed by new death sentences imposed at re-sentencings).

94. *Giarrantano v. Murray*, 847 F.2d 1118, 1122 (4th Cir. 1988) (en banc) (pointing out that “[b]oth society and affected individuals have a compelling interest in insuring that death sentences have been constitutionally imposed”), *rev’d on other grounds*, 492 U.S. 1

collateral appellate system (in capital and non-capital cases alike) and the fact that, in discretionary appeals in capital cases, appointed counsel is provided in most death-penalty jurisdictions.⁹⁵ Knowing that human nature dictates that the vast majority of death-row inmates will pursue discretionary appeals,⁹⁶ the state and federal governments should devote the resources necessary to permit expedited appeals in all capital cases (resources that obviously are not currently being sufficiently allocated in view of the existing inordinate delays). Because the governments have not done so, the delays occasioned by such discretionary appeals, at least non-frivolous ones, should not be attributed to inmates who pursue such appeals.

Third, it is axiomatic in our legal system that a person should not have to waive one constitutional right in order to exercise another.⁹⁷ Meaningful appellate review (on direct appeal) in capital cases appears to be a constitutional right,⁹⁸ and some type of federal habeas corpus review appears also to be a constitutional right under the Habeas Corpus Suspension Clause of the Constitution.⁹⁹

C. A Systemic Lackey Claim

The original *Lackey* claim was based on an inmate-specific

(1989) (holding that states have no constitutional duty to appoint counsel for indigent death-row inmates seeking state post-conviction relief).

95. See Sarah L. Thomas, Student Author, *A Legislative Challenge: A Proposed Model Statute to Provide for the Appointment of Counsel in State Habeas Corpus Proceedings for Indigent Prisoners*, 54 Emory L.J. 1139, 1155 & 1155 n. 115 (2005) (stating that “[t]he majority of states that do provide for the appointment of counsel in habeas cases do so only in capital cases” and citing statutes).

96. *Pratt & Morgan*, 2 A.C. at 33 (“It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it.”); see also *Valle*, 132 S. Ct. at 2 (Breyer, J., dissenting from denial of stay) (“[O]ne cannot realistically expect a defendant condemned to death to refrain from fighting for his life by seeking to use whatever procedures the law allows.”).

97. See e.g. *Simmons v. U.S.*, 390 U.S. 377, 393–94 (1968).

98. See n. 40, *supra*.

99. See *id.* (pointing out that the Clause apparently creates a right to some type of federal habeas review of state prisoners’ constitutional claims).

case of excessive delay and, in particular, on delay more attributable to the state than to the death-row inmate. Yet the claim's jurisprudential basis arguably transcends individual cases of delay and extends to all inmates on death row when systemic delays reach a certain point. Just as *Furman* had the effect of invalidating every existing death sentence in America, the ineluctable logic of the *Lackey* claim—if ever embraced by a majority of the Court—would provide a forceful argument that every death sentence in America is invalid because systemic delays have undermined the legitimate purposes of capital punishment.¹⁰⁰

Another way to conceptualize a “systemic” *Lackey* claim is to imagine the hypothetical situation of a state's enactment of a statute requiring a condemned defendant to wait fifteen or more years on death row before being executed. Surely, the Supreme Court would invalidate such an intentional punishment as cruel and unusual, or would at least invalidate the requirement that the inmate wait such a lengthy period of time as a cruel and unusual psychological superaddition to the execution itself.¹⁰¹ The logic

100. Cf. Steiker & Steiker, *supra* n. 72, at 682 (“The real power of the *Lackey* claim is not in its potential to yield fruit as a cognizable claim of individual deprivation. Rather, the issue sheds light on the dysfunctional character of our capital system.”). Even if the systemic delays do not render the entire country's death-penalty machine unconstitutional, death-penalty systems in certain states—such as California, which has a large death row, has seen few executions, and experiences longer than average delays—appear to be good candidates for being declared per se unconstitutional. See Sara Colón, Student Author, *Capital Crime: How California's Administration of the Death Penalty Violates the Eighth Amendment*, 97 Cal. L. Rev. 1377 (2009).

101. See *Baze v. Rees*, 553 U.S. 35, 96 n. * (2008) (Thomas, J., concurring in judgment) (discussing the Framers' belief that “superadditions”—gratuitous forms of torture added to executions—were cruel and unusual punishment); cf. *La. ex rel. Francis v. Resweber*, 329 U.S. 459, 463–64 (1947) (plurality) (stating that intentional action by a state in inflicting torture in addition to the normal physical and psychological pain associated with an execution would constitute cruel and unusual punishment); *id.* at 470–72 (Frankfurter, J., concurring) (same). In *Francis*, a death-row inmate was subjected to an initial, failed attempt at electrocution. *Id.* at 460 (“The executioner threw the switch but, presumably because of some mechanical difficulty, death did not result.”). He thereafter filed an appeal seeking to enjoin a second attempt at electrocution on the ground that it would constitute cruel and unusual punishment under the Eighth Amendment. Although four members of the Court contended in dissent that his second execution should be prohibited under the Eighth Amendment, five members of the Court concluded that it would not constitute cruel and unusual punishment because the initial failed attempt at electrocution was not intentional and, thus, a second execution would not involve “purpose[ful]” and “unnecessary” cruelty. *Id.* at 464 (plurality) (“There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution.”); see also *id.* at 470–72

of such a clearly correct (albeit hypothetical) Eighth Amendment ruling applies with nearly equal force to the current situation of systemic delays.¹⁰² As average delays grow longer and executions grow rarer, it seems fair to charge that states with capital punishment have shown “deliberate indifference”¹⁰³ to the fact that the average inmate now spends between fifteen and twenty years on death row before being executed.

If the Supreme Court were to find an Eighth Amendment violation based on the states’ deliberate indifference, the only appropriate remedy would be a declaration that the entire system of capital punishment, as it now operates, is unconstitutional. Just as *Furman* resulted in every extant death sentence being vacated, so would such a systemic *Lackey* ruling. Practically speaking, that remedy would be the only way to prevent the unconstitutional systemic delays. The sole alternative remedy that would rectify the constitutional violation would be the equivalent of a structural injunction requiring immediate executions of the bulk of the current death-row population. Yet that remedy would not be viable for several reasons, some practical (shortages in the drugs required for that many lethal injections, for example)¹⁰⁴ and some legal (courts issuing inmate-specific stays of execution pending the resolution of appeals raising other colorable claims in addition to *Lackey* claims).

IV. THE PARADOXES OF *FURMAN*

One *Furman* paradox is well-known: The Court’s

(Frankfurter, J., concurring) (discussing constitutional prohibition and declining to eliminate possibility that “a hypothetical situation, which assumes a series of abortive attempts at electrocution or even a single, cruelly willful attempt, would not raise different questions”).

102. As Justice Douglas stated in his concurring opinion in *Furman*, “[a] law which in the overall view reaches that result in practice has no more sanctity than a law which in terms provides the same.” *Furman*, 408 U.S. at 256 (Douglas, J., concurring) (citation omitted).

103. See *Helling v. McKinney*, 509 U.S. 25, 30 (1993) (pointing out that prison officials violate the Cruel and Unusual Punishments Clause of the Eighth Amendment if they are “deliberately indifferent” to “inhumane conditions of confinement”).

104. See e.g. *Powell v. Thomas*, 784 F. Supp. 2d 1270, 1275 (M.D. Ala. 2011) (noting recent shortages in sodium thiopental, a drug widely used in lethal injections).

“experiment” in “tinker[ing] with the machinery of death”¹⁰⁵ eventually led Justice Blackmun, who had voted to uphold the post-*Furman* system in 1976,¹⁰⁶ to articulate what he characterized as the irreconcilable contradiction spawned by *Furman*. As he saw it, *Furman* required both (1) that the process must impose capital punishment in a rational, consistent, and non-arbitrary manner, and (2) that the process must enable defendants to offer—and must require capital sentencers to consider—any and all mitigating evidence that defendants wished to submit. Concluding that the second *Furman* requirement resulted in unwarranted disparities in sentencing (including those rooted in socio-economic differences between defendants), Justice Blackmun reasoned that no death-penalty system meeting it could also operate in conformance with *Furman*'s first requirement.¹⁰⁷ As a result, his final conclusion was that the *Furman* machine should be dismantled.

As I have discussed above,¹⁰⁸ however, the *Lackey* claim highlights another Eighth Amendment paradox that also supports dismantling the *Furman* machine. On the one hand:

- The Court's post-*Furman* jurisprudence has required complicated proceedings in the trial courts as well as “meaningful appellate review”;
- The complexity of the trial-court process and the requirement of searching appellate review have created error-laden capital trial and sentencing proceedings and have resulted in a large percentage of successful appeals based on those errors; and

105. *Callins*, 510 U.S. at 1145 (Blackmun, J., dissenting).

106. *See* n. 32, *supra*.

107. *Callins*, 510 U.S. at 1152–53 (Blackmun, J., dissenting). Justice Blackmun was not alone in noting this paradox in the Court's post-*Furman* jurisprudence, Justices Scalia and Thomas, too, have criticized it, *see id.* at 1142–43 (Scalia, J., concurring); *see also Graham v. Collins*, 506 U.S. 461, 479–501 (1993) (Thomas, J., concurring), and would have the Court essentially abandon the part of its post-*Furman* jurisprudence requiring the admission and consideration of any and all mitigating evidence in capital cases. *See Callins*, 510 U.S. at 1142–43 (Scalia, J., concurring); *Graham*, 506 U.S. at 499–501 (Thomas, J., concurring).

108. *See* pp. 64–66, *supra*.

- The consequences have been clogged appellate dockets and excessive delays in the processing of the typical capital defendant's multi-layered appeals.

Yet, on the other hand, there is a compelling argument—with strong support in both Eighth Amendment originalism¹⁰⁹ and *Furman* itself¹¹⁰—that excessive delays in executing death sentences render the entire system of capital punishment unconstitutional. The Court has not yet invalidated a death sentence because of excessive delay, but it eventually may do so as the length of average delays continues to increase and some case-specific delays are now approaching four decades.

V. CONCLUSION: A WAY TO RESOLVE THE SECOND *FURMAN* PARADOX?

After *Furman*, the state and federal governments rebuilt their death-penalty machines to comply with the new requirements. If the Court eventually accepts Justice Breyer's invitation and embraces the logic of the *Lackey* claim, the machine will have to be retooled again.¹¹¹

A third-generation death-penalty machine—one that would pass constitutional muster—would differ in three main respects from the one currently in existence:

- The pool of death-eligible defendants would be significantly narrowed from its current state (perhaps to a national death-row population of 500

109. See nn. 65–68, *supra*.

110. See *Furman*, 408 U.S. at 310–12 (White, J., concurring).

111. I do not propose that the machine should be scrapped once and for all. The American public and their elected representatives in the majority of state legislatures and Congress clearly favor capital punishment for at least some crimes. Moreover, the Constitution does not ban capital punishment *per se*. See U.S. Const. amend. V (requiring federal grand juries for “capital” crimes and “due process” before the federal government can “deprive” a person of “life”); *id.* at amend. XIV, § 1 (requiring “due process” before a state can “deprive” a person of “life”).

or fewer instead of the more than 3000 inmates currently awaiting execution);¹¹²

- Trial procedures would do more to ensure that only the unquestionably guilty¹¹³ are convicted and sentenced to death, and those only if they had both the effective assistance of counsel¹¹⁴ and a capital trial free of prosecutorial and police misconduct; and

112. Narrowing the pool of capital defendants would require at least two significant changes from the systems currently in place in most states: (1) further limiting the definition of capital murder to only certain exceptionally aggravated species of murder (for example, multiple murders committed under additional aggravated circumstances; premeditated murder by an inmate serving a sentence of life without parole; murder of a high-level governmental official); and (2) a state-wide administrative system governing the exercise of prosecutorial discretion whereby only the worst of the worst eligible defendants are selected through the use of objective criteria for capital prosecution.

113. Repeated claims of innocent defendants being sentenced to death—and the many exonerations of capital defendants in the modern era, *see Atkins v. Va.*, 536 U.S. 304, 320 n. 25 (2002) (pointing out that Court could not “ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated”)—surely are one reason that our society tolerates the current system of protracted appellate review in capital cases. In other words, exonerations that have occurred many years after inmates were sentenced to death suggest that the protracted appellate process is a necessary component of our current system: It allows such delayed exonerations to occur. If the system were retooled to ensure that only clearly guilty defendants were sentenced to death, society likely would be more willing to limit appeals and expedite them. One means of helping ensure that innocent persons are not sentenced to death would be a jury instruction requiring proof “beyond all doubt” at the sentencing phase. Corresponding appellate review using this standard of proof would be strict. *Cf. e.g. Holland v. U.S.*, 348 U.S. 121, 139 (1954) (discussing former standard of sufficiency review, which required federal courts to ask whether the prosecution’s evidence negated “every reasonable hypothesis other than that of guilt”). Although such a “beyond all doubt” standard applicable to the capital-sentencing stage would not necessarily need to be a constitutional requirement, state legislatures could adopt it or an equivalent to help ensure that innocent persons are not sent to death row.

114. Providing for effective assistance of counsel would mean, of course, that death-penalty states must invest adequate financial resources in capital defense—something that has not been done in many death-penalty states in the post-*Furman* era. *See e.g. Adam M. Gershowitz, Statewide Capital Punishment: The Case for Eliminating Counties’ Role in the Death Penalty*, 63 *Vand. L. Rev.* 307, 323 (2010) (pointing out that “[n]early all capital defendants are too poor to hire their own lawyers and are therefore provided with free counsel in the form of a public defender or an appointed lawyer,” and that, “[u]nfortunately, in many jurisdictions these poor defendants receive inadequate representation because their lawyers are ineffective or because otherwise-competent lawyers are woefully underfunded”) (footnotes omitted).

- Appeals would be expedited, and a reversal of a capital conviction or sentence because of errors caused by state actors like police officers, prosecutors, and trial judges would bar imposition of capital punishment on remand because of the delays occasioned by re-sentencing and more appeals.¹¹⁵

If such a system were in place, capital prosecutors would have strong incentives to limit capital prosecutions to clearly worthy defendants such as Timothy McVeigh,¹¹⁶ John Allen Muhammad,¹¹⁷ and less well-known but comparable capital murderers, and to avoid engaging in misconduct. Trial judges also would have stronger incentives to avoid reversible errors.

If the number of death-row inmates were significantly reduced from its current bloated number and capital trials were less likely to be infected with reversible errors, direct appeals in death-penalty cases could be expedited. Furthermore, with such heightened protections at trial and decreased incidents of ineffective assistance of counsel and police and prosecutorial misconduct, there would be less need for post-conviction review. Although federal habeas review of state-court capital convictions and death sentences could not be abolished, Congress could amend the current federal statute to place strict time limits on such review in all capital cases (similar to the unused “opt-in” scheme currently in the federal statute). States also could create collateral review procedures that would

115. Conversely, reversals based on ineffective assistance of counsel ordinarily would not bar retrials on remand. Such an exception to the no-re-sentencing rule would prevent the incentive of some defense counsel to pull punches intentionally in order to obtain a reversal for ineffective assistance.

116. McVeigh was responsible for the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City, which resulted in the deaths of 168 people and injured hundreds more. See *U.S. v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998), *overruled in part*, *Hooks v. Ward*, 184 F.3d 1206 (10th Cir. 1999). He was executed in 2001.

117. Muhammad was responsible for the string of sixteen sniper-style shootings across the southeastern United States in the fall of 2002, ten of which resulted in the deaths of the victims. See *Muhammad v. Cmmw.*, 619 S.E.2d 16 (Va. 2005). He was executed in 2009.

proceed concurrently with the direct appeal process in capital cases,¹¹⁸ and require expedited judicial review of both.

If such a death-penalty system existed, the *Lackey* claim would lose much of its force. The delays between imposition and execution of death sentences in such a system—which, realistically, could be as little as two or three years¹¹⁹—would still be significantly longer than the delays considered acceptable at the time of the Eighth Amendment's adoption. However, constitutionally speaking, there would be a difference in kind and not merely in degree from the decades-long delays that currently plague the American system of capital punishment.

Although the Court has not yet accepted Justice Breyer's invitation to review a *Lackey* claim, his repeated dissents from denials of certiorari suggest that the issue will endure. Furthermore, the ever-upward trajectory of average delays may eventually lead the Court to accept the validity of the *Lackey* claim.¹²⁰ Yet even if the Court refuses to categorically strike down every death sentence because of systemic delays, it could take less dramatic actions likely to have salutary effects. First, the Court could invalidate only death sentences in cases in which there is extensive delay (say, over fifteen years) primarily caused by, and directly attributable to, state actors rather than to the defendant. For the state actors' failings to be proved, the defendant could be required to establish that the requisite

118. Cf. Tex. Code Crim. App. 11.071 (providing for concurrent direct and habeas appeals in death-penalty cases).

119. Two years appears realistic, assuming that the courts were committed to expediting appeals. With modern innovations in court reporting (allowing for expedited transcripts), strictly enforced expedited briefing schedules, and expedited appellate court timetables (for example, a decision rendered within sixty days of oral argument), the state and federal court systems each could process a typical capital appeal in one year. Cf. 28 U.S.C. § 2266 (providing expedited timetables for federal court decisions in AEPDA's "opt-in" statutory scheme). Expedited procedures for the Supreme Court's consideration of capital cases (including certiorari petitions) could also help reduce the systemic delays caused by death-penalty litigation.

120. Because the Supreme Court has yet to accept the invitation to review the merits of the *Lackey* claim, and may not do so (if ever) for many more years, a state high court in a death-penalty state in the meantime could address the issue under its state constitutional analogue to the Eighth Amendment. If the current death-penalty system were invalidated in a single state and retooled by that state's legislature in a manner that would narrow the class of eligible capital defendants and also expedite capital appeals, the Supreme Court might be inclined to respond on a national basis.

amount of delay occurred as a result of one or more of the following:

- the delay occurred on the first round of direct appeal (which is mandatory in the vast majority of death-penalty jurisdictions and which arguably is constitutionally required);¹²¹
- state courts unreasonably delayed their resolution of state habeas appeals under the circumstances; and/or
- state actors were responsible for delays in some other manner (i.e., the government official responsible for scheduling execution dates unreasonably failed to set an execution date after a defendant's direct and collateral appeals were exhausted).

The Court also could create a rule that treats as presumptively unconstitutional any delay on the initial round of direct appeal that exceeds a period considered reasonable to resolve such an appeal (say, one or two years). Creating a bright-line rule that treats certain delay as presumptively unreasonable—subject to rebuttal by the state if good reasons for the delay could be offered¹²²—would comport with the Court's current speedy-trial jurisprudence.¹²³ If the Court were

121. See nn. 39 & 40, *supra*, and accompanying text. Delays occasioned by multiple direct appeals following appellate reversal would be attributed to the state because the state—not the defendant—would by definition have caused the error requiring each reversal on appeal. See e.g. *Foster*, 537 U.S. at ___, 123 S. Ct. at 472 (Breyer, J., dissenting from denial of certiorari, noting that “[t]he length of this confinement has resulted partly from the State's repeated procedural errors”).

122. Exceptionally long and complex trial proceedings like those in *McVeigh*, 153 F.3d 1166, or an appellate court's appointment of replacement counsel after the repeated failure of defendant's original counsel to meet briefing schedules could offer such a justification.

123. See *Doggett v. U.S.*, 505 U.S. 647, 652 n. 1 (1992) (“Depending on the nature of the charges, the lower courts have generally found postaccusation delay to be ‘presumptively prejudicial’ [under the Speedy Trial clause of the Sixth Amendment] at least as it approaches one year”). Bright-line constitutional rules exist in other areas of the Court's constitutional jurisprudence. See e.g. *Md. v. Shatzer*, ___ U.S. ___, 130 S. Ct. 1213 (2010) (setting fourteen-day period for break-in-custody requirement affecting *Miranda*

to take such an approach, appellate courts and legislatures in death-penalty jurisdictions likely would respond by expediting capital appeals. If particular jurisdictions did not so respond, and unreasonable delays continued in a significant portion of cases (resulting in many case-specific reversals of death sentences), the Court at that point could invalidate the entire state's death penalty system in a *Furman*-like fashion.

Whether or not the Court adopts this proposal, the post-*Furman* capital punishment system has reached the point at which *something* must be done. The current systemic delays in executing death sentences call into question the constitutional legitimacy of the entire system of capital punishment. The paradox caused by *Furman* and its Eighth Amendment progeny may be difficult to resolve, but that is no reason to allow the current death-penalty machine to grind on at such an excruciatingly slow pace.



rights); *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (setting forty-eight hours as period in which government should conduct probable-cause hearing in connection with warrantless arrest).

