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Systematic Pre-Execution Delay: Both a Source of and a Protection against the Arbitrary Administration of the Death Penalty in the U.S.

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Systematic Pre-Execution Delay: Both a Source of and a Protection against the Arbitrary Administration of the Death Penalty in the U.S.

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Submitted in partial fulfillment of Honors Requirements
for the Department of Policy Studies

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What if we cannot tolerate all the stays and appeals and retrials that a decent respect for human life requires without making the law seem foolish and without subverting the point of a death sentence? Then we must abandon capital punishment, even if we think it right in principle, because then we cannot have it, even if it is right, without cheating."

*Ronald Dworkin, Los Angeles Times, July 11, 1999*

I. Introduction

When the Eighth Amendment protection against cruel and unusual punishments was ratified, the delay between death sentences and executions was measured in days or a few short weeks at the most.\(^1\) If any particular delay was longer, it was an exceptional instance of case-specific individualized delay. Over two centuries later, the average pre-execution delay in the United States currently stands at an estimated 15.5 years, with some inmates spending over three decades on death row.\(^2\) As capital punishment jurisprudence has evolved over time, “speed in executing justice [was] sacrificed to assuring accuracy in the judgment and fairness in the procedure.”\(^3\) As a direct result, today’s death penalty is confronting an irresolvable dilemma: the necessary procedural safeguards to ensure the proper application of the death penalty have produced not individual, but systemic delay between sentencing and execution that violates the Eighth Amendment.

The “awesome” and “irrevocab[le]” nature of the death penalty creates a heightened concern for accuracy at both the guilt and sentencing phases of capital trials, which is not required in non-capital trials.\(^4\) One enduring argument in Supreme Court capital punishment

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\(^3\) *Jeffers v. Lewis* 38 F.3d 411 (9th Cir. 1994) (Noonan, J., dissenting).

jurisprudence asserts that the death penalty is “qualitatively different” from all other punishments.\(^5\) Consistently described as the “ultimate” punishment, the death penalty is unique in its “severity” and inherent “finality.”\(^6\) Though capital and non-capital trials are subject to the same types of potential errors, such as prosecutorial misconduct, inadequate assistance of counsel, incorrect evidentiary rulings, unjust jury selection processes, and misleading jury instructions, the frequencies and consequences of these mistakes differ greatly when death is on the table. As such, the Supreme Court has developed a “death-is-different jurisprudence [which] asks for added procedural safeguards when humans play God.”\(^7\) The Court derived this guarantee of a higher standard of due process for capital defendants\(^8\) from the requirements of the Eighth Amendment protection against cruel and unusual punishments, which concern “nothing less than the dignity of man.”\(^9\)

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\(^8\) See *Ring*, 536 U.S. at 614 (Breyer, J., concurring) (“The Eighth Amendment required States to apply special procedural safeguards when they seek the death penalty”); *Spaziano*, 468 U.S. at 468 (Stevens, J., concurring) (death “must be accompanied by unique safeguards”).

Arguably, the 1972 landmark case of *Furman v. Georgia* is the most significant instance in which the Supreme Court harnessed this Eighth Amendment logic to establish bulwarks against egregious applications of the death penalty. In a plurality decision with nine separate opinions, five concurring and four dissenting, the Court outlined vague standards by which a punishment would be deemed cruel and unusual. These standards include assessments of whether the punishment is too severe for the crime or arbitrarily inflicted, and whether the same purpose could be achieved with a lesser sentence. While such standards are applicable to all types of state-imposed punishments, their implications for the death penalty yield the need for procedural safeguards distinctive to capital cases. Although the Court in *Furman* did not clarify specifically what these safeguards are, it ruled that the death penalty as applied in 1972 did not have them. Instead, the Court classified capital punishment in the *Furman*-era as being arbitrarily applied because of systematic failures granting juries “untrammeled discretion.”\(^{10}\) The judgment created a temporary national moratorium on executions and labeled “any given death sentence” throughout the United States constitutionally invalid regardless of the presence or absence of any identifiable error in individual cases.

The Court did not expound upon what systematic safeguards *Furman* required until *Gregg v. Georgia* four years later. It was this clarification that “provided the foundation for the modern American death penalty.”\(^{11}\) With the *Gregg* decision, the four year de facto moratorium on executions ended, prompting other states to revise their own death penalty statutes to align with required safeguards rooted in both *Furman* and *Gregg*. Ironically, these additional safeguards for capital defendants, solely meant to promote a just and fair

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10 *Furman*, 408 U.S. at 247 (Douglas, J., concurring).

application of the death penalty, have generated new constitutional challenges which cast doubt on the possibility that any application of such a penalty ever can be just. “Furman and its progeny created an extremely complex body of constitutional rules in capital cases,” augmenting the room for error at the trial level and the importance of review at the appellate level. The substantive and procedural complexity of capital cases, the multiple layers of appeals available to every death row inmate, the sheer volume of unresolved appeals, and the incentive for those condemned to death “to leave no appellate stone unturned” have institutionalized lengthy delays between sentencing and execution.13

As a result of this institutionalized delay, death sentences have been effectively transformed into sentences of “life in the shadow of death.”14 The reality is that only a few of the 3,019 inmates currently on death row will ever actually be executed.15 Who and how many will be determined, not by the “nature of the crime or the date of the death sentence,” but by arbitrary factors such as how quickly (or slowly) one proceeds through the post-conviction review process, which is impossible to predict.16 For this reason, there is no identifiable “meaningful basis for distinguishing” the class of capital convicts who ultimately are executed from those who are not.17 As such, the application of the death penalty has returned to the arbitrariness of the Furman-era, only it is executions rather than death sentences that are “wantonly and so freakishly imposed” to the point of serving no

13 Id. at 52.
17 Gregg 428 U.S. at 198 (“There should be a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many where it is not.”)(Stewart, J., concurring).
penological purpose.\textsuperscript{18} Ironically, it is the Court’s decision in \textit{Furman} that elicited this contemporary arbitrariness. \textit{Furman} produced “an Eighth Amendment paradox in which unconstitutional delays are caused by an elaborate capital-punishment jurisprudence that was intended to promote constitutional death sentences.”\textsuperscript{19}

The concept of delay as an Eighth Amendment challenge is relatively new in the field of capital punishment jurisprudence, but the concept of \textit{systemic} delay is even more novel. Since the issue of pre-execution delay first appeared before the Court in 1995, death row inmates have consistently filed delay claims centered on the particulars of their individual cases. While every claim based on such individual delay has been denied, no claim based on systemic delay has ever been filed. However, in July of 2014, Judge Carney of the federal district court relied on a systemic delay argument to declare California’s death penalty unconstitutional in \textit{Jones v. Chappell}, though the case was originally filed based on a claim of individual delay.\textsuperscript{20} Judge Carney’s decision is currently being appealed before the Ninth Circuit Court, which is unlikely to issue a judgment for at least three years.\textsuperscript{21}

This paper aims to support Judge Carney’s systemic delay approach in \textit{Jones v. Chappell} and expand the scope of his logic beyond California to a national context. Specifically I argue that, should the case reach the Supreme Court, \textit{Jones} has the potential to be the next \textit{Furman}. To do this, I will first outline the sources of pre-execution delay, which are largely rooted in the requirements of \textit{Furman} and \textit{Gregg}, and therefore in the death penalty system itself. This discussion will aid the reader in understanding delay as necessary to prevent arbitrariness in the administration of the death penalty and to uphold the Eighth

\textsuperscript{18} \textit{Furman} 408 U.S. at 310 (1972) (Stewart, J., concurring).
\textsuperscript{19} Newton, supra at 45.
\textsuperscript{20} \textit{Jones supra} note 16.
\textsuperscript{21} Id. at 13.
Amendment rights of death row inmates. I will then briefly detail a history of the courts’ treatment of delay-based claims, followed by an analysis of how *Jones v. Chappell* provides the framework to alter the landscape of delay claims in capital punishment jurisprudence. Such an analysis will reframe delay as a source of arbitrariness in the administration of the death penalty and a violation of Eighth Amendment rights. Finally, I will conclude this paper by putting the two contradictory conceptions of delay as a source of and protection against arbitrariness in discussion with one another. This discussion will end with the conclusion that, thought the Supreme Court has always held that the death penalty is *prima facie* constitutional, we have reached a point in time in which any application of such a penalty is unconstitutional.

II. Sources of Delay

Many of the sources of systemic delays can be traced to the holding in *Furman*, which was clarified in *Gregg*. The underlying question in *Gregg* was whether the revised death penalty statutes of five states passed constitutional muster against the backdrop of *Furman* as precedent. Though two of the states’ statutes were invalidated, the Court upheld the other three, providing insight for what it deemed sufficient to prevent the death penalty from being applied to “a capriciously selected random handful.” Each of the three statutes *Gregg* approved, for example, had several features in common, namely requirements for bifurcated trials, aggravating and mitigating factors, and automatic direct appeals. All of the 33 states that amended their death penalty statues following the holding in *Gregg*

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22 The death penalty schemes of Georgia, Florida, and Texas were upheld while those of North Carolina and Louisiana were rejected. *See Gregg* 428 U.S.

23 *Furman* 408 U.S. at 310 (1972) (Stewart, J., concurring).
incorporated some version of these safeguards with the understanding that they were necessary to decrease arbitrariness and promote justice in the distribution of death sentences.

For instance, bifurcation, which requires a defendant’s conviction and sentence to be determined in two distinct trials, holds paramount due process implications. In typical non-capital criminal proceedings, juries function merely as fact-finders to determine a defendant’s guilt. Should a jury return a guilty verdict, it is almost always the judge, not the jury, who assigns the punishment. In fact, a common jury instruction in non-capital trials warns jurors not to consider the question of punishment when deciding the question of guilt.\(^\text{24}\) However, in a capital case, the jury is charged not only with finding the facts, but also with imposing a sentence by applying the law to the facts. Unlike lesser punishments such as fines and terms in prison, the death penalty does not exhibit a gradient of severity embodied in sentencing guidelines with minimums and maximums which require considerable discretion. The sentence of capital punishment offers only one option – death. Yet under the law, not everyone convicted of a capital crime is deemed worthy of state-imposed death. As such, capital juries must make two distinct legal determinations: one of death eligibility and one of death selection.\(^\text{25}\) Bifurcation is a safeguard that allows juries to make the death-selection determination during the sentencing phase of capital trials independent of the death-eligibility determination during the guilt phase.\(^\text{26}\)

The death-eligibility determination is informed by a list of aggravating factors, which are conditions that increase the culpability of the criminal act.\(^\text{27}\) Since the holding in Gregg,
every death penalty jurisdiction has barred juries from imposing death sentences unless they found the presence of at least one of the specified aggravating factors. The purpose of this reform, largely driven by the goals set forth in Furman, was to decrease jury discretion by “genuinely narrow[ing] the class of death-eligible” offences.28 This narrowing requirement aims to ensure that the group of those eligible for the death penalty is “substantially smaller than the universe of all first-degree murderers.”29 Once a defendant is deemed death-eligible, mitigating factors allow the jury more discretion to make an individualized determination of whether that particular defendant deserves the death penalty.30 Mitigating factors are facts that decrease culpability, sometimes to such a degree that the death penalty may not be warranted despite a positive death-eligibility determination.31 In different ways, both aggravating and mitigating factors narrow the applicability of the death penalty, contributing to the Court’s goal of reserving the punishment for the “worst of the worst.” With the Gregg decision, the Court held that supplying juries with both sets of guidelines was necessary to decrease arbitrariness in the application of the death penalty.

In addition to bifurcated trials and aggravating and mitigating factors, the Court also endorsed safeguards in the form of automatic direct appellate reviews of capital convictions

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30 The U.S.-China Death Penalty Reform Project, supra note 24.
31 While each state has its own set of mitigating circumstances, common examples include: the age of the defendant at the time of the crime; the capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance; the victim was a willing participant; the defendant was an accomplice in the capital offense committed by another person. See Terry Lenamon, Terry Lenamon’s List of State Death Penalty Mitigation Statutes (2010) available at http://www.jdsupra.com/legalnews/terry-lenamons-list-of-state-death-pena-78641/. See also Jeffrey Kirchmeier, A Tear in Eye of the Law: Mitigating Factors and the Progression Toward a Disease Theory of Criminal Justice, 83 Oregon L. Rev. 631 (2004).
and sentences.\textsuperscript{32} Since \textit{Furman}, both the Supreme Court and lower courts have stated repeatedly that the “duty [of an appellate court] to search for...error with painstaking care...is never more exacting than it is in a capital case.”\textsuperscript{33} To date, only those sentenced to death have been afforded the right to automatic appeal. Although the Court has always held that there is no constitutional right to any type of appellate review in criminal cases, state laws in death penalty jurisdictions have created this right uniquely for capital defendants.\textsuperscript{34}

Similarly, there is no constitutional right to adequate representation for indigents at the appellate level, yet many death penalty retentionist states have developed and entrenched such a right for capital defendants in their statutes. Some states provide appointed counsel to all indigent defendants in post-conviction proceedings in capital cases.\textsuperscript{35} Those states that have not recognized this right in their laws have done so in practice. Where there is no expressed authority permitting the appointment of counsel in a post-conviction proceeding, the trial judge has “inherent authority to appoint an attorney and to require the state to pay the legal costs.”\textsuperscript{36} Additionally, a majority of death penalty jurisdictions do not only guarantee capital convicts representation at the appellate level, but they also guarantee a

\textsuperscript{32} \textit{Furman}, supra note 10 (White, J., concurring)

\textsuperscript{33} \textit{Kyles v. Whitley}, 514 U.S. 419, 422 (1995) (quoting \textit{Burger v. Kemp}, 483 U.S. 776, 785 (1987)). \textit{See also Parker v. Dugger}, 498 U.S. 321(1991) ("We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally").

\textsuperscript{34} \textit{See 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”); \textit{Douglas v. California}, 372 U.S. 353 (1963) (held that when a state affords a defendant a right to appeal, it must provide an attorney to indigent defendants for the first statutory appeal); \textit{Murray v. Giarranto}, 492 U.S. 1 (1989) (held there is no constitutional right to representation for post-conviction proceedings, or those proceedings after the direct appeal).

\textsuperscript{35} \textit{See e.g., ARIZ. R. CRIM. P. 32.4(c) (the court is required to appoint counsel for a defendant sentenced to death); FLA. STAT. ANN. § 27.702 (2004) (creating capital collateral regional counsel, funded by the state, to represent defendants in capital post-conviction proceedings in state and federal courts); NEV. REV. STAT. § 34.820(1)(a) (1991) (mandates appointment of counsel in post-conviction proceeding for a defendant under sentence of death); OKLA. STAT. ANN. tit. 22, § 1089 (2006) (the public defender must represent all indigent defendants in post-conviction proceedings in capital cases).}

qualitative threshold of representation. Just as state laws outline necessary qualifications for appointed defense attorneys in capital trials, many also list separate requirements for appointed counsel in capital appeals.37 Recognizing the elevated importance of appellate review in capital cases, most jurisdictions established the added precaution of mandated rather than automatic direct appeals, which effectively prohibit death row inmates from waiving their appellate rights.38

Yet, these safeguards, derived from Furman and provided to aid the pursuit of constitutional outcomes, largely are responsible for unconstitutional delays. Bifurcation, emphasis on aggravating and mitigating factors, and other intricate nuances in the realm of capital punishment jurisprudence form a complex and often confusing process vulnerable to many errors. Aggravating and mitigating factors, for example, are both subject to different standards of law. Mitigating factors do not have to be proven beyond a reasonable doubt, nor is there any requirement that the jury make a unanimous finding on a particular mitigating factor or on how much weight it should be given.39 Moreover, jurors are generally not restricted to the provided list of mitigating factors outlined in state statutes in order to find decreased culpability. In contrast, jurors are restricted to the state provided lists of aggravating factors, from which at least one must be proven beyond a reasonable doubt and


38 With the exception of Arkansas and federal government, all jurisdictions have mandated direct appeals in capital cases. See Alex Kozinski and Sean Gallagher, Death: The Ultimate Run-On Sentence, 46 Case W. Res. L. Rev. 1 at 6 (1995).

agreed upon unanimously. The bifurcation of trials adds a layer of complexity for jurors to decipher which stage in the trial is the proper time to make such an assessment. Some states require that the mandatory aggravating factor be found at the guilt phase of the trial and some require that it be found at the penalty phase. These intricacies greatly increase the significance of jury instructions, which are often difficult for ordinary citizens to understand even in non-capital cases, which then provides an additional basis for an appeal. Other than these guidelines, jurors are not given any direction on how to weigh aggravating and mitigating factors against each other. In these ways, such procedural safeguards augment the possibility of error and the need for highly skilled representation at the trial level.

Any perceived error at the trial level, whether it is actually an error or not, translates to some length of delay as the claim works its way through the extensive appellate process. Claims traditionally take three trips up the appellate ladder: state direct appeal, state collateral review, and federal habeas review. Each stage has its own multi-layered process ending with the appellant’s right to petition to the U.S. Supreme Court for a writ of certiorari, which grants the Court the discretion, but not the obligation, to hear the case. Some jurisdictions even delay the start of this tedious appellate process by requiring death row inmates to first file a motion for a new trial prior to appeal, despite the fact that this motion is denied in a majority of cases. Regardless of the state, the first stage of appellate review begins with an automatic or mandatory direct appeal to the highest court in the state, which in most cases is the state supreme court. This court generally is already flooded with capital and non-capital appeals. Because of the volume and complexity of capital appeals, the

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40 The U.S.-China Death Penalty Reform Project, supra note 25.
California Supreme Court, for instance, only decides about three-quarters of the capital cases it receives annually, resulting in the backlog of unresolved cases.\textsuperscript{42} In the 1993-1994 term, the California Supreme Court ruled on just 20 death cases, amounting to under ten percent of the total pending. Unresolved appeals at this stage snowball into further delays as the state continues issuing death sentences, which will also require mandatory or automatic direct appellate review.

Perhaps the simplest explanation for excessive delays is the sheer volume of death sentences each year compounded by the mass of unresolved capital appeals. At murder trials, “almost all of the incentives conspire to generate death sentences.”\textsuperscript{43} Elected prosecutors and judges generally benefit politically from appearing tough on crime. Defense attorneys, more often than not, are appointed, underpaid, and overmatched. Jurors in death penalty trials must be “death qualified,” which precludes people with reservations about handing down a death sentence from ever serving on capital juries.\textsuperscript{44} Some states’ laws regarding aggravating factors, which are meant to “genuinely narrow” the pool of death-eligible murderers, are so extensive that they essentially classify every murder as capital murder.\textsuperscript{45}

Tennessee’s death penalty statute, for instance, outlines 20 aggravating factors that make an offender eligible for the death penalty, which is more than double that of eight other

\textsuperscript{42} Kozinski, \textit{supra} note 39.
\textsuperscript{44} A string of studies has found that death qualified jurors are more likely to weigh aggravating circumstances more heavily than mitigating circumstances (Butler & Moran, 2002; 2007a), to evaluate ambiguous expert scientific testimony more favorably (Butler & Moran, 2007b), to be skeptical of defenses involving mental illness (Butler & Wasserman, 2006), to be more affected by victim impact statements during the sentencing phase of capital trials (Butler, 2008b), and to evaluate mitigating circumstances more negatively when a combination of strong and weak mitigation is presented than when only strong mitigation is presented (Butler & Moran, 2008a). Death-qualification requirements have also been shown to have an impact on the racial composition of the jury, whites tend to be more death qualified than minorities. Death-qualified juries tend to be more conviction prone than other juries.
\textsuperscript{45} \textit{Zant}, 462 U.S.at 877.
death penalty states. With just 13 aggravating factors, California has “the broadest death penalty law in America,” rendering 95 percent of its murderers death-eligible. Additionally, the broad statutory language of various aggravating factors, such as “the murder was especially heinous, atrocious, cruel, or depraved,” only contribute to the broad application of death penalty. Because the Court recognizes that a petitioner can be guilty of a capital crime and yet ineligible for the death penalty, much litigation at the early stages of the appeals process entails debating these vague statutory state requirements for death-eligibility. This technical litigation is only the prelude to addressing the merits of the petitioner’s constitutional claims. As a result of inherent delays in the appeals process and incentives for inmates to delay death, virtually all those sentenced to death take advantage of every available tier of appellate review. The more capital cases in litigation, the fewer resources each receives, contributing to yet more pre-execution delay.

Delay ensues even further, as those sentenced to death cannot receive a scheduled execution date until at least the direct appeal has been denied. Once a date is set, the state generally has 60 days to carry out the execution, during which time the inmate usually files for a stay of execution to extend life long enough to pursue post-conviction remedies.

When execution is imminent, any single judge of the circuit can grant a temporary stay. If

footnotes:

46 Arkansas, Connecticut, Indiana, Kentucky, Mississippi, New Hampshire, Nebraska, and Ohio all list less than ten aggravating circumstances in their death penalty statutes. See The Death Penalty Information Center, supra note 28.
48 “The murder was especially heinous, atrocious, cruel, or depraved,” is the first aggravating factor listed in the death penalty statutes in 25 of the 32 states that retain the death penalty. See The Death Penalty Information Center, supra note 1.
50Id. at 320.
52 Kozinski, supra note 39, at 21.
the inmate does not obtain a stay and the execution is not conducted within this time frame, the death warrant expires and the inmate must wait to receive a new execution date. It is not uncommon for inmates to receive five or six executions dates before they are finally executed.

The second stage of the appellate process, following direct appeal, is state collateral review, which is also known as state post-conviction review. During this stage, an inmate may file for a petition of habeas corpus, which asserts that his imprisonment is unlawful because of a denied state or federal constitutional right. State post-conviction review provides a procedural mechanism for raising claims which could not have been introduced on direct appeal, as direct appellate claims are limited to issues that appeared in the formal trial record. Unlike a direct appeal, state collateral review may challenge the validity of the conviction, the sentence, or both, by raising issues outside of the record, such as ineffective assistance of counsel or juror misconduct. Petitions at this stage of the appellate process are first filed with the original trial judge, then appealed to an intermediate court, and finally to the highest court in the state. Some states also conduct an additional review of proportionality to compare the sentence in the case being reviewed with sentences in similar cases. This is just one of many more examples of added procedural safeguards built into state death penalty systems that contribute to systematic delay.

The final rung of the appellate ladder is federal habeas review. Though similar to state habeas corpus review, federal habeas review is based on the denial of a federal rather than a state constitutional right. This stage also consists of review at three levels, namely the U.S. District Court, the U.S. Court of Appeals, and the U.S. Supreme Court. Depending on
the necessity of evidentiary hearings,\textsuperscript{53} petitions can linger at the district court level of federal \textit{habeas} review for as little as three months or as long as two years before moving to the Court of Appeals.\textsuperscript{54} Also, once a claim reaches the federal level, the exhaustion doctrine becomes applicable, often preventing claims from moving up the ladder of federal review, sending them back down to state courts instead. This doctrine requires all \textit{habeas} issues to be fully litigated in state courts prior to their arrival in federal courts.\textsuperscript{55} Codified by Congress in 1948, the doctrine was designed to protect the role of state courts in the enforcement of federal law by “allowing them to correct errors on federal questions, and exposing the case to federal judges only after all state remedies have been pursued.”\textsuperscript{56} Yet, the most significant constitutional issues in death cases are often federal questions.\textsuperscript{57} Thus, exhaustion causes further pre-execution delay by preventing the start of federal review until after state review is complete and by providing an additional procedural claim as a precursor to substantive claims. “One of the most difficult procedural obstacles for state prisoners to overcome when seeking federal \textit{habeas corpus} relief,”\textsuperscript{58} exhaustion requirements can add three to four years of delay to the appellate process.\textsuperscript{59}

Finding that this multi-layered appellate process is a hindrance to the state’s interest in the finality of convictions, various legislative bodies have made several attempts to

\textsuperscript{53} See Joan Comparet-Cassani, \textit{Evidentiary Hearings in California Capital Habeas Proceedings: What Are the Rules of Discovery?}, 39 Santa Clara L. Rev. 409, 412 (1999) (“The purpose of evidentiary hearings is to decide the material facts at issue as framed by the pleadings.”) \textit{See also Hurles v. Ryan} 752 F. 3d 768 (2014) (The Ninth Circuit has “held repeatedly that where a state court makes factual findings without an evidentiary hearing or other opportunity for the petitioner to present evidence, the fact-finding process itself is deficient and not entitled to deference.”).

\textsuperscript{54} Id.

\textsuperscript{55} \textit{Rose v. Lundy} 455 U.S. 509 (1982).

\textsuperscript{56} Franklin Zimring, \textit{The Contradictions of American Capital Punishment}, 78 (2003).

\textsuperscript{57} Ned Walpin, The New Speed-up in Habeas Corpus Appeals, \textsc{Frontline Online}, (2014), http://www.pbs.org/wgbh/pages/frontline/shows/execution/readings/speed.html


\textsuperscript{59} Jones, \textit{supra} note 21.
streamline review for death row inmates. One of the most controversial of federal attempts is the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA), which limits claims in successive federal appeals to issues of newly discovered evidence “that would have undermined the jury’s verdict or that involve new constitutional rights that would have been retroactively applied by the Supreme Court.” The combination of this restriction on the types of claims raised in successive habeas petitions and the deadline for filing the first habeas petition creates a procedural trap in which an inmate’s constitutional objections may be lost. In essence, failing to raise a claim of a constitutional rights violation in the first habeas petition amounts to the waiving of those rights. As a result, AEDPA, designed to decrease delay and accelerate justice, largely hinders justice. The primary reason the appellate process is so slow in capital cases is because onerous review is necessary to ensure not only an inmate has been properly convicted of a capital crime, but that he is deserving of the death penalty as a sentence. The average capital petition raises over three times the number of issues as those in non-capital cases. Writing and reviewing individual petitions are time-consuming processes, as the record in capital cases “has a voluminous nature… [and] can consist in more than 120 volumes of testimony and numerous exhibits and filings easily exceeding more than 15,000 pages.” Likewise, court opinions in capital cases commonly run over 60 pages in length. As such, the AEDPA provisions fail to recognize that proper

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61 See McKeskey v. Zant, 499 U.S. 467, 468 (1991) (“To excuse [a defendant’ s] failure to raise the claim earlier, he must show cause -- e.g., that he was impeded by some objective factor external to the defense, such as governmental interference or the reasonable unavailability of the factual basis for the claim -- as well as actual prejudice resulting from the errors of which he complains. He will not be entitled to an evidentiary hearing if the district court determines as a matter of law that he cannot satisfy the cause and prejudice standard”).

preparation for appellate proceedings requires a complete investigation of the entire case, which includes a review of factors both present and not present in the record.63

Instead of decreasing delay, “the primary effect of [these] strict procedural rules, [which] trigger default [holdings] in death cases, is to put a premium on the sophistication, the skill, and the careful attention to detail of those lawyers who represent death penalty defendants at trial and in the early appellate process.”64 While the issues raised in capital cases are already inherently more numerous and substantively complex than those in non-capital cases, the added layer of multifarious procedural rules widens the gap between good and bad attorneys.65 As a result, the elevated need for highly skilled lawyers in capital cases carries both direct and indirect implications for pre-execution delay. Ineffective representation at the trial level indirectly translates to delay as appellate attorneys prepare and courts review claims rooted in the Sixth Amendment right to adequate assistance at trial. Direct effects on delay, on the other hand, are manifest in the lack of attorneys who are both qualified and willing to accept appointments to handle appeals.66 It is not unusual for an inmate to spend years on death row waiting to be assigned representation long before his appeals even begin.

One source of both inadequate representation of counsel at the trial level and lack of available counsel at the appellate level rests in the states’ systems of compensation for legal assistance in capital cases. The American Bar Association Guidelines state that appointed counsel in capital litigation must not only “be fully compensated at a rate that… reflects the

64 Zimring, supra note 60 at 48.
65 Id.
66 Uelmen, supra note 49 at 498.
extraordinary responsibilities inherent in death penalty representation,” but also “compensated proportionately to prosecutors in that jurisdiction.” Yet, across the board, at both the trial and appellate levels, state death penalty systems provide inadequate pay for appointed attorneys, who often lack the resources needed to mount a vigorous defense or appeal. In 2010, the average public defender’s office in Florida received $150,000 in federal grant money as compared to the $4.3 million that the prosecutor’s office received. From 2004-2005, the Tennessee public defender’s office received less than half of that of the prosecution. A study of Virginia in 2004 revealed that “[n]o public defender office receive[d] money to supplement salaries or to hire support staff, paralegals or additional attorneys,” while 56 of the 120 district attorney offices “reported receiving supplemental local funds to boost staff salaries… totaling $7,484,391.93.”

This lack of adequate funding leads to a lack of adequate representation. The problem is only exacerbated by the fact that almost all defendants in capital cases cannot afford private attorneys and must rely on the state’s system for legal aid. Those who need court appointed legal assistance at the trial level will also need appointed representation at the appellate level for at least the mandated or automatic direct appeals. In nearly every death case, the adequacy of representation of trial counsel is among the most significant issues.

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68 White, supra note 12, at 5.
litigated on appeal. A 2002 study revealed that death row inmates in Texas, for example, face a one-in-three chance of being executed after inadequate representation. Other states are not immune to this type of miscarriage of justice either. In Washington state, one-fifth of the 84 people who have faced execution in the last two decades were represented by attorneys who had been, or were later, disbarred or suspended, despite the fact that the state’s overall disbarment rate is less than one percent. The gravity of this problem is best understood in conjunction with Justice Ginsburg’s comment, “I have yet to see a death case among the dozens coming to the Supreme Court… in which the defendant was well represented at trial… People who are well represented at trial do not get the death penalty.”

The combination of complex law, extreme time commitment, low pay, and legal requirements for high levels of experience discourage attorneys from taking on capital cases, creating a significant shortage of available counsel, particularly at the appellate level. Though continuity of representation by the same lawyer in both state and federal habeas corpus proceedings helps to reduce delays, especially where exhaustion is an issue, attorneys are not required and often do not want to undertake such time commitments. The lack of lawyers at the appellate level is an “aspect of capital punishment [that was] masked during the de facto moratorium on executions between [Furman and Gregg,] and by the slow resumption on executions in the late 1970s and the early 1980s.” While only a handful of executions were carried out each year during this time, the number of death sentences continued to rise.

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73 Uelmen, supra note 49 at 501
77 Mello, supra note 54 at 514.
rapidly (See Figure 1, page 21). Executions did not start to resume in double digits until 1984, around which time the problem of a lack of capital attorneys started to become visible. Many states, such as Florida, responded by creating statutes providing for the appointment of counsel in post-conviction proceedings. Legal scholars reacted by producing, for the first time, literature on the problem of pre-execution delay and the lack of capital attorneys.78 Yet, the amount of time spent on death row from sentence to execution has continued to follow an upward trend from the Gregg holding until today. Now, delays between sentencing and executions are almost double what they were at the time that delay was first recognized as a problem in the early 80s.

Figure 1: Total number of executions and death sentences by year from 1977-2014.

In addition to the procedural aspects of capital punishment, pre-execution delays are also lengthened by social, political, and technological progressions that shape the death

78 See Sun, supra note 14.
penalty’s place in the contemporary American criminal justice system. Because Eighth Amendment evaluations are guided by “evolving standards of decency that mark the progress of a maturing society,” the Court is continually modifying the terms of eligibility for the death penalty. In 2002, for example, the Court ruled that the execution of those with intellectual disabilities could no longer be tolerated according to modern interpretations of human decency. This precipitated a string of cases defining and redefining what it means to have intellectual disabilities, permanently altering the pool to whom the death penalty may be applied.

As pre-execution delays increase, so too does the age of the death row population, which itself has recently generated yet another available appeal rooted in constitutional questions. As Jonathon Turley stated, “Dead man walking is one thing, dead man being pushed along to the execution chamber in a wheelchair is another thing.” With the average capital convict entering death row at the age of 39 and pre-execution delays spanning decades, it is not unusual to see seniors on death row. The oldest man ever to live on death row was barred from being executed not because of his age, but because of a combination of mental ailments related to old age and the procedural safeguards founded in Furman. At the age of 94, Viva Leroy Nash died in 2010 of natural causes on death row after living there for a quarter of a century. Nash was spared from state-inflicted death after the Ninth Circuit ruled that his execution would constitute a violation of his statutory right to adequate assistance of counsel, despite that fact that he was represented by competent attorneys. The

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80 See Atkins, 536 U.S 304 (2002).
82 BJS Statistics 2013, supra note 2 at 10 tbl 5.
83 Nash v. Ryan, 581 F. 3d 1048 (9th Cir. 2009).
court reasoned that his mental state resulting from old age and years under the conditions of death row rendered him incompetent, which interfered with his ability to communicate potentially beneficial information to his appellate counsel.

In the 2006 case of *Allen v. Ornoski*, the Ninth Circuit considered the question of whether physical infirmities due to age could bar execution. At 76 years old, death row inmate Clarence Allen argued in his appeal that the momentum and reasoning behind post-*Furman* decisions gradually reducing the class of death-eligible convicts should apply equally to restricting the application of the death penalty to disabled seniors. His claim was supported by the supplemental claim that, though some death row seniors committed capital crimes late in life, many are awaiting execution at such an advanced age precisely because of the inevitable slowness of the capital appeals process. Allen himself had spent 23 years on death row, during which time he developed diabetes, went blind, and became confined to a wheelchair. Though his appellate claim was rejected, this denial does not necessarily prevent subsequent death row inmates from raising similar questions in their own appeals, as the evolving-standards-of-decency test may elicit a different judgment over time.

The Court has employed the evolving-standards-of-decency test to determine not only who could be executed, but how. Throughout history, the Court has always held that the

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84 *Allen v. Ornoski*, 435 F. 3d 946 (9th Cir. 2006).

85 As evidence to support his claim, Allen points to Supreme Court’s decisions of the post-*Furman* era, in which the Court has gradually (1) enlarged the classes of persons who are ineligible for the death penalty, see *Ford v. Wainwright*, 477 U.S. 399 (1986) (executing the mentally incompetent is unconstitutional); *Thompson v. Oklahoma*, 487 U.S. (1988) (executing youths under sixteen at time of offense is unconstitutional); *Atkins v. Virginia*, 536 U.S. 304 (2002) (executing the mentally retarded is unconstitutional); *Roper v. Simmons*, 543 U.S. 551 (2005) (executing juveniles who committed the offense while under eighteen is unconstitutional), and (2) narrowed the range of offenses that are death-eligible, see *Coker v. Georgia*, 433 U.S. 584 (1977) (execution for offenses short of murder is unconstitutional); *Thompson* 487 U.S. at 815 (1988) (executing those who aided a felony but did not kill or intend to kill is unconstitutional).

86 *Allen v. Ornoski* 546 U.S. ____ (2006) (Breyer, J., dissenting from denial of *certiorari*).
death penalty must be carried out in a manner that is not “inhumane and barbarous.”

However, our understanding of what it means to be “inhumane and barbarous” develops over time. Legislative efforts to adopt the most humane methods of execution accompanied by advances in technology have led to three primary waves of execution methods. At different points in history, hanging, electrocution, and lethal injection have each been the most prevalent execution scheme throughout the country, with lethal injection being the current method of choice. While the United States Supreme Court has yet to rule a particular method of execution unconstitutional, state courts have undertaken numerous reviews of various methods, some of which resulted in voiding certain types. Both Nebraska and Georgia, for instance, outlawed the use of the electric chair. Today, lethal injection has been placed under a microscope of judicial review because of the prevalence of botched executions. Thus, even when a death row inmate has exhausted all appeals related to his conviction and sentence, he may still appeal on grounds that the state’s method of execution poses a violation of his Eighth Amendment protection from cruel and unusual punishments.

Even those who survive the appeals process may never be executed, as over half of the death sentences levied since Furman have resulted in some kind of relief granted at the appellate stage (See Figure 2, Page 26). Fifty-eight percent of all those condemned to death in the past four decades have had their sentence vacated as a result of a successful appeal or a retroactively applied change to the capital statute that secured their initial conviction. While the success rate of non-capital habeas petitions is low, with estimates peaking at 7 percent,

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87 *In re Kemmler*, 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed. 447 (1890).
the success rate in capital habeas is much higher, peaking at 80 percent in 1982.90 The high rate of overturned death sentences supports the need for extensive appellate review in capital cases. A national study released in 2000 revealed that “courts found serious reversible error in nearly 7 of every 10 of the thousands of capital sentences that were fully reviewed” over the span of the 23 year-long period.91 Moreover, capital cases in states that have high affirmance rates for death penalty appeals at the state level are actually more likely to be granted relief at the federal level, which is the last tier of appellate review.92 Every federal habeas claim that has ever been found to have merit and therefore granted relief has first been rejected in multiple layers of judicial scrutiny. Without the safeguard of the multilayered process of appellate review in capital cases, the percentage of executions in the U.S. since Furman would significantly increase, as would the number of those wrongly executed.

90 Mello, supra note 54 at 520-22.
92 Uelmen, supra note 49 at 503.
Figure 2: Reasons for removal from death row from 1973-2013 ($n=5,487$).

NOTES: Of the 8,466 people sentenced to death between 1973 and 2013, 5,487 have been removed for various reasons. Other death encompasses natural death and suicides.


Yet, unsuccessful appeals do not necessarily generate executions either. Recently, increasing numbers of exonerations and botched executions have triggered de facto or self-imposed moratoriums in various states to allow for further review of death penalty practices. Some moratoriums do not have identified end dates, while those that do often end where another begins. According to the Death Penalty Information Center, currently eight of the 32 states that retain the death penalty have some kind of mandated hold on all executions within the state. Moreover, states without any moratoriums also have trouble executing

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93 There are currently 152 exonerations in the United States. From 1973-1999, there was an average of three exonerations per year. From 2000-2011, there was an average of 5 exonerations per year.

death row inmates who have exhausted all appeals. This is due predominately to a national shortage of drug supply for lethal injections, which is the primary method of execution in all thirty-two death penalty states. There is also a shortage of medical personnel willing to administer the lethal dose, which is required by law in some death penalty jurisdictions, yet criticized by the medical community.

Even without all of these external factors preventing death penalty states from carrying out executions, some would likely still refrain from doing so. This is because some states lack an appetite for executions and are more interested in delaying death than causing it. For states such as New Hampshire and Kansas, which have not had any executions since Gregg’s revival of capital punishment, the death penalty carries more symbolic than practical value. Similarly, of the 378 death warrants issued in Pennsylvania since 1976, only three have resulted in executions, all of which were considered “volunteers” who waived their appellate rights. Regardless of their reasoning, 25 of the 32 states that retain the death penalty did not execute anyone from their death row population in 2014. Only 35 people were executed, accounting for just 1.1 percent of the entire death row population. As a result, more people enter than leave death row each year, contributing to a growing death row population, which further amplifies pre-execution delays.

III. A History of Delay Claims

Despite the institutionalization of delay in death penalty systems across the United States, death row appellants have always shaped their Eighth Amendment challenges to pre-execution delay in terms of the particulars of their individual cases, rather than in terms of systematic factors. Where systems of providing court-appointed counsel have created a stalemate in the appellate process for death row inmates across the state, petitioners claim
that periods of lack of representation in their own case have added to their pre-execution delay. Where systems that automatically review every death sentence generate a backlog of unresolved cases, freezing the progress of all capital appeals, petitioners claim that the state was unduly slow in their particular case. Where institutionalized safeguards have transformed pre-execution delay into “life in the shadow of death” for all those sentenced to death, petitioners claim they have suffered psychological ailments from their own personalized experience on death row. This individualized framework for constitutional challenges to execution following extensive delay has been universally ineffective in courts at all levels. In order to appreciate the significance of Judge Carney’s reframing Jones’s claim from one of individual to systematic delay, it is first necessary to understand the Court’s historical treatment of pre-execution delay claims in general.

The issue of pre-execution delay first appeared before the Supreme Court in the 1995 case of Lackey v. Texas. specimen, Clarence Lackey argued that his execution after almost two decades on death row would be cruel and unusual punishment for two distinct but analytically related reasons. First, Lackey claimed that the threat of imminent execution he experienced for 17 years in the “twilight zone between life and death” amounted to torture prohibited by the Eighth Amendment. The second element of Lackey’s argument was rooted in the Furman principle that punishments must further legitimate and substantial penological goals to survive Eighth Amendment scrutiny. According to Lackey, the 17 years between his sentence and scheduled execution diminished any potential retributive or deterrent benefits, both of which the Court and legal scholars alike have identified as the only legitimate purposes of capital punishment. These two components of Lackey’s 1995

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96 Sun, supra note 14.
argument, namely the presence of torture from extended periods on death row and the absence of penological purpose, have historical roots in judicial opinions and constitute what has become the common capital appeals claim known as a Lackey claim. 97

Despite the abundance of Lackey claims in modern capital litigation, the claim itself has never spared anyone from execution. The original Lackey claimant, Clarence Lackey, for instance, was executed after the Supreme Court unanimously denied certiorari for his delay-based claim. 98 However, in a memorandum issued alongside the Court’s denial of certiorari, Justice Stevens offered hope for the success of similar claims in the future by acknowledging that Lackey’s Eighth Amendment challenge was “not without foundation.” 99 Justice Stevens reminded lower courts that the Eighth Amendment was derived in part from the 1689 English Bill of Rights, which our British counterparts have interpreted to prohibit execution after inordinate delay. 100 Justice Stevens also endorsed Lackey’s reliance on the holdings of high courts in other countries as persuasive precedent to support his claim. 101 Because the Court

97 See In Re Medley, 134 U.S. 160, 172 (1890) (“One of the most horrible feelings to which [man] can be subjected...is the uncertainty..., as to the precise time when his execution [will] take place.”); People v. Anderson, 6 Cal. 3d 628, 12 (1972) (“The process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.”); Furman 408 U.S. at 288 (Brennan, J., concurring) (“Mental pain [is]... an inseparable part of [the death penalty], for the prospect of pending execution exerts a frightful toll during the inevitable long wait”).

98 Lackey 514 U.S. 1045 (Stevens, J. respecting denial of certiorari).

99 Id.

100 Stevens describes the English Bill of Rights as “relevant to the interpretation of our own Constitution.” Lackey 514 U.S. (Stevens, J. respecting denial of certiorari).

101 See Abbott v. Attorney General of Trinidad and Tobago (1979) 1 W.L.R 1342. Though the Judicial Committee of the Privy Council dismissed the appeal of a death row inmate with a five year pre-execution delay, the Lords agreed “That so long a period should have been allowed to pass between the passing of a sentence of death and its being carried out is, in their Lordship’s view, greatly to be deplored.” See also Pratt and Morgan v. Attorney General of Jamaica, (1993) The Privy Council unanimously commuted two inmates’ death sentences in Jamaica to life in prison on the basis that “there is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years.” Notably, “many years” in this case is in reference to just over 5 years, which is half the modern day average pre-execution delay of Virginia, the state with quickest turnaround between sentencing and execution. Lord Griffiths stated “A state that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve”; See also Soering v. United Kingdom 161 Eur. Ct. H.R. (1989) The European Court of Human Rights ruled that Britain could not deport a German man to face capital charges in Virginia solely because, if convicted, he would
refused to hear the case, rather than passing a judgment on the merits of the claim, Justice Stevens brought his memorandum to a close by encouraging state and federal courts to “serve as laboratories in which the issue [of extensive pre-execution delay could] receive[ ] further study.”

Although Justice Stevens encouraged lower courts to be laboratories for this “important and undecided issue” when it first arose in 1995, almost all courts never had the opportunity to conduct experiments because Lackey claims are virtually always denied on procedural rather than substantive grounds. For example, the “gatekeeping” provision of the federal Antiterrorism and Effective Death Penalty Act (AEDPA), which prohibits raising new claims on successive federal habeas corpus petitions, has established a significant procedural roadblock for death row inmates seeking relief via Lackey claims. Claims based on individual delay by nature do not become ripe, or suitable for judicial review, until after the inmate has already lingered on death row for several years. As such, by the time the appellant is able to assert a claim rooted in inordinate delay, he will have already filed his first federal habeas petition. This is almost always guaranteed to be the case since another provision of AEDPA requires the first federal habeas petition to be filed within a year of conviction. As such, death row inmates are procedurally forced to file Lackey claims as successive petitions, which are then procedurally barred from relief on the basis that they are

expect to spend almost a decade on death row, suffering “the anguish and mounting tension of living in the ever-present shadow of death.”

102 Lackey 514 U.S. 1045 (Stevens, J. respecting denial of certiorari).
103 Id.
successive. Several states, such as Utah, have also incorporated similar provisions in relation to successive state habeas petitions.\textsuperscript{105}

Prior to the enactment of AEDPA, there was a handful of Lackey claims that were reviewed on merits and rejected in lower courts. However, these cases involved isolated incidents when delay was attributed to the conduct of the inmate seeking relief.\textsuperscript{106} In these cases, the courts concluded that the petitioners filed “frivolous claims at the eleventh hour” asserting the unconstitutionality of delay with the purpose of creating further delay to extend their life.\textsuperscript{107} Justice Thomas highlighted the irony of this tactic, arguing that a defendant cannot “avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed.”\textsuperscript{108} The reality that some capital prisoners use successive petitions in this way was the motivational force behind the adoption of the AEDPA gatekeeping provisions regarding successive petitions.\textsuperscript{109} However, the AEDPA provisions strip all Lackey claims of any potential relief, not just those created as a byproduct of

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\item \textsuperscript{105} Utah’s post-conviction relief statute prevents an inmate from raising a Lackey claim in state court in his third petition for post-conviction relief. (“We conclude that Mr. Gardner could have raised these claims in his second state petition for post-conviction relief…and that he is therefore barred from raising it in this successive petition.”) Gardner v. State, 234 P.3d 1115, 1136 (Utah 2010).
\item \textsuperscript{106} The majority of high courts of other countries have adopted the position similar to that in Pratt and Morgan v. Attorney General of Jamaica, (1993), in which Lord Griffith states “If the appellate procedure enables the prisoner to prolong the appellate hearing over a period of years, the fault is to be attributed to the appellate system and not to the prisoner.” Conversely, the United States judiciary arms death row inmates with a wealth of opportunities to appeal and then faults them for taking advantage of them. Those who share Justice Thomas’s view of pre-execution delay have advocated for inmates to waive their appellate rights as a way to prevent any potentially unconstitutional consequences that may attach to pre-execution delay. Such a position presupposes that any appeals would be rejected, which is an empirically unsupported assumption given that over half of the capital appeals since Furman have been granted relief at some point in the appellate process. Thus, it is unrealistic to suggest that “prisoners might hold back to play procedural games with the court” when their lives are literally in the balance. Williams v. Lockhart, 862 F.2d 155, 161 (8th Cir. 1988) (Lay, C.J., concurring).
\item \textsuperscript{108} Knight v Florida, 528 U.S. 990 at 992 (1999) (Thomas, J., concurring in denial of certiorari).
\item \textsuperscript{109} Uelman, Gerald, Death Penalty Appeals and Habeas Proceedings: The California Experience (2009).
\end{itemize}
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frivolous claims. Claims with pre-execution delay derived from the petitioner’s abuse of the judicial system are subject to the same treatment as those derived from the petitioner’s legitimate exercise of his right to review or from the State’s negligent or deliberate action. As such, AEDPA shifts the focus of Lackey claims to procedural rather than substantive questions.

Though lower court rejection of Lackey claims generally are rooted in such procedural grounds, the Supreme Court has interpreted this “resounding[ ] reject[ion]” as the primary justification for refusing to grant certiorari in its own Lackey cases. As a result, the Court has never conducted a legitimate Eighth Amendment evaluation of a Lackey case, leaving lower courts without a binding precedent from the high court as to the merits of such a claim. This lack of precedent combined with the court-created Teague Rule yields a further procedural challenge for Lackey claims. Established in Teague v. Lane (1989), the rule mandates that the judgment of constitutional claims in federal habeas proceedings should be evaluated based on precedent existing at the time the petitioner’s judgment became final. In other words, Teague prohibits a new rule of law from being retroactively applied, regardless of whether the petitioner is seeking to establish the new law for the first time or to apply a law that was established after the petitioner’s conviction became final.

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110 Lackey, 514 U.S. (Stevens, J., respecting denial of certiorari).
111 Knight, 528 U.S. at 992 (Thomas, J., concurring in denial of certiorari); see id. at 992-93 & n.4 (citing eight state court cases in support of this assertion, and noting that he was “not aware of a single American court that has accepted such an Eighth Amendment claim”).
When deciding whether a petitioner’s claim is *Teague*-barred, federal courts must first ascertain whether a state court considering the appellant’s claim at the time the conviction became final “would have felt compelled by existing precedent to conclude that the rule [the appellant] seeks was required by the Constitution.”¹¹⁴ In this way, “*Teague* appears to preclude *Lackey* claims automatically... [as] it is almost inconceivable that a claim of inordinate delay could develop before an inmate’s conviction and sentence becomes final, and there is no binding precedent for holding that an inordinate delay in execution violates the Eighth Amendment.”¹¹⁵ Federal Courts have applied *Teague* to *Lackey* claims in this manner since the original *Lackey* claim in 1995, in which the Fifth Circuit vacated the district court’s stay of Clarence Lackey’s execution on the basis that “*Teague’s* non-retroactivity doctrine bar[red] Lackey’s claim.”¹¹⁶

While there is an abundance of academic scholarship evaluating the merits of *Lackey* claims, conclusions that pre-execution delay is unconstitutional remain moot if statutory procedures continue to prevent the argument from ever being presented and assessed in court. In 2013, Angela Sun published an article contending that *Lackey* claims have been universally unsuccessful as constitutional challenges because of their misplaced emphasis on the extraordinary delays of *individual* inmates. Instead, Sun advocates for a novel *systematic* approach to *Lackey* claims, which attributes delay to the state’s flawed administration of the

¹¹⁶ *Lackey v. Scott*, 52 F.3d 98, 100 (5th Cir.), cert. dismissed, 514 U.S. 1093 (1995); *see also Chambers v. Dreke*, 145 F. App’x 468, 472 (5th Cir. 2005) (declaring that the district court’s resolution that petitioner’s claim was *Teague*-barred was “not debatable.”); *see also Smith v. Mahoney*, 611 F.3d 978, 998-99 (9th Cir. 2010) (The Ninth Circuit Court rejected the *Lackey* claim of a petitioner who spent 25 years on Montana’s death row because “at the time [the appellant’s conviction became final] [a court] would not have felt compelled by existing precedent to conclude that the rule [he] sought was required by the Constitution.”); *see also Allen v. Ornoski*, 435 F.3d 946, 955 (9th Cir. 2006) (determining that “[t]here is no clearly established federal law, as determined by the Supreme Court, to support” the petitioner’s claim).
death penalty, rather than to any specific post-conviction action in a particular case. By focusing on delay as a symptom of systematic state action, pre-execution delay itself is redefined as a state implemented punishment distinct from the punishment of a death sentence. Specifically citing California as the prime example, Sun argues that states with death penalty schemes inherently plagued by delay have created the fundamentally new and torturous punishment of “life in the shadow of death.”

With this new breed of Lackey claim, inmates can circumvent the procedural limitations of current Lackey claims, as the systematic approach allows for claims to become ripe for review at the moment of conviction, not when an execution date is set. The systematic approach also moots the argument that the inmate is to blame for the delay. Blame is instead shifted onto the state, as it is built into the state’s appellate process.

IV. Jones v. Chappell

Earnest Jones has been on death row since his 1995 conviction for the rape and murder of his girlfriend’s mother. After just a year’s wait to be assigned federal habeas counsel, a significantly shorter amount of time than average, Jones’ filed an initial petition to the federal court in March of 2010. This petition was comprised of 30 different claims for relief, the 27th of which was a standard Lackey claim, alleging that “execution following a long period of confinement under a sentence of death would violate [his] right to be free from cruel, torturous, and unusual punishment.” This was the same textbook Lackey claim he raised before the California Supreme Court, which unanimously rejected Claim 27 on the basis that it was “untenable, [for] if the appeal results in reversal of the death judgment, he

117 Sun, supra note 102 at 1585.
has suffered no conceivable prejudice, while if the judgment is affirmed, the delay has prolonged his life.”

119 This claim, like all standard Lackey claims, was built on arguments of psychological torture and lack of penological purpose and suffers from the procedural defects previously discussed. For the next five years or so, Jones’s case was litigated in the federal court and subject to numerous motions for deadline extensions, all of which were granted. Notably, the contentious litigation during these five years was not regarding his Lackey claim, but evidentiary claims.120

On April 10, 2014, the case took a turn when Judge Carney issued a five page order noting that he was “extremely troubled by the long delays in execution of sentences in [Jones’s case] and other California death penalty cases.”121 Judge Carney asserted that the state’s “strong interest in expeditiously exercising its sovereign power to enforce the criminal law… [had] been utterly stymied for two reasons,” both of which were attributed to systematic problems with the state’s administration of the death penalty.122 The two reasons Judge Carney cited were delays caused by state and federal procedures for litigation in post-conviction constitutional claims and the state’s lack of a lethal injection protocol. As a result, “both petitioner and the state must labor under the grave uncertainty of not knowing whether petitioner’s execution will ever, in fact, be carried out.”123 This claim emphasizes the key distinction between standard Lackey claims and Sun’s new breed of Lackey claims, which focuses on systematic delays. The focus in standard Lackey claims is the uncertainty of the

119 See 29 Cal. 4th at 1238.
120 Some of the other 29 claims Jones raised include: ineffective assistance of counsel, failure of the prosecutor to disclose exculpatory evidence, unconstitutional jury composition, unconstitutional jury instructions, and failure of the California statute to narrowly limit the application of the death penalty. Jones, Petition for Writ of Habeas Corpus, filed March 10, 2010.
121 Judge Carney’s Order Re: Briefing and Settlement Discussions [hereinafter Briefing and Settlement], filed April 10, 2014, at 1.
122 Id. at 3.
123 Id. at 2-3.
individual petitioner as to his own execution, with the central argument rooted in psychological torture. A systematic approach, however, allows for the expansion of uncertainty to the state, juries, judges, legislatures, and the citizens of California as well. When delay is attributed to structural problems within the state’s administration of the death penalty in every case, not to individual actions in individual cases, every death sentence carries with it an element of uncertainty starting from the moment of conviction.

In his Order, Judge Carney expressed his opinion that “this state of affairs is intolerable, for both petitioner and the state, and that petitioner may have a claim that his death sentence is arbitrarily inflicted and unusually cruel because of the inordinate delay and unpredictability of the federal and state appellate process.”¹²⁴ In a move of unusual judicial activism, Judge Carney then ordered Jones to “file an amendment to his operative petition for writ of habeas corpus alleging [a] claim that the long delay in execution of sentence in his case, coupled with the grave uncertainty of not knowing whether his execution will ever, in fact, be carried out, renders his death sentence unconstitutional.”¹²⁵ Along with his Order, Judge Carney provided both parties with a chart of statistics regarding California’s death row population, which neither party introduced to the Court, and encouraged the parties to “address the chart and the troubling issues it raises.”¹²⁶

While Judge Carney’s initiative in this case, ordering the petitioner to raise a claim he would not have raised otherwise, is unusual, it is not unconstitutional. The 1984 case of Jersey v. T.L.O, for instance, provides Supreme Court precedent for such action. In this case,

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¹²⁴ Id. at 4.
¹²⁵ Judge Carney’s Order Directing Petitioner to File Amendment to Petition [hereinafter Order Directing], filed April 14, 2014, at 2.
a federal judge instructed the petitioner to amend his claim to raise a Fourth Amendment constitutional question.\textsuperscript{127} The \textit{T.L.O} case is arguably more activist in that the judge raised a completely new constitutional issue, whereas Judge Carney merely instructed the petitioner to frame his Eighth Amendment claim in a new light. However, it is worth noting that three Supreme Court Justices dissented from the \textit{T.L.O} majority opinion, arguing that “adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review.”\textsuperscript{128}

Moreover, Judge Carney’s activism in \textit{Jones} did not end with his call for an amended complaint. Following his Order for Jones to amend his petition, the district court set a briefing schedule with deadlines for both parties’ initial and reply briefs discussing the issue of systematic delay. Shortly after the parties filed their first briefs addressing the new claim, Judge Carney, again unprompted, amended the briefing schedule, eliminating reply briefs and advancing the final hearing date by almost a month.\textsuperscript{129} At the hearing, Judge Carney gave the parties a chance to address any concerns regarding his Order, which he had already written and distributed to both parties prior to the hearing. Specifically, the Order declared California’s death penalty unconstitutional. During the course of the hearing, counsel for the state objected, not on the merits of the reasoning behind Judge Carney’s decision, but on the same procedural grounds that hinder \textit{Lackey} claim relief, namely \textit{Teague} and the exhaustion doctrine.

At the close of the hearing, Judge Carney granted some insight into the motivation behind his judicial activism in this case. He admitted, “I have thought a lot about this. I have

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\textsuperscript{128} \textit{T.L.O} 468 U.S. (Stevens, Brennan, and Marshall dissenting).
\textsuperscript{129} \textit{Id.} at 1.
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had this concern for years. And then I finally started digging… once I looked at the statistics, I felt I had no choice.”

Notably, he traced his interest in the constitutional question of pre-execution delays to the capital case of Thomas Edwards, whose appeal he presided over years prior. Edwards served 25 years on death row before dying of natural causes, and fulfilling, in Judge Carney’s own words, “the worst nightmare of [his victim’s] father,” whose only motivation for living was to witness Edwards’s execution. Edwards died a month before Jones’s case was assigned to Judge Carney. While Judge Carney does not explicitly indicate the precise moment he first started “digging into the statistics,” he does note that once he did, he “at least convinced [him]self that there [was] a constitutional problem… [and he] could not be passive or silent.” While Judge Carney’s reference to the Edwards case at the hearing provides insight into his motivations, it does not explain the timing of his activism, which occurred four years after he first received Jones’s case, and four years after Edwards died. Regardless of the motivations behind it, Judge Carney’s Order Declaring California’s Death Penalty System Unconstitutional was made official 15 minutes following this hearing in July of 2014.

A. Jones’s Amended Argument

Following Judge Carney’s initial Order for Petitioner to Amend Petition, Jones revised his original Lackey claim attempting to mirror the type of evolved Lackey claim Sun advocates for in her article. Jones even cites Sun’s work in the brief of his new argument before the district court. However, the wording of his amended petition leaves his claim

131 Id.
132 Id. at page 6 (emphasis added).
133 Petitioner’s Opening Brief on Claim 27 (Case No. CV-09-2158-CJC)[hereinafter Petitioner’s Brief], filed December 1, 2014 (emphasis added), at 36.
open to attack as being a hybrid Lackey claim focusing on both individual and systematic delay, rather than Sun’s fully evolved claim of solely systematic delay. Specifically, Jones amended his initial complaint to argue that “the extraordinary lengthy delay in execution of sentence in Mr. Jones’s case, coupled with the grave uncertainty of not knowing whether his execution will ever be carried out, renders his death sentence unconstitutional.” The phrasing of the latter portion of the claim, focusing on the unconstitutionality of his individual death sentence rather than every death sentence in California, can be explained by the judicial principle of standing, in which individuals can only litigate their own rights in court, not the rights of others. However, the latter phrasing, referring to delays specific to Mr. Jones’s case, cannot be explained away as easily, because the difference between standard Lackey claims and Sun’s hybrid Lackey claim lies in the framing of delays as institutionalized rather than case-specific. Notably, this wording of Jones’s amended petition, to no fault of Jones, is the exact wording from Judge Carney’s Order to Amend Petition.

However, this quote from Judge Carney’s Order is not the only language in Jones’s First Amended Petition that is characteristic of a standard Lackey claim. In fact, in its opening brief to the Ninth Circuit Court of Appeals, the state pinpoints specific wording, such as “the unique facts of his case,” to argue that Jones’s revised petition amounts to nothing more than the original Lackey claim of his first petition. Ironically, the state presents two contradictory arguments regarding Jones’s revised claim, both of which call for a denial of relief on procedural grounds. The first asserts that Jones’s revised petition does not present an argument different from his original claim, which was appropriately denied by the

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134First Amended Petition for Writ Habeas Corpus by a Prisoner in State Custody (Case No. CV-09-2158-CJC)[hereinafter Amended Petition], filed April 28, 2014, at 414.
California Supreme Court with no precedent for relief requiring otherwise. The second asserts that Jones’s revised claim raises a new issue which the California Supreme Court has not yet ruled on, and therefore the claim is procedurally barred from relief in the federal courts based on the exhaustion doctrine, which requires that the claim first be reviewed by state courts. Either way, according to the state, Jones’s claim as presented in his First Amended Petition should be denied on arguments of procedure rather than merit.

Regardless of the state’s assertion that Jones’s revised petition is not new, Jones’s claim obviously adopts at least some of Sun’s approach and presents the psychological torture argument in the new light of systematic state action. Jones argues that the state’s lack of lethal injection protocol leaves him with horrible uncertainties as to whether he will ever be executed, how he will be executed, and, taking into account the recent prevalence of botched executions, whether his execution would be free from physical torture. Despite the fact that Jones’s arguments largely reflect those of Sun, the timing of Jones’s appeal negates any advantage a systematic approach to Lackey claims has over procedural obstacles. One of the fundamental reasons for a systematic approach is so Lackey claims could circumvent the obstacles of the ripeness doctrine. The systematic delay argument ripens Lackey claims at the point of conviction rather than when an execution date is assigned. A Lackey claim with a systematic approach raised after the petitioner has already suffered mental anguish on death row for an extended period of time is just as “untenable” as a Lackey claim with an individual approach to delay.

B. Judge Carney’s Decision

Regardless of the reading of Jones’s First Amended Petition as a standard Lackey claim, an evolved Lackey claim, or a hybrid Lackey claim, Judge Carney’s ruling treats the
issue in this case as completely separate from all Lackey claims. In fact, the only reference to Lackey in the whole of Judge Carney’s 29-page opinion resides in footnote 19, which emphasizes, not the similarities, but the differences between Lackey claims and Judge Carney’s new approach.135 The most obvious difference between the two is that psychological torture, a key component of all Lackey claims, is not mentioned anywhere in the Judge Carney’s opinion. Instead, Judge Carney argues that death penalties coupled with systematic delay cultivate an inherent unpredictability as to when, or even whether, executions will be carried out. This uncertainty “smacks of little more than a lottery system,” and amounts to the kind of arbitrariness proscribed by Furman.136 As such, Judge Carney’s specific reframing of the issue of individual delay to one of systematic delay consequently transformed Jones’s claim from a “delay claim” to an “arbitrary selection for execution claim,” which has no resemblance to a standard Lackey claim.137

This avoidance of treating Jones as a Lackey claim is obviously deliberate, as psychological torture was a major component of both Jones’s original and First Amended Petition. Yet, the idea never appeared in Judge Carney’s opinion. In contrast, some form of the word “arbitrariness” is used 23 times in Judge Carney’s 29 page opinion, but just four times in Jones’s 47 page First Amended Petition, none of which is in reference to the specific claim in question (Claim 27). Therefore, Judge Carney not only ruled on an issue the petitioner never initially intended to raise, but justified the result based on principles the

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135 Unlike Mr. Jones’s claim, in previous instances where federal courts have been presented claims of unconstitutional delay preceding execution, they have generally appeared in the context of claims brought by inmates in whose individual cases the delay were extraordinary. See, e.g., Lackey v. Texas, 514 U.S. 1045 (Petitioner spent 17 years on death row); Smith v. Mahoney, 611 F.3d 978 (9th Cir. 2010) (Petitioner spent 25 years on death row). In those cases, however, the petitioner did not argue, as does Mr. Jones here, that his execution would be arbitrary and serve no penological purpose because of system-wide dysfunction in the post-conviction review process.

136 Furman, 408 at 47(White, J., concurring).

137 Transcript, supra 136 at 4.
petitioner never presented. The only element of Judge Carney’s decision that is reflective of the actual arguments raised by both Jones and the state is the systematic approach to delay.

Yet, by refusing to recognize the Jones claim as a Lackey claim, Judge Carney is able to escape many of the procedural defaults that have obstructed Lackey claims for the past few decades. For instance, Judge Carney’s treatment of Jones as an “arbitrariness of execution claim,” rather than a “delay claim,” provides an avenue to overcome a history of precedent unfavorable to unconstitutional delay claims. This is because such a new approach offers a radically different theory of the Eighth Amendment violation and stare decisis “does not preclude a new argument based on a different theory.”138 Thus, when the state accused Judge Carney of deviating from precedent in the Jones judgment, saying “I have been unable to find a single case, until [this one], which has ever held that delay in execution of a capital sentence is constitutionally prohibited,” Judge Carney was able to reply “I’m not aware of one either, if that makes you feel any better” without himself feeling compelled by existing precedent to deny Jones’s claim.139

Another procedural obstacle to Lackey claim relief that is shielded by Judge Carney’s novel approach is the requirements of the exhaustion doctrine as outlined in the Anti-Terrorism and Effective Death Penalty Act (AEDPA). The doctrine prevents federal courts from ruling on an issue that was not litigated in state courts first. In the Jones case, both parties and Judge Carney agree that “the California Supreme Court has not looked at [the] claim” of systematic delay based on arbitrariness.140 Ironically, exhaustion, which is meant to grant the state courts a role in deciding federal questions, became an issue in this case

139 Transcript, supra note 136 at 12.
140 Transcript, supra note 136 at 7.
specifically because of the judicial activism of the federal judge. The issue the California Supreme Court ruled on was a standard Lackey claim, and the new claim of systematic delay was not raised until Judge Carney ordered Jones to amend his petition. In standard Lackey cases, claims of individual delay raised at federal habeas proceedings would be sent down to the state court level if the claim had not yet exhausted all possible state remedies. However, claims framed by systematic delay trigger an exception to exhaustion requirements. Under AEDPA, exhaustion is not necessary where “circumstances exist that render [the state] process ineffective to protect the rights of the applicant.”141 Unlike with individual delay, the systematic delay approach necessitates an ineffective state appellate process by definition in order to be a meritorious claim. In Jones’s case, for example, Judge Carney ruled that requiring Jones to return to the California Supreme Court to exhaust his claim would be the same as “require[ing] Mr. Jones to have his claim resolved by the very system [Jones] has established is dysfunctional and incapable of protecting his constitutional rights.”142

Additionally, Judge Carney’s systematic delay approach is also protected against the Teague Rule requirements that would bar Lackey claims from relief. According to Teague, a federal court may not rely on a “new rule” to be applied retroactively in the course of federal collateral review.143 Because no court has ever held that any kind of pre-execution delay is unconstitutional, whether individual or systematic, such a judicial ruling would be barred from relief under Teague. However, by relying on the idea of arbitrariness, Judge Carney was able to provide a retort to the state’s objection to his review of Jones’s amended petition on the basis of the Teague Rule. While the state claims that the new rule applied in the Jones

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142 Jones, supra note 16 at 27.
case is that pre-execution delay is unconstitutional, Judge Carney insists that the rule he applied can be traced to the 1972 *Furman* decision, which was, and still is, an applicable part of law at the time of Jones’s conviction in 1995. Specifically, the rule Judge Carney relies on is that punishments “cannot be… inflicted in an arbitrary and capricious manner.” Such a rule is not new, “rather, it is inherent in the most basic notions of due process and fair punishment embedded in the core of the Eighth Amendment.”

In the appeal of Judge Carney’s decision to the Ninth Circuit, the state continues to insist that the *Teague* Rule applies in such a way that bars Jones from relief. According to the state, the appropriate rule derived from *Furman* is narrowly limited to prohibiting the arbitrary imposition of death sentences. According to the state, *Furman* carries no precedent in relation to arbitrariness in executions. The state points to evidence for this both in the language of the *Furman* and *Gregg* opinions themselves and in the fact that *Furman*’s ban on the death penalty was overturned by *Gregg* after statutes regulating death sentences, not execution procedures, were revised. All this aside, Judge Carney himself has even recognized that *Furman* and *Gregg* discuss arbitrariness only in terms of sentencing, rather than executions. Yet, Judge Carney defends his decision by asserting that the principles on which *Furman* relied are still applicable in *Jones*, for “the Eighth Amendment simply cannot

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144 *Gregg* 428 U.S. at 188 (plurality opinion) (citing *Furman*, 408 U.S. at 313 (White, J., concurring)) (describing Furman’s holding). See also *Furman*, 408 U.S. at 293 (Brennan, J., concurring)(“When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily”).

145 *Jones*, supra note 16 at 27. See also *Furman*, 408 U.S. at 274–77 (Brennan, J., concurring) (describing the principle that “the State must not arbitrarily inflict a severe punishment” as “inherent in the [Cruel and Unusual Punishment] Clause” and tracing its application in Anglo–American jurisprudence); See also id. at 242 (Douglas, J., concurring) (This rule is certainly one “so deeply embedded in the fabric of due process that everyone takes it for granted.”); *Dyer v. Calderon*, 151 F.3d 970, 984 (9th Cir. 1998) (en banc) It is therefore not a new rule for Teague purposes. *See id.* (“[A] rule needs to be announced for purposes of *Teague* only if it’s new.”).

146 Appellant’s Opening Brief 40-41 (Case No. 09-CV-02158-CJC), filed December 1, 2014.
be read to proscribe a state from randomly selecting which few members of its criminal population it will sentence to death, but to allow that same state to randomly select which trivial few of those condemned it will actually execute.”¹⁴⁷ According to Judge Carney, “arbitrariness in executions is still arbitrariness, regardless of when in the process arbitrariness arises.”¹⁴⁸ Surely if death sentences that are arbitrarily distributed amount to cruel and unusual punishment, then a fortiori, arbitrary executions are Eighth Amendment constitutional violations as well.

Notably, all of the state’s initial objections to granting Jones relief on the basis of arbitrariness derived from systematic delay are rooted in the same procedural bars that hinder traditional Lackey claims, namely those of exhaustion requirements of AEDPA and the Teague rule. This approach is indicative of the state failing to alter its strategy and instead responding to Jones as if the case was a standard Lackey case by only eliciting procedural, rather than substantive objections in its initial brief on the issue prior to Judge Carney’s decision. For instance, the state did not directly refute the systematic delay claim by asserting that the delay in Jones’s case is an isolated incident in a system that otherwise operates efficiently in administering the death penalty. Nor did the state argue that the delay plagued by the California death penalty system is necessary to protect the constitutional rights of those sentenced to death. According to Judge Carney, the state refrained from making these arguments because it “[could] not reasonably make [them].”¹⁴⁹ Regardless of the reason for failing to address the merits of the claim, failing to do so when the case was in the district court may have amounted to a waiving of the right to address the merits when the case is

¹⁴⁷ Jones, supra note 17 at 19.
¹⁴⁸ Id.
¹⁴⁹ Id. at 24.
litigated before the Ninth Circuit.\textsuperscript{150} This is because the review of the Circuit Court is limited to resolving issues that were raised on the formal record.

With the decision pending appeal, Judge Carney’s ruling has had direct impact only on Jones in the form of vacating his death sentence, while all other death sentences in California remain untouched. This is because district court rulings do not carry binding influence over the entirety of the state, but over a smaller jurisdiction within the state. For this reason, had pro-death penalty Attorney General Kamala Harris forgone appeal to the Ninth Circuit Court, further legal and political steps would have been required to move the direct impact of Judge Carney’s judgement “declaring California’s Death Penalty System unconstitutional” from Jones’s particular case to a de-facto abolition of the death penalty in California.\textsuperscript{151} Should the Ninth Circuit affirm the judgment, it will then apply as binding precedent to the entire state of California. In this way, the Attorney General’s decision to appeal the case may ironically result in vacating the sentences of the remaining 747 people on death row, representing an important catalyst towards statewide abolition of the death penalty.

Regardless of the outcome of the current appeal to the Ninth Circuit, the Jones case has the potential to revolutionize delay-based claims, as the Jones decision provides the United States Supreme Court with a reason to grant certiorari to claims concerning the constitutionality of delay. In the past, the Court has often cited the complete lack of successful delay claims in lower courts as a reason to deny certiorari. Justice Thomas employed this reasoning in his concurring opinion denying certiorari in Knight v. Florida

\textsuperscript{150} Petitioner-Appellee’s Answering Brief, 13 (Case No. 14-56373), filed February 27, 2015.

just five years after the original 1995 *Lackey* case. According to Thomas, the lower courts’ “resounding[ ] reject[ion]” of *Lackey* claims indicates a close to the experiment of constitutional challenges concerning pre-execution delay. The success of Jones’s delay claim supports Justice Stevens retort that the experiment with delay-based claims is far from over. At the time of *Knight*, Justice Stevens argued that denied delay-based claims can only be considered part of “the experiment” if two elements exist: 1) delay is attributed to the state rather than the appellant and; 2) the denial was rooted in arguments of merit rather than procedure. Almost two decades after the original *Lackey* claim in 1995, *Jones v. Chappell* is the first case in which both of those elements exist and the first case in which relief was granted. Contrary to Justice Thomas, the experiment with pre-execution delay claims is not only far from over, but has just begun with Judge Carney’s decision in 2014.

This significance of the *Jones* decision is reflected in Texan death row inmate Lester Bower’s use of the *Jones* decision in his *Petition for Writ of Certiorari* to the Supreme Court of the United States less than two months following Judge Carney’s decision. Like *Jones*, *Bower* claimed that the delay he experienced waiting for execution, which amounts to 30 years as compared to Jones’s 19, was a violation of the prohibition against cruel and unusual punishment. However, Bower’s claim resembles a standard *Lackey* claim of individual delay rather than the novel systematic approach of *Jones*. Nevertheless, *Bower* cited *Jones*, a case from a different circuit, not for the principles on which Judge Carney based his decision, but for the fact that Judge Carney was able to make a merit-based decision in the first place.

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152 *Knight*, 528 U.S. at 992 (J. Thomas concurring for denial of certiorari).
153 *Bower v. Texas*, Petition for Writ of Certiorari, 31 (Case No. 14-____) filed September, 9, 2014 [hereinafter Bower Petition] (“Particularly given the lingering substantial questions regarding guilt and innocence, executing Mr. Bower after more than 30 years on death row, with several execution dates stayed on the eve of execution, and after he has been held in solitary conditions for years, is cruel and unusual punishment and violates the Eighth and Fourteenth Amendments.”)
The petition referenced both *Jones* and cases in which courts have denied relief, utilizing these contrasting opinions to implore the Court to finally take a position on the controversial issue. *Bower* asserted, “The issue has percolated sufficiently, and this Court’s intervention is needed to address this important issue.”\(^{154}\) Though the Court recently denied *Bower* *certiorari* in late March of 2015, Bower’s use of the *Jones* decision in his petition for *certiorari* is significant.

**V. Beyond Carney**

By specifically linking systematic delay with the arbitrariness of *Furman*, Judge Carney expanded the scope of *Jones*’s potential impact far beyond what he may have even realized. While Judge Carney likely recognized that his opinion could result in the abolition of the death penalty across the state of California, he failed to realize the possible implications his opinion may have on death penalty systems of other jurisdictions and on American capital punishment more generally. For example, one of the key points Judge Carney utilizes to support his judgment is that California is the state which deviates the most from the national average for delay. According to Judge Carney, “the experience of other states across the country—which, on average, take substantially less than 20 years, let alone 25 or 30 years, to adjudicate their post-conviction review process—demonstrate that the inordinate delay in California’s death penalty system is not reasonably necessary to protect an inmate’s rights.”\(^{155}\) In this way, Judge Carney relies on California’s position as the nation’s leader in lengthy pre-execution delay to classify California as “unusual” in relation to the understanding of the cruel and unusual clause of the Eighth Amendment. Likewise, academic scholars who advocate for systematic, rather than individual, delay pinpoint

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\(^{154}\) *Id.*

\(^{155}\) *Jones*, *supra* note 16 at 25.
California as the ideal state to test such an approach specifically because of its inordinate delay relative to other death penalty jurisdictions.156

However, relying on California’s place as the state with the longest delay to support the argument that California’s delay is unconstitutional minimizes the influence that the arbitrariness argument may have on all death penalty jurisdictions in the United States, not just those with delays well above the national average. For example, by focusing on arbitrariness, rather than on delay, a comparison of the longest delay, 25 years in California, to the shortest delay, 10 years in Virginia, yields not only the unconstitutionality of California’s death penalty system because delay is longer, but the unconstitutionality of both systems by the very fact that they are substantially different without any justification. This particular comparison of the longest and the shortest delay also highlights another key distinction between Sun’s hybrid Lackey claim and Judge Carney’s arbitrariness claim, though both are derived from systematic delays. When systematic delay is framed as a hybrid Lackey claim, longer delays are considered worse than shorter delays because Lackey claims are rooted in arguments of psychological torture. Generally, the longer one spends on death row, the worse the psychological harm inflicted on the inmate. This is because the conditions of death row are “so oppressive, [that a death row inmate] endure[s a] roller coaster of hope and despair so wrenching and exhausting, that ultimately, [he] can no longer bear it, and then it is only in dropping his appeals that he has any sense of control over his fate.”157

Yet, when systematic delay is framed as an arbitrariness claim, a longer delay before an inmate’s execution translates into a longer life, where life is considered preferable to

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156 Sun, supra note 14.
157 Death Penalty Information Center, supra note 1.
death. While Judge Carney’s opinion as a whole seems to support the idea that inmates are worse off with longer delays, he highlights Jones’s delay as an exemplary case of arbitrariness precisely because it is relatively short compared to that of the typical California inmate.\footnote{Jones’s delay was 19 years at the time of this litigation.} Jones is more likely to be executed, not because of the nature of his crime, but because he received court appointed counsel for state habeas proceedings five and a half years after his sentencing, which is a fraction of the delay that all other California inmates endure.\footnote{Jones, Appellant’s Opening Brief, 52-53 (9th Cir.).} When this logic comparing the length of delays is applied to the average delays between death penalty jurisdictions, Virginians on death row, who are more likely to be executed due to shorter delays, seem more entitled to relief on the basis of arbitrariness stemming from delay than those in California, which has been repeatedly labeled as the ideal state for delay-based claims.

In reframing longer delays as beneficial to death row inmates, Judge Carney’s arbitrariness approach is not subject to the same critique that has often plagued Lackey claims, namely blaming the inmate for delays. Because claims rooted in arguments of psychological torture paint delay as more unbearable than death itself, it is easy to fault the inmate for causing the delay. After all, the alternative to pursuing available appeals is death via execution. Additionally, it is even more dubious that those raising Lackey claims are not seeking relief in the form of immediate execution, but relief in the form of a commuted sentence to life in prison. For these reasons, there is a stereotype that death row inmates pursue frivolous claims with the sole purpose of extending the appellate process to delay or prevent their executions. Some even consider Lackey claims themselves to be inherently frivolous because of the nature of their request for relief. Many decisions denying Lackey
claims have attributed blame for delay to the appellant regardless of whether his claims were deemed frivolous. While there is an obvious irony in faulting a petitioner for taking advantage of the same appellate process the state created to uphold the rights of the petitioner, it is difficult to understand how delay that results in life, even life in the shadow of death, can be worse than death itself. Lackey claims, including Sun’s hybrid Lackey claim, asks those evaluating the merits of such claims to do the impossible and place themselves in the shoes of someone living in the shadow of death in order to understand how extensive delay before death can be undesirable.

In contrast, Judge Carney’s arbitrariness argument frames delay in a more intuitive manner that is easier to accept. If Jones were to be executed, his execution would be unconstitutional, not because delay postponed death, but because delay did not postpone his execution long enough to avoid death in a system that arbitrarily allows others to escape the same fate. In this way, the state’s blaming Jones for his delay does not read the same as blaming the claimant in a Lackey case. In its initial brief to the Ninth Circuit, the state listed all the measures taken by Jones’s counsel that resulted in delays, including “fill[ing] briefs and petitions on the last possible day, present[ing] dozens of claims to the California Supreme Court, obtain[ing] seven separate extensions for his opening brief on direct appeal, totaling over 400 days, and obtain[ing] seven separate extensions for his reply brief on habeas appeal totaling over 200 days.”160 Here, the state adopts its usual position in Lackey cases by blaming the petitioner for “significantly prolong[ing] the process of review.”161 However, in Jones’s case, Judge Carney advances his arbitrariness argument using the fact that Jones’s delay is relatively short. In this way, the state only furthers Judge Carney’s point

160 Id.
161 Id.
by highlighting all the ways in which Jones’s own actions contributed to delays. Had Jones’s “counsel [not] made these decisions,” there would be an even larger discrepancy between Jones’s delay and the state average delay, indicating a larger level of arbitrariness.162

Because the nature of systematic delays involves placing blame squarely on the state for the arbitrariness caused by delays, the state has an even greater interest in deflecting blame than it does in Lackey cases. In its initial brief before the Ninth Circuit, the state blamed not only Jones for delaying his own case, but third party “capital defendants and their counsel [who] have succeeded in suspending all executions in California by challenging the state’s methods of execution.”163 In the same breath that the state blames capital defendants for “contributing to the unpredictable period of delay preceding actual execution”… the state recognizes “their right to bring such challenges… to ensure that executions are carried out in accordance with the Eighth Amendment.”164 In other words, the state does not dispute that California executions are preceded by unpredictable delays, but that those delays are necessary to uphold the constitutional rights of death row inmates.

Such recognition is reflective of the Furman paradox, in which established constitutional standards have resulted in the same outcome they aimed to prevent, namely an unconstitutional application of the death penalty. According to Furman, “evolving standards of decency” have led to systems that “provide death row inmates with ample opportunities to contest their convictions and sentences . . . in recognition of the fact that the common law practice of imposing swift and certain executions could result in arbitrariness and error.”165 Thus, Judge Carney’s arbitrariness argument stemming from systematic delay supports the

162 Id.
163 Id.
164 Id.
165 Furman, 408 U.S. at 245 (1972).
claim that the same system which was designed to avoid arbitrary results has produced them. This is also evident in the state’s assertion that “the post-conviction review processes might be hastened if the state had…less interest in ensuring the accuracy and legality of its judgments in capital cases.”\textsuperscript{166} Thus, while the Supreme Court has always ruled that the death penalty is \textit{prima facie} constitutional, we have reached a moment in time in which the “evolving standards of decency” have made any application of such a punishment unconstitutional.

This becomes clear when the principles of arbitrariness Judge Carney derived from \textit{Furman} to declare the death penalty unconstitutional in California are applied inter-jurisdictionally across the United States. For example, Judge Carney supported his claim of arbitrariness in California by relying on \textit{Furman’s} holding that “when the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily.”\textsuperscript{167} National statistics regarding executions reveal infrequency to such a degree that “the existence of the death penalty in this country is virtually an illusion.”\textsuperscript{168} Of the 8,466 people eligible for execution since \textit{Gregg} in 1976, meaning those sentenced to death, less than 25 percent have resulted in an execution (See Figure 2, page 26).

The application of the death penalty seems even more arbitrary when we consider statistics relating to the percentage of the death row population executed each year. Since \textit{Gregg}, the largest percentage of the death row population executed in a given year was less than 3 percent in 1999 (See Table 1 Page 55). While the number of executions reached a

\textsuperscript{166} \textit{Supra} note 165 at 43.
\textsuperscript{167} \textit{Furman}, 408 U.S. at 235 (1972).
record high at 98 in the year 1999, that number has steadily dropped. Last year, only 35
people were removed from death row as a result of execution. While the number of death
sentences has also steadily declined, the number of people sentenced to death is always
significantly greater than the number of those executed (See Figure 1, page 21). As such, the
number of those executed each year will always be much less than the death row population,
which currently stands at 3,019 inmates.
Table 1: National statistics for percent of death row population executed and average time elapsed from sentencing to execution from 1977-2014.

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<td>2013</td>
<td>3,088</td>
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<td>2014</td>
<td>3,054</td>
<td>35</td>
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</tbody>
</table>

NOTES: The Bureau of Justice did not calculate data for the average time elapsed between sentencing and execution for the years 1979, and 1981-1983 because a reliable average could not be generated from fewer than 10 cases. Data for the average time before executions conducted in 2014 has not yet been released.


The arbitrariness of the death penalty can be measured not just in terms of the number of executions, but also in terms of the number of states that retain the punishment. Because states have historically gauged the unusualness of their own punishments by comparing them
to the practices of other states,\textsuperscript{169} “the disparity of representation in capital cases [can] raise[] doubts about capital punishment itself.”\textsuperscript{170} In more than one \textit{Furman} concurring opinion, the Justices referenced the number of states that retain the death penalty, in addition to the number of those states that carry out executions. The latter statistic is just as, if not more, important than the former because, unlike other punishments, the death penalty is not inflicted immediately. While no one would ever sentence an individual to a term in prison to begin 15 years or so after his conviction, the death penalty, with an elevated concern for accuracy, necessitates such delay. As a result, those who are sentenced to death but are never executed have not actually been administered the death penalty. In addition to the necessity for delay, not all states that retain the death penalty have the same “appetite for executions.”\textsuperscript{171} Kansas and New Hampshire, for instance, have not performed a single execution since \textit{Furman}. As such, a statistic indicating the number of states that have the death penalty on the books would not be truly representative of the number of states that support executions. Though 32 of the 50 states retain the death penalty, only seven actively carried out execution in 2014. Thus, whether a person is executed depends less on the nature of the crime than on where the crime was committed. In fact, 81 percent of all executions conducted since 1976 have taken place in southern states. Texas and Oklahoma alone account for almost half.\textsuperscript{172}

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{169}] See Alexander A. Reinert, \textit{Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit from Proportionality Theory?}, 36 Fordham Urb. L.J. 53, 59 (2009) (stating in nineteenth century most states gauged whether punishment was unusual by comparing it to practices of other states).
\item[\textsuperscript{170}] \textit{Furman}, 408 U.S. at 257 (Douglas, J., concurring).
\item[\textsuperscript{171}] The Death Penalty Information Center
\item[\textsuperscript{172}] Death Penalty Information Center: \textit{Executions by State and Region Since 1976}, http://www.deathpenaltyinfo.org/executions
\end{itemize}
\end{footnotesize}
However, the significance of *where* is not limited to discussions of the state in which the crime occurred, as the county holds importance as well. Only a small number of counties are responsible for a disproportionate number of all the executions carried out since the 1976. Specifically, 30 percent of executions came from just 15 counties, which represents less than one percent of the total number of counties in the United States (See Figure 3, page 57).

Figure 3: Top 15 counties that perform executions since 1976.

This application of the principles of arbitrariness to executions inter-jurisdictionally on a national scale mirrors the Supreme Court’s treatment of death sentences in *Furman*.

While *Furman* dealt directly with the capital sentencing statutes of just two states, the Court conducted a national survey of statistics regarding the application of the death penalty. From these statistics, similar to those already discussed, the Court held that the death penalty was
arbitrarily inflicted, resulting in a de facto moratorium on executions throughout the United States. Should Furman’s inter-jurisdictional treatment of death sentences not constitute a sufficient reason to approach analysis of arbitrariness in executions in a similar manner, the federal death penalty system provides an alternative reason. Case law and scholarly literature demonstrate that well-established precedent allows Congress to authorize capital punishment for federal crimes even where state law differs.\textsuperscript{173} This means that defendants may be subject to federal capital charges for crimes committed within the borders of abolitionist states. Though one would expect federal law to apply evenly throughout the country, review of the federal death penalty illustrates a system that is yet again, largely a “southern program.”\textsuperscript{174}

Just as inter-jurisdictional review of the death penalty reveals unconstitutional arbitrariness, so too does an intra-jurisdictional analysis. This approach involves comparing the application of the death penalty across cases within a state instead of comparing the death penalty systems of more than one state. Rather than conducting individual evaluations of all 32 states that retains the death penalty to demonstrate the scope of applicability of Judge Carney’s arbitrariness argument, this position can be advanced with an analysis of death penalty retentionist states grouped into two categories: states that carry out executions and those that do not. Judge Carney’s decision in Jones is an example of the arbitrariness argument applied to a death penalty state that does not carry out executions. The core of Judge Carney’s arbitrariness argument as applied to California is the infrequency and unpredictability with which executions are imposed. As such, Judge Carney cites statistics and institutionalized sources of delay, such as mandatory direct appellate review and a

\textsuperscript{173} Id.
\textsuperscript{174} The Death Penalty Information Center, Arbitrariness, http://www.deathpenaltyinfo.org/arbitrariness
backlog of unresolved appeals, to illustrate how these two elements are inherent in the state’s death penalty system.

One such relevant statistic, which is repeated six times throughout Judge Carney’s opinion, is that only 13 of the over 900 individuals sentenced to death have been executed since the reinstatement of the death penalty in 1976. Yet, with a rate of 0.1 percent of sentences resulting in execution, California is not the jurisdiction with the lowest execution rate since Furman (See Table 2, page 60). As previously noted, Kansas and New Hampshire, which still retain the death penalty, have not executed any of those sentenced to death since Gregg. Pennsylvania, with a slightly higher execution rate than California, has only executed 3 people since 1976, all of whom were volunteers who waived their appeals. As Justice Stewart articulated in Furman, such infrequency is “cruel and unusual in the same way that being struck by lightning is cruel and unusual.”\(^{175}\)

\(^{175}\) Furman, 408 U.S. at 309 (Stewart, J., concurring).
Table 2: Percent of sentences from 1976-2014 resulting in executions and percent of death row population executed in 2014 organized by jurisdiction.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
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<th></th>
<th>2014</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Percent of Sentences Resulting in Execution</td>
<td>Deaths</td>
<td>Executions</td>
<td>Percent of Death Row Population Executed</td>
</tr>
<tr>
<td>Virginia</td>
<td>72.8%</td>
<td>151</td>
<td>110</td>
<td>0.0%</td>
</tr>
<tr>
<td>Texas</td>
<td>53.5%</td>
<td>969</td>
<td>518</td>
<td>3.6%</td>
</tr>
<tr>
<td>Missouri</td>
<td>41.6%</td>
<td>197</td>
<td>80</td>
<td>25.6%</td>
</tr>
<tr>
<td>Utah</td>
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<td>19</td>
<td>7</td>
<td>0.0%</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>35.7%</td>
<td>311</td>
<td>111</td>
<td>6.1%</td>
</tr>
<tr>
<td>Delaware</td>
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<td>16</td>
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<tr>
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<td>10</td>
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<td>0.0%</td>
</tr>
<tr>
<td>South Dakota</td>
<td>27.3%</td>
<td>11</td>
<td>3</td>
<td>0.0%</td>
</tr>
<tr>
<td>Florida</td>
<td>25.7%</td>
<td>950</td>
<td>90</td>
<td>2.0%</td>
</tr>
<tr>
<td>Georgia</td>
<td>24.5%</td>
<td>234</td>
<td>55</td>
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</tr>
<tr>
<td>Arkansas</td>
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<td>Louisiana</td>
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<tr>
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<tr>
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<td>New Hampshire</td>
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<td>1</td>
<td>0</td>
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</tr>
</tbody>
</table>

NOTES: Only the thirty-two states which retain the death penalty by statute are included (the U.S. federal government and the U.S. military also retain the death penalty and are therefore included). States are listed in receding order of percent of sentences from 1976-2014 resulting in execution. Shaded states are indicative of the only seven states that executed inmates in 2014. Data from 2014 reflects the state of affairs as of October 1, 2014.

Virginia, on the other hand, is the death penalty retentionist state with the highest percentage of sentences resulting in execution since *Gregg*. Yet, even at roughly 73 percent, this greater frequency in past executions does not diminish the unpredictability of whether those under sentences of death today will be executed. Though there are just eight people on Virginia’s death row, the last execution occurred in 2013. Of the 32 states that retain the death penalty, 25 of them do not actively carry out executions due to either moratoriums, lack of lethal drugs, or “deep-seated reluctance to inflict it.”176 In some states, it is difficult to distinguish which of these is the primary motivation behind the state’s lack of executions. Regardless of which of the three reasons it is, all three increase both the infrequency and therefore the unpredictability of executions. All inmates sentenced under systems with moratoriums, for example, are inherently faced with some sort of delay and uncertainty as to whether they will ever be executed. Moratoriums can be enacted or lifted with or without provocation and can span years or decades. Because of the temporary, yet unpredictable nature of moratoriums, it is not difficult to argue that executions in inactive death penalty states are infrequent and capricious, which are two tenants of arbitrariness.

Additionally, executions that do occur in largely inactive states are unlikely to serve either penological purposes of deterrence or retribution. The Justices deciding *Furman* considered it a “near truism” that death penalty systems cannot effectively serve either purpose when the overwhelming number of people who are death eligible are not executed.177 Inactive death penalty states by definition do not frequently execute their death row populations. Even those executions that do occur within such systems are unlikely to deter anyone from committing murder, as executions in such systems are outside of the norm.

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176 *Id.* at 300 (Brennan, J., concurring).
177 *Id.*
Those contemplating murder in inactive death penalty jurisdictions are more likely to believe that they will not be executed for their crimes, regardless of whether they receive a capital sentence. Similarly, any retributive value of executions is diminished by the length of delays built into every capital appellate process by the safeguards required in *Furman*. Instead, many inactive states retain the death penalty not as a deterrent or for retribution, but as a bargaining tool. Such was the case of Gary Ridgeway, in which Washington state prosecutors waived seeking the death penalty in exchange for his confession to 48 murders.¹⁷⁸ When used in this way, the death penalty is not reserved for the worst of the worst, but is reserved for an arbitrarily selected random few instead.

Though Judge Carney applied his arbitrariness argument only to California, an inactive death penalty state, the argument holds equal weight for states that actively carry out executions. In fact, as early as 1994, a year before the first *Lackey* claim was reviewed by the Supreme Court, Judge Noonan from the Ninth Circuit Court of Appeals articulated the same arbitrariness argument rooted in systematic pre-execution delay in his dissent in a case from the active death penalty state of Arizona. In doing so, Judge Noonan cited statistics pertaining to Arizona similar to those Judge Carney cited in *Jones* relating to California. Like Judge Carney, Judge Noonan wrote that “On the face of these facts it appears that the administration of the death penalty in Arizona is so arbitrary as to constitute cruel and unusual punishment,” despite the fact that the petitioner’s claim was framed by individual rather than systematic delay.¹⁷⁹ While Judge Noonan recognized that the reasoning behind his dissent was not within the scope of the arguments raised by the petitioner, he, like Judge Carney, recognized that the “court has power when justice requires it to consider *sua sponte*


¹⁷⁹ *Jeffers*, 38 F.3d at 425 (Noonan, J., dissenting).
questions of law neither pressed nor passed upon by the court of administrative agency below.” 180 Notably, two other Justices joined in Judge Noonan’s dissent.

While there is more infrequency of executions in inactive death penalty retentionist states than in active ones, the death penalty systems of both groups of states carry the same uncertainty as to who will be the randomly selected few that are executed. For example, in 2014, Texas executed just 10 of its 276 death row inmates, which is equivalent to just 3.6 percent of its total population. Because who will be executed is based on how quickly or slowly one makes it through the appellate process, it is impossible to determine which of the 276 death row inmates will be the unlucky 10 randomly selected for execution. This unpredictability extends to even Missouri, the state which executed the largest portion of its death row population in 2014. Like Texas, the state carried out 10 executions, though there was a pool of just 39 people on death row from which to choose. Yet, even the fact that a large percentage of the Missouri death row population was executed in 2014 does not indicate that the same was true in the past or will be true in the future. Because the number of executions each state carries out each year is also dependent on factors that influence delay, the rate of executions even in active death penalty states is rarely steady from year to year. Missouri is a clear example of this. While there were 10 executions in 2014, there were just two in 2013, and zero in 2012 (See Figure 4, page 64). While Missouri is indeed classified as an active death penalty, the lack of pattern in the number of executions conducted each year helps illustrate the point that states can easily cross the line between the categories or active and inactive from year to year. This is further indicative of yet another type of arbitrariness in death penalty systems across the United States.

180 Id.
VI. Conclusion

Regardless of the outcome of the Jones appeal to the Ninth Circuit, the case has highlighted not only the unsuccessful treatment of Lackey claims in the past, but also indicated a shift in how delay-based claims will be, or should be, approached in the future. Because the death penalty is such a controversial topic, the merits of Lackey claims have been substituted for shallow debates over procedure. The standard focus on individual delay in particular capital cases has allowed for such an approach and effectively denied capital litigants access to Eighth Amendment analysis on the merits of their delay claims. In effect, the historical handling of Lackey claims by all parties involved, including the appellants, the states’ respondents, and the judges, has been passive. It was not until the 2014 case of Jones v. Chappell in which an activist stance was taken in relation to delay claims. Judge Carney took a standard Lackey claim and attempted to move it in a direction in which arguments of merits would take precedent over arguments of procedure. By focusing on systematic rather
than individual delay, delay-based claims would not only have greater defense against procedural obstacles, but they also carry wider implications for future litigation.

This shift in the way delay-based claims are treated in courts is necessary because delay itself is also necessary. While the state has an interest in the finality of convictions and sentences, the irrevocability of the death penalty warrants additional safeguards in its distribution. While these safeguards derived from *Furman* are meant to provide additional protection for capital defendants’ constitutional rights, they have the effect of creating unconstitutional delays. The evolving standards of decency test the Court employs to measure Eighth Amendment requirements against the application of death penalty have created a current system littered with catch 22s. An inmate who takes advantage of all the appeals available to him is then faulted for delaying his execution. Procedural rules, such as AEDPA, to speed up the appellate process have precluded inmates from raising constitutional claims of inordinate delay.

Thus, the inordinate delay built into the death penalty system as an Eighth Amendment requirement had led to executions so infrequent and unpredictable as to amount to unconstitutional arbitrariness. With only seven states actively executing those on death row, the American death penalty does not serve as a promoter of deterrence or retribution, but rather is arbitrarily and “freakishly imposed.”

The American death penalty system no longer produces death sentences but sentences of life in prison with the remote possibility of death. Ironically, the very requirements of *Furman* have made the death penalty so infrequent and so unpredictable that it is inherently arbitrary, and for that very reason the death penalty does not pass constitutional muster according to *Furman* principles. Were it not for Judge

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Carney’s systematic approach to delay in *Jones*, courts would only recognize delay as a protection against rather than a source of arbitrariness. Because Judge Carney’s decision in *Jones* utilized the principles in *Furman* to apply the prohibition of arbitrariness to executions, *Jones* has the potential to result in the end of the death penalty. Unlike *Furman*, however, such an end would be permanent rather than a temporary moratorium, as moratoriums would only create further unconstitutional delay.
Supporting Figures and Tables

Figure 5: Executions resulting from death sentences between 1976 and 2014 in jurisdictions that currently retain the death penalty.

NOTES: Only states which retain the death penalty by statute are included (the U.S. federal government and the U.S. military are also included). They are listed in order by number of death sentences from highest to lowest. The height of each bar on the graph indicates the total number of death sentences in the corresponding state. See Table ____ for raw data.

SOURCES: Death Penalty Information Center, *Executions by Year Since 1976* and *Death Sentences by Year, 1977-present*. 

67
Table 3: Number of People Executed by Jurisdiction, 1930-2014.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>1930-1972 (42 years)</th>
<th>1976-2014 (38 years)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Executions per year</td>
<td>Executions per year</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Georgia</td>
<td>366</td>
<td>55</td>
</tr>
<tr>
<td>Texas</td>
<td>297</td>
<td>518</td>
</tr>
<tr>
<td>California</td>
<td>292</td>
<td>13</td>
</tr>
<tr>
<td>North Carolina</td>
<td>263</td>
<td>43</td>
</tr>
<tr>
<td>Ohio</td>
<td>172</td>
<td>53</td>
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<tr>
<td>Florida</td>
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<tr>
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<td>Vermont (1964)</td>
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</table>

NOTES: This table includes two sets of data about executions in the United States. The first shows the number of executions from 1930 to 1972, when the death penalty was abolished. The second data set displays the number of executions in each U.S. state since the ban on the death penalty was overturned by the U.S. Supreme Court in 1976.
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