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The Irrelevance of Prisoner Fault for Excessively Delayed Executions

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The Irrelevance of Prisoner Fault for Excessively Delayed Executions

Russell L. Christopher*

Abstract

Are decades-long delays between sentencing and execution immune from Eighth Amendment violation because they are self-inflicted by prisoners, or is such prisoner fault for delays simply irrelevant to whether a state-imposed punishment is cruel and unusual? Typically finding delay to be the state's responsibility, Justices Breyer and Stevens argue that execution following upwards of forty years of death row incarceration is unconstitutional. Nearly every lower court disagrees, reasoning that prisoners have the choice of pursuing appellate and collateral review (with the delay that entails) or crafting the perfect remedy to any delay by submitting, as Justice Thomas has invited complaining prisoners to do, to execution. By choosing the former, any resulting delay is self-inflicted; delayed executions are prisoners' own fault. Despite this argument's commonsense appeal, left unexplained is how prisoner fault inoculates state-imposed punishment from Eighth Amendment violation. Lacking a rationale for the prisoner fault argument, this Article proposes the two most obvious candidates: (i) analogizing to fault attribution for delays in the Sixth Amendment speedy trial right context; and (ii) choosing post-conviction review rather than submitting to execution, prisoners waive Eighth Amendment challenge of the resulting delay. But neither is persuasive; moreover, each proposed rationale presupposes the existence of the very right that Justice Thomas and nearly every court vigorously deny: an Eighth Amendment right against excessively delayed

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execution. The absence of a persuasive rationale exposes prisoner fault as irrelevant and removes the primary obstacle to courts recognizing that execution following decades of death row incarceration constitutes cruel and unusual punishment.

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I. Introduction

How long of a delay between sentencing and execution is too long before it violates the Eighth Amendment?¹ How many years of death row incarceration are too many before a subsequent execution would be cruel and unusual punishment? Neither the nationwide average of nearly sixteen years² nor the average of twenty-five years in the two leading death penalty states³ is enough. Not even individual instances exceeding thirty⁴ and nearing forty years suffice.⁵ Apparently, no length of delay and no

1. See U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

2. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT, 2012—STATISTICAL TABLES, 14 tbl.10 (2014), <http://www.bjs.gov/content/pub/pdf/cp12st.pdf> [hereinafter DOJ STATISTICS 2012].

3. By number of persons on death row, California (712) and Florida (403) are the two leading death penalty states. *Id.* at 18 tbl.15. In California, post-sentencing delays “exceed[] 25 years on average.” *Jones v. Chappell*, No. CV 09-02158-CJC, 2014 WL 3567365, at *12 (C.D. Cal. 2014). According to Justice Kennedy, “[t]he last ten people Florida has executed have spent an average of 24.9 years on death row.” Transcript of Oral Argument at 46, *Hall v. Florida*, 134 S. Ct. 1986 (2014) (No. 12-10882).

4. See, e.g., *Valle v. Florida*, 132 S. Ct. 1, 1 (2011) (Breyer, J., dissenting from denial of certiorari) (commenting on thirty-three years of death row incarceration).

5. See *Muhammad v. Florida*, 134 S. Ct. 894, 894 (2014) (Breyer, J., dissenting from denial of certiorari). The prisoner, aka Thomas Knight, received his death sentence in 1975. *Knight v. Florida*, 528 U.S. 990, 994 (1999) (Breyer, J., dissenting from denial of certiorari). Therefore, he had been incarcerated on death row for thirty-nine years. Far from being an isolated instance, over 200

duration of incarceration are too long according to the principal argument supporting the constitutionality of execution following decades of death row incarceration.⁶ According to this argument, delays between sentencing and execution are the prisoners' fault.⁷ As such, they cannot violate the Eighth Amendment prohibition against cruel and unusual punishment regardless of the length of delay and duration of incarceration.⁸ Under this argument, execution following four decades (or conceivably more) of death row incarceration is no more troubling to the Eighth Amendment than execution delayed by one decade or one year.⁹ This Article contends, however, that prisoner fault lacks an underlying rationale related to the concerns of the Eighth Amendment and thus should be irrelevant in assessing the constitutionality of excessively delayed executions. Neutralizing the prisoner fault argument removes the primary obstacle to recognizing that execution following upwards of thirty years or more of death row incarceration is cruel and unusual punishment.¹⁰

The most important articulation of the prisoner fault argument is from Justice Clarence Thomas: a prisoner cannot “avail himself of the panoply of appellate and collateral

prisoners have been on death row for thirty to forty years. DOJ STATISTICS 2012, *supra* note 2, at 18 tbl.15 (stating that thirty-three current death row prisoners were placed there from 1974 to 1979, sixty from 1980 to 1982, and 121 from 1983 to 1985).

6. See *infra* Part II (providing a discussion of the prisoner fault argument).

7. For the first articulation of this argument by a Supreme Court Justice, see *infra* text accompanying note 11 and *infra* Part II.A.

8. See *Knight*, 528 U.S. at 992 (“It is incongruous to arm capital defendants with an arsenal of ‘constitutional’ claims with which they may delay their executions, and simultaneously to complain when executions are inevitably delayed.”).

9. See *infra* Part II (discussing the prisoner fault argument in greater detail).

10. See *Jones v. Chappell*, No. CV 09-02158-CJC, 2014 WL 3567365, at *11 (C.D. Cal. July 16, 2014) (identifying “that the delay is caused by the petitioner himself, and therefore cannot be constitutionally problematic” as one of the two principal arguments used by courts denying claims of excessively delayed executions); Carol S. Steiker & Jordan M. Steiker, *Capital Punishment: A Century of Discontinuous Debate*, 100 J. CRIM. L. & CRIMINOLOGY 643, 682 (2010) (characterizing the prisoner fault argument as an “obvious difficult[y]” for prisoners claiming the unconstitutionality of excessively delayed executions).

procedures and then complain when his execution is delayed.”¹¹ That is, prisoners have the choice of pursuing appellate and collateral review of their death sentence or simply submitting, as Justice Thomas has invited complaining prisoners to do, to execution.¹² Choosing the latter forecloses delay. Choosing the former entails delay between sentence and execution and prolongation of death row incarceration. Because they have chosen, in effect, delay and because their actions have caused delay, the resulting delay is prisoners’ own fault.¹³ As prisoners’ own fault, delayed executions cannot violate the Eighth Amendment.¹⁴

To place the prisoner fault argument in context requires a brief account of the origin of the modern debate on the Supreme Court as to the constitutionality of execution following lengthy terms of death row incarceration. In 1995, in *Lackey v. Texas*,¹⁵ Clarence Lackey petitioned the Supreme Court claiming that his execution following seventeen years of death row incarceration was unconstitutional.¹⁶ Brent Newton, counsel for Lackey, explained the two components of Lackey’s claim, as follows: “[F]irst . . . execution after keeping Lackey under the extreme conditions of death row for such a lengthy period of time would exact more punishment than . . . the Eighth Amendment [allowed]; and second, neither of the state’s primary interests . . . —retribution and deterrence—would be meaningfully served . . . after such a lengthy delay”¹⁷ According to Newton, each component asserted that Lackey’s execution would be disproportionate and thus cruel and unusual in violation of the

11. *Knight v. Florida*, 528 U.S. 990, 990 (1999).

12. *See Foster v. Florida*, 537 U.S. 990, 991 (2002) (Thomas, J., concurring in denial of certiorari) (“Petitioner could long ago have ended his ‘anxieties and uncertainties’ by submitting to what the people of Florida have deemed him to deserve: execution.” (quoting *id.* at 993 (Breyer, J., dissenting from denial of certiorari))).

13. *See infra* Part II (providing analysis of the prisoner fault argument).

14. *See infra* Part II (discussing the prisoner fault argument).

15. 514 U.S. 1045 (1995).

16. *See id.* (Stevens, J., respecting denial of certiorari) (stating that petitioner’s claim, “[t]hough novel, . . . is not without foundation”).

17. Brent E. Newton, *The Slow Wheels of Furman’s Machinery of Death*, 13 J. APP. PRAC. & PROCESS 41, 54–55 (2012).

Eighth Amendment.¹⁸ Newton emphasized that the delay was “primarily attributable to the state and not to Lackey.”¹⁹ Justice John Paul Stevens wrote a memorandum respecting the Court’s denial of certiorari stating that the “petitioner’s claim is not without foundation.”²⁰ Though he found the “importance and novelty” of the claim “sufficient to warrant review by this Court,” he maintained that the issue would benefit from further development and invited lower courts to address it.²¹ Justice Stephen Breyer simply noted his agreement with Justice Stevens “that the issue is an important undecided one.”²²

Subsequently, numerous death row prisoners filed “*Lackey* claim”²³ petitions with the Court, arguing that execution following lengthy periods of death row incarceration violated the Eighth Amendment.²⁴ Though all of these petitions for certiorari

18. *Id.*

19. *Id.* at 55.

20. *Lackey*, 514 U.S. at 1045.

21. *See id.* (noting that the factors that made Lackey’s case “sufficient to warrant review” also simultaneously served as a “principled basis for postponing consideration of the issue until after it ha[d] been addressed by other courts”).

22. *Id.* at 1047.

23. *See, e.g.*, *Moore v. State*, 771 N.E.2d 46, 54 (Ind. 2002) (“This claim [of substantially delayed execution] has become known as a *Lackey* claim.”); Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 762 (2002) (“[T]he claim of inordinate delay of execution [is] commonly known as a ‘*Lackey* claim.’”).

24. *See Muhammad v. Florida*, 134 S. Ct. 894, 894 (2014) (denying application for stay of execution of sentence of death); *Valle v. Florida*, 132 S. Ct. 1, 1 (2011) (Breyer, J., dissenting) (evaluating petitioner’s application for stay of execution “for a crime for which he was initially sentenced to death more than 33 years ago”); *Johnson v. Bredesen*, 558 U.S. 1067, 1067 (2009) (evaluating claim by petitioner who had “been confined to a solitary cell, awaiting his execution for nearly 29 years”); *Thompson v. McNeil*, 556 U.S. 1114, 1115 (2009) (“As [petitioner] awaits execution, petitioner has endured especially severe conditions of confinement, spending up to 23 hours per day in isolation in a 6- by 9-foot cell The dehumanizing effects of such treatment are undeniable.”); *Smith v. Arizona*, 552 U.S. 985, 985 (2007) (Breyer, J., dissenting) (declining certiorari where petitioner argues “that the Federal Constitution’s prohibition against cruel and unusual punishments forbids his execution more than 30 years after he was initially convicted”); *Allen v. Ornoski*, 546 U.S. 1136, 1140 (2006) (Breyer, J., dissenting) (denying stay of execution of petitioner, who is “76 years old, is blind, suffers from diabetes, is confined to a wheelchair, and has been on death row for 23 years”); *Foster v. Florida*, 537 U.S. 990, 991 (2002) (denying certiorari where petitioner had “spent more than 27 years in prison

were denied by the Court, they often drew responses from Justice Stevens, Justice Breyer, or Justice Clarence Thomas, or some combination thereof.²⁵ Justice Stevens found merit in two of the petitions,²⁶ and emphasized that denial of certiorari “does not constitute a ruling on the merits” in two others.²⁷ Justice Breyer dissented to the denial of certiorari of eight petitions,²⁸ and joined

since his initial sentence of death”); *Knight v. Florida*, 528 U.S. 990, 994 (1999) (Breyer, J., dissenting) (considering the Eighth Amendment claim of petitioner sentenced to death nearly twenty-five years prior); *Elledge v. Florida*, 525 U.S. 944, 944 (1998) (evaluating petition for certiorari of prisoner who had been awaiting execution for over twenty-three years).

25. See cases cited *infra* note 28 (demonstrating the significant trend of Breyer dissenting to the denials of certiorari for these petitions and Thomas separately concurring with the denials).

26. See *Johnson v. Bredesen*, 558 U.S. 1067, 1067 (2009) (Stevens, J., respecting denial of certiorari) (noting that the petitioner “bears little, if any, responsibility for his delay”); *Thompson v. McNeil*, 556 U.S. 1114, 1114 (2009) (Stevens, J., respecting denial of certiorari) (observing that petitioner’s delay was longer than prior cases where Justice Stevens and Justice Breyer “noted that substantially delayed executions arguably violate the Eighth Amendment’s prohibition against cruel and unusual punishment”).

27. *Foster v. Florida*, 537 U.S. 990, 990 (2002) (Stevens, J., respecting denial of certiorari); *Knight v. Florida*, 528 U.S. 990, 990 (1999) (Stevens, J., respecting denial of certiorari).

28. See *Muhammad v. Florida*, 134 S. Ct. 894, 894 (2014) (Breyer, J., dissenting from denial of certiorari) (“I would grant the application for stay of execution and the petition for certiorari limited to the *Lackey* claim.”); *Valle v. Florida*, 132 S. Ct. 1, 1 (2011) (Breyer, J., dissenting from denial of certiorari) (“I have little doubt about the cruelty of so long a period of incarceration [over thirty-three years] under sentence of death.”); *Thompson*, 556 U.S. at 1119 (Breyer, J., dissenting from denial of certiorari) (“Here, petitioner has been on death row for 32 years, well over half his life. For the reasons we have set forth in the past and for many of those added in Justice Stevens’ separate statement, I would grant this petition.”); *Smith v. Arizona*, 552 U.S. 985, 985 (2007) (Breyer, J., dissenting from denial of certiorari) (arguing that a delay of execution for over thirty years is clearly “unusual” and “cruel”); *Allen v. Ornoski*, 546 U.S. 1136, 1136 (2006) (Breyer, J., dissenting from denial of certiorari) (stating that he would grant petitioner’s stay of execution because the petitioner “raises a significant question as to whether this execution would constitute ‘cruel and unusual punishment[t]’”); *Foster*, 537 U.S. at 991 (Breyer, J., dissenting from denial of certiorari) (“[A]s . . . I have previously pointed out, the combination of uncertainty in the execution and long delay is arguably ‘cruel.’ This Court has recognized that such a combination can inflict ‘horrible feelings’ and ‘an immense mental anxiety amounting to a great increase of the offender’s punishment.’”); *Knight*, 528 U.S. at 993 (Breyer, J., dissenting from denial of certiorari) (“Where a delay, measured in decades, reflects the State’s own failure to comply with the Constitution’s demands, the claim that time has

Justice Stevens in one other.²⁹ Justice Thomas wrote concurring memorandums to the denial of certiorari of four petitions.³⁰ The responses from these Justices to the denial of certiorari of *Lackey* claims comprise a spirited debate with Justices Breyer and Stevens arguing that execution following lengthy terms of death row incarceration violated the Eighth Amendment and Justice Thomas forcefully disagreeing.³¹

Leading capital punishment scholars Carol and Jordan Steiker have pondered the curious state of the battle over the *Lackey* claim.³² They asked, how could a claim be powerful enough to sustain the attention and commitment of two Supreme Court Justices for nearly two decades yet so unpersuasive as to garner the agreement of not a single lower court?³³ Steiker and Steiker answered that the most “obvious difficult[y]” with the

rendered the execution inhuman is a particularly strong one. I believe this Court should consider that claim now.”); *Elledge v. Florida*, 525 U.S. 944, 944 (1998) (Breyer, J., dissenting from denial of certiorari) (noting that “not only has [petitioner], in prison, faced the threat of death for nearly a generation, but he has experienced that delay because of the State’s own faulty procedures and not because of frivolous appeals on his own part”).

29. *Johnson*, 558 U.S. at 1067.

30. *See id.* at 1071 (stating that there is no constitutional support for this “novel” Eight Amendment argument); *Thompson*, 556 U.S. at 1117 (claiming that “[i]t makes ‘a mockery of our system of justice . . . for a convicted murderer, who, through his own interminable efforts of delay . . . has secured the almost-indefinite postponement of his sentence, to then claim that the almost-indefinite postponement renders his sentence unconstitutional.” (quoting *Turner v. Jabe*, 58 F.3d 924, 933 (4th Cir. 1995) (Luttig, J., concurring))); *Foster*, 537 U.S. at 990–91 (Thomas, J., concurring in denial of certiorari) (asserting that the Court’s constitutional jurisprudence had not been altered since he last wrote on this topic, and therefore, this Eighth Amendment argument still has no grounding in the Constitution); *Knight*, 528 U.S. at 992 (“Ironically, the neoteric Eighth Amendment claim proposed by Justice Breyer would further prolong collateral review by giving virtually every capital prisoner yet another ground on which to challenge and delay his execution.”).

31. *See sources cited supra* notes 26–30.

32. *See Steiker & Steiker, supra* note 10, at 681 (“What should we make of the repeated, unsuccessful efforts to bring the *Lackey* claim before the Court . . . ?”).

33. *See id.* (“The claim clearly has enough staying power to command the sustained attention of members of the Court, and yet has not been embraced by any lower courts . . .”).

Lackey claim is the prisoner fault argument.³⁴ They suggested two different types of solution.

The first type of solution is “focusing on delays wholly or mostly attributable to the state.”³⁵ Adopting this approach, *Jones v. Chappell*,³⁶ in July 2014, became the first federal decision recognizing a *Lackey* claim.³⁷ Finding excessive systemic delays between sentencing and execution, *Jones* ruled that California’s death penalty violated the Eighth Amendment’s prohibition against cruel and unusual punishment.³⁸ The court reasoned that among the hundreds placed on death row, the selection of the random few death row prisoners who would actually be executed (rather than die of old age) was “arbitrary.”³⁹ In addition, the decades-long delay “deprive[s the death penalty] of any deterrent or retributive effect it might once have had. Such an outcome is antithetical to any civilized notion of just punishment.”⁴⁰ Rejecting the prisoner fault argument, *Jones* concluded that the factual premise of the argument was “simply incorrect.”⁴¹ The court stated, “[t]hese delays—exceeding 25 years on average—are inherent to California’s dysfunctional death penalty system, not the result of individual inmates’ delay tactics, except perhaps in isolated cases.”⁴²

34. *See id.* at 682.

35. *Id.*

36. No. CV09-02158-CJC, 2014 WL 3567365 (C.D. Cal. July 16, 2014).

37. *See id.* at *14 (“Inordinate . . . delay . . . has resulted in a system that serves no penological purpose. Such a system is unconstitutional.”).

38. *See id.* at *1 (claiming that the systemic delays have “made [convictee’s] execution so unlikely that the death sentence carefully and deliberately imposed by the jury has been quietly transformed into one no rational jury or legislature could ever impose: *life in prison, with the remote possibility of death*”).

39. *See id.* at *9 (“The Eighth Amendment simply cannot 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.”).

40. *Id.*

41. *See id.* at *11 (remarking that the prisoner fault explanation does not stand to reason, “at least as to California’s administration of its death penalty system”).

42. *Id.* at *12.

In addition to *Jones*, focusing on delays attributable to the state is also the approach taken by most *Lackey* claimants, and, to some extent, by Justices Breyer and Stevens.⁴³ But apart from *Jones*, this approach has uniformly failed because of disagreements as to the attribution of delay.⁴⁴ Where Justices Breyer and Stevens and *Lackey* claimants attribute delay to the state, Justice Thomas and every lower court (except *Jones*) view the very same delay but attribute it to the defendant.⁴⁵ Thus, the problem with rejecting the prisoner fault argument on empirical grounds is that it is subject to disputes as to who—the prisoner or the state—was responsible for the delay in any given case.

Rather than on empirical grounds, Steiker and Steiker’s second type of solution is rejecting the prisoner fault argument in principle—“rejecting the notion that seeking enforcement of constitutional guarantees forfeits the right against excessively prolonged death-row incarceration.”⁴⁶ It is this second type of solution that is the focus of this Article. However, rejecting the

43. See, e.g., *Johnson v. Bredesen*, 558 U.S. 1067, 1069 (2009) (declaring the twenty-nine years since petitioner was sentenced to death “a lengthy delay due in no small part to the State’s malfeasance in this case”).

44. See, e.g., *Thompson v. McNeil*, 556 U.S. 1114, 1120 (2009) (Breyer, J., dissenting)

Justice Thomas suggests that petitioner cannot now challenge the constitutionality of the delay because much of that delay is his own fault—he caused it by choosing to challenge the sentence that the people of Florida deemed appropriate. . . . [T]he delay here resulted in significant part from constitutionally defective death penalty procedures for which petitioner was not responsible. In particular, the delay was partly caused by the sentencing judge’s failure to allow the presentation and jury consideration of nonstatutory mitigating circumstances, an approach which we have unanimously held constitutionally forbidden

45. Compare *Johnson*, 558 U.S. at 1067 (Stevens, J., joined by Breyer, J., respecting denial of certiorari) (contending that the petitioner “bears little, if any, responsibility for this delay” of over twenty-eight years), with *Johnson*, 558 U.S. at 1071 (Thomas, J., concurring in denial of certiorari) (characterizing the delay as “occasioned by his appeals”); compare *Knight v. Florida*, 528 U.S. 990, 993 (1999) (Breyer, J., dissenting from denial of certiorari) (noting that delays of nineteen and twenty-five years were largely due to “the State’s own failure to comply with the Constitution’s demands”), with *Knight*, 528 U.S. at 992 (Thomas, J., concurring in denial of certiorari) (referring to defendants’ use of “claims with which they may delay their executions”).

46. Steiker & Steiker, *supra* note 10, at 682.

prisoner fault argument in principle would seem to be a formidable task. First, the prisoner fault argument is enormously influential. It is the principal response by both Justice Thomas and the lower courts to the *Lackey* claim.⁴⁷ Many, if not nearly all, lower courts addressing *Lackey* claims reflexively deny them by invoking the prisoner fault argument.⁴⁸ Second, it enjoys an undeniable element of common sense appeal. If prisoners choose actions that cause delay, prisoners have in effect chosen delay and should be held responsible for the resulting delay.

We can begin to see a crack in this edifice of common sense by simply asking, what does prisoner fault have to do with the Eighth Amendment? Even if *Lackey* claimants may be said to be choosing delay, as the prisoner fault argument maintains, they are not choosing execution and decades of death row incarceration. Even if the delay is self-inflicted by the prisoners themselves, surely the decades of death row incarceration and execution are not self-inflicted, but rather state-imposed. The prisoner fault argument addresses delay per se, but the *Lackey* claim objects not to delay, but rather to the punishment of execution following lengthy periods of death row incarceration violating the Eighth Amendment.⁴⁹ That is, there is a gap

47. See *Jones*, 2014 WL 3567365, at *11 (identifying the prisoner fault argument as one of the two main arguments against the *Lackey* claim); Steiker & Steiker, *supra* note 10, at 682 (designating the prisoner fault argument as one of the most “obvious difficulties” for the *Lackey* claim).

48. See, e.g., *Stafford v. Ward*, 59 F.3d 1025, 1028 (10th Cir. 1995) (“Because Appellant chose to avail himself of [procedural challenges] . . . we reject Appellant’s claim that his execution after the lengthy proceedings in this case [fifteen years on death row] would implicate the Eighth Amendment.”) (emphasis added); *Booker v. McNeil*, No. 1:08cv143/RS, 2010 WL 3942866, at *38 n.21 (N.D. Fla. Oct. 5, 2010) (“[N]o federal or state courts have accepted [the prisoner’s claim] . . . especially where both parties bear responsibility for the long delay.” (quoting *Knight v. State*, 746 So. 2d 423, 437 (Fla. 1998))); *Duncan v. Carpenter*, No. 3:88-00992, 2014 WL 3905440, at *16 (M.D. Tenn. Aug. 11, 2014) (“[T]he delay . . . occasioned in large part by his own voluntary pursuit of state and federal remedies, does not entitle him to relief.”); *McKinney v. State*, 992 P.2d 144, 151 (Idaho 1999) (“Death row prisoners are not entitled to have their sentences commuted to life because of the delay caused by their own unsuccessful collateral attacks on their sentences.”) (emphasis added); see also *infra* Part II.D.

49. See *supra* text accompanying notes 16–18 (articulating the *Lackey* claim).

between the prisoner fault argument addressing delay, and both *Lackey* claims and the Eighth Amendment addressing punishment. Who is at fault for the delay does not alter the nature or character of the punishment that the prisoner receives. Thirty years of death row incarceration followed by execution is still just that—no more and no less—regardless of whether the prisoner or state is at fault for the delay. In short, prisoner fault for delay seems irrelevant to the Eighth Amendment’s concern with placing limits on state-imposed punishment. Given the ubiquity and apparent persuasiveness of the prisoner fault argument, surely one or more of the courts invoking it have supplied a supporting rationale or citation to well-grounded authority. Surprisingly, how or why prisoners’ choice and fault inoculates executions following upwards of thirty years or more of death row incarceration from Eighth Amendment violation is largely unexplained.⁵⁰

This Article undertakes the first comprehensive and sustained critical examination of the principal argument supporting the constitutionality of executions following lengthy periods of death row incarceration. It does not seek to establish that excessively delayed executions are unconstitutional. Rather, the focus is narrower. It merely seeks to establish that the principal argument supporting the constitutionality of excessively delayed executions—the prisoner fault argument—lacks an underlying rationale related to the concerns of the Eighth Amendment and thus should not foreclose *Lackey* claims. The Article contends that the prisoner fault argument should be rejected for two reasons. First, its proponents have failed to provide any explicit rationale or well-grounded precedential authority in support of it. Second, lacking such an explicit rationale, the Article proposes the two most obvious candidates for an underlying rationale: (i) analogizing to the analysis of fault attribution for delays in assessing claims of Sixth Amendment speedy trial right violations,⁵¹ and (ii) by choosing appellate and

50. See cases cited *infra* notes 137, 152, and 158 (serving as examples of pre-*Lackey* rulings which denied petitioners’ Eighth Amendment claims due to the prisoner fault argument, with little to no explanation as to why prisoner fault supposedly barred cruel and unusual punishment arguments).

51. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused

collateral review, rather than submitting to execution, prisoners waive their Eighth Amendment right against execution following lengthy terms of death row incarceration.⁵² This Article demonstrates that these proposed rationales are not only unpersuasive but also ultimately serve only to provide additional support for *Lackey* claims. Moreover, each proposed rationale presupposes and concedes the same right that Justice Thomas and the lower courts vehemently deny exists—the right against excessively delayed executions.⁵³

The remainder of this Article unfolds in the following parts. Part II traces the history of the prisoner fault argument. Attempting to identify the source or rationale of the argument, it begins by presenting the articulations of the argument by Justice Thomas.⁵⁴ Finding neither citation to well-grounded authority nor an underlying rationale, Part II next locates the first utterance of the argument, in 1960, and examines each subsequent articulation and rejection of the argument until the appearance of Justice Stevens’s *Lackey* Memorandum in 1995.⁵⁵ It then considers the views of Justices Breyer and Stevens as to the prisoner fault argument and canvasses the foreign and international cases they cite, some of which agree with, and some of which reject, the argument.⁵⁶ Finally, Part II chronicles the post-*Lackey* cases that uniformly applied the prisoner fault argument until July 2014, when a federal district court rejected

shall enjoy the right to a speedy . . . trial”); *infra* Part III.

52. See *infra* Part IV (providing further explanation of this argument).

53. See *Johnson v. Bredesen*, 558 U.S. 1067, 1072 (2009) (Thomas, J., concurring in denial of certiorari) (declaring “that the [*Lackey*] claim itself has no constitutional foundation”); *id.* (“[A] *Lackey* claim would fail no matter how it arrived.”); *Thompson v. McNeil*, 556 U.S. 1114, 1117 (2009) (Thomas, J., concurring in denial of certiorari) (“[The central issue is] whether the death-row inmate’s litigation strategy, which delays his execution, provides a justification for the Court to invent a new Eighth Amendment right. It does not.”); *Knight v. Florida*, 528 U.S. 990, 992 (1999) (Thomas, J., concurring in denial of certiorari) (“Consistency would seem to demand that those who accept our death penalty jurisprudence as a given also accept the lengthy delay between sentencing and execution as a necessary consequence.”); see also *infra* Parts II.B and D (discussing Justice Thomas’s arguments).

54. *Infra* Part II.A.

55. *Infra* Part II.B.

56. *Infra* Part II.C.

the argument not in principle, but on empirical grounds.⁵⁷ Part II concludes that while courts rejecting the prisoner fault argument have provided an underlying rationale for doing so relevant to the Eighth Amendment, courts utilizing the argument have not.⁵⁸

With an account of the prisoner fault argument still elusive, Parts III and IV present the two most obvious candidates for a possible rationale. Part III proposes analogizing to the Sixth Amendment speedy trial right.⁵⁹ The analogy is at least superficially attractive because of the obvious parallels between claims of delayed executions and claims of delayed trials.⁶⁰ After briefly explaining the speedy trial right and the Supreme Court's test for determining its violation, Part III explains how one aspect of that test—the extent to which fault for trial delays may be attributed to the defendant—closely mirrors the prisoner fault argument.⁶¹ Having finally located a seemingly plausible rationale for the prisoner fault argument, it examines more closely whether the analogy provides a persuasive rationale.⁶² After presenting three difficulties, Part III concludes that not only is the speedy trial right analogy unpersuasive as a rationale but also that it ultimately furnishes additional support for *Lackey* claims.

Part IV proposes waiver as a possible rationale for the prisoner fault argument.⁶³ That is, by choosing to pursue post-conviction review and the delay such review entails, prisoners waive their Eighth Amendment right against execution following decades of death row incarceration.⁶⁴ After explaining the waiver of constitutional rights in general,⁶⁵ Part IV discusses the extent of, and particular limitations on, waiver of the Eighth

57. *Infra* Part II.D.

58. *Infra* Part II.E.

59. See U.S. CONST. amend. VI. (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .”); *infra* Part III.

60. *Infra* Part III.A.

61. *Infra* Part III.B.

62. *Infra* Part III.C.

63. *Infra* Part IV.

64. *Infra* Part IV.

65. *Infra* Part IV.A.

Amendment.⁶⁶ Despite the wide consensus that waiver cannot transform a paradigmatically cruel and unusual punishment like torture into a humane and ordinary punishment, there is some Supreme Court authority that might allow waiver of Eighth Amendment rights regarding an arguably cruel and unusual punishment.⁶⁷ As a result, waiver is a seemingly plausible rationale for the prisoner fault argument.⁶⁸ Part IV presents six difficulties, however, and concludes that waiver is not only unpersuasive as a rationale, but also further supports recognition of *Lackey* claims.⁶⁹ This Article concludes that the principal argument supporting the constitutionality of excessively delayed executions—the prisoner fault argument—lacks both an explicit rationale from its proponents and any conceivable persuasive rationale.⁷⁰ Without a supporting rationale relevant to the concerns of the Eighth Amendment, prisoner fault for excessively delayed executions should be irrelevant in assessing *Lackey* claims.

II. History of Prisoner Fault Argument in *Lackey* Claims

This Part traces the history of the principal argument used to deny *Lackey* claims—prisoner fault for delay—in an attempt to identify its underlying rationale. Rather than starting at the beginning, it presents the pronouncements of this argument by its most important spokesman before proceeding more chronologically, canvassing articulations of the argument from the earliest cases to the latest. First, this Part presents Justice Thomas’s articulations of the argument and the authority that he cited in support of it.⁷¹ Second, finding little authority, this Part examines the first case to advance the argument and considers all

66. *Infra* Parts IV.B–C.

67. For more information, see *infra* Part IV.B.

68. *Infra* Part IV.B.

69. *Infra* Part IV.C.

70. *Infra* Part V.

71. *Infra* Part II.A. See cases cited *infra* notes 78–88 for Justice Thomas’s use of this argument.

subsequent pre-*Lackey* cases.⁷² Third, it discusses Justices Breyer and Stevens’s view of the argument in *Lackey*, as well as the foreign and international cases that *Lackey* cites.⁷³ Fourth, this Part surveys post-*Lackey* state and lower federal courts’ formulations of the argument.⁷⁴ It concludes that in addition to there being several state, foreign, and international courts that directly reject the prisoner fault argument, there is no well-grounded precedential authority or underlying rationale for the argument that the vast majority of American courts use to reject *Lackey* claims.⁷⁵

A. Justice Thomas’s Articulations of the Argument

Justice Thomas emphasized prisoners’ choice of and fault for execution delays in all four of his concurrences to the denial of certiorari of *Lackey* claims.⁷⁶ In *Knight v. Florida*,⁷⁷ Justice Thomas referred to the prisoner as “avail[ing] himself of the panoply of appellate and collateral procedures and then complain[ing] when his execution is delayed.”⁷⁸ In *Foster v. Florida*,⁷⁹ Justice Thomas observed that the “[p]etitioner could long ago have ended his ‘anxieties and uncertainties’ by submitting to what the people of Florida have deemed him to deserve: execution.”⁸⁰ Neither citation to authority nor explanation as to the relevance of prisoner fault accompanied these statements. In *Thompson v. McNeil*,⁸¹ Justice Thomas reiterated both of the above statements⁸² and noted that the “petitioner chose to challenge his

72. *Infra* Part II.B.

73. *Infra* Part II.C.

74. *Infra* Part II.D.

75. *Infra* Part II.E.

76. To review these cases, see *infra* notes 77–83.

77. 528 U.S. 990 (1999).

78. *Id.* at 990.

79. 537 U.S. 990 (2002).

80. *Id.* at 991 (quoting *id.* at 993 (Breyer, J., dissenting from denial of certiorari)).

81. 556 U.S. 1114 (2009).

82. See *id.* at 1116–17 (Thomas, J., concurring) (quoting *Knight* and *Foster* directly in order to establish the defendant’s fault in delaying execution).

death sentence.”⁸³ This time Justice Thomas did cite to some authority. Disagreeing with Justices Stevens and Breyer that “the subsequent delay caused by petitioner’s 32 years of litigation creates an Eighth Amendment problem,”⁸⁴ Justice Thomas quoted from a Fourth Circuit concurring opinion: “It makes ‘a mockery of our system of justice . . . for a convicted murderer, who, through his own interminable efforts of delay . . . has secured the almost-indefinite postponement of his sentence, to then claim that the almost-indefinite postponement renders his sentence unconstitutional.”⁸⁵ How a prisoner making a “mockery” inoculates execution following decades-long death row incarceration from Eighth Amendment scrutiny is unexplained, and the Fourth Circuit concurring opinion, on which Justice Thomas relied, neither explained the relevance nor cited any authority in support of its statement.⁸⁶ Finally, in *Johnson v. Bredesen*,⁸⁷ Justice Thomas reiterated the above statement from *Knight* without any citation to authority or explanation of its relevance to the Eighth Amendment.⁸⁸ Justice Thomas’s articulations of the prisoner fault argument neither cite to any well-grounded precedential authority nor offer an underlying rationale for why prisoner choice of and fault for delay is relevant under the Eighth Amendment.⁸⁹

B. Pre-Lackey Precedent

Written in 1960, *Chessman v. Dickson*⁹⁰ is perhaps the first case to utter the prisoner fault argument.⁹¹ In denying the

83. *Id.* at 1117.

84. *Id.*

85. *Id.* (quoting *Turner v. Jabe*, 58 F.3d 924, 933 (4th Cir. 1995)).

86. *See Turner*, 58 F.3d at 933 (Luttig, J., concurring) (asserting that petitioner’s Eighth Amendment claim was absurd and manipulative, without justification or further explanation).

87. 558 U.S. 1067 (2009).

88. *See id.* at 1071 (2009) (Thomas, J., concurring) (claiming that Justice Stevens’s “novel” Eighth Amendment argument has no constitutional basis).

89. *See id.* at 1072–73.

90. 275 F.2d 604 (9th Cir. 1960).

91. *See id.* at 608.

prisoner's claim of cruel and unusual punishment stemming from delay of over eleven years, the Ninth Circuit court declared, "I do not see how we can offer life (under a death sentence) as a prize for one who can stall the processes for a given number of years, especially when in the end it appears the prisoner never really had any good points."⁹² *Chessman* offered neither citation to authority nor explanation as to how a prisoner "stall[ing] the processes" necessarily bars an Eighth Amendment claim.⁹³

In contrast, the next two cases considering the issue treated the prisoner's choice and fault as irrelevant. In *People v. Anderson*⁹⁴ in 1972, the state argued "that these delays are acceptable because they often occur at the instance of the condemned prisoner."⁹⁵ Rejecting this argument, the California Supreme Court explained that "[a]n appellant's insistence on receiving the benefits of appellate review of the judgment condemning him to death does not render the lengthy period of impending execution any less torturous or exempt such cruelty from constitutional proscription."⁹⁶ In 1980, in *District Attorney for Suffolk District v. Watson*,⁹⁷ a dissenting opinion argued, without citation to authority or explanation, "[t]o the extent that a defendant resorts to those endless appellate procedures, he should not be heard to complain about the prolongation of his period of anxiety and agony over his possible execution."⁹⁸ Disagreeing, the majority opinion of the Supreme Judicial Court of Massachusetts replied,

The fact that the delay may be due to the defendant's insistence on exercising his appellate rights does not mitigate the severity of the impact on the condemned individual, and

92. *Id.* at 607. A subsequent case interprets this proposition as "distinguish[ing] between innocent delays and delays caused by a defendant's dilatory tactics." *Turner v. Jabe*, 58 F.3d 924, 928 (4th Cir. 1995).

93. *Chessman*, 275 F.2d at 607.

94. 493 P.2d 880 (Cal. 1972).

95. *Id.* at 895.

96. *Id.*

97. 411 N.E.2d 1274 (Mass. 1980).

98. *Id.* at 1302.

the right to pursue due process of law must not be set off against the right to be free from inhuman treatment.⁹⁹

In contrast to Justice Thomas and *Chessman*'s use of the prisoner fault argument,¹⁰⁰ both of the above cases rejecting the prisoner fault argument supplied a rationale related to the concerns of the Eighth Amendment—prisoner fault for delay is irrelevant under the Eighth Amendment because it fails to alter the nature or character of the punishment or consequences the prisoner has to endure during the delay.¹⁰¹

The remaining cases in the pre-*Lackey* era all advanced the prisoner fault argument. In 1986, in *Richmond v. Ricketts*,¹⁰² a federal district court rejected the prisoner's contention of lack of responsibility for the twelve-year delay.¹⁰³ The delay failed to violate the Eighth Amendment, the court explained, because it "was prompted by Richmond's request . . . to have his challenges heard by several courts. The fact that this review has taken a long time does not indicate that the delay is unwarranted."¹⁰⁴ The court, however, failed to explain why arguably cruel and unusual punishment that is "[warranted]" and "prompted" by the defendant necessarily forecloses Eighth Amendment scrutiny.¹⁰⁵ The only authority cited for this proposition is the Ninth Circuit case of *Chessman*, discussed above, which itself neither cited any authority nor provided any explanation as to why delay that is

99. *Id.* at 1283. Further explaining the irrelevance of the prisoner's choice, the court noted, "[I]t is often the very reluctance of society to impose the irrevocable sanction of death which mandates, 'even against the wishes of the criminal, that all legal avenues be explored before the execution is finally carried out.'" *Id.* (quoting *Furman v. Georgia*, 408 U.S. 238, 289 n.37 (1972) (Brennan, J., concurring)).

100. For Justice Thomas's use of the argument, see *supra* Part II.A. For *Chessman*'s use of the argument, see *supra* text accompanying notes 92–93.

101. See *infra* notes 144–149 and accompanying text.

102. 640 F. Supp. 767 (D. Ariz. 1986).

103. See *id.* at 803 (noting the procedural actions made by petitioner which resulted in the delay, including filing a petition for relief, requesting review by the Arizona Supreme Court, seeking relief in the United States Supreme Court, and filing a petition for a writ of habeas corpus).

104. *Id.*

105. See *id.* (concluding, without further explanation, that "Richmond has presented nothing to this court which would support the relief he seeks under this allegation").

the prisoner's choice or responsibility necessarily precluded Eighth Amendment violation.¹⁰⁶

On appeal, in *Richmond v. Lewis*,¹⁰⁷ in 1990, the Ninth Circuit affirmed the district court's denial of Richmond's Eighth Amendment claim.¹⁰⁸ In support of its use of the prisoner fault argument, *Richmond* offered *Chessman* and *Andrews v. Shulsen*¹⁰⁹ as "relevant, though not controlling, precedents."¹¹⁰ *Richmond* explained that the *Andrews* "court reasoned that to accept petitioner's argument would be 'a mockery of justice' given that the delay was attributable more to petitioner's actions [of challenging his death sentence] than to the state's."¹¹¹ But *Richmond* failed to explain how a purported "mockery of justice" foreclosed the Eighth Amendment.¹¹²

Andrews, however, did offer somewhat of a rationale. *Andrews* argued that "[t]he extensive and repeated review of petitioner's death sentence was sought by petitioner and is afforded by the Eighth and Fourteenth Amendments and by federal law. To accept petitioner's argument would create an irreconcilable conflict between constitutional guarantees and would be a mockery of justice."¹¹³ But this rationale is hardly persuasive. Apparently, the irreconcilable conflict would be the prisoner having both the right to challenge his death sentence and the right to be free from cruel and unusual punishment

106. See *id.* For a brief discussion of *Chessman*, see *supra* text accompanying notes 91–93.

107. 948 F.2d 1473 (9th Cir. 1990).

108. See *id.* at 1492 (citing *Chessman* to support its assertion that delays caused by the petitioner's constitutional challenges are not necessarily unwarranted).

109. 600 F. Supp. 408 (D. Utah 1984).

110. *Richmond*, 948 F.2d at 1491.

111. *Id.* (quoting *Andrews*, 600 F. Supp. at 431). The prisoner in *Andrews* was not making a *Lackey* claim, but instead argued that the repeated setting and staying of execution dates violated the Eighth Amendment. *Andrews*, 600 F. Supp. at 431.

112. See *Richmond v. Lewis*, 948 F.2d 1473, 1491 (9th Cir. 1990) ("We know of no decision by either the United States Supreme Court or this circuit that has held that the accumulation of time a defendant spends on death row during the prosecution of his appeals can accrue into an independent constitutional violation, and *Richmond* has cited no such decision.").

113. *Andrews*, 600 F. Supp. at 431.

where the former creates the conditions for a violation of the latter. The conflict is hardly irreconcilable, however. There is no conflict at all if either the former is done in a timely manner or a death sentence is commuted to a life sentence (capital punishment is not constitutionally obligatory).

Two Seventh Circuit cases decided less than a week prior to *Lackey* also invoked the prisoner fault argument.¹¹⁴ In 1995, *Free v. Peters*¹¹⁵ denied a *Lackey* claim because “any inordinate delay in the execution of Free’s sentence is directly attributable to his own conduct.”¹¹⁶ The court offered neither citation to authority nor any explanation as to the relevance of the court’s argument to the Eighth Amendment.¹¹⁷ Decided the same day, *Williams v. Chrans*¹¹⁸ denied a *Lackey* claim based on the reasoning, such as there is, of *Free*.¹¹⁹

C. Views of Justices Breyer and Stevens

In *Lackey*, Justice Stevens acknowledged that, at least for some types of prisoner actions, prisoner responsibility for delay was arguably relevant: “There *may* well be constitutional significance to the reasons for the various delays that have occurred in petitioner’s case.”¹²⁰ He noted that “[i]t *may* be appropriate to distinguish” among the following three reasons for delay:

- (a) a petitioner’s abuse of the legal system by . . . repetitive, frivolous filings;
- (b) a petitioner’s legitimate exercise of the right to review; and
- (c) negligence or deliberate action by the

114. See cases cited *infra* notes 115 and 118 and accompanying text (providing citations to these cases).

115. 50 F.3d 1362 (7th Cir. 1995).

116. *Id.* at 1362.

117. See *id.* (concluding that “[t]he circumstances of this case are clearly distinguishable from *Lackey*”).

118. 50 F.3d 1363 (7th Cir. 1995).

119. See *id.* at 1364 (“[W]e are bound by the doctrines of stare decisis and precedent to the rule established by the panel in *Free*.” (citing *Free*, 50 F.3d at 1362)).

120. 514 U.S. 1045, 1047 (1995) (Stevens, J., respecting denial of certiorari) (emphasis added).

State. Thus, though English cases indicate that the prisoner should not be held responsible for delays occurring in the latter two categories, it is at least *arguable* that some portion of the time that has elapsed since this petitioner was first sentenced to death in 1978 should be excluded from the calculus.¹²¹

Notice that Justice Stevens employed three qualifiers in the above quoted language (the three italicized words).¹²² He did not state that prisoner fault suffices to bar a *Lackey* claim; equally, Justice Stevens did not state that prisoner fault is irrelevant.¹²³ His precise view is unclear. And Justice Stevens failed to explain why any types of prisoner fault might be relevant to the Eighth Amendment.¹²⁴ Although in his subsequent memorandums respecting denial of certiorari of *Lackey* claims Justice Stevens did stress that the prisoners were not at fault, or not entirely at fault, for the delays, he never returned to the issue of whether prisoner fault is relevant in principle.¹²⁵

Perhaps Justice Stevens conceded that at least some types of prisoner fault “may” be and “arguably” are relevant to acknowledge that some English cases assumed its relevance.¹²⁶ In the 1993 case, *Pratt v. Attorney General of Jamaica*,¹²⁷ the Judicial Committee of the Privy Council of the British House of Lords, the highest court in England and the highest court of appeal for many Commonwealth countries, found that a fourteen-year delay was “inhuman or degrading punishment or treatment”

121. *Id.* (emphasis added) (internal citations omitted).

122. *See supra* text accompanying notes 120–121.

123. *See Lackey v. Texas*, 514 U.S. 1045, 1047 (1995) (mentioning prisoner’s abuse of the judicial system as a possible factor to consider).

124. *See id.*

125. *See Johnson v. Bredesen*, 558 U.S. 1067, 1067 (2009) (“[Petitioner] bears little, if any, responsibility for this delay.”); *Thompson v. McNeil*, 556 U.S. 1114, 1116 (2008) (“[D]elays have multiple causes, including ‘the States’ failure to apply constitutionally sufficient procedures at the time of initial [conviction or] sentencing.” (quoting *Knight v. Florida*, 528 U.S. 990, 998 (1999) (Breyer, J., dissenting from denial of certiorari))).

126. *See Lackey*, 514 U.S. at 1047 (acknowledging the possible importance of reasons for delay).

127. [1994] 2 A.C. 1 (P.C.) (en banc) (appeal taken from Jam.).

in violation of the Jamaican constitution.¹²⁸ Some portions of the opinion suggested that delay is entirely the responsibility of the state:

[A] state that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it.¹²⁹

But another portion of the opinion found that prisoners should be responsible for frivolous challenges: “If delay is due entirely to the fault of the accused such as . . . frivolous and time wasting resort to legal procedures which amount to an abuse of process the defendant cannot be allowed to take advantage of the delay”¹³⁰ But the court failed to explain how this type of prisoner fault transforms “inhuman or degrading punishment or treatment” into acceptable treatment.¹³¹

Pratt surveyed other precedents regarding responsibility for delay.¹³² Two previous Privy Council decisions found that the delays were the prisoner’s responsibility.¹³³ In *Abbott v. Attorney-General of Trinidad and Tobago*,¹³⁴ the Privy Council ruled that the prisoner “cannot complain about the delay totalling three years . . . caused by his own action in appealing against his conviction or about the delay totalling two years . . . caused by his own action in appealing against the sentence.”¹³⁵ The Privy Council in *Riley v. Attorney-General of Jamaica*¹³⁶ agreed: “Apart

128. *See id.* at 33–36 (P.C. 1993) (“To execute these men now after holding them in custody in an agony of suspense for so many years would be inhuman punishment within the meaning of section 17(1) [of the Jamaican Constitution].”).

129. *Id.* at 33.

130. *Id.* at 29–30.

131. *See id.*

132. *See id.* at 3 (discussing other cases involving responsibility for delay).

133. *See id.* at 30–31 (citing two other Privy Council decisions finding a prisoner responsible for delays).

134. [1979] 1 W.L.R. 1342 (P.C.) (appeal taken from Trin. & Tobago).

135. *Id.* at 1345.

136. [1983] 1 A.C. 719 (P.C.) (appeal taken from Jam.).

from the delays necessarily occasioned by the appellate procedures pursued by the appellant (of which it could hardly lie in any applicant's mouth to complain)"¹³⁷ A Canadian Supreme Court case, *Kindler v. Canada*,¹³⁸ similarly found delay to be the prisoner's responsibility.¹³⁹ Noting that "a defendant is never forced to undergo the full appeal procedure," the court observed, "it would be ironic if delay caused by the appellant's taking advantage of the full and generous avenue of the appeals available to him should be viewed as a violation of fundamental justice."¹⁴⁰ But the court failed to explain how the absence of force and the presence of irony were relevant.¹⁴¹

Other authorities cited by *Pratt* found the cause of the delay irrelevant because it did not alter the consequences for the prisoner.¹⁴² In *Vatheeswaran v. State of Tamil Nadu*,¹⁴³ the Indian Supreme Court stated, "[w]e think that the cause of the delay is immaterial when the sentence is death. Be the cause for the delay, the time necessary for appeal . . . or some other cause for which the accused himself may be responsible, it would not alter the dehumanizing character of the delay."¹⁴⁴ In *Soering v. United Kingdom*,¹⁴⁵ the European Court of Human Rights considered whether the extradition, by the United Kingdom, of a West German citizen to Virginia for a capital offense would subject the extraditee to "torture or to inhuman or degrading punishment or treatment" in violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁴⁶ The United Kingdom invoked the prisoner fault

137. *Id.* at 724.

138. [1991] 68 C.C.C. (3d) 1 (S.C.C.).

139. *See id.* at 15.

140. *Id.*

141. *See id.*

142. *See Pratt v. Attorney-General of Jam.*, [1994] 2 A.C. 1, 32 (P.C.) (en banc) (appeal taken from Jam.) (citing other cases that refused to recognize the cause of the delay as relevant).

143. [1983] 2 S.C.R. 348 (India).

144. *Id.* at 353. The Indian "court held that delay exceeding two years . . . should be sufficient" to render a subsequent execution unconstitutional. *Pratt*, [1994] 2 A.C. at 32.

145. 11 Eur. Ct. H.R. 439 (1989).

146. *See id.* at 439.

argument: “[I]nsofar as the delays exist because of the availability of avenues of appeal coupled with an intentional tactic of delay,” they do not violate the Convention.¹⁴⁷ Disagreeing and finding that extradition would violate the Convention because of the likely prolonged stay on death row of six to eight years, the court explained as follows:

This length of time awaiting death is, as . . . the United Kingdom Government noted, in a sense largely of the prisoner’s own making in that he takes advantage of all avenues of appeal Nevertheless . . . it is equally part of human nature that the person will cling to life by exploiting those safeguards to the full. However well-intentioned and even potentially beneficial is the provision of the complex of post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many years the conditions on death row¹⁴⁸

Significantly, not only did *Vatheeswaran* and *Soering* directly reject the prisoner fault argument, but also they, unlike courts advancing the argument, did supply a relevant rationale.¹⁴⁹ It is essentially the same rationale as the two state courts (*Anderson* and *Watson*) rejecting the prisoner fault argument—prisoner fault for delay is irrelevant because it does not change the nature or character of the torturous consequences for the prisoner.¹⁵⁰ If the punishment of or consequences for the prisoner are cruel and unusual, no amount of prisoner choice and fault can change that.

Justice Stevens’s acknowledgment in *Lackey* that prisoner fault may be or arguably is relevant cannot be attributed to Justice Breyer.¹⁵¹ Justice Breyer did not fully join Justice Stevens’s memorandum but merely stated that he “agrees with Justice Stevens that the issue [*Lackey* claims] is an important

147. *See id.* at 493.

148. *Id.* at 475.

149. *See supra* text accompanying notes 144 and 148 (citing cases that disregard the cause of delay in finding it inhumane).

150. *See supra* text accompanying notes 96 and 99 (noting the disagreement among courts regarding inhuman treatment as a result of delay caused by a prisoner’s exhaustion of the appellate process).

151. *See supra* text accompanying notes 120–126 (discussing Justice Stevens’s opinion in *Lackey*).

undecided one.”¹⁵² And like Justice Stevens, Justice Breyer never clearly states a view as to the relevance of prisoner fault in principle. But in *Valle v. Florida*,¹⁵³ Justice Breyer tantalizingly hints that prisoner fault may be irrelevant in principle:

It might be argued that Valle, not the State, is responsible for the long delay. But Valle replies that more than two decades of delay reflect the State’s failure to provide the kind of trial and penalty procedures that the law requires. *Regardless*, one cannot realistically expect a defendant condemned to death to refrain from fighting for his life by seeking to use whatever procedures the law allows.¹⁵⁴

At the risk of over interpretation, Justice Breyer may be arguing that “regardless” of whether the prisoner or the state is responsible for the delay, the prisoner cannot be faulted for the delay in the sense that it should not be a basis to deny his claim.¹⁵⁵ Though not entirely clear, Justice Breyer may be suggesting that prisoner fault is irrelevant.

D. Post-Lackey Precedent

Perhaps the most influential post-*Lackey* federal circuit court case is *McKenzie v. Day*.¹⁵⁶ In denying the prisoner’s claim that execution following a twenty-year delay violates the Eighth Amendment, *McKenzie* stated that “[t]he delay has been caused by the fact that McKenzie has availed himself of [opportunities to challenge his sentence].”¹⁵⁷ *McKenzie* emphasized that delay is the choice of the prisoner:

152. *Lackey v. Texas*, 514 U.S. 1045, 1047 (1995) (respecting denial of certiorari).

153. 132 S. Ct. 1 (2011).

154. *Id.* at 2 (emphasis added).

155. *See id.*

156. 57 F.3d 1461 (9th Cir. 1995); *see also* Kathleen M. Flynn, *The “Agony of Suspense”: How Protracted Death Row Confinement Gives Rise to an Eighth Amendment Claim of Cruel and Unusual Punishment*, 54 WASH. & LEE L. REV. 291, 293 (1997) (citing *McKenzie v. Day* as an important decision).

157. *McKenzie*, 132 S. Ct. at 1466–67.

A number of death row inmates have refused to avail themselves of avenues of review precisely to avoid this ordeal [of decades on death row]. This option is available to anyone sentenced to die, and to the extent petitioners choose to delay execution in the hope of obtaining relief, that is a choice they make for themselves.¹⁵⁸

Neither citation to authority nor explanation of relevance to the Eighth Amendment accompanied the above statements.¹⁵⁹ As the dissent observed, “However this issue of fact [whether the state or prisoner is responsible for the delay] is eventually decided (if it ever has to be decided), it in no way throws into doubt the viability of McKenzie’s Eighth Amendment claim.”¹⁶⁰

Numerous other federal circuit court cases have denied *Lackey* claims by invoking the prisoner fault argument.¹⁶¹ The cases either asserted this argument with no citation to authority, no argument supporting its relevance under the Eighth Amendment, or by citation to one of the cases discussed above, which, in turn, failed to explain the relevance of this argument

158. *Id.* at 1470 n.21 (citations omitted).

159. *See supra* notes 157–158.

160. *McKenzie*, 57 F.3d at 1486.

161. *See, e.g.*, *Allen v. Ornoski*, 435 F.3d 946, 957 n.10 (9th Cir. 2006) (distinguishing the prisoner’s claim from other cases “where much of the delay had been due to the State’s own errors”); *Chambers v. Bowersox*, 157 F.3d 560, 570 (8th Cir. 1998) (“Delay has come about because Chambers, of course with justification, has contested the judgments against him, and, on two occasions, has done so successfully.”); *White v. Johnson*, 79 F.3d 432, 439 (5th Cir. 1996) (“White has had the choice of seeking further review . . . or avoiding further delay of his execution by not petitioning for further review”); *Stafford v. Ward*, 59 F.3d 1025, 1029 n.5 (10th Cir. 1995) (“[B]ecause Appellant chose to avail himself of stays to pursue these avenues of review, they may not be used to support an Eighth Amendment claim.”); *Turner v. Jabe*, 58 F.3d 924, 933 (4th Cir. 1995) (Luttig, J., concurring) (“The delay of which he [the prisoner] now complains is a direct consequence of his own litigation strategy”); *Fearance v. Scott*, 56 F.3d 633, 639 (5th Cir. 1995) (“Fearance was not the victim of a Bleak House-like procedural system hopelessly bogged down; at every turn, he . . . sought extensions of time, hearings and reconsiderations.”); *Porter v. Singletary*, 49 F.3d 1483, 1485 (11th Cir. 1995) (“We note that Porter has proffered no evidence to establish that delays in his case have been attributable to negligence or deliberate action of the state.” (citations omitted)).

under the Eighth Amendment.¹⁶² The same applies to federal district court cases¹⁶³ and state cases¹⁶⁴ rejecting *Lackey* claims.

As discussed above, the lone federal case to recognize a *Lackey* claim, *Jones v. Chappell*, declined to directly address the relevance of prisoner fault in principle.¹⁶⁵ Instead, it treated the

162. See *supra* note 161 and *infra* notes 163–164.

163. See, e.g., *Booker v. McNeil*, No. 1:08cv143/RS, 2010 WL 3942866, at *38 n.21 (N.D. Fla. Oct. 5, 2010) (“[N]o federal or state courts have accepted [the prisoner’s claim] . . . especially where both parties bear responsibility for the long delay.”); *Hairston v. Paskett*, No. CV-00-303-S-BLW, 2008 WL 3874614, at *8 (D. Idaho Aug. 15, 2008) (“[P]rolonged incarceration under a sentence of death does not offend the Eighth Amendment, particularly when the delay results from prisoners unsuccessful pursuit of collateral relief and not from the State’s dilatory tactics.”); *Delvecchio v. Illinois*, No. 95C6637, 1995 WL 688675, at *8 (N.D. Ill. Nov. 17, 1995) (“Petitioner has extended the time . . . of his execution and therefore, any additional punishment caused by the delay is attributable to the petitioner.”).

164. See, e.g., *State v. Schackart*, 947 P.2d 315, 336 (Ariz. 1997) (“[D]efendant’s claim that the state is solely responsible for the delays in this case is inaccurate.”); *People v. Hill*, 839 P.2d 984, 1017 (Cal. 1992) (“Defendant, however, does not—and in good faith cannot—allege even the slightest undue delay *by the state* in this case.”); *Valle v. Florida*, 70 So. 3d 530, 552 (Fla. 2011) (“Valle ‘cannot now contend that his punishment has been illegally prolonged because the delay in carrying out his sentence is in large part due to his own actions in challenging his convictions[s] and sentence.’” (quoting *Tompkins v. State*, 994 So. 2d 1072, 1085 (Fla. 2008))); *McKinney v. State*, 992 P.2d 144, 151 (Idaho 1999) (“Death row prisoners are not entitled to have their sentences commuted to life because of the delay caused by their own unsuccessful collateral attacks on their sentences.”); *Bieghler v. State*, 839 N.E.2d 691, 697 (Ind. 2005) (“[T]he time between his conviction and the approaching execution flows from his having availed himself of the appeals process.”); *State v. Sparks*, 68 So. 3d 435, 492 (La. 2011) (“Much of the delay in the direct appeal is clearly attributable to the defendant. . . . Thus his argument contending the length of time on death row violates the Eighth Amendment rings hollow.”); *Jordan v. State*, 786 So. 2d 987, 1028 (Miss. 2001) (“[T]he Constitution would not protect a defendant who availed himself of the ‘panoply of appellate and collateral procedures’ and then claimed that his execution had been long delayed.” (quoting *Knight v. Florida*, 528 U.S. 990, 990 (1999) (Thomas, J., concurring in denial of certiorari))); *State v. Smith*, 931 P.2d 1272, 1288 (Mont. 1996) (noting that defendant “has availed himself [of the review process] . . . which has resulted in the delay and the multiple sentencing hearings in this case”); *State v. Moore*, 591 N.W.2d 86, 94 (Neb. 1999) (“The delay in carrying out the sentence of death has been caused by the fact that Moore has availed himself of [the review process]”); *State v. Austin*, 87 S.W.3d 447, 486 (Tenn. 2002) (“As in most cases, the delay in the instant case was caused in large part by numerous appeals and collateral attacks lodged by the Appellant.”).

165. See *Jones v. Chappell*, No. CV09-02158-CJC, 2014 WL 3567365, *11–13

issue empirically by “find[ing] that much of the delay in California’s post-conviction process is created by the State itself, not by inmates’ own interminable efforts to delay.”¹⁶⁶ And regarding the case at bar, the court noted that “there is no evidence of frivolous filings or unreasonable delay caused by” the prisoner.¹⁶⁷

E. Conclusion

Based somewhat on Justice Stevens’s typology of reasons for delay,¹⁶⁸ there are three principal positions courts take as to the relevance of the reason or party at fault for delay. First, only where the delay is largely or entirely due to negligence or deliberate delay by the state should a *Lackey* claim possibly be recognized.¹⁶⁹ This seems to be the position, in principle, of courts denying *Lackey* claims, but as an empirical matter, such courts invariably fail to find negligence or deliberate delay by the state.¹⁷⁰ Second, only in cases where the delay is largely due to the prisoner frivolously employing legal process to intentionally delay should a *Lackey* claim be foreclosed.¹⁷¹ This is the position of some cases recognizing *Lackey* claims, for example *Pratt*.¹⁷² Third, the reason for the delay is immaterial.¹⁷³ This is the position of some courts recognizing *Lackey* claims, for example,

(C.D. Cal. July 16, 2014) (highlighting that California’s application of its death penalty system does not assume that the inmate causes the delay).

166. *Id.* at *12.

167. *Id.* at *12 n.20.

168. *See supra* text accompanying note 121 (listing three reasons for delay that Justice Stevens identifies as potentially important).

169. *See Lackey v. Texas*, 514 U.S. 1045, 1047 (1995).

170. *See* sources cited *supra* notes 45, 161–164 (comparing cases that attribute delay to the inefficacy of the state’s judicial process with cases that view the same delay as attributable to the defendant and implement the prisoner fault argument).

171. *See Lackey*, 514 U.S. at 1047 (noting that filing repetitive, frivolous claims constitutes an abuse of the legal system).

172. *See supra* text accompanying note 130 (emphasizing that courts hold prisoners responsible for frivolous challenges).

173. *See supra* text accompanying note 144 (describing delay as “dehumanizing” regardless of its cause).

Anderson, Watson, Vatheeswaran, and Soering.¹⁷⁴ Only courts taking the third position have been able to muster a rationale relevant to the concerns of the Eighth Amendment's prohibition against cruel and unusual punishment: regardless of the source of or fault for the delay, the nature and character of the punishment of or torturous consequences for the prisoner remains the same.¹⁷⁵

Perhaps further evidencing the lack of a principled rationale, the first two positions face some difficult questions. The question that those taking either of the first two positions—the cause of the delay is relevant—have failed to answer is how does prisoner fault transform what otherwise would be cruel and unusual punishment into humane and ordinary punishment? The questions that those taking the second position—prisoner fault is relevant depending on whether the use of legal process was legitimate or frivolous—have failed to answer are as follows: How does execution following decades of incarceration on death row change from cruel and unusual to humane and ordinary by changing the classification of a prisoner's use of legal process from legitimate to frivolous? Is it plausible to say that whether a

174. See *supra* text accompanying notes 96, 99, 144, and 148 (describing the delay as torturous and inhumane whether or not the prisoner contributes to it).

175. See *supra* text accompanying notes 96, 99, 144, and 148 (noting that the cause of the delay does not change the fact that the delay results in inhumane treatment of death row inmates). One type of prisoner action, however, may both increase delay *and* change the nature and character of the punishment or consequences the prisoner receives during the delay—escape from death row. Because the prisoner is suffering from neither punishment nor torturous consequences while away from death row, delay caused by that type of prisoner fault might be relevant even under the third position. Thus, the more precise articulation of the third position might be that prisoner fault is irrelevant where it does not alter the nature and character of the punishment of or torturous consequences for the prisoner during the delay. Because so few death row prisoners escape, this consideration is often overlooked and, as a practical matter, may not be significant. Nonetheless, the prison escape situation does underscore that the better and more precise understanding of the *Lackey* claim is not that the Eighth Amendment's prohibition against cruel and unusual punishment is violated by an excessively delayed execution. Rather, it is violated by execution following a sufficiently lengthy period of death row incarceration. Expressing the right violated as a right to a timely execution or as a right against excessively delayed execution is merely a short-cut expression of the right that reflects the infrequency of death row escapes.

prisoner deserves execution turns on whether or not his legal filings are “repetitive”?¹⁷⁶ These questions are difficult to answer for those finding cause of delay relevant (the first two positions) because cause of delay seems unrelated to Eighth Amendment concerns. The relevance of the cause of the delay seems procedural-based and inadequate to address the substantive concerns of the Eighth Amendment prohibition against cruel and unusual punishment.

While their position is unclear, to the extent that Justices Breyer and Stevens, and the *Jones* court, do find at least some types of prisoner fault to be relevant, the above questions are even more difficult to answer given their support of *Lackey* claims. Justices Breyer and Stevens powerfully argue that “the penological justifications for the death penalty [retribution and deterrence] diminish as the delay lengthens.”¹⁷⁷ *Jones* agrees.¹⁷⁸ Does prisoner fault affect this relationship between delay and the penological justifications? It is difficult to see how it could. If prisoner fault cannot alter this relationship, then perhaps prisoner fault should be irrelevant. But if at least some types of prisoner conduct are sufficiently relevant to bar *Lackey* claims, would that mean that the penological justifications for the death penalty *increase* as a prisoner’s filings become increasingly repetitive? To avoid that absurdity, perhaps as a prisoner’s filings become increasingly repetitive execution becomes increasingly constitutional *despite* the diminution of the penological justifications for execution. But that is no less absurd. To avoid

176. See *Lackey v. Texas*, 514 U.S. 1045, 1047 (1995) (Stevens, J., respecting denial of certiorari) (describing “repetitive, frivolous filings” by defendant as an abuse of the judicial system).

177. See *Johnson v. Bredesen*, 558 U.S. 1067, 1067 (2009) (Stevens, J., joined by Breyer, J., respecting denial of certiorari); accord *Knight v. Florida*, 528 U.S. 990, 995 (1999) (Breyer, J., dissenting from denial of certiorari) (“[T]he longer the delay, the weaker the justification for imposing the death penalty in terms of punishment’s basic retributive or deterrent purposes.”).

178. See *Jones v. Chappell*, No. CV09-02158-CJC, 2014 WL 3567365, at *10 (C.D. Cal. July 16, 2014) (contending that “long delays preceding execution frustrate whatever deterrent effect the death penalty may have”); *id.* (citing Lewis Powell, *Capital Punishment*, 102 HARV. L. REV. 1035, 1041 (1989) (“The retributive value of the death penalty is diminished as imposition of sentence becomes ever farther removed from the time of the offense.”)).

these absurdities, perhaps prisoner fault should be irrelevant to the assessment of *Lackey* claims.

III. Analogy to Sixth Amendment Speedy Trial Right

Tracing the history of the prisoner fault argument in Part II revealed neither the support of well-grounded precedential authority nor a persuasive underlying rationale related to the concerns of the Eighth Amendment prohibition against cruel and unusual punishment. Moreover, the courts rejecting the argument and declaring prisoner fault irrelevant do supply a rationale related to Eighth Amendment concerns.¹⁷⁹ With a rationale for the prisoner fault argument still elusive, Parts III and IV advance the two most obvious possible candidates.

This Part proposes analogizing to the Sixth Amendment right to a speedy trial. The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial.”¹⁸⁰ This “fundamental” right applies to states as well through the Due Process clause of the Fourteenth Amendment.¹⁸¹ The speedy trial right protects against delays between accusation (or the filing of formal criminal charges) and the commencement of a criminal trial.¹⁸² Because reversing and remanding for a new trial would only exacerbate already existing delay, the “only possible remedy” for a violation of this right is dismissal of the indictment or charges with prejudice.¹⁸³ The Due Process clause of the Fifth and Fourteenth Amendments extends

179. See *supra* Part II.E.

180. U.S. CONST. amend. VI.

181. See *Klopfer v. North Carolina*, 386 U.S. 213, 222–23 (1967) (holding that the Fourteenth Amendment enforces the Sixth Amendment against the States).

182. See, e.g., *United States v. Marion*, 404 U.S. 307, 313 (1971) (explaining that the speedy trial right attaches “when a criminal prosecution has begun and extends only to those . . . who have been ‘accused’ in the course of that prosecution”); *United States v. Hills*, 618 F.3d 619, 629 (7th Cir. 2010) (“The constitutional right to a speedy trial is triggered when an indictment is returned against a defendant.”).

183. See *Strunk v. United States*, 412 U.S. 434, 440 (1973); *Barker v. Wingo*, 407 U.S. 514, 522 (1972).

this right of expeditious process beyond the commencement of the trial to at least the direct appeal stage.¹⁸⁴ It also extends to delays in sentencing¹⁸⁵ and thus could possibly extend to delays between sentencing and execution.

One might think that the analogy is less helpful to courts rejecting *Lackey* claims and more helpful to *Lackey* claimants. A *Lackey* claimant could argue, based on the analogy, that decades-long stays on death row violate the prisoner's right to an expeditious execution. In fact, some death row prisoners have made exactly this claim, both in conjunction with an Eighth Amendment *Lackey* claim¹⁸⁶ and without.¹⁸⁷ Commentators have also argued that decades-long stays on death row implicate and may violate the speedy trial, or related due process, right.¹⁸⁸

184. See *United States v. Loud Hawk*, 474 U.S. 302, 312 (1986) (noting that “safeguards [of the Sixth Amendment’s guarantee of a speedy trial] may be as important to the accused when the delay is occasioned by an unduly long appellate process as when the delay is caused by . . . continuances in the date of the trial”); see generally Marc M. Arkin, *Speedy Criminal Appeal: A Right Without a Remedy*, 74 MINN. L. REV. 437 (1990) (noting the prevalence of delays during criminal appeals and discussing possible remedies).

185. See *Pollard v. United States*, 352 U.S. 354, 357 (1957) (regarding delays between trial and sentencing); *United States v. Thomas*, 167 F.3d 299, 301 (6th Cir. 1999) (regarding delays between appellate court decision and resentencing hearing).

186. See, e.g., *State v. Sparks*, 68 So. 3d 435, 491 (La. 2011) (“[Prisoner’s] argument has two components. First . . . executing him after twenty-three years on death row constitutes cruel and unusual punishment. Second . . . the delay violates his right to due process and a speedy trial.”).

187. See, e.g., *State v. Azania*, 865 N.E.2d 994, 998 (Ind. 2007) (“[Prisoner] says he makes no Eighth Amendment or ‘*Lackey*’ claim in this appeal. He contends instead that the delay in his case has violated the Speedy Trial Clause of the Sixth Amendment and Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.”).

188. See Dwight Aarons, *Getting Out of this Mess: Steps Toward Addressing and Avoiding Inordinate Delay in Capital Cases*, 89 J. CRIM. L. & CRIMINOLOGY 1, 40 (1998) (noting that the *Lackey* claim “is analogous to a claim based on the Sixth Amendment right to a speedy trial or to the due process right to a speedy criminal appeal”); Dwight Aarons, *Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?*, 29 SETON HALL L. REV. 147, 207 (1998) [hereinafter Aarons, *Inordinate Delay*] (considering the applicability of the analysis used to assess speedy trial right violation claims to *Lackey* claims); Jeremy Root, Note, *Cruel and Unusual Punishment: A Reconsideration of the Lackey Claim*, 27 N.Y.U. REV. L. & SOC. CHANGE 281, 321 (2001) (“The policies supporting the Speedy Trial Clause of the Sixth

The analogy, however, may also supply a rationale for the prisoner fault argument. Lying within the analysis used to assess claims of speedy trial right violations is a doctrine that if not the source of the prisoner fault argument is closely related. The doctrine maintains that delays in the commencement of trial caused by the legal processes that a defendant chooses to pursue—pretrial motions, pretrial evidentiary hearings, etc.—are attributed to the defendant, not the state, and do not count toward whatever period of delay suffices to establish a speedy trial right violation.¹⁸⁹ Applying this doctrine of speedy trial right analysis to the *Lackey* claim context generates the prisoner fault argument: execution delays caused by the prisoner’s pursuit of appellate and collateral review are attributed to the prisoner, not the state, and do not contribute to the imposition of a cruel and unusual punishment violative of the Eighth Amendment.

This Part contains three subparts. First, it presents the speedy trial right analysis propounded by the Supreme Court and applied by the lower courts.¹⁹⁰ Second, it demonstrates how an aspect of that analysis may support the prisoner fault argument and assesses the extent to which the speedy trial right analogy is helpful to courts rejecting *Lackey* claims.¹⁹¹ Third, it demonstrates some difficulties with the analogy and concludes that the analogy ultimately provides more support to *Lackey* claims than courts rejecting those claims.¹⁹²

A. The Speedy Trial Right Test

*Barker v. Wingo*¹⁹³ advanced the leading test for assessing speedy trial right violations as well as due process claims

Amendment are directly relevant to claims that inordinate delay between the day of the sentence and the day of the execution violate constitutional rights, because a parallel set of interests are at stake.”).

189. See *infra* Part III.B (describing the allocation of fault when assessing delays).

190. *Infra* Part III.A.

191. *Infra* Part III.B.

192. *Infra* Part III.C.

193. 407 U.S. 514 (1972).

regarding delays beyond the trial stage.¹⁹⁴ Before arriving at its comparatively more flexible test, the Supreme Court first considered and rejected two “rigid” alternatives.¹⁹⁵ First, trials must commence within a specified time period, for example, within six months from the indictment or formal charges.¹⁹⁶ The Court rejected this approach because the right cannot be so simply “quantified into a specified number of days or months.”¹⁹⁷ Second, the “demand-waiver” doctrine provided that a defendant waives the right unless and until the defendant demands it.¹⁹⁸ The premise of the doctrine is that delay generally benefits defendants.¹⁹⁹ The Court rejected this approach for three reasons.²⁰⁰ First, “presuming waiver of a fundamental right from inaction[] is inconsistent with this Court’s pronouncements on waiver of constitutional rights.”²⁰¹ Second, “it is not necessarily true that delay benefits the defendant.”²⁰² Third, “[a] defendant

194. See, e.g., *id.* at 530 (announcing a four factor balancing test to determine speedy trial and due process violations involving delays); *Harris v. Champion*, 15 F.3d 1538, 1546–47 (10th Cir. 1994) (employing the four factor *Barker* test regarding delays on appeal); *State v. Azania*, 865 N.E.2d 994, 1000–01 (Ind. 2007) (using the four factor *Barker* test regarding post-trial delay under the Due Process Clause).

195. See *Barker*, 407 U.S. at 522–30 (discussing the two alternative approaches).

196. See *id.* at 523 (“The first suggestion is that we hold that the Constitution requires a criminal defendant to be offered a trial within a specified time period.”).

197. See *id.* (rejecting the specified time period approach).

198. See *id.* at 523–25 (“The second suggested alternative would restrict consideration of the right to those cases in which the accused has demanded a speedy trial.”).

199. See *id.* at 526 (stating that the demand waiver doctrine “usually works for the benefit of the accused”).

200. See *id.* at 528 (rejecting “the rule that a defendant who fails to demand a speedy trial forever waives his right”).

201. *Id.* at 525. The Court further explained that it “has defined waiver as ‘an intentional relinquishment or abandonment of a known right or privilege.’” *Id.* (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). “[C]ourts should ‘indulge every reasonable presumption against waiver.’” *Id.* (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937)). “[P]resuming waiver from a silent record is impermissible.” *Id.* at 526 (quoting *Carnley v. Cochran*, 369 U.S. 506, 516 (1962)).

202. *Id.* at 526. The Court cites two reasons that delay does not necessarily benefit the defendant. First, delay hampers the ability to mount a defense. See

has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process.”²⁰³ Because “society has a particular interest in bringing swift prosecutions . . . society’s representatives are the ones who should protect that interest.”²⁰⁴

Eschewing either rigid approach, *Barker* announced a four-factor balancing test: “Length of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.”²⁰⁵ The first factor—length of delay—serves as a “triggering mechanism;” absent a sufficiently long delay there is no need to analyze the other factors.²⁰⁶ Courts generally consider a delay of one year or more as “presumptively prejudicial.”²⁰⁷ The second factor—“the reason the government assigns to justify the delay”—is differentially weighed depending on the reason.²⁰⁸ As to the third factor—defendant’s assertion of the right—the defendant’s failure to assert the right will make establishing a speedy trial right violation “difficult.”²⁰⁹ But it does not waive the

id. (noting that, in certain cases, delay harms the defendant’s ability to defend himself). Second, and “[m]oreover, a defendant confined to jail prior to trial is obviously disadvantaged by delay.” *Id.* at 527.

203. *Id.* at 527 (citing *Dickey v. Florida*, 398 U.S. 30, 37–38 (1970) (“Although a great many accused persons seek to put off the confrontation as long as possible, the right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authorities is to provide a prompt trial.”)); *Hodges v. United States*, 408 F.2d 543, 551 (8th Cir. 1969) (“The government and . . . trial court are not without responsibility for the expeditious trial of criminal cases The right to ‘a speedy . . . trial’ is constitutionally guaranteed and, as such, is not to be honored only for the vigilant”).

204. *Barker v. Wingo*, 407 U.S. 514, 527 (1972).

205. *Id.* at 530.

206. *See id.* (describing the length of delay as a “triggering mechanism”).

207. *See, e.g., Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992) (“Depending on the nature of the charges, the lower courts have generally found postaccusation delay ‘presumptively prejudicial’ at least as it approaches one year.”); *United States v. Larson*, 627 F.3d 1198, 1208 (10th Cir. 2010) (“Generally, delays approaching one year are presumptively prejudicial.”); *Speedy Trial*, 43 ANN. REV. CRIM. PROC. 418, 422 (2014) (“Courts generally hold that a delay in excess of one year is presumptively prejudicial.”).

208. *See Barker*, 407 U.S. at 531 (“Here, too, different weight should be assigned to different reasons.”).

209. *See id.* at 532 (“The defendant’s assertion of his speedy trial right, then, is entitled to strong evidentiary weight”).

right or bar relief entirely for two reasons.²¹⁰ First, there is no precise time at which the defendant must assert or waive the right.²¹¹ Second, the Court “places the primary burden on the courts and prosecutors to assure that cases are brought to trial.”²¹² The fourth factor—prejudice to the defendant—is “assessed in the light of the interests of defendants which the speedy trial right was designed to protect[.] . . . (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.”²¹³ Although the Court identified the third interest as the “most serious,”²¹⁴ the Court explained that “if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense.”²¹⁵ Thus the first interest, by contributing directly to the third interest, may be at least as serious.

The Court stressed that none of these four factors is either a necessary or a sufficient condition for a speedy trial right violation.²¹⁶ That is, just as no single factor suffices for a violation, the absence of a single factor does not preclude a violation.²¹⁷ Each of the four factors must be balanced and weighed together.²¹⁸ Some of the factors are interrelated.²¹⁹ Not only does “the presumption that pretrial delay has prejudiced the

210. *See id.* at 528 (rejecting the rule that a defendant who fails to demand a speedy trial waives his right entirely).

211. *See id.* at 521–22 (noting that the right to a speedy trial remains a vague concept).

212. *Id.* at 529.

213. *Id.* at 532.

214. *See id.*

215. *Id.* at 533.

216. *See id.* (“We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial.”).

217. *See, e.g., Doggett v. United States*, 505 U.S. 647, 657–58 (1992) (finding a speedy trial violation in the absence of particularized evidence of the fourth factor—prejudice to the defendant).

218. *See Barker v. Wingo*, 407 U.S. 514, 530 (1972) (describing the Court’s test as a balancing test that weighs the conduct of both the prosecution and the defendant).

219. *See, e.g., id.* at 531 (noting the close relationship of the length of the delay to the reasons the government uses to justify the delay).

accused intensif[y] over time,”²²⁰ but also the prejudice factor’s weight or “importance increases with the length of delay.”²²¹ As a balancing test, courts must “necessarily . . . approach speedy trial cases on an *ad hoc* basis.”²²² Although it “is a balancing test, in which the conduct of both the prosecution and the defendant are weighed,”²²³ the Court “places the *primary* burden on the courts and prosecutors to assure that cases are brought to trial.”²²⁴

B. Support for Prisoner Fault Argument

The second factor—the government’s “reason for the delay,” as articulated by *Barker*,²²⁵ or “whether the government or the criminal defendant is more to blame for that delay,” as articulated by a subsequent Supreme Court decision, *Doggett v. United States*²²⁶—is the factor most relevant to the prisoner fault argument against *Lackey* claims. Intentional delay by the government weighs heavily against the state, negligence such as overcrowded courts weighs against the government but less so, and valid reasons justify the delay.²²⁷ Note the parallels (and the differences) between the three reasons for delay under *Barker* and Justice Stevens’s three possible reasons for delay in

220. *Doggett*, 505 U.S. at 652.

221. *Id.* at 656. Put a different way, “such is the nature of the prejudice presumed that the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. Thus, our toleration of such negligence varies inversely with its protractedness . . .” *Id.* at 657. These twin effects might be explained more simply. First, the longer the delay, the greater the presumption of prejudice to the defendant. Second, the longer the delay, the greater the weight assigned to the factor of prejudice. Thus, combining their effects, the longer the delay, the presumption of prejudice becomes stronger and the factor of prejudice attains greater weight.

222. *See Barker*, 407 U.S. at 530 (“A balancing test necessarily compels courts to approach speedy trial cases on an *ad hoc* basis.”).

223. *Id.*

224. *Id.* at 529 (emphasis added).

225. *Id.* at 530.

226. 505 U.S. 647, 651 (1992).

227. *See Barker v. Wingo*, 407 U.S. 514, 531 (1972) (indicating that “different weights should be assigned to different reasons” for delay).

Lackey,²²⁸ and the way that each reason is assessed as favorable or not to each party:

Table 1

<u>Speedy Trial Right Reasons for Delay</u> <u>According to <i>Barker</i></u> <i>Favorable to Defendant:</i>	<u><i>Lackey</i> Claim Reasons for Delay</u> <u>According to Justice Stevens</u> <i>Favorable to Prisoner:</i>
State's Intentional Delay	State's Intentional Delay or Negligence
State's Negligence or Overcrowded Courts	Prisoner's Legitimate Use of Legal Process
<i>Favorable to State:</i> Valid Reasons (e.g., missing witness)	<i>Favorable to State:</i> Prisoner's Abuse of Legal Process

As the above chart depicts, the state's intentional delay and negligence producing delay are treated the same by both *Barker* and Justice Stevens—against the state.²²⁹ While *Barker* does not specifically address a defendant's abuse of legal process, presumably that would constitute a valid reason (as cited by the state) for delay. If so, *Barker* and Justice Stevens would possibly be in agreement that a defendant/prisoner's abuse of legal process would be favorable to the state. The crucial area of disagreement between Justice Stevens and both Justice Thomas and nearly all courts is a prisoner's legitimate use of legal process. Justice Stevens maintains that delay for that reason favors the prisoner and disfavors the state; Justice Thomas and nearly all courts maintain the opposite. As to this crucial issue, *Barker* is silent.

But post-*Barker* decisions are consistent not with Justice Stevens's view but rather the view of Justice Thomas and courts rejecting *Lackey* claims—"delay caused by the defense weighs against the defendant."²³⁰ Pretrial delay caused by the defendant's actions, even legitimate ones, are attributed to the

228. See *supra* text accompanying notes 120–121 (explaining Justice Stevens's comments on prisoner responsibility). Note that for Justice Stevens, these three reasons for delay only "may" or "arguably" have constitutional significance. *Lackey v. Texas*, 514 U.S. 1045, 1047 (1995).

229. See *supra* Table 1 (comparing the treatment of reasons for delay in the speedy trial right context with *Lackey* claim reasons for delay as articulated by Justice Stevens).

230. *Vermont v. Brillion*, 556 U.S. 81, 90 (2009).

defendant, categorized as a “valid reason”²³¹ under *Barker*,²³² and undercut a speedy trial right violation claim.²³³ As the Fifth Circuit in *Divers v. Cain*²³⁴ declared, delays “attributable to the conduct of the defendant weigh in favor of the state.”²³⁵ The Supreme Court in *United States v. Loud Hawk*²³⁶ provided the following explanation for the rule: “Having sought the aid of the judicial process and realizing the deliberateness that a court employs in reaching a decision, the defendants are now not able to criticize the very process which they so frequently called upon.”²³⁷ In essence, this is the prisoner fault argument. By choosing to pursue legal processes, which necessarily take some time to resolve, the defendant or prisoner cannot complain of the resulting delay.²³⁸

The following chart, comparing the treatment of speedy trial right reasons for delay post-*Barker* and the treatment of

231. *Barker v. Wingo*, 407 U.S. 514, 531 (1972).

232. *Id.*; see, e.g., *Speedy Trial*, *supra* note 207, at 424 (“Delays resulting from valid reasons such as . . . defendant’s actions do not weigh against the government at all.”).

233. See, e.g., *United States v. Porchay*, 651 F.3d 930, 940 (8th Cir. 2011) (finding that “much of the delay in her case was attributable to her own actions” including filing over fifty documents requiring hearings and responses, and thus did not weigh against the state); *United States v. Hills*, 618 F.3d 619, 630–31 (7th Cir. 2010) (attributing delays to defendants for continuances requested by defendants, proceedings disqualifying defense counsel, defendants’ motion to proceed pro se, and a hearing requested by defendants’ challenging government’s compliance with discovery requirements); *United States v. Hall*, 551 F.3d 257, 272 (4th Cir. 2009) (characterizing “pre-trial proceedings largely resulting from defense motions” as a valid basis for delay and not attributable to the state); *United States v. Drake*, 543 F.3d 1080, 1085–86 (9th Cir. 2008) (finding that most of the delay stemmed from actions of the defendant and concluding that this weighed against the defendant).

234. 68 F.3d 211 (2012).

235. *Id.* at 218 (2012) (quoting *Amos v. Thornton*, 646 F.3d 199, 207 (5th Cir. 2011)).

236. 474 U.S. 302 (1986).

237. *Id.* at 316–17 (quoting *United States v. Auerbach*, 420 F.2d 921, 924 (5th Cir. 1969)).

238. See *supra* note 10 and accompanying text (reasoning that when a petitioner chooses to delay execution by using available post-conviction review processes, the resulting delay is his own fault).

execution delays by Justice Thomas and nearly all lower courts, is as follows:

Table 2

<u>Speedy Trial Right Reasons for Delay (Post-Barker)</u>	<u>Lackey Claim Reasons for Delay (Justice Thomas/lower courts)</u>
<i>Favorable to Defendant:</i>	<i>Favorable to Prisoner:</i>
State’s Intentional Delay	State’s Intentional Delay or Negligence
State’s Negligence or Overcrowded Courts	
<i>Favorable to State:</i>	<i>Favorable to State:</i>
Valid reasons (e.g., missing witness, defendant’s abuse or legitimate use of legal process)	Prisoner’s Abuse of Legal Process Prisoner’s Legitimate Use of Legal Process

As the above chart shows, the assessments of whether the reasons for delay favor the state or the defendant/prisoner are nearly identical in the speedy trial and *Lackey* claim contexts.²³⁹ The assessments of the reasons for delay in the speedy trial context post-*Barker* are now more consistent with the view of Justice Thomas and nearly all lower courts than with the view of Justice Stevens.²⁴⁰ Most importantly, the post-*Barker* assessment of a defendant’s legitimate use of legal process is consistent with the Justice Thomas/lower courts view.²⁴¹ A defendant/prisoner’s legitimate use of legal process that causes delay is attributed to the defendant.²⁴²

239. See *supra* Table 2 (indicating that a state’s intentional delay or negligence is favorable to the defendant, whereas a defendant’s abuse or use of legal process favors the state).

240. See *supra* notes 232–237, Table 2, and accompanying text (maintaining that delays resulting from defendant’s actions do not weigh against the government, but that intentional delays or those resulting from negligence do).

241. See *supra* notes 232–237, Table 2, and accompanying text (choosing to pursue legal processes of appellate and collateral review undermines a defendant’s basis to complain of the resulting delay).

242. See *supra* note 233, Table 2, and accompanying text (reasoning that the resulting delay is a product of the defendant’s actions).

As a result, analogizing to the speedy trial right may provide some basis for the prisoner fault argument for rejecting *Lackey* claims. More specifically, the second factor (reason for delay) of the *Barker* four-factor test for evaluating speedy trial right violation claims, as interpreted by post-*Barker* courts, may be analogous to and provide some support for courts rejecting *Lackey* claims on the basis of attribution of the delay to the prisoner. If speedy trial right violation claims and *Lackey* claims are sufficiently analogous, then the relevance of defendant fault for delay between accusation and commencement of trial may make relevant prisoner fault for delay between sentence and execution. And if a defendant's responsibility for delaying trial undercuts a Sixth Amendment speedy trial right violation claim, then similarly a death row prisoner's responsibility for delaying execution undercuts an Eighth Amendment *Lackey* claim.

C. Difficulties for Prisoner Fault Argument

Having located a seemingly plausible rationale for the prisoner fault argument in the analysis of claims of speedy trial right violations, the issue now becomes whether the speedy trial right analogy helps more than it hurts. This subpart presents three reasons why it may hurt more than help. First, reliance on the speedy trial analogy presupposes and concedes the existence of a prisoner's right to expeditious execution.²⁴³ Denying *Lackey* claims (of violation of Eighth Amendment right against execution following lengthy periods of death row incarceration), based on the failure to satisfy a factor or requirement (reason for delay) of that right implies the existence of that right, even if only in principle.²⁴⁴ Second, the contextual approach of *Barker* is inconsistent with the categorical approach of courts rejecting *Lackey* claims.²⁴⁵ Under the contextual approach of *Barker*, at

243. See *infra* Part III.C.1 (rejecting a claim of right-violation for failing to satisfy a factor or requirement of that right logically entails the existence of that very right).

244. See *infra* Part III.C.1 (explaining that the Speedy Trial Right analogy ultimately presupposes the existence of the right to a timely execution).

245. See *infra* Part III.C.2 (noting that *Barker* requires a flexible, "ad hoc,"

least occasionally *Lackey* claimants would prevail.²⁴⁶ Third, the analogy makes not just one factor of the *Barker* four factor test relevant, but all four of the factors.²⁴⁷ *Lackey* claimants may satisfy enough of the factors to prevail.²⁴⁸

The above three subparts accept the analogy but point out its limitations and, moreover, argue that it may help *Lackey* claims more than hurt. These three objections are animated by the view that if courts rejecting *Lackey* claims are to analogize to the speedy trial right, and benefit from the advantages of that analogy, they must incur the disadvantages of that analogy as well. They cannot selectively cherry-pick among the aspects of the speedy trial right analysis that are favorable and disregard unfavorable aspects. If the Sixth Amendment speedy trial right analysis and Eighth Amendment *Lackey* claim analysis are truly analogous, then other aspects of the Sixth Amendment speedy trial right analysis beyond just the second factor (reason for delay) may also be relevant to Eighth Amendment *Lackey* claim analysis. Those other aspects and factors pose some difficulties for courts rejecting *Lackey* claims.

1. Speedy Trial Right Analogy Presupposes Existence of Right to Timely Execution

While analogizing to the speedy trial right analysis may explain the relevance of prisoner fault and supply a rationale for the prisoner fault argument, this relevance and rationale comes at a price. The price is that reliance on the analogy presupposes and concedes the existence of a right against excessively delayed executions. Denying a speedy trial right violation claim because, at least in part, the defendant caused the delay presupposes and concedes the existence of a right to a speedy trial within the Sixth

and “highly contextual inquiry”).

246. See *infra* Part III.C.2 (explaining that *Barker*’s approach is inconsistent with the approach of courts that reject *Lackey* claims).

247. See *infra* Part III.C.3 (notwithstanding a conclusion attributing responsibility for the delay to the prisoner, the other three *Barker* factors may provide the basis for a *Lackey* claim).

248. For further explanation, see *infra* Part III.C.3.

Amendment.²⁴⁹ Similarly, denying a *Lackey* claim because the defendant caused the delay presupposes and concedes the right to an expeditious execution within the Eighth Amendment. To reject a claim of right-violation for the failure to satisfy a factor or requirement of that right surely entails the existence of that very right. Thus, to reject a *Lackey* claim of right-violation (that the Eighth Amendment right against execution following lengthy death row incarceration was violated) because the prisoner failed to satisfy a factor or requirement (reason for delay) of that right surely entails the existence of that very right. It is incongruous to reject a claim of right-violation for failing to satisfy a factor or requirement of that right while denying the very existence of that right. Yet Justice Thomas and courts rejecting *Lackey* claims have never explicitly acknowledged the right, even in principle, to a timely execution and strongly deny the existence of such a right.²⁵⁰ One cannot establish the non-existence of a right by pointing out that the prisoner fails to satisfy a factor or requirement of the right. As a result, reliance on the analogy establishes the existence of a right under the Eighth Amendment against execution following a lengthy period of death row incarceration.

2. *Barker's Contextual Approach Inconsistent with Categorical Approach of Courts Rejecting Lackey Claims*

The very method employed by the *Barker* test for assessing claims of speedy trial right violations is inconsistent with the approach taken by courts rejecting *Lackey* claims. *Barker* eschewed any “rigid,”²⁵¹ “bright-line rule”²⁵² in favor of a

249. See U.S. CONST. amend. XI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .”).

250. See *supra* notes 53 and 161–164 and accompanying text (illustrating that Justice Thomas finds *Lackey* claims lack constitutional foundation in every instance).

251. *Barker v. Wingo*, 407 U.S. 514, 522 (1972).

252. See *United States v. Ferreira*, 665 F.3d 701, 709 (2011) (applying *Barker* does “not impose a bright-line rule” (citing *United States v. Erenas-Luna*, 560 F.3d 772, 779 (8th Cir. 2009) (“[W]e have not held that a bright line exists . . .”))).

flexible,²⁵³ “ad hoc,”²⁵⁴ “highly contextual inquiry.”²⁵⁵ Under a rigid test, we would expect defendants not meeting the requirements to be categorically barred from prevailing, but under the fact-intensive and case-by-case approach of *Barker*, sometimes defendants would prevail and sometimes they would not.²⁵⁶ Until very recently, however, no federal court had ever recognized a *Lackey* claim.²⁵⁷ Currently, no appellate court—state or federal—recognizes a *Lackey* claim.²⁵⁸ Courts have rejected *Lackey* claims categorically rather than contextually.²⁵⁹ Courts rejecting *Lackey* claims typically cite that there is simply no precedent for recognizing a *Lackey* claim.²⁶⁰ Such an approach is hardly consistent with an ad hoc, highly contextual inquiry. Were the analogy between the speedy trial right analysis and *Lackey* claim analysis to hold, courts would have to employ a contextual, not categorical, approach and, at least occasionally, recognize *Lackey* claims.

253. *United States v. Loud Hawk*, 474 U.S. 302, 314 (1986) (referring to the “flexibility” of the *Barker* test).

254. *Barker*, 407 U.S. at 530.

255. *Doggett v. United States*, 505 U.S. 647, 670 n.5 (1992) (Thomas, J., dissenting).

256. *See infra* Part III.C.3 (asserting that application of *Barker*’s four-factor balancing test would support recognition of *Lackey* claims in certain circumstances).

257. *See supra* text accompanying note 37 (indicating that the first such claim was recognized in July 2014).

258. *See supra* notes 161, 164 and *infra* note 260 (listing numerous instances and the attendant reasoning of courts rejecting *Lackey* claims).

259. *See Newton, supra* note 17, at 62 (characterizing Justice Thomas’s view as “the *Lackey* claim categorically lacks merit”).

260. *See, e.g., Thompson v. Sec’y Dept. Corr.*, 517 F.3d 1279, 1284 (11th Cir. 2008) (“Especially given the total absence of Supreme Court precedent . . . we conclude that execution following a 31-year term of imprisonment is not itself a constitutional violation.”); *Reed v. Quarterman*, 504 F.3d 465, 488 (5th Cir. 2007) (“No other circuit has found that inordinate delay in carrying out an execution violates the condemned prisoner’s eighth amendment rights.” (quoting *White v. Johnson*, 79 F.3d 432, 436 (5th Cir. 1996))); *People v. Vines*, 251 P.3d 943, 988–89 (Cal. 2011) (“[W]e have consistently concluded . . . that delay . . . is not a basis for concluding that either the death penalty itself, or the process leading to its execution, is cruel and unusual punishment.” (quoting *People v. Brown*, 93 P.3d 244, 260 (Cal. 2004))); *Valle v. State*, 70 So. 3d 530, 552 (Fla. 2011) (“[T]his Court has repeatedly held this [*Lackey*] claim to be meritless.”).

3. Applying Entire Speedy Trial Right Analysis Supports Lackey Claim

Reliance on the analogy to the speedy trial right to supply a rationale for the relevance of prisoner fault makes not just one factor of the *Barker* test relevant to *Lackey* claims but potentially all four factors. Even if the second *Barker* factor—attribution of responsibility for the delay—cuts against the prisoner, the other three factors may support a *Lackey* claim. If so, despite the analogy possibly serving as a rationale supporting the relevance of prisoner fault, the analogy would only further support the recognition of *Lackey* claims. That is, the cost of the relevance of prisoner fault is the recognition of *Lackey* claims based on their satisfaction of the *Barker* four-factor balancing test.

a. First Factor: Length of Delay

The sheer length of delays found constitutional in *Lackey* claims dwarf the length of delays found unconstitutional in speedy trial right violation claims.²⁶¹ In *Barker*, the Supreme Court termed the delay of over five years to be “extraordinary,”²⁶² and in *Doggett v. United States*, the Court held that a delay of over eight years, even in the absence of particularized evidence of prejudice to the defendant, constituted a violation²⁶³ and was “extraordinary.”²⁶⁴ If delays of five years and eight years are extraordinary, then the delays of upwards of thirty years and more in *Lackey* claims must be “*supra*-extraordinary.” As a result, this first factor—length of delay—would clearly favor the prisoner, not the state, and support recognition of a *Lackey* claim.

261. Compare *Thompson v. McNeil*, 556 U.S. 1114, 1116–17 (2009) (illuminating Justice Thomas’s position that even delays of thirty-two years do not create Eighth Amendment problems), with *Doggett v. United States*, 505 U.S. 647, 657–58 (1992) (maintaining that an eight-year delay was unconstitutional).

262. *Barker v. Wingo*, 407 U.S. 514, 533 (1972).

263. See *Doggett v. United States*, 505 U.S. 647, 657–58 (1992) (“[T]he delay attributable to the Government’s negligence far exceeds the threshold needed to state a speedy trial claim.”).

264. *Id.* at 652.

b. Second Factor: Reason for Delay

Although the second factor seemingly weighs against the *Lackey* claimant because of the rule that a defendant's actions that cause delay are "ordinarily" attributed to the defendant,²⁶⁵ this rule is not absolute. The Supreme Court in *Loud Hawk*, regarding delays caused by an interlocutory appeal brought by the defendant, conceded that "an unreasonable delay caused by the prosecution in that appeal, or a wholly unjustifiable delay by the appellate court" could be attributed not to the defendant but to the state.²⁶⁶ In the latest Supreme Court case addressing the speedy trial right, *Vermont v. Brillon*,²⁶⁷ the Court ruled that "delay caused by the defendant's counsel is also charged against the defendant."²⁶⁸ However, the Court cautioned that this "general rule . . . is not absolute," and "[d]elay resulting from a systemic 'breakdown in the public defender system' could be charged to the state."²⁶⁹ Similarly, the state could be charged with any delays caused by "the trial court's failure to appoint counsel with dispatch."²⁷⁰ Thus, the general rule that actions of the defendant that cause delay are attributable to the defendant contains the exception that undue delays caused by overburdened prosecutors, overcrowded appellate dockets, or understaffed public defender offices are attributable to the government.²⁷¹ And

265. See *United States v. Loud Hawk*, 474 U.S. 302, 316 (1986) ("[W]here a pretrial appeal by the defendant is appropriate . . . delays from such an appeal ordinarily will not weigh in favor of a defendant's speedy trial claims.").

266. See *id.* at 315–16 ("[W]here a pretrial appeal by the defendant is appropriate . . . delays from such an appeal ordinarily will not weigh in favor of a defendant's speedy trial claims.").

267. 556 U.S. 81 (2009).

268. *Id.* at 91.

269. *Id.* at 94 (quoting *Brillon v. Vermont*, 955 A.2d 1108, 1111 (Vt. 2008)).

270. *Id.* at 85.

271. See *Strunk v. United States*, 412 U.S. 434, 436 (1973) ("[D]elays caused by overcrowded court dockets or understaffed prosecutors are among the factors . . . [that must be attributed to the government] since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant."); *United States v. Hills*, 618 F.3d 619, 630 (7th Cir. 2010) (acknowledging that "delays resulting from a trial court's schedule are ultimately attributed to the government" (citing *Barker v. Wingo*, 407 U.S. 514, 531 (1972))).

this exception is consistent with *Barker's* analysis that delays caused by government “negligence or overcrowded courts” are not attributable to the defendant.²⁷² Rather, *Barker* explained, they are to be attributed to the state because “ultimate responsibility for such circumstances must rest with the government.”²⁷³

While the prisoner fault argument is consistent with the general rule in speedy trial right analysis regarding attribution of fault for delay, it is inconsistent with that general rule’s exceptions.²⁷⁴ But if delayed trials and delayed executions are sufficiently analogous, then the prisoner fault argument must incorporate not only the general rule but the exceptions as well. Just as delays caused by a defendant choosing to pursue pretrial motions, interlocutory appeals, and requests for hearings “ordinarily” do not count toward establishing a speedy trial violation,²⁷⁵ so also a death row prisoner’s choosing to obtain appellate and collateral review do not generally provide a basis to complain of delayed execution.²⁷⁶ But just as delays due to government negligence, overcrowded courts, or systemic breakdown are attributable to the state in the speedy trial context, so also any delays caused by government negligence due to overcrowded courts or systemic breakdown in the *Lackey* claim context would be attributed to the state.²⁷⁷ Is there any evidence

272. See *Barker v. Wingo*, 407 U.S. 514, 531 (1972) (finding that overcrowding and negligence are more neutral reasons for delay than deliberate interference with the defense, but that responsibility still lies with the government).

273. *Id.*

274. See *supra* notes 271–273 and accompanying text (explaining that the general rule that defendant actions causing delay are attributable to defendant contains the exception that undue delays caused by overburdened courts or government negligence are attributable to the state).

275. See *supra* notes 232–237, Table 2, and accompanying text (explaining that delays resulting from such actions do not typically weigh against the government).

276. See *supra* note 237 and accompanying text (noting that pursuit of post-conviction legal processes necessarily entails a measure of delay as they take considerable time to resolve, so the resulting delay cannot be complained of).

277. See *supra* notes 271–273 and accompanying text (emphasizing that delays caused by government negligence and systemic breakdown are attributable to the state, not the defendant).

of such government negligence or systemic breakdown in America's capital punishment system?

According to *Jones v. Chappell*, the evidence is ample.²⁷⁸ *Jones* found evidence of widespread systemic dysfunction in California's administration of the death penalty:

Most death row inmates wait between three and five years for counsel to be appointed for their direct appeal [A]nother two to three years are spent waiting for oral argument to be scheduled before the California Supreme Court. On state habeas review . . . at least eight to ten years elapse between the death verdict and appointment of habeas counsel. . . . Then, after state habeas briefs are submitted, another four years elapse before the California Supreme Court issues a generally conclusory denial of the inmate's claims.²⁷⁹

The court concluded that “[t]hese delays—exceeding 25 years on average—are inherent to California's dysfunctional death penalty system, not the result of individual inmates' delay tactics, except perhaps in isolated cases.”²⁸⁰ The structural, systemic delay described by *Jones* clearly satisfies the exception, acknowledged by the Supreme Court in *Loud Hawk* and *Brillon*, that delays caused by government negligence and systemic breakdown are attributable not to the defendant, but to the state.²⁸¹ *Jones* provides authority that *Lackey* claimants might well satisfy the second *Barker* factor—reason for the delay.²⁸² And *Jones* is not alone.²⁸³ Despite prisoners choosing to pursue

278. See *Jones v. Chappell*, 2014 WL 3567365, at *1–6 (C.D. Cal. July 16, 2014) (detailing the facts giving rise to California's violation of Jones's Eighth Amendment protection against cruel and unusual punishment and the unconstitutionality of California's death penalty system).

279. *Id.* at *12.

280. *Id.*

281. See *supra* notes 266–272 and accompanying text (attributing responsibility for the breakdown in the criminal administration of the criminal justice system to the government).

282. See *Jones*, 2014 WL 3567365, at *1–6 (finding systemic dysfunction in the administration of California's death penalty as resulting from government failure rather than individual inmates' delay tactics).

283. See, e.g., *Thompson v. McNeil*, 556 U.S. 1114, 1116 (2009) (Stevens, J., respecting denial of certiorari) (internal citations omitted) (“[Due to states' failures and defective procedures] [t]he reversible error rate in capital trials is staggering. More than 30 percent of death verdicts imposed between 1973 and

appellate and collateral review that cause execution delays, which “ordinarily” would be attributed to the prisoner, the delay might be attributed to the state because of negligence and systemic breakdown.

c. Third Factor: Defendant’s Assertion of Right

It is not entirely clear how this third factor applies in the delayed execution context. True, many *Lackey* claimants fail to assert their claim until they have already been on death row for many years.²⁸⁴ On that basis, this third factor may militate against recognition of a *Lackey* claim. However, one commentator suggests that this third factor does not analogously translate to the delayed execution context: “Not all of the *Barker* factors apply with full force in the context of inordinate delay. It is nonsensical to require that the capital defendant insist that the state rush to execute him. If the defendant was sincere in such demands, he could almost always ‘volunteer’ to be executed.”²⁸⁵ Another possible difficulty with applying the third factor to the delayed execution context is that penalizing a prisoner for failing to assert a right that until July 2014

2000 have been overturned, and 129 inmates sentenced to death during that time have been exonerated.”); *Smith v. Arizona*, 552 U.S. 985, 986 (2007) (Breyer, J., dissenting from denial of certiorari) (observing that “much of the delay at issue [thirty years] seems due to constitutionally defective sentencing proceedings”); *Foster v. Florida*, 537 U.S. 990, 993 (2002) (Breyer, J., dissenting from denial of certiorari) (“The length of this confinement [twenty-seven years] has resulted partly from the State’s repeated procedural errors.”); *Knight v. Florida*, 528 U.S. 990, 993 (1999) (Breyer, J., dissenting from denial of certiorari) (characterizing the delays as stemming from “the State’s own failure to comply with the Constitution’s demands”); *Elledge v. Florida*, 525 U.S. 944, 944 (1998) (Breyer, J., dissenting from denial of certiorari) (noting that the prisoner “has experienced that delay [twenty-three years] because of the State’s own faulty procedures”).

284. See, e.g., *Johnson v. Bredeesen*, 558 U.S. 1067, 1071 (2009) (Thomas, J., concurring in denial of certiorari) (“Petitioner . . . for all his current complaints about delay [of twenty-eight years], did not raise a *Lackey* objection to the speed of his proceedings in the 1999 habeas petition he filed 18 years into his tenure on death row.”); *McKenzie v. Day*, 57 F.3d 1461, 1465 (9th Cir. 1995) (noting that prisoner’s *Lackey* claim involving a delay of twenty years could have been brought one to nine years earlier).

285. Aarons, *Inordinate Delay*, *supra* note 188, at 207.

no American jurisdiction or court recognized²⁸⁶ seems unfair and inappropriate. In *Doggett*, the Court did not weigh the third factor against the defendant despite his failure to assert his right to a speedy trial until over eight years after his indictment.²⁸⁷ The Court reasoned that the defendant was unaware of the indictment and would have had no reason to assert a speedy trial right.²⁸⁸ Not only is the death row prisoner unaware of the recognition of a right to a timely execution, but moreover, the death row prisoner is unaware of that right because in every court except one, that right does not exist.²⁸⁹ A prisoner cannot be faulted for failing to assert a right that he is not only unaware of, but also does not exist. Were courts to recognize the right, in principle, and explicitly state that defendant's early and repeated assertion of the right is a factor to be considered, *Lackey* claimants would have little difficulty satisfying this factor.

d. Fourth Factor: Prejudice to Defendant

This fourth factor clearly favors *Lackey* claimants. The *Lackey* claimant satisfies two of the three forms of prejudice that the speedy trial right serves to protect.²⁹⁰ Incarceration on death row under horrific conditions for upwards of thirty years or more clearly constitutes “oppressive . . . incarceration”²⁹¹ and causes “anxiety and concern,”²⁹² as evidenced by the high rate of insanity²⁹³ and

286. See *supra* note 37 and accompanying text (noting that *Jones v. Chappell* is the first federal decision recognizing a *Lackey* claim).

287. See *Doggett v. United States*, 505 U.S. 647, 653–54 (1992) (“[D]oggett is not to be taxed for invoking his speedy trial right only after his arrest.”).

288. See *id.* (“[H]e was subjected neither to pretrial detention nor . . . to awareness of unresolved charges against him.”).

289. See *supra* note 37 and accompanying text (explaining that the United States District Court for the Central District of California is the exception as of July 2014).

290. See *supra* note 213 and accompanying text (explaining that the aim is to prevent oppressive pretrial incarceration and minimize the anxiety and concern of the accused).

291. *Barker v. Wingo*, 407 U.S. 514, 532 (1972).

292. *Id.*

293. See, e.g., *Solesbee v. Balkcom*, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting) (“[T]he onset of insanity while awaiting execution of a death sentence is not a rare phenomenon.”).

suicide.²⁹⁴ The third form of prejudice—to the prisoner’s defense²⁹⁵—is not clearly satisfied. Not every *Lackey* claimant can persuasively establish that the delay impaired his defense, but probably some could.²⁹⁶ But there is no requirement that a defendant establish all three forms of prejudice in order to obtain the support of the prejudice factor.²⁹⁷ By clearly satisfying two of the three forms of prejudice and possibly satisfying the third, the fourth factor clearly supports recognition of a *Lackey* claim.²⁹⁸

294. See, e.g., *Valle v. Florida*, 132 S. Ct. 1, 1 (2011) (Breyer, J., dissenting from denial of stay) (“In *Lackey* and in *Knight* Justice Stevens and I referred to the legal sources, in addition to studies of attempted suicide, that buttress the commonsense conclusion that 33 years in prison under threat of execution is cruel.”).

295. See *Barker*, 407 U.S. at 532 (noting that the third form of prejudice that the speedy trial right is designed to protect against is the possibility that the defense will be impaired).

296. See *Root*, *supra* note 188, at 322 (“In making the analogy [from speedy trial right claims] to excessive delays associated with capital appeals, each of these types of prejudice are clearly present.”).

297. See, e.g., *Doggett v. United States*, 505 U.S. 647, 654 (1992) (finding a speedy trial violation and satisfaction of the fourth factor despite the defendant only claiming one of the three forms of prejudice).

298. True, *Barker* considered prejudice to the defendant’s defense the most important form of prejudice. See *Doggett*, 505 U.S. at 654 (“Of these forms of prejudice, ‘the most serious is the last [prejudice to the defendant’s defense], because the inability of a defendant to adequately prepare his defense skews the fairness of the entire system.’” (quoting *Barker*, 407 U.S. at 532)). That *Lackey* claimants would satisfy this most important form of prejudice less often than they would satisfy lesser forms of prejudice, however, would not prevent the prejudice factor from supporting *Lackey* claimants for two reasons. First, as discussed above, the longer the delay, the greater the presumption of prejudice, the less need to demonstrate particularized evidence of prejudice, and the greater the weight of the prejudice factor as compared to other factors. See *supra* notes 220–221 and accompanying text (discussing the prejudice factor). Second, if the delay is sufficiently lengthy, the length of the delay alone suffices to establish prejudice. Extreme delay “allow[s] the delay itself to constitute prejudice.” *United States v. Larson*, 627 F.3d 1198, 1209 (10th Cir. 2010) (quoting *United States v. Seltzer*, 595 F.3d 1170, 1180 n.3 (10th Cir. 2010)). “In cases of extreme delay, the defendant may rely on the presumption of prejudice and need not present specific evidence of prejudice.” *Larson*, 627 F.3d at 1209; accord *United States v. Ferreira*, 665 F.3d 701, 706 (6th Cir. 2011) (“[E]xtreme delays may, on their own, ‘give rise to a strong presumption of evidentiary prejudice.’” (quoting *United States v. Smith*, 94 F.3d 204, 209 (6th Cir. 1996))). In calculating whether a delay constitutes an extreme delay, courts consider both the total length of delay as well as the length of delay attributable to the government. In *Doggett*, the Supreme Court found a total delay of eight years,

e. Balancing the Four Factors

Balancing and weighing these four factors support recognition of *Lackey* claims. A prisoner would clearly satisfy the length of delay and prejudice factors and possibly satisfy the assertion of the right and reason for the delay factors. Viewing these factors most favorably to the state, the reason for the delay and assertion of the right factors favor the state, but the length of delay and prejudice factors would still strongly favor the prisoner. With the prejudice factor of substantially greater weight than the other factors due to the “*supra-extraordinary*” delay, the factors still support recognition of a *Lackey* claim.

IV. Waiver of Eighth Amendment Right

Part III considered analogizing to the speedy trial right analysis for the missing rationale of the prisoner fault argument. The analogy seems attractive because delayed trials and delayed executions share an obvious parallel. More importantly, defendants’ actions causing delays in trials are ordinarily attributed to defendants just as the prisoner fault argument attributes to prisoners delays in executions caused by their

with six of those years attributable to the government, sufficiently extreme as to constitute prejudice. *Doggett*, 505 U.S. at 657–58. And the Third Circuit found a total delay of less than four years, with less than three years attributable to the government, to be sufficiently extreme to constitute prejudice. *United States v. Batts*, 589 F.3d 673, 682–83 (2009). In contrast, the length of delays in *Lackey* claims—upwards of thirty years or more—substantially exceeds the length of delays found sufficiently extreme in speedy trial right violation claims so as to constitute prejudice.

In addition, Justice Thomas forcefully argued that not only is prejudice to the defendant’s defense a *less* important form of prejudice, it may not be a form of prejudice that is cognizable at all under the speedy trial right. He maintained that “the Speedy Trial Clause’s core concern is impairment of liberty.” *Doggett*, 505 U.S. at 660 (dissenting) (quoting *United States v. Loud Hawk*, 474 U.S. 302, 312 (1986)). Justice Thomas explained that “prejudice to the defense is not the sort of impairment of liberty against which the Clause is directed.” *Doggett*, 505 U.S. at 661. Rather, “[t]he speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial.” *Id.* (quoting *United States v. MacDonald*, 456 U.S. 1, 8 (1982)). As a result, Justice Thomas would be constrained in objecting to any failure of *Lackey* claimants to satisfy this harm to the defense form of prejudice.

actions. But even if the analogy does supply the missing relevance of prisoner fault, rather than undercutting *Lackey* claims, the analogy ultimately provides further support to *Lackey* claims for three reasons. First, the analogy presupposes the existence of the very right that courts rejecting *Lackey* claims strenuously deny.²⁹⁹ Second, the contextual method of assessing claims of speedy trial rights violations, as opposed to courts categorically barring *Lackey* claims, when applied to *Lackey* claims would yield more favorable outcomes for prisoners.³⁰⁰ Third, *Lackey* claimants would likely prevail when not only the reason for delay factor but all four factors of the speedy trial right analysis were applied to their claims.³⁰¹

With a helpful rationale for the prisoner fault argument still elusive, this Part explores another obvious candidate—waiver. By choosing to seek appellate and collateral review, which delays execution, death row prisoners thereby waive their right under the Eighth Amendment’s Cruel and Unusual Punishments Clause against execution following a lengthy period of death row incarceration. Although most courts rejecting *Lackey* claims invoke the prisoner fault argument,³⁰² perhaps only the Supreme Court of Utah, in *Gardner v. State*,³⁰³ has explicitly characterized it in terms of waiver: “[S]ome courts considering . . . *Lackey* claims have disposed of the claims on the ground of waiver. That is, because executions are delayed as a result of a petitioner’s decision to invoke legal process, it is incongruous to hold that the time consumed by the process makes the petitioner’s sentence unconstitutional.”³⁰⁴

299. See *supra* Part III.C.1 (noting that courts rejecting *Lackey* claims deny the existence of an Eighth Amendment right against execution following lengthy death row incarceration).

300. See *supra* notes 251–255 and accompanying text (maintaining that faithful application of the *Barker*’s fact-intensive approach would lead some defendants to prevail in asserting *Lackey* claims).

301. See *supra* Part III.C.1 (indicating that application of the entire Speedy Trial Right analysis supports *Lackey* claims).

302. See *supra* notes 47, 161–164 and accompanying text (identifying the prisoner fault argument as the basis for reflexive denial of *Lackey* claims by lower courts).

303. 234 P.3d 1115 (Utah 2010).

304. See *id.* at 1143 (“Although [the petitioner] was entitled to make the

Part IV examines whether waiver might supply the underlying rationale for the prisoner fault argument. First, this Part supplies a brief overview of waiver of constitutional rights in general.³⁰⁵ Second, it discusses the extent of, and limitations on, the constitutionality of waiver of the Eighth Amendment prohibition against cruel and unusual punishment.³⁰⁶ Third, this Part presents six difficulties with the waiver rationale for the prisoner fault argument.³⁰⁷ It concludes that the waiver rationale is unpersuasive.³⁰⁸ Moreover, rather than providing a rationale for the prisoner fault argument, the waiver rationale provides further support for *Lackey* claims. There are sound reasons why nearly all courts denying *Lackey* claims, despite making waiver-like arguments, decline to explicitly base the prisoner fault argument on waiver.

A. Waiver of Constitutional Rights, Generally

Constitutional rights are generally susceptible to waiver.³⁰⁹ For example, the Supreme Court held that one may waive the Fourth Amendment right to be free from “unreasonable searches and seizures”³¹⁰ by consenting to a search lacking probable

motion and amend his federal petition, he cannot now claim that the delay caused by his actions constitutes cruel and unusual punishment.” (citing *Johns v. Bowersox*, 203 F.3d 538, 547 (8th Cir. 2000)); *Richmond v. Lewis*, 948 F.2d 1473, 1491–92 (9th Cir. 1991) (“A petitioner should not be able to benefit from the ultimately unsuccessful pursuit [of his] constitutional rights.”).

305. *Infra* Part IV.A.

306. *Infra* Part IV.B.

307. *Infra* Part IV.C.

308. *Infra* Part IV.C.

309. See, e.g., Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 801 (2003) (“[T]he Supreme Court has recognized that criminal defendants may waive various constitutional protections Indeed, these criminal protections are routinely bargained away.”); Daniel R. Williams, *Mitigation and the Capital Defendant Who Wants to Die: A Study in the Rhetoric of Autonomy and the Hidden Discourse of Collective Responsibility*, 57 HASTINGS L.J. 693, 702 (2006) (“[W]aivers of constitutional rights are commonplace. You are free to say thanks, but no thanks to the most basic and precious of constitutional rights We live in a legal culture where waivers of constitutional rights flourish.”).

310. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and

cause.³¹¹ One may waive the Fifth Amendment right against compelled self-incrimination³¹² by voluntarily confessing.³¹³ One may waive the Sixth Amendment right to a jury trial³¹⁴ by requesting a bench trial.³¹⁵ One may waive the Sixth Amendment right to the assistance of counsel³¹⁶ by opting to self-represent.³¹⁷ One may waive the Sixth Amendment right to confront one's accusers³¹⁸ by pleading guilty.³¹⁹ These are just a sampling of the many constitutional rights that may be waived.

Not all constitutional rights may be so readily waived. The Thirteenth Amendment prohibits slavery.³²⁰ In effect, this creates a constitutional right not to be enslaved. Could this right not to be enslaved be waived? That is, by choosing to work for free and to be the property of another does one waive the protection of the Thirteenth Amendment thereby making one's enslavement constitutional? Surely no. The First Amendment guarantees freedom of speech, the press, association, and religious affiliation.³²¹ Could these First Amendment rights be waived? As

seizures, shall not be violated . . .”).

311. See *Schneekloth v. Bustamonte*, 412 U.S. 218, 248 (1973) (recognizing that one may waive his Fourth Amendment right if consent is voluntarily given).

312. U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself . . .”).

313. See *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (enumerating the rights waived when a defendant enters a guilty plea, among them the privilege against self-incrimination).

314. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . .”).

315. See *Singer v. United States*, 380 U.S. 24, 34 (1965) (“[A] defendant can . . . in some instances waive his right to a trial by jury.”).

316. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.”).

317. See *Faretta v. California*, 422 U.S. 806, 819 (1975) (“The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense.”).

318. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .”).

319. See *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (noting that the right to confront one's accusers is waived by entering a guilty plea).

320. U.S. CONST. amend. XIII (“Neither slavery nor involuntary servitude . . . shall exist within the United States . . .”).

321. U.S. CONST. amend. I (“Congress shall make no law respecting an

Jason Mazzone explains, “the Court has held that other provisions of the Constitution [that is, not the 4th, 5th, and 6th Amendments], particularly First Amendment rights, may not generally be waived.”³²² As to waiver, is the Eighth Amendment more like the Fourth, Fifth, and Sixth Amendments that generally allow waiver or is it more like the First and Thirteenth Amendments that generally do not?

B. Support for Prisoner Fault Argument

At least to some extent, courts accept waiver of Eighth Amendment rights in some contexts. In so-called volunteer execution cases, a convicted capital offender may decline (non-mandatory) appellate and collateral review of her capital sentence, thereby waiving her Eighth Amendment (as well as other) rights.³²³ For example, convicted capital offender Gary Gilmore declined appellate review, declaring that he wished to be executed immediately.³²⁴ Gilmore’s mother petitioned the Supreme Court for a stay of execution but the Court upheld Gilmore’s waiver.³²⁵ Courts have also treated defendants’ choice not to present mitigating evidence as waiving the ability to challenge the subsequent capital sentence based on the jury’s failure to consider mitigating evidence.³²⁶ The choice is construed

establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . .”).

322. Mazzone, *supra* note 309, at 801.

323. See Williams, *supra* note 309, at 697 n.20 (“The Supreme Court has never been receptive to the argument that this form of volunteering is constitutionally troublesome.”); LINDA CARTER ET AL., UNDERSTANDING CAPITAL PUNISHMENT 371 (3d ed. 2012) (noting that “between 1976 and May 2011, 133 individuals were executed who were considered ‘volunteers’”).

324. See Gilmore v. Utah, 429 U.S. 1012, 1015 n.4 (1976) (“At a hearing on November 1, 1976, on a motion for a new trial, Gilmore’s attorneys informed the trial court that they had been told by Gilmore not to file an appeal and not to seek a stay of execution of sentence on his behalf.”).

325. See *id.* at 1013 (“[T]he Court is convinced that Gary Mark Gilmore made a knowing and intelligent waiver of any and all federal rights he might have asserted after the Utah trial court’s sentence was imposed . . .”).

326. See, e.g., Schriro v. Landrigan, 550 U.S. 465, 469, 481 (2007) (holding that interfering with counsel’s attempt to present mitigating evidence at capital

as the defendant waiving the Eighth Amendment protections that capital punishment is cruel and unusual without the jury considering mitigating evidence suggesting that the defendant is not death-worthy.³²⁷

Until recently, courts refused to recognize waivers of Eighth Amendment rights involving the type of punishment. Consider the punishment of banishment, which the Supreme Court in *Trop v. Dulles*³²⁸ held is cruel and unusual in violation of the Eighth Amendment.³²⁹ If a defendant is given the choice of imprisonment or banishment, and the defendant chooses banishment, does the defendant's choice constitute a waiver thereby transforming banishment into a constitutional punishment for that defendant? Courts have said no; a defendant's choice does not transform an unconstitutional punishment into a constitutional one.³³⁰ In *Dear*

sentencing hearing waived defendant's right to claim ineffective counsel based on the failure to present mitigating evidence despite Eighth Amendment guarantee that a jury have the opportunity to consider mitigating evidence before imposing a capital sentence).

327. See Jules Epstein, *Mandatory Mitigation: An Eighth Amendment Mandate to Require Presentation of Mitigation Evidence, Even When the Sentencing Trial Defendant Wishes to Die*, 21 TEMP. POL. & CIV. RTS. L. REV. 1, 7 (2011) (“[C]ourts have nationally placed few barriers in the path of a defendant who seeks to waive the presentation of mitigation evidence, and in virtually every instance has done so without reference to Eighth Amendment principles or concerns.”).

328. 356 U.S. 86 (1958).

329. See *id.* at 100–01 (“We believe, as . . . the court below, that use of denationalization as a punishment is barred by the Eighth Amendment.”).

330. See *Rutherford v. Blankenship*, 468 F. Supp. 1357, 1360–61 (W.D. Va. 1979) (“Banishment was a condition voluntarily and knowingly agreed to by petitioner in this course of the plea bargain negotiations, although for reasons outlined below, this court holds that the condition is unenforceable.”); *Henry v. State*, 280 S.E.2d 536, 536 (S.C. 1981) (“[T]he trial judge was without authority to impose banishment from the State as a condition of prohibition, even if appellant agreed to the sentence.”). *But see Carchedi v. Rhodes*, 560 F. Supp. 1010, 1016 (S.D. Ohio 1982) (ruling that prisoner's acceptance of banishment as a condition for obtaining early parole by clemency from the governor constituted a waiver of right to challenge the constitutionality of the banishment condition). *Carchedi's* holding, however, may be limited to parolees. See Jeffrey L. Kirchmeier, *Let's Make a Deal: Waiving the Eighth Amendment by Selecting a Cruel and Unusual Punishment*, 32 CONN. L. REV. 615, 635 (2000) (distinguishing *Carchedi* from other non-parole cases). The court premised its decision on the principle that “the government may impose upon the parolee certain conditions of liberty which would be unconstitutional if applied to

Wing Jung v. United States,³³¹ the Ninth Circuit considered the constitutionality of a sentence giving the defendant a choice between imprisonment and banishment.³³² Finding the sentence unconstitutional, the court “rejected the argument that the government may cloak unconstitutional punishments in the mantle of ‘choice.’”³³³ Courts have similarly disallowed waivers regarding a wide variety of punishments.³³⁴

But the 1999 Supreme Court decision *Stewart v. LaGrand*³³⁵ opened the door to the constitutionality of waivers regarding type of punishment. Pursuant to Arizona’s choice of method of execution option, convicted capital offender Walter LaGrand chose lethal gas instead of lethal injection.³³⁶ On a habeas challenge to lethal gas as cruel and unusual punishment violative of the Eighth Amendment, the Ninth Circuit rejected Arizona’s argument that LaGrand waived his claim by choosing lethal gas: “Eighth Amendment protections may not be waived, at least in the area of capital punishment.”³³⁷ Because lethal gas had previously been held unconstitutional in the Ninth Circuit and LaGrand’s choice did not constitute a valid waiver, the Ninth Circuit enjoined Arizona from executing LaGrand by lethal gas.³³⁸

ordinary individuals.” *Carchedi*, 560 F. Supp. at 1015.

331. 312 F.2d 73 (9th Cir. 1962).

332. *See id.* at 75–76 (“The court having imposed a lawful imprisonment then suspended the sentence for six months upon the condition that the defendant depart from the United States.”).

333. *Campbell v. Wood*, 18 F.3d 662, 680 (9th Cir. 1994) (en banc) (citing *Dear Wing Jung*, 312 F.2d at 75–76).

334. *See, e.g., id.* at 680–81 (rejecting the State’s argument that the defendant’s choice of hanging in preference to lethal injection waived Eighth Amendment objection to hanging); *Commonwealth v. McKenna*, 383 A.2d 174, 180 (Pa. 1978) (“[W]e decline to apply the rationale of . . . [previous cases accepting waivers on procedural grounds] in a situation where a finding of waiver will result in the imposition of a sentence of death . . . in a manner clearly contrary to the express law of the land.”); *see also State v. Brown*, 326 S.E.2d 410, 411–12 (S.C. 1985) (holding that allowing sexual offenders the choice between imprisonment and castration is unconstitutional because castration itself is cruel and unusual punishment).

335. 526 U.S. 115 (1999) (per curiam).

336. *Id.* at 119.

337. *Id.* at 117–18 (quoting *LaGrand v. Stewart*, 173 F.3d 1144, 1148 (9th Cir. 1999)).

338. *Id.*

The Supreme Court reversed the Ninth Circuit on two grounds: LaGrand's claims were "procedurally defaulted," and his Eighth Amendment right was waived.³³⁹ As to waiver, the Court's brief analysis is as follows:

By declaring his method of execution, picking lethal gas over the State's default form of execution—lethal injection—Walter LaGrand has waived any objection he might have to it. See, e.g., *Johnson v. Zerbst* To hold otherwise, and to hold that Eighth Amendment protections cannot be waived in the capital context, would create and apply a new procedural rule in violation of *Teague v. Lane*³⁴⁰

In dissent, Justice Stevens asserted, "whether a capital defendant may consent to be executed by an unacceptably torturous method of execution is by no means clear."³⁴¹ Referencing the unusual posture in which the Court heard the case, Stevens declared, "I would not decide such an important question without full briefing and argument."³⁴² Although the Court has not revisited the issue, *LaGrand* is followed in the lower courts, thereby precluding challenge to the constitutionality of various methods of execution when chosen by the capital offender pursuant to choice of method of execution statutes.³⁴³

Echoing Justice Stevens's concerns, one might argue *LaGrand* possibly undermines the fundamental principle that waiver cannot transform an unconstitutional punishment into a constitutional punishment. Though arguing that the protections of the Eighth Amendment should not be subject to waiver,³⁴⁴

339. See *id.* at 119–20 ("By declaring his method of execution, picking lethal gas over the State's default form of execution—lethal injection—Walter LaGrand has waived any objection he might have to it.").

340. *Id.* at 119.

341. *Id.* at 121.

342. *Id.*

343. See generally Christopher Q. Cutler, *Nothing Less Than the Dignity of Man: Evolving Standards, Botched Executions and Utah's Controversial Use of the Firing Squad*, 50 CLEV. ST. L. REV. 335, 393 (2003) ("Those courts considering choice-of-method statutes after *LaGrand* have followed its dictates without question.").

344. See Kirchmeier, *supra* note 330, at 642 (arguing that there are "three reasons why the Constitution does not allow defendants to waive the Eighth Amendment ban on cruel and unusual punishment").

Jeffrey Kirchmeier raised the concern that *LaGrand* implied that “[a]s long as defendants are given constitutional options, any punishment would be constitutional when reformed through the power of choice.”³⁴⁵ For example, “if a rape defendant may waive his Eighth Amendment rights and be [surgically] castrated in exchange for a lighter prison sentence, courts could allow thieves to have their hands chopped off and Peeping Toms to have their eyes gouged out.”³⁴⁶

Despite waiver of Eighth Amendment rights being more limited than some other constitutional rights, and despite the fundamental principle that waiver cannot transform a cruel and unusual punishment into a humane and ordinary punishment, *LaGrand* perhaps does provide support for waiver to serve as the missing underlying rationale of the prisoner fault argument. The next subpart, however, demonstrates that the waiver rationale is ultimately unhelpful.

C. Difficulties for Prisoner Fault Argument

This subpart presents six difficulties with waiver serving as the rationale for the prisoner fault argument. First, waiver cannot make paradigmatically cruel and unusual punishments, like torture, constitutional.³⁴⁷ Second, waiver cannot make categorically death-ineligible offenders, like children, eligible for capital punishment.³⁴⁸ Third, the scope of *LaGrand*'s precedential authority may be limited.³⁴⁹ Fourth, even if the Eighth Amendment is fully subject to waiver, *Lackey* claimants may be unable to satisfy the standards for a legally valid waiver.³⁵⁰ Fifth, and perhaps most fundamentally, waiver presupposes the existence of the right being waived—a right the existence of which Justice Thomas and nearly all lower courts strongly

345. *Id.* at 650.

346. *Id.*

347. *Infra* Part IV.C.1.

348. *Infra* Part IV.C.2.

349. *Infra* Part IV.C.3.

350. *Infra* Part IV.C.4.

deny.³⁵¹ Sixth, and perhaps of most practical significance, Justice Thomas seems to reject the waiver rationale.³⁵² The first three difficulties present limitations on the scope of waiver of Eighth Amendment rights that merely weaken waiver as a rationale for the prisoner fault argument. The last three difficulties much more strongly establish that waiver will not succeed as the missing rationale.

1. Waiver Cannot Make Cruel and Unusual Punishments Constitutional

Consider the paradigmatic examples of cruel and unusual punishment: burning at the stake, disemboweling, drawing and quartering, tarring and feathering, stoning, crucifying, being pulled limb from limb, etc. Suppose a defendant was able to choose one of these punishments. Under the logic of the prisoner fault argument, the prisoner's choice makes the prisoner responsible for what the prisoner chooses. It thereby renders such punishments unproblematic to impose on that prisoner. And under the waiver basis for that argument, the prisoner would be waiving her Eighth Amendment right against such otherwise paradigmatically cruel and unusual punishments. Reliance on the waiver rationale for the prisoner fault argument commits one to the view that such barbaric punishments are constitutional for such a defendant. But surely such punishments remain unconstitutionally cruel and unusual even for a defendant who has effected (or attempted to effect) a waiver.³⁵³ If we are unable

351. *Infra* Part IV.C.5.

352. *Infra* Part IV.C.6.

353. At least prior to *LaGrand*, the principle that waiver cannot transform an unconstitutional punishment into a constitutional punishment enjoyed a wide consensus. See *Whitmore v. Arkansas*, 495 U.S. 149, 173 (1990) (Marshall, J., dissenting) ("Certainly a defendant's consent to being drawn and quartered or burned at the stake would not license the State to exact such punishments."); *Lenhard v. Wolf*, 444 U.S. 807, 811 (1979) (Marshall, J., dissenting) (maintaining that society's interest that cruel and unusual punishments not be imposed "cannot be overridden by a [capital] defendant's purported waiver" of the right to trial); *Gilmore v. Utah*, 429 U.S. 1012, 1018 (1976) (White, J., joined by Brennan and Marshall, JJ., dissenting) ("[T]he consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment

to accept that waiver could transform paradigmatically cruel and unusual punishment like torture into a constitutional punishment, then perhaps waiver cannot transform an arguably cruel and unusual punishment into a constitutional punishment.³⁵⁴ If so, waiver as a rationale for the prisoner fault argument, despite the support of *LaGrand*, is somewhat problematic.

otherwise forbidden by the Eighth Amendment.”); Stephen Blum, *Public Executions: Understanding the “Cruel and Unusual Punishments” Clause*, 19 HASTINGS CONST. L.Q. 413, 451 (1992) (“[O]ne may not consent to cruel and unusual punishment. For example, even if given the choice of punishments between torture and death, the prisoner could not choose torture.”).

Even after *LaGrand*, legal scholars maintain this bedrock principle. See Dale E. Ho, *Silent at Sentencing: Waiver Doctrine and a Capital Defendant’s Right to Present Mitigating Evidence After Schriro v. Landrigan*, 62 FLA. L. REV. 721, 745 (2010) (“Given that, under the Eighth Amendment, the State has no authority to impose certain penalties because those penalties are abhorrent to society’s standard of decency, one could reasonably argue that a defendant should not be permitted to invite the State to flout those standards.”); Kirchmeier, *supra* note 330, at 643 (arguing that “waiver should not apply in the context of the application of the Eighth Amendment to barbaric punishments”); Mazzone, *supra* note 309, at 844 n.235 (“It is not difficult to imagine other limitations on waiver . . . [I]t is unlikely that a defendant could agree—waiving Eighth Amendment protections—to be publicly flogged and then drawn and quartered.”); Williams, *supra* note 309, at 720 (“We can start with an easy proposition, that as a matter of intuition the state’s obligation not to inflict inhumane punishment—notably torture—ought to be irrevocable and thus not subject to waiver.”).

Elizabeth Rapaport applies this fundamental principle to the *Lackey* claim context: “Perhaps for many of the condemned [on death row], periodic torture would be preferable to certain and immediate death, but that does not render torture plus death a sentence that would survive Eighth Amendment review.” Elizabeth Rapaport, *A Modest Proposal: The Aged on Death Row Should Be Deemed Too Old to Execute*, 77 BROOK. L. REV. 1089, 1127 (2012).

354. According to *Jones v. Chappell*, execution following excessively lengthy terms of death row incarceration is not merely arguably cruel and unusual punishment but actually is cruel and unusual punishment. No. CV-09-01258-CJC, 2014 WL 3567365, at *1 (C.D. Cal. July 16, 2014) (“Allowing this system to continue to threaten Mr. Jones with the slight possibility of death, almost a generation after he was first sentenced, violates the Eighth Amendment’s prohibition against cruel and unusual punishment.”).

2. *Waiver Cannot Make Death-Ineligible Capital Offenders Eligible*

In addition to it being unthinkable that waiver could allow barbaric punishments like torture to be constitutional, it is also unthinkable that waiver could allow categories of death-ineligible capital offenders to become eligible for capital punishment.³⁵⁵ *Kennedy v. Louisiana*³⁵⁶ and *Coker v. Georgia*³⁵⁷ found execution unconstitutional for the crime of rape. Would a rapist's consent to or choice of the death penalty make execution constitutional for him? *Roper v. Simmons*³⁵⁸ and *Thompson v. Oklahoma*³⁵⁹ found execution unconstitutional for juveniles and persons under the age of sixteen, respectively.³⁶⁰ Would a fifteen-year-old's consent to or choice of the death penalty make it constitutional to execute her? *Ford v. Wainwright*³⁶¹ and *Atkins v. Virginia*³⁶² found execution unconstitutional for persons who are insane and mentally retarded, respectively.³⁶³ Would such a cognitively challenged person's consent to or choice of capital punishment make it constitutional to execute him? After the Supreme Court in *Furman v. Georgia*³⁶⁴ declared capital punishment

355. See John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 MICH. L. REV. 939, 969 (2005) (arguing that a death-ineligible defendant who waives his Eighth Amendment rights with suicidal motivation should not be permitted to do so); Ho, *supra* note 353, at 745 n.120 ("The view that the State has no authority to impose certain punishments, regardless of a defendant's consent, has found voice in the dissenting opinions of Justices White, Brennan, and Marshall."); Kirchmeier, *supra* note 330, at 650 ("[I]f, as the Court implies in *LaGrand*, *Johnson* permits Eighth Amendment waivers, then rape defendants, child defendants, and insane defendants could choose the death penalty even though the Court has held that it violates the Eighth Amendment to execute those categories of defendants.").

356. 554 U.S. 407, 413 (2008) (holding capital punishment unconstitutional for the crime of rape of a child).

357. 433 U.S. 584, 592 (1977) (holding capital punishment unconstitutional for the crime of rape of an adult).

358. 543 U.S. 551 (2005).

359. 487 U.S. 815 (1988).

360. *Id.* at 838; *Roper*, 543 U.S. at 578.

361. 477 U.S. 399 (1986).

362. 536 U.S. 304 (2002).

363. *Id.* at 321; *Ford*, 477 U.S. at 417–18.

364. 408 U.S. 238 (1972) (per curiam).

unconstitutional as applied in 1972,³⁶⁵ but before the Court in *Gregg v. Georgia*³⁶⁶ declared it conditionally constitutional in 1976,³⁶⁷ would any offender's consent to or choice of execution during that time period make it constitutional to execute her? As to each of these questions, the answer is surely no. Allowing such persons whom the Supreme Court has ruled the Eighth Amendment categorically bars their execution to "waive into" capital punishment is unthinkable. As a result, waiver of the Eighth Amendment, at least in the capital punishment context, is not absolute. That waiver of the Eighth Amendment is limited may also limit the applicability of waiver in the *Lackey* claim context.

3. Limiting LaGrand

Despite the possible troubling implications of *LaGrand*, commentators have noted several reasons why it may not establish a precedent undermining the fundamental principle that defendants' choice cannot transform cruel and unusual punishment into constitutional punishment.³⁶⁸ First, the analysis was "cursory" and the Court did not receive full briefing and oral argument.³⁶⁹ Second, "the analysis and conclusion are dicta because of the Court's conclusion that the issue was procedurally

365. *Id.* at 239.

366. 428 U.S. 153 (1976).

367. *Id.* at 153.

368. See Cutler, *supra* note 343, at 394 ("Several principles nonetheless suggest weaknesses in *LaGrand* and provide hope for those challenging [the constitutionality of a punishment consented to or chosen]."); Epstein, *supra* note 327, at 26 ("[*LaGrand*] avoided the [fundamental] issue, and *LaGrand* therefore offers no limitation on the principle espoused here—that a person may not agree to a punishment that is intolerable for society to impose."); Kirchmeier, *supra* note 330, at 642 (concluding that *LaGrand* "failed to fully resolve the choice issue, and it remains open until the Court addresses the issue in a different procedural posture").

369. See Kirchmeier, *supra* note 330, at 640 (speculating that "[p]erhaps the Court devoted little effort to the issue because of the time constraints dictated by Walter LaGrand's execution, which was scheduled for only hours after the Court's decision").

defaulted.”³⁷⁰ Third, in basing its waiver decision on the *Teague* rule barring the application of new rules to habeas petitioners, the Court suggests that it might reach a different result in a case on direct appeal, rather than habeas, when *Teague* would not apply.³⁷¹ As a result, *LaGrand* may not seriously threaten the fundamental principle that waiver cannot transform an unconstitutional punishment into a constitutional punishment. Thus, waiver as the underlying rationale of the prisoner fault argument is less persuasive. As an arguably cruel and unusual punishment, execution following death row incarceration for upwards of thirty years or more cannot necessarily be made constitutional on the basis of waiver.³⁷²

370. *Id.*

371. See Cutler, *supra* note 343, at 394 (“Removed from the strict habeas prohibition against imposing a new constitutional requirement retroactively, direct review would allow the Supreme Court to consider plenary arguments on the issue.”); Epstein, *supra* note 327, at 26 (noting that the procedural posture of the case was “significant”); Kirchmeier, *supra* note 330, at 640–42 (“[T]he Court indicated that it could reach a different result if a case were to reach the Court on a certiorari grant from a direct appeal rather than from habeas review and if the issue were not defaulted.”); cf. Cutler, *supra* note 343, at 393 (“Essentially, the Supreme Court found that the special rules of habeas review prevented carving out an exception to the general rule of waiver for Eighth Amendment claims.”).

372. One might object that *LaGrand* may be interpreted in a way that both preserves waiver as a tenable basis for the prisoner fault argument and avoids constitutionalizing paradigmatically unconstitutional punishments. The interpretation is that *LaGrand* allows waiver regarding punishments that have not been ruled by the Supreme Court to violate the Eighth Amendment prohibition against cruel and unusual punishment. This interpretation would bar waiver regarding both torture and capital punishment (for classes of offenders, like juveniles, who are categorically death ineligible) while still allowing waiver regarding *Lackey* claims.

But a problem with this interpretation remains. It would still constitutionalize novel, exotic forms of punishment that the Supreme Court has yet to rule as cruel and unusual but that are no less torturous than those it has. Consider, for example, being eaten alive by wild boar, or even new technology-based punishments that the Framers could not have envisioned—being burned from the inside by an army of mini-laser-wielding nanobots. Under the interpretation of *LaGrand* offered by the objection, these clearly cruel and unusual punishments could be constitutionalized through waiver. One might still object that the Supreme Court has already ruled these punishments unconstitutional—they simply constitute torture. And as torture, the *LaGrand* interpretation would bar such punishments from being constitutionalized via waiver. But if so, then *Lackey* claimants could equally claim that execution

4. Lackey Claimants Cannot Satisfy Waiver Standard

Even assuming that *LaGrand* cannot be limited and the Eighth Amendment prohibition against cruel and unusual punishment is fully subject to waiver, it is not clear that death row prisoners asserting *Lackey* claims can effect a valid and legal waiver. The Supreme Court in *Johnson v. Zerbst*,³⁷³ the very case *LaGrand* cited as authority for its holding that the defendant waived Eighth Amendment challenge to lethal gas as a cruel and unusual punishment,³⁷⁴ held that waiver is the “intentional relinquishment or abandonment of a known right or privilege.”³⁷⁵ As Jason Mazzone explained, “waiver occurs when a person possesses a right that she could exercise but she purposely decides to relinquish it and does not exercise it.”³⁷⁶

This waiver standard raises two obstacles for *Lackey* claimants to effect a valid and legal waiver. First, by seeking appellate and collateral review, prisoners are not *intentionally* or *purposely* relinquishing any Eighth Amendment protections. Their only intent, or their direct intent, is to obtain appellate and collateral review of their capital conviction and/or sentence so as to avoid execution altogether. They either lack the intent altogether or perhaps, in some cases, only have the indirect

following decades on death row incarceration is also torture (and thus not subject to waiver).

To avoid the absurdity of clearly cruel and unusual punishments being constitutionalized through waiver, one must adhere to the fundamental principle that the Eighth Amendment prohibition against cruel and unusual punishment cannot be waived with respect to types of punishment. Or it can only be waived with respect to a punishment that the Supreme Court has affirmatively stated is constitutional. On this basis, execution following decades of death row incarceration cannot be immune from Eighth Amendment challenge on the basis of waiver unless and until the Supreme Court affirmatively rules on its constitutionality.

373. 304 U.S. 458 (1938).

374. See *Stewart v. LaGrand*, 526 U.S. 115, 119 (1999) (per curiam) (stating that the defendant, by selecting execution by lethal gas instead of lethal injection, waived his right to challenge the constitutionality of execution by lethal gas (citing *Zerbst*, 304 U.S. at 464)).

375. *Zerbst*, 304 U.S. at 464.

376. Mazzone, *supra* note 309, at 804.

intent to delay their execution. Thus they do not intentionally or purposely relinquish any Eighth Amendment protections.³⁷⁷

Second, and more fundamentally, that which is being relinquished must be a *known* legal right. But the right to an expeditious execution is a right unknown to almost all courts. Can prisoners effect a relinquishment of a known legal right that is a right unknown to (i.e., unrecognized by) courts? It seems incongruous for courts rejecting *Lackey* claims to do so on the basis that prisoners have waived a right that the court itself refuses to recognize. At present, the right to a timely execution is neither a known legal right nor an existing legal right in any jurisdiction save one.³⁷⁸ And because it is not an existing right, it cannot be a right that the prisoner “possesses” and “could exercise.”³⁷⁹ A prisoner cannot effect a valid waiver of a right that is neither known nor existing.³⁸⁰

377. To see this point in a different way, contrast the *Lackey* claimant with a defendant who is truly intentionally waiving a right. By pleading guilty a defendant waives the Sixth Amendment right to, among other things, a jury trial. By pleading guilty, the defendant does truly intend to not have a jury trial. By electing to self-represent, a defendant waives the Sixth Amendment right to have counsel represent him. By self-representing, the defendant does truly intend to not have another represent him. But merely by seeking appellate and/or collateral review of a capital conviction or sentence, we cannot in the same way conclude that such a defendant is waiving Eighth Amendment protection against cruel and unusual punishment for an excessively delayed execution. By seeking such review, the defendant’s true and direct intent is to reverse the conviction or sentence.

378. See *supra* notes 39–42 and accompanying text (discussing *Jones* as the first federal decision recognizing a *Lackey* claim).

379. Mazzone, *supra* note 309, at 804.

380. One might object that the *Lackey* claimant is not waiving the right, under the Eighth Amendment’s Cruel and Unusual Punishments Clause, against execution following a lengthy period of death row incarceration. Rather, it is simply the right against cruel and unusual punishment that is being waived. Because that right is obviously known and existing, a *Lackey* claimant can easily meet the standard for a valid and legal waiver.

But the right being waived cannot be simply the right against cruel and unusual punishment. To see this, consider the following hypothetical. Suppose a death row prisoner asserts two claims. First, that execution following decades of death row incarceration violates the Eighth Amendment’s prohibition against cruel and unusual punishment (this is the familiar *Lackey* claim). Second, that the execution *alone* violates the Eighth Amendment’s prohibition against cruel and unusual punishment based on *Furman v. Georgia*, because, for example, it is arbitrary. See *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (per curiam)

Thus, even assuming that *LaGrand* cannot be limited, and even assuming that the Eighth Amendment Cruel and Unusual Punishments Clause is fully subject to waiver, *Lackey* claimants may not be able to effect a valid and legal waiver. They are not intentionally relinquishing the right, the right is not known, they do not possess the right, and it is not a right they could exercise. Consequently, waiver fails to supply a rationale for the prisoner fault argument.

5. Waiver of Right Presupposes Existence of Right

The previous section argued that non-existent rights cannot be waived. Because the right to an expeditious execution is non-existent (in every jurisdiction but one), the right cannot be waived (in any jurisdiction but one). This section makes essentially the same argument but from the opposite direction. Let us assume *arguendo* that *Lackey* claimants are legally waiving the protection the Eighth Amendment's Cruel and Unusual Punishments Clause extends to execution following decades of death row incarceration. But the concept of waiver implies that there is an underlying right that is being waived.

(Stewart, J., concurring) (“I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.”). Courts employing the prisoner fault argument based on a waiver rationale would deny the first claim because the prisoner waived it. If the right being waived was the entire right against cruel and unusual punishment that would mean that the second claim can also be rejected on the basis of waiver. However, there is no basis for the second claim to be denied based on waiver. No court has ever ruled that, by seeking review of the arbitrariness of an execution, the prisoner has waived the right against cruel and unusual punishment. Thus, the right being waived with respect to the first claim is not the entire right against cruel and unusual punishment. Courts denying *Lackey* claims are merely ruling that the prisoner is barred from making Eighth Amendment claims based on delay. They are not ruling that the prisoner has waived—always and forever—the entire Eighth Amendment or the entire Cruel and Unusual Punishments Clause.

As a result, the right that courts denying *Lackey* claims are concluding that prisoners have, in effect, waived is the right against execution following a sufficiently lengthy period of death row incarceration. Because that right is neither known nor existing (in every jurisdiction but one), the right cannot be waived (in any jurisdiction but one).

Waiver of a right presupposes and concedes the existence of that right. As the Supreme Court stated in *Zerbst*, waiver is the “intentional relinquishment or abandonment of a known right or privilege.”³⁸¹ For a right to be both known and relinquished, as is required for a legally valid waiver, it must exist. As Mazzone similarly explained, “waiver occurs when a person possesses a right that she could exercise but she purposely decides to relinquish it and does not exercise it.”³⁸² Thus, for there to be a legally valid waiver, the person waiving the right must both possess it and be capable of exercising it. For a right to be both possessed and capable of being exercised, it must exist. As a result, if the rationale of the prisoner fault argument is waiver, then death row prisoners do have an Eighth Amendment right against execution following a sufficiently lengthy term of death row incarceration. But this is a right that no court rejecting a *Lackey* claim has ever acknowledged. Reliance on waiver as the rationale for the prisoner fault argument would force courts to recognize a right the existence of which they have vehemently denied.³⁸³

6. Justice Thomas Rejects Waiver Rationale

A final consideration militating against waiver supplying the rationale for the prisoner fault argument is that Justice Thomas may have explicitly rejected it. In *Thompson v. McNeil*,³⁸⁴ Justice Thomas denied the prisoner’s *Lackey* claim by invoking the prisoner fault argument, stating that a defendant cannot “avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed.”³⁸⁵ In his dissent, Justice Breyer summarized Justice Thomas’s view as follows:

381. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

382. Mazzone, *supra* note 309, at 804.

383. *See supra* notes 53, 161–164 (presenting numerous examples of courts denying the existence of a constitutional right associated with a *Lackey* claim).

384. 556 U.S. 1114 (2009).

385. *Id.* at 1117 (Thomas, J., concurring in denial of certiorari) (quoting *Knight v. Florida*, 528 U.S. 990, 990 (1999) (Thomas, J., concurring in denial of certiorari)).

“Justice Thomas suggests that petitioner cannot now challenge the constitutionality of the delay because much of that delay is his own fault—he caused it by choosing to challenge the sentence that the people of Florida deemed appropriate.”³⁸⁶ Justice Breyer replied that the prisoner has not waived his Eighth Amendment claim: “I do not believe that petitioner’s decision to exercise his right to seek appellate review of his death sentence automatically waives a claim that the Eighth Amendment proscribes a delay of more than thirty years.”³⁸⁷ Justice Thomas replied to Breyer’s argument as follows: “The issue is not whether a death-row inmate’s appeals ‘waive’ any Eighth Amendment right; the issue instead is whether the death-row inmate’s litigation strategy, which delays his execution, provides a justification for the Court to invent a new Eighth Amendment right. It does not.”³⁸⁸ By this statement, Justice Thomas seemed to concede that a death row prisoner seeking appellate and collateral review, and thereby delaying his execution, is not waiving any Eighth Amendment right. Instead, Justice Thomas believed that the issue is whether the Eighth Amendment’s prohibition against cruel and unusual punishment protects against substantially delayed executions and he declared that it does not.

Note that Justice Thomas argued that recognition of a *Lackey* claim would require “the Court to invent a *new* Eighth Amendment right.”³⁸⁹ Thus, the right, according to Justice Thomas, does not presently exist within the Eighth Amendment. Because non-existent rights cannot be waived, waiver fails as a rationale for the prisoner fault argument.³⁹⁰ And the cost of the waiver rationale succeeding would be the concession that the right against execution following excessively lengthy death row incarceration does presently exist and is presently protected by the Eighth Amendment.³⁹¹ That is, either waiver fails as a

386. *Id.* at 1120.

387. *Id.*

388. *Id.* at 1117.

389. *Id.* (emphasis added).

390. *See supra* Part IV.C.4 (arguing that a *Lackey* claimant cannot satisfy the waiver standard because the claimants are not “intentionally or purposely relinquishing” a “known legal right”).

391. *See supra* Part IV.C.5 (arguing that waiver presupposes the existence of

rationale or the cost of its success is acceptance of the very right the existence of which Justice Thomas and the lower courts vigorously deny.³⁹² Either way, the possible rationale of waiver for the prisoner fault argument is not helpful to Justice Thomas and the lower courts denying *Lackey* claims.

V. Conclusion

The principal basis for courts rejecting claims that execution following death row incarceration of upwards of thirty years or more violates the Eighth Amendment prohibition against cruel and unusual punishment (*Lackey* claims) is that such lengthy delays between sentencing and execution are self-inflicted by the prisoners. By choosing to pursue appellate and collateral review, the resulting delays are the prisoners' fault and thus cannot violate the Eighth Amendment. Though utilized by nearly every court addressing *Lackey* claims, the prisoner fault argument lacks an underlying rationale tying it to the concerns of the Eighth Amendment. This Article proposed the two most obvious possible rationales—analagizing to the Sixth Amendment speedy trial right and waiver—but neither proposed rationale is persuasive. Even assuming that these proposed rationales do make prisoner fault relevant, the price for purchasing this relevance is the concession that the Eighth Amendment does contain the very right that courts denying *Lackey* claims refuse to recognize. Therefore, either prisoner fault for delay is irrelevant and the prisoner fault argument is untenable or prisoner fault for delay is relevant, but prisoners do have an Eighth Amendment right against execution following an excessively lengthy period of death row incarceration. Either way, the prisoner fault argument should no longer be the primary obstacle to courts recognizing *Lackey* claims.

a right to an expeditious execution).

392. See *supra* notes 53, 161–164 (citing numerous cases in which the existence of a right to an expeditious execution is denied).