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Absurdity and Excessively Delayed Executions

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Absurdity and Excessively Delayed Executions

Russell L. Christopher*

While capital punishment per se is constitutionally permissible, is “capital punishment plus” unconstitutional? Death row prisoners claim that capital punishment plus as much as thirty years or more of post-sentence, pre-execution death row incarceration is disproportionate and excessive, constituting cruel and unusual punishment. While Justice Breyer and former Justice Stevens defend the claim as meritorious, Justice Thomas derides it as a mockery of justice and nearly every court denies the claim. In upholding the constitutionality of such excessively delayed executions, courts principally rely on a trio of arguments. Utilizing a reductio ad absurdum method of argument, this Article demonstrates that the trio would absurdly deny numerous, long-standing, fundamental rights emanating from the Fifth, Sixth, and Fourteenth Amendments and expressly guaranteed by the Supreme Court. By absurdly denying clearly existing constitutional rights, the trio is unsound. Demonstrating that the trio is unsound clears the path for courts to recognize that excessively delayed executions violate the Eighth Amendment prohibition against cruel and unusual punishment.

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INTRODUCTION

On America's death row, delays between sentence and execution are now approaching forty years.¹ In what are known as "Lackey claims," after Clarence Lackey's 1995 petition to the Supreme Court for a writ of certiorari, death row prisoners argue that execution following decades of death row incarceration is disproportionate punishment violating the Eighth Amendment's prohibition against cruel and unusual punishment for two reasons.² As Brent Newton, counsel for Lackey and architect of the *Lackey* claim explained, "first . . . execution after . . . [incarceration] under the extreme conditions of death row for such a lengthy period of time would exact more punishment than . . . the Eighth Amendment [allows]; and second, . . . neither of the state's primary interests . . . — retribution and deterrence — would be meaningfully served . . . after such a lengthy delay . . ."³ Despite Justice Stephen Breyer and former Justice John Paul Stevens championing *Lackey* claims,⁴ for nearly twenty years — until 2014 — no court had recognized them.⁵

¹ 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 prisoners have been on death row for thirty to forty years. TRACY L. SNELL, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT, 2012 — STATISTICAL TABLES 18 tbl.15 (rev. 2014) (stating that 33 current death row prisoners were placed there from 1974–1979, 60 from 1980–1982, and 121 from 1983–1985).

² U.S. CONST. amend. VIII ("[N]or cruel and unusual punishments inflicted."). Although the Supreme Court denied Lackey's petition, *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (Stevens, J., respecting denial of certiorari), the similar claims brought by numerous other death row prisoners have become known as "Lackey claims." 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.'").

³ Brent E. Newton, *The Slow Wheels of Furman's Machinery of Death*, 13 J. APP. PRAC. & PROCESS 41, 54-55 (2012) [hereinafter *Slow Wheels*].

⁴ See, e.g., Carol S. Steiker & Jordan M. Steiker, *Capital Punishment: A Century of Discontinuous Debate*, 100 J. CRIM. L. & CRIMINOLOGY 643, 681 (2010) ("Over the past fifteen years, Justices Stevens and Breyer have repeatedly called for the Court to address the issue, with Justice Breyer characterizing the claim as 'serious' (quoting *Elledge v. Florida*, 525 U.S. 944, 944 (1998) (dissenting from denial of certiorari)) and 'particularly strong,' (quoting *Knight*, 528 U.S. at 993 (dissenting from denial of certiorari)), and Justice Stevens ultimately declaring that prolonged death row incarceration is 'unacceptably cruel.'" (quoting *Thompson v. McNeil*, 556 U.S. 1114, 1116 (2009) (respecting denial of certiorari))). For Justice Breyer's most recent

Repeatedly denying *Lackey* claims, courts have principally relied on three arguments. First, death row prisoners choose to pursue appellate and collateral review of their sentence.⁶ As chosen by prisoners, a consequence of that choice — delay between sentence and execution — is attributable to the prisoners, not the State.⁷ “It makes ‘a mockery of our system of justice . . . for a convicted murderer, who [chooses appellate and collateral review that causes] . . . the almost-indefinite postponement of his sentence, to then claim that the almost-indefinite postponement renders his sentence unconstitutional.’”⁸ Second, appellate and collateral review of capital sentences is necessary to ensure their accuracy and fairness.⁹ A consequence of what is necessary to ensure accuracy and fairness — delay between sentence and execution — must be constitutionally permissible.¹⁰ “[D]eath row delays [are constitutional] because delay results from the ‘desire of our courts, state and federal, to get it right, to explore . . . any argument that might save someone’s life.’”¹¹ Third, appellate and collateral review of capital sentences is necessary to satisfy the Eighth Amendment.¹² “It

dissent from a denial of certiorari of a *Lackey* claim, see *Muhammad*, 134 S. Ct. at 894.

⁵ See, e.g., *Booker v. McNeil*, No. 1:08cv143/RS, 2010 WL 3942866, at *38 n.12 (N.D. Fla. Oct. 5, 2010) (“[N]o federal or state courts have accepted [*Lackey* claims] . . .” (citations omitted)). In July 2014, *Jones v. Chappell* became the first (post-*Lackey*) case to recognize a *Lackey* claim. See *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1069 (C.D. Cal. 2014) (vacating defendant’s death sentence because lengthy delays between sentencing and execution have “resulted in a system that serves no penological purpose” and is “unconstitutional”); Brent E. Newton, *Justice Kennedy, the Purposes of Capital Punishment, and the Future of Lackey Claims*, 62 BUFF. L. REV. 979, 987, 998 (2014) [hereinafter *Justice Kennedy*] (reporting that “no lower court has granted relief on a *Lackey* claim” but then noting in a Post-Script the announcement of *Jones*’ recognition of a *Lackey* claim).

⁶ See, e.g., *Thompson v. McNeil*, 556 U.S. 1114, 1117 (2009) (Thomas, J., concurring in denial of certiorari) (emphasizing that the “petitioner chose to challenge his death sentence”); *McKenzie v. Day*, 57 F.3d 1461, 1470 n.21 (9th Cir. 1995) (“[T]o the extent petitioners choose to delay execution in the hope of obtaining relief, that is a choice they make for themselves.”).

⁷ See, e.g., *Turner v. Jabe*, 58 F.3d 924, 933 (4th Cir. 1995) (Luttig, J., concurring) (“The delay of which [the prisoner] now complains is a direct consequence of his own litigation strategy . . .”).

⁸ *Thompson*, 556 U.S. at 1117 (quoting *Turner*, 58 F.3d at 933).

⁹ See, e.g., *State v. Smith*, 931 P.2d 1272, 1288 (Mont. 1996) (“[T]he cause for the delay . . . [was that the prisoner] ‘availed himself of procedures our law provides to ensure that executions are carried out only in appropriate circumstances.’” (quoting *McKenzie*, 57 F.3d at 1466-67)).

¹⁰ See *Thompson v. Sec’y for the Dep’t of Corr.*, 517 F.3d 1279, 1284 (11th Cir. 2008).

¹¹ *Id.* (quoting *Chambers v. Bowersox*, 157 F.3d 560, 570 (8th Cir. 1998)).

¹² See, e.g., *White v. Johnson*, 79 F.3d 432, 439 (5th Cir. 1996) (noting the state’s

would be a mockery of justice to conclude that delays caused by satisfying the Eighth Amendment themselves violate it.”¹³

These three arguments have been extraordinarily influential in denying *Lackey* claims. Nearly every court addressing *Lackey* claims on the merits has invoked at least one, if not all three.¹⁴ Most of the federal circuit courts have invoked all three and Supreme Court Justice Clarence Thomas endorses at least two of them.¹⁵ These arguments have apparently been sufficiently persuasive to the full Court; it steadfastly has declined to accept review of *Lackey* claims.¹⁶ Until 2014, no court had disagreed with them.¹⁷

This Article demonstrates, however, that these three influential arguments entail absurd consequences — the denial of fundamental, long-standing constitutional rights. That is, not only do they deny a claimed Eighth Amendment right against excessively delayed execution, but they also deny constitutional rights expressly guaranteed by the Supreme Court. Demonstrating that this trio of arguments leads to absurd or false conclusions denying clearly existing constitutional rights demonstrates that the trio is unsound.¹⁸ Eliminating the support of the trio eliminates the primary obstacle to

“interest in insuring that those who are executed receive fair trials with constitutionally mandated safeguards”).

¹³ *State v. Moore*, 591 N.W.2d 86, 94 (Neb. 1999); accord *McKenzie*, 57 F.3d at 1467 (“We cannot conclude that delays caused by satisfying the Eighth Amendment themselves violate it.”).

¹⁴ See, e.g., Jane Marriott, *Walking the Eighth Amendment Tightrope: ‘Time Served’ in the United States Supreme Court*, in *AGAINST THE DEATH PENALTY: INTERNATIONAL INITIATIVES AND IMPLICATIONS* 159, 179 (Jon Yorke ed., 2008) (“[There are] three forms of reasoning that inevitably le[a]d to the [*Lackey*] claim being rejected. First . . . that courts may find compelling reasons for the delay. Second, . . . delays caused by way of satisfying the demands of the Eighth Amendment simply cannot violate it. Third, . . . the delay was not attributable to the state . . .”); see also *infra* notes 123, 151, 166.

¹⁵ See *infra* Part I.C.1.b and note 232.

¹⁶ See, e.g., *Thompson*, 517 F.3d at 1284 (noting “the total absence of Supreme Court precedent”). For the most recent denial of certiorari of a *Lackey* claim triggering a response by a Justice, see *Muhammad v. Florida*, 134 S. Ct. 894, 894 (2014) (Breyer, J., dissenting from denial of certiorari).

¹⁷ See *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1066 (C.D. Cal. 2014) (rejecting two of these arguments as “simply incorrect” on empirical grounds); see also *infra* Part I.C.

¹⁸ An argument is unsound if either its form of reasoning is invalid or if it contains a false premise. See Albert E. Blumberg, *Modern Logic*, in 5 *THE ENCYCLOPEDIA OF PHILOSOPHY* 12, 13 (Paul Edwards ed., 1967) (explaining the “term ‘sound,’ to refer to arguments that both are valid and contain true premises”); Christopher Kirwan, *Argument*, in *THE OXFORD GUIDE TO PHILOSOPHY* 49, 49 (Ted Honderich ed., 2d ed. 2005) (noting that ‘sound’ refers to “valid arguments with true premises”).

courts recognizing that execution following decades of death row incarceration is unconstitutional.

Utilizing a *reductio ad absurdum* method of argument,¹⁹ this Article assumes the soundness of the trio in order to apply the trio to a variety of constitutional rights and assess the consequences. If that application leads to absurd or false conclusions, then the trio is unsound. As an example, to see how the trio leads to absurd or false conclusions, suppose an indigent defendant exercises her Sixth Amendment right to the appointment of counsel.²⁰ Following conviction, she appeals claiming that her appointed counsel was ineffective and her Sixth Amendment right to the effective assistance of counsel was violated.²¹ Further suppose that an appellate court denies her claim based on the following application of the trio to this Sixth Amendment context. First, the defendant chose to have appointed counsel.²² As chosen by the defendant, a consequence of that choice — ineffectiveness of counsel — is attributable to the defendant, not the State.²³ It makes a mockery of our system of justice for a defendant to request the appointment of counsel at State expense and, after that counsel is furnished, then to complain that her counsel's ineffectiveness renders her conviction unconstitutional.²⁴ Second, the appointment of counsel for indigents is necessary for accuracy and fairness.²⁵ A consequence of what is necessary for accuracy and fairness — ineffectiveness of counsel — must be constitutionally permissible.²⁶ The appointment of

¹⁹ “The *reductio ad absurdum* is a valid argument form which is widely used and highly effective.” WESLEY C. SALMON, *LOGIC* 30 (1963). Under this method, to demonstrate that an argument is unsound, its truth is assumed. If that assumption leads to false or absurd consequences, then the assumption may be false and the argument may be rejected. See, e.g., JULIAN BAGGINI & PETER S. FOSL, *THE PHILOSOPHER'S TOOLKIT: A COMPENDIUM OF PHILOSOPHICAL CONCEPTS AND METHODS* 117 (2003) (“[T]he philosopher starts with premises held by those whose position they undermine . . . follow[ing] through the logic of the premises to their absurd conclusion . . . hop[ing] to show that, if the premises lead to absurd consequences, the premises must be wrong.”); see also *infra* note 182.

²⁰ See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.”); *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963) (extending the Sixth Amendment right to appointed counsel for indigents to state court defendants via the Fourteenth Amendment as a matter of fundamental fairness essential to a fair trial).

²¹ See *infra* notes 30–32 and accompanying text.

²² Compare statement in text, with *supra* note 6 and accompanying text.

²³ Compare statement in text, with *supra* note 7 and accompanying text.

²⁴ Compare statement in text, with *supra* note 8 and accompanying text.

²⁵ Compare statement in text, with *supra* note 9 and accompanying text.

²⁶ Compare statement in text, with *supra* note 10 and accompanying text.

counsel cannot result in a Sixth Amendment violation because appointment of counsel stems from the desire of our courts, state and federal, to get it right, to furnish any assistance that might prevent a wrongful conviction.²⁷ Third, the appointment of counsel for indigents (charged with a felony) is necessary to satisfy the Sixth Amendment.²⁸ It would be a mockery of justice for ineffectiveness of counsel caused by satisfying the Sixth Amendment to violate it.²⁹ Not only does the trio deny an indigent with appointed counsel a constitutional right to effective assistance of counsel, but also granting such a right would be a mockery of justice.

Of course, something is terribly wrong. The trio did not deny the defendant's ineffectiveness claim because the defendant did, in fact, receive effective counsel. Nor did the trio deny the claim because the defendant failed to meet her evidentiary burden or failed to establish prejudice. Rather, the trio denied her claim by establishing that the defendant lacks a Sixth Amendment right to effective assistance of counsel in principle. Moreover, the trio would establish that *no* defendant enjoys both the right to appointed counsel and the right to effective assistance of counsel. Something is terribly wrong because, of course, *all* defendants exercising the right to counsel, "whether retained or appointed," do have a Sixth Amendment right to the effective assistance of counsel.³⁰ Beginning with *Powell v. Alabama*³¹ in 1932, the Supreme Court has long recognized and repeatedly held that the Sixth Amendment "right to counsel is the right to the effective assistance of counsel."³² Because the trio absurdly denies a clearly existing, long-standing constitutional right expressly guaranteed by the Supreme Court, the trio is unsound.

Perhaps, one might object, the delayed execution and right to counsel contexts are disanalogous. While ineffectiveness of counsel is only a possible consequence of a defendant exercising the right to counsel, delay between sentencing and execution is a necessary consequence of a death row prisoner seeking post-conviction review. As will be discussed more expansively below,³³ the objection is

²⁷ Compare statement in text, with *supra* note 11 and accompanying text.

²⁸ Compare statement in text, with *supra* note 12 and accompanying text.

²⁹ Compare statement in text, with *supra* note 13 and accompanying text.

³⁰ *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

³¹ 287 U.S. 45, 58 (1932) ("[Because counsel was ineffective,] we hold that defendants were not accorded the right of counsel in any substantial sense.").

³² *Strickland*, 466 U.S. at 686 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).

³³ See *infra* Part II.G.3.

unpersuasive. While *some* delay may be a necessary consequence of post-conviction review, the *entirety* of, for example, a thirty-year delay stemming from multiple “constitutionally defective sentencing proceedings” is unnecessary and avoidable.³⁴ Furthermore, because the nationwide average period of delay is less than sixteen years, the average delays of twenty-five years in California and Florida are clearly unnecessary and avoidable.³⁵ As a result, just as ineffectiveness of counsel is only a possible consequence of a defendant’s choice to exercise the right to counsel, so also particularly lengthy or excessive delay is only a possible consequence of a prisoner’s choice to pursue post-conviction review. On that basis, the two contexts are analogous.

One might still object that there is something special about the Sixth Amendment context in which the trio leads to an absurd or false conclusion. But this Article will demonstrate that the trio absurdly denies six other clearly existing constitutional rights stemming from the Fifth Amendment, the Sixth Amendment, and the Due Process and Equal Protection clauses of the Fourteenth Amendment. That the trio absurdly denies seven clearly existing, long-standing, fundamental constitutional rights established by the Supreme Court and stemming from three different constitutional Amendments suggests that the problem with the trio lies not in their application to that one context and one right but in the trio itself.

We now have more than a hint as to why the trio has been so influential in denying *Lackey* claims. Because the trio would deny numerous, clearly existing constitutional rights guaranteed by the Supreme Court, the trio establishes too high a bar for an actual or claimed constitutional right to meet. If even long-standing, fundamental constitutional rights guaranteed by the Supreme Court cannot meet this too-high standard, a *Lackey* claim’s failure to meet this too-high standard is no longer evidence that it fails to warrant constitutional protection.

One might still object that the trio cannot fairly be applied to constitutional rights outside the Eighth Amendment. As will be discussed more fully below,³⁶ the objection is unpersuasive for several reasons. First, not only is there little about the three arguments relevant only to the Eighth Amendment, there is little about them relevant to the Eighth Amendment at all. Second, the three arguments

³⁴ *Smith v. Arizona*, 552 U.S. 985, 985-86 (2007) (Breyer, J., dissenting from denial of certiorari).

³⁵ See *infra* notes 66–68.

³⁶ See *infra* Part II.G for a more comprehensive response to this possible objection, as well as responses to other anticipated objections.

themselves are framed as broad propositions meant to capture our sense of intuition and reason about constitutional rights. They can fairly be applied just as broadly as they are framed. Third, as will be demonstrated, the arguments themselves derive from Sixth Amendment speedy trial right analysis. Because the three arguments themselves derive from arguments outside the Eighth Amendment context, they may fairly be applied outside the Eighth Amendment context.

In undertaking the first comprehensive critical examination of the three principal arguments courts use to deny *Lackey* claims, this Article does not make an affirmative case for why *Lackey* claims should prevail. The affirmative case has already been extensively advanced.³⁷ But what is largely missing in the debate is each side specifically addressing each other's arguments.³⁸ Moreover, each side is talking past each other. *Lackey* claimants are making *substantive Eighth Amendment* arguments about *punishment*;³⁹ courts are largely dismissing it as a *procedural due process* claim involving nothing more than *delay*.⁴⁰ Attempting to bridge this conceptual divide and redress this imbalance in the debate, this Article directly engages with the principal arguments of courts rejecting *Lackey* claims. In order to find common ground, it assumes *arguendo* that the arguments are sound in order to assess their consequences. The consequences of these arguments, however, are the absurd denial of seven clearly existing, long-standing constitutional rights guaranteed by the Supreme Court. Because the trio leads to absurd or false conclusions — the non-existence of clearly existing constitutional rights — the trio itself is unsound.

The Article unfolds in the following Parts. After Part I furnishes an overview of capital punishment and excessively delayed executions, Part II demonstrates that the trio is unsound because the trio absurdly denies the following clearly existing constitutional rights established

³⁷ For the most recent examples, see Russell L. Christopher, *Death Delayed Is Retribution Denied*, 99 MINN. L. REV. 421, 452-79 (2014) (arguing that execution following prolonged death row incarceration violates retributivism); Michael Johnson, *Fifteen Years and Death: Double Jeopardy, Multiple Punishments, and Extended Stays on Death Row*, 23 B.U. PUB. INT. L.J. 85, 103-12 (2014) (contending that extended death row incarceration violates double jeopardy). For a collection of the literature, see Newton, *Justice Kennedy*, *supra* note 5, at 988 n.34. For the arguments of Justices Breyer and Stevens, see cases cited *infra* notes 96–101 and accompanying text.

³⁸ For criticisms that courts denying *Lackey* claims have not squarely addressed the claims, see *infra* notes 238–39 and accompanying text.

³⁹ See *supra* notes 2–3 and accompanying text.

⁴⁰ See *infra* notes 238–43 and accompanying text.

by the Supreme Court: (i) Sixth Amendment right to a jury pool representative of the community, (ii) Sixth Amendment and Fourteenth Amendment Due Process Clause rights to an impartial jury, (iii) Fourteenth Amendment Equal Protection Clause right against discriminatory use of peremptory challenges in jury selection, (iv) Fifth Amendment right to a no-adverse-inference jury instruction regarding the defendant's choice not to testify, (v) Fifth Amendment right against negative comments to the jury regarding the defendant's choice not to testify, and (vi) the Sixth Amendment right to a speedy trial. Finally, Part II presents and counters four possible objections to this Part's claim that the trio is unsound.

While Part II demonstrates *that* the three arguments are unsound, Part III explains *why* these three intuitively appealing arguments are unsound. These explanations provide additional bases, independent from Part II, for rejecting the trio. The flaw in the first argument — a defendant/prisoner is responsible for the consequences of the constitutional rights she chooses to exercise — is the false assumption that the defendant/prisoner is ultimately responsible for the type of trial the State conducts and the type of punishment the State imposes. The flaw in the second and third arguments — the consequences of what is necessary for accuracy, fairness, and satisfying the Constitution cannot violate it — is the false assumption that what is necessary to satisfy the Constitution is also sufficient. The mere satisfaction of one right necessary to satisfy the Constitution will not be sufficient to satisfy all of a defendant's/prisoner's multiple constitutional rights. And in some cases, the consequences of satisfying one right — necessary to satisfy the Constitution — will violate another right thereby precluding the satisfaction of all of the rights sufficient to satisfy the Constitution. By demonstrating that the three principal arguments used by courts to deny *Lackey* claims are unsound, this Article clears the path for courts to recognize that execution following as much as thirty years or more of death row incarceration violates the Eighth Amendment prohibition against cruel and unusual punishment.

I. OVERVIEW OF EXCESSIVELY DELAYED EXECUTIONS

After sketching a brief explanation of the constitutionality of capital punishment in general, Part I charts the ever-increasing delays between sentencing and execution, as well as their causes. Next, it canvasses the early, pre-*Lackey* cases addressing excessively delayed executions before examining *Lackey* itself and the ensuing debate on the Court between Justices Breyer, Stevens, and Thomas. After

surveying the chilly reception *Lackey* claims have received in the lower courts over the last twenty years, this Part highlights two very recent developments possibly portending a brighter future for the claim. Finally, Part I more expansively presents, and notes the criticisms of, the trio.

A. *Constitutionality of Capital Punishment*

In order to better understand the *Lackey* claim, a brief account of the Supreme Court's analysis of the constitutionality of capital punishment may be helpful. In 1972, in *Furman v. Georgia*, the Court found the death penalty unconstitutional as applied principally because its imposition was arbitrary and capricious.⁴¹ "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual."⁴² In 1976, in *Gregg v. Georgia*, the Court upheld capital punishment as per se constitutional under a two-part test.⁴³ First, capital punishment must be acceptable not only from the perspective of the Eighth Amendment's adoption in 1791, but also to contemporary society — acceptable under "the evolving standards of decency that mark the progress of a maturing society."⁴⁴ Second, capital punishment "must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.'"⁴⁵ This principle of human dignity bars both "barbarous" methods of execution⁴⁶ that are "cruelly inhumane"⁴⁷ and excessive punishments.⁴⁸ There are two types of excessive punishments — unnecessary and disproportionate.⁴⁹ An unnecessary punishment fails to further legitimate penological goals — principally, retribution and deterrence.⁵⁰ A disproportionate punishment fails to sufficiently

⁴¹ See *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring) ("[T]here is no meaningful basis for distinguishing the few cases in which [capital punishment] is imposed from the many cases in which it is not.").

⁴² *Id.* at 309 (Stewart, J., concurring).

⁴³ *Gregg v. Georgia*, 428 U.S. 153, 169-87 (1976).

⁴⁴ *Id.* at 173 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

⁴⁵ *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958)).

⁴⁶ *Id.* at 170-71.

⁴⁷ *Id.* at 175.

⁴⁸ See *id.* at 173-75 (explaining that punishment comporting with human dignity "means, at least, that the punishment not be 'excessive'").

⁴⁹ *Id.* at 173.

⁵⁰ *Id.* at 183 (noting that unnecessary punishment constitutes "the gratuitous infliction of suffering").

correlate with the severity of the offense⁵¹ or the culpability of the offender.⁵² Regarding the severity of the offense, capital punishment is proportionate to at least some types of murder,⁵³ but is disproportionate to the offense of rape.⁵⁴ With respect to the culpability of the offender, capital punishment is proportionate for at least some adults, but is disproportionate for juveniles.⁵⁵ The original and primary conception of the *Lackey* claim maintains that execution following lengthy death row incarceration violates the Eighth Amendment prohibition against cruel and unusual punishment as both unnecessary and disproportionate punishment.⁵⁶ Another conception of the claim argues that the lengthy death row incarceration alone is unconstitutional as cruelly inhumane.⁵⁷

B. Delay Between Sentence and Execution

Over time, the temporal intervals between capital sentencing and execution and the duration of tenures on death row have steadily risen. In the eighteenth-century William Blackstone reported that “in England, it is enacted by statute that the judge, before whom a murderer is convicted, shall in passing sentence, direct him to be executed on the next day but one.”⁵⁸ Terming the two days a “short but awful interval,”⁵⁹ Blackstone explained that the interval must be

⁵¹ *Id.* at 173 (assessing proportionality between the punishment and “the severity of the crime”).

⁵² *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (holding that capital punishment is disproportionate for the mentally retarded because of their lesser culpability).

⁵³ *See, e.g., Gregg*, 428 U.S. at 187 (holding that death penalty is not disproportionate to defendant’s murder conviction).

⁵⁴ *See Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding that capital punishment is disproportionate to the crime of rape).

⁵⁵ *See Roper v. Simmons*, 543 U.S. 551, 575 (2005) (holding that capital punishment is disproportionate for juveniles).

⁵⁶ *See supra* notes 2–3 and accompanying text; *see also Ceja v. Stewart*, 134 F.3d 1368, 1376 (9th Cir. 1998) (Fletcher, J., dissenting) (noting two different types of *Lackey* claims).

⁵⁷ *See, e.g., Thompson v. McNeil*, 556 U.S. 1114, 1115 (2009) (Stevens, J., respecting denial of certiorari) (“[A]wait[ing] 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. Two death warrants [were] . . . stayed only shortly before [his] . . . scheduled . . . [execution]. The dehumanizing effects of such treatment are undeniable.”).

⁵⁸ 4 WILLIAM BLACKSTONE, COMMENTARIES *202 (internal citation omitted). That is, execution must occur two days after the sentence.

⁵⁹ *Id.*

brief because “it is of great importance, that the punishment should follow the crime as early as possible” in order to further the penological goals of punishment.⁶⁰ In colonial-era America, the typical interval between sentencing and execution ranged from one to several weeks.⁶¹ More recently, the nationwide average period of delay jumped from two years in 1968,⁶² to six years in 1988,⁶³ to ten years in 1998,⁶⁴ to eleven years in 2008,⁶⁵ and to nearly sixteen years in 2012.⁶⁶ Currently, in California and Florida, the two leading death penalty states (by number of persons on death row),⁶⁷ the average delay is twenty-five years.⁶⁸ Nationwide, over 200 persons have been on death row from thirty to forty years.⁶⁹ These increasing “delays have multiple causes.”⁷⁰ Some blame the complex and lengthy appellate and collateral review process⁷¹ and the intentional delay of prisoners.⁷²

⁶⁰ *Id.* at *397 (“[T]he prospect of gratification . . . [from] commit[ting] the crime, should instantly awake the attendant idea of punishment. Delay of execution serves only to separate these ideas; and then the execution itself affects the minds of the spectators rather as a terrible sight, than as the necessary consequence of transgression.”).

⁶¹ *E.g.*, STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 17 (2002).

⁶² *See* *People v. Anderson*, 493 P.2d 880, 894 n.37 (Cal. 1972) (en banc) (noting that the national median period of death row incarceration in 1968 was 33.3 months), *superseded by constitutional amendment*, CAL. CONST. art. 1, § 27, as recognized in *Strauss v. Horton*, 207 P.3d 48, 90 (Cal. 2009).

⁶³ SNELL, *supra* note 1, at 14 tbl.10.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 18 tbl.15 (California: 712, Florida: 403).

⁶⁸ In California, delays between sentencing and execution “exceed[] 25 years on average.” *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1066 (C.D. Cal. 2014). According to Justice Anthony 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), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-10882_6kh7.pdf.

⁶⁹ SNELL, *supra* note 1, at 18 tbl.15 (citing 121 current death row prisoners placed there from 1983–1985, 60 from 1980–1982, and 33 from 1974–1979).

⁷⁰ *Thompson v. McNeil*, 556 U.S. 1114, 1116 (2009) (Stevens, J., respecting denial of certiorari).

⁷¹ *See, e.g.*, *Coleman v. Balkcom*, 451 U.S. 949, 957-58 (1981) (Rehnquist, J., dissenting from denial of certiorari) (“[T]his Court and the lower federal courts have converted the constitutional limits upon imposition of the death penalty . . . into arcane niceties which parallel the equity court practices described in Charles Dickens’ ‘Bleak House.’”).

⁷² *See, e.g.*, *Turner v. Jabe*, 58 F.3d 924, 933 (4th Cir. 1995) (Luttig, J., concurring) (referring to prisoners’ “interminable efforts of delay and systemic abuse”).

Others blame states' constitutionally defective procedures⁷³ and a dysfunctional system overburdened due to insufficient resources.⁷⁴

Regardless of their cause, these increasing delays have transformed a death sentence from capital punishment per se into capital punishment plus or "decades-plus-death."⁷⁵ What was once an execution preceded by a de minimis period of administrative detention has now become "two separate punishments: lengthy incarceration under very severe conditions (essentially solitary confinement in many states), followed by an execution."⁷⁶ For some capital offenders, the death penalty has become the equivalent of carceral punishment in the form of life imprisonment without the possibility of parole plus capital punishment.

In the pre-*Lackey* era, involving comparatively shorter delays, courts were comparatively more receptive to prisoners' claims. Perhaps the first (and only) Supreme Court decision addressing the constitutionality of execution delay is *In re Medley*⁷⁷ in 1890. Regarding a delay of only four weeks, the Court stated, in dicta, that "one of the most horrible feelings to which [the death row prisoner] can be subjected during that time is the uncertainty [The] immense mental anxiety amount[ed] to a great increase of the offender's punishment."⁷⁸ No court squarely addressed the issue again until 1960 in *Chessman v. Dickson*.⁷⁹ Noting that any threshold for when excessive delay might become unconstitutional would be "arbitrary," the Ninth Circuit affirmed the constitutionality of a twelve-year delay.⁸⁰ In subsequently superseded decisions, both the

⁷³ See, e.g., *Smith v. Arizona*, 552 U.S. 985, 985 (2007) (Breyer, J., dissenting from denial of certiorari) ("[M]uch of the delay at issue seems due to constitutionally defective sentencing proceedings."); *Knight v. Florida*, 528 U.S. 990, 998 (1999) (Breyer, J., dissenting from denial of certiorari) (characterizing delays as stemming primarily from states' "constitutionally defective death penalty procedures").

⁷⁴ See, e.g., *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1053 (C.D. Cal. 2014) ("[T]he dysfunctional administration of California's death penalty system has resulted, and will continue to result, in an inordinate and unpredictable period of delay preceding . . . execution[s]."); *id.* at 1056-57 (noting "the State's underfunding of its death penalty system to be a key source of the problem").

⁷⁵ Elizabeth Rapaport, *A Modest Proposal: The Aged of Death Row Should Be Deemed Too Old to Execute*, 77 BROOK. L. REV. 1089, 1124 (2012).

⁷⁶ Carol S. Steiker & Jordan M. Steiker, *Entrenchment and/or Destabilization? Reflections on (Another) Two Decades of Constitutional Regulation of Capital Punishment*, 30 LAW & INEQ. 211, 230-31 (2012).

⁷⁷ 134 U.S. 160 (1890).

⁷⁸ *Id.* at 172.

⁷⁹ 275 F.2d 604 (9th Cir. 1960).

⁸⁰ *Id.* at 607.

California Supreme Court in 1972 and the Supreme Judicial Court of Massachusetts in 1980 ruled capital punishment as unconstitutionally cruel based, in part, on lengthy delays between sentencing and execution.⁸¹ Arguing that delays frustrate the penological goals of punishment, in 1981 Justice Rehnquist urged that executions be expedited to preserve “the integrity of the entire criminal justice system.”⁸² In 1986, a federal district court found a twelve-year delay, for which the prisoner was deemed responsible, constitutional.⁸³ In two cases that perhaps influenced Justices Breyer and Stevens, the European Court of Human Rights in 1989 and the British Judicial Committee of the Privy Council in 1993 ruled that executions following lengthy terms of death row incarceration violate prohibitions against “inhuman and degrading” punishment or treatment.⁸⁴ The latter court established the threshold of five years of death row confinement as being presumptively unconstitutional.⁸⁵

The modern era of the debate over excessively delayed executions began with *Lackey v. Texas* in 1995.⁸⁶ Clarence Lackey’s petition for certiorari to the Supreme Court claimed that execution following seventeen years of death row incarceration violated the Eighth

⁸¹ *People v. Anderson*, 493 P.2d 880, 894 (Cal. 1972) (en banc) (“The cruelty of capital punishment [also] lies . . . in the dehumanizing effects of the lengthy imprisonment prior to execution . . .”), *superseded by constitutional amendment*, CAL. CONST. art. 1, § 27, as recognized in *Strauss v. Horton*, 207 P.3d 48, 90 (Cal. 2009); *Dist. Att’y for Suffolk Dist. v. Watson*, 411 N.E.2d 1274, 1283 (Mass. 1980) (“[M]ental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death.” (quoting *Furman v. Georgia*, 408 U.S. 238, 287-88 (1972) (Brennan, J., concurring))), *superseded by constitutional amendment*, MASS. CONST. art. CXVI, as recognized in *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116, 117-18 (Mass. 1984).

⁸² *Coleman v. Balkcom*, 451 U.S. 949, 959 (1981) (Rehnquist, J., dissenting from denial of certiorari).

⁸³ *Richmond v. Ricketts*, 640 F. Supp. 767, 803 (D. Ariz. 1986) (“The delay in the execution was prompted by [the prisoner].”).

⁸⁴ *Pratt v. Att’y Gen. of Jamaica*, [1994] 2 A.C. 1 (P.C.) 35 (appeal taken from Jam.) (holding that execution after fourteen years on death row was unconstitutional “inhuman or degrading punishment or other treatment”); *Soering v. United Kingdom*, 11 Eur. Ct. H.R.439, 472, 475-78 (1989) (ruling that an extraditee’s potential six to eight year term of death row incarceration if extradited to Virginia would constitute “torture or . . . inhuman or degrading treatment or punishment”). For their possible influence on Justices Breyer and Stevens, see *Lackey v. Texas*, 514 U.S. 1045, 1047 (1995) (Stevens, J., respecting denial of certiorari).

⁸⁵ *Pratt*, 2 A.C. at 35 (finding a five-year delay as “strong grounds” for a violation).

⁸⁶ 514 U.S. at 1045.

Amendment's prohibition against cruel and unusual punishment.⁸⁷ Though the full Court denied review, Justice Stevens commented that Lackey's claim was "not without foundation."⁸⁸ Neither of the grounds justifying the constitutionality of capital punishment "arguabl[y] . . . retains any force for prisoners who have spent some 17 years under a sentence of death."⁸⁹ First, "[s]uch a delay, if it ever occurred, certainly would have been rare in 1789, and thus the practice of the Framers would not justify a denial of petitioner's claim."⁹⁰ Second, execution furthers neither of the penological goals of capital punishment — retribution and deterrence — after such lengthy delay.⁹¹ Justice Stevens also noted that English jurists and foreign courts had found similar claims "persuasive."⁹² Justice Breyer simply noted his agreement "that the issue is an important undecided one."⁹³

Though Justice Stevens found Lackey's claim sufficient to warrant review by the full Court,⁹⁴ he invited the lower courts "to 'serve as laboratories in which the issue receives further study before it is addressed by this Court.'"⁹⁵ Encouraged by Justices Breyer and Stevens, numerous death row prisoners subsequently filed *Lackey* claims that the lower courts repeatedly rejected and the full Court declined to review. Respecting the denial of these certiorari petitions, a lively debate arose between Justices Breyer, Stevens, and Thomas. Justice Breyer wrote dissenting memorandums to the denial of certiorari or denial of stay of execution in eight cases⁹⁶ and agreed with or joined Justice Stevens in two further cases.⁹⁷ Justice Stevens

⁸⁷ *Id.* at 1045.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *See id.* ("[A]fter such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted."); *id.* at 1046 ("[T]he additional deterrent effect from an actual execution now, on the one hand, as compared to 17 years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal.").

⁹² *Id.* at 1047.

⁹³ *Id.*

⁹⁴ *Id.* at 1045.

⁹⁵ *Id.* at 1047 (quoting *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of certiorari)).

⁹⁶ *See* *Muhammad v. Florida*, 134 S. Ct. 894, 894 (2014); *Valle v. Florida*, 132 S. Ct. 1, 1 (2011); *Thompson v. McNeil*, 556 U.S. 1114, 1119 (2009); *Smith v. Arizona*, 552 U.S. 985, 985 (2007); *Allen v. Ornoski*, 546 U.S. 1136, 1140 (2006); *Foster v. Florida*, 537 U.S. 990, 991 (2002); *Knight v. Florida*, 528 U.S. 990, 993 (1999); *Elledge v. Florida*, 525 U.S. 944, 944 (1998).

⁹⁷ *Johnson v. Bredesen*, 558 U.S. 1067, 1067 (2009); *Lackey*, 514 U.S. at 1047.

found merit in the prisoners' claims in three cases⁹⁸ and emphasized that denial of certiorari "does not constitute a ruling on the merits" in two other cases.⁹⁹ Justices Breyer and Stevens agreed that excessively delayed executions violate the Eighth Amendment because the "the penological justifications for the death penalty diminish as the delay lengthens."¹⁰⁰ The remedy is barring execution after such delays.¹⁰¹ Concurring in the denial of certiorari in four cases, Justice Thomas¹⁰² found delays constitutional because they stemmed from efforts, both by courts to ensure that prisoners receive due process,¹⁰³ and by prisoners to exploit these procedural requirements to manufacture delay.¹⁰⁴ As "mak[ing] 'a mockery of our system of justice,'"¹⁰⁵ Justice Thomas noted that *Lackey* claims require no other remedy than reminding prisoners that they are free to craft their own remedy by simply "submitting to . . . execution."¹⁰⁶ Assessing the lower courts' response to Justice Stevens' invitation that they serve as laboratories for further study of *Lackey* claims, Justice Thomas concluded: "These courts have resoundingly rejected the claim as meritless. I submit that the Court should consider the experiment concluded."¹⁰⁷ Justice Breyer disagreed, replying that most courts have avoided the merits of *Lackey* claims and denied them instead on procedural grounds.¹⁰⁸

Until recently, Justice Thomas' view had prevailed. From 1995 through 2013, no American court had recognized a *Lackey* claim. Moreover, the last American court to find execution following lengthy delay to be unconstitutional was in 1980.¹⁰⁹ While the next section will present the three principal arguments, Justice Thomas and courts

⁹⁸ See *Johnson*, 558 U.S. at 1067; *Thompson*, 556 U.S. at 1114; *Lackey*, 514 U.S. at 1045.

⁹⁹ *Foster*, 537 U.S. at 990; *Knight*, 528 U.S. at 990.

¹⁰⁰ *Johnson*, 558 U.S. at 1069.

¹⁰¹ E.g., *id.* ("[A] successful *Lackey* claim would have the effect of rendering invalid a particular death sentence . . .").

¹⁰² *Id.* at 1070; *Thompson*, 556 U.S. at 1116; *Foster*, 537 U.S. at 990; *Knight*, 528 U.S. at 990.

¹⁰³ See, e.g., *Knight*, 528 U.S. at 991 ("[T]he delay in carrying out the prisoner's execution stems from this Court's Byzantine death penalty jurisprudence.").

¹⁰⁴ See, e.g., *Thompson*, 556 U.S. at 1117 (referring to a prisoner's "litigation strategy, which delays his execution").

¹⁰⁵ *Id.* (quoting *Turner v. Jabe*, 58 F.3d 924, 933 (4th Cir. 1995)).

¹⁰⁶ *Foster*, 537 U.S. at 991 ("Petitioner could long ago have ended [the delay] . . . by submitting to what the people of Florida have deemed him to deserve: execution.").

¹⁰⁷ *Knight*, 528 U.S. at 992-93 (citations omitted).

¹⁰⁸ See *id.* at 998-99 (dissenting from denial of certiorari).

¹⁰⁹ See *supra* note 81 and accompanying text.

denying *Lackey* claims have employed several other arguments as well. First, while international precedent supports *Lackey* claims, such precedent is neither binding nor persuasive.¹¹⁰ Second, there simply is no American precedent.¹¹¹ Third, recognizing a *Lackey* claim would only exacerbate the delay.¹¹² Fourth, alternatively, recognizing *Lackey* claims would promote “speed rather than accuracy.”¹¹³ And fifth, “the delay in carrying out death sentences has been of benefit to death row inmates, allowing [them] to extend their lives.”¹¹⁴

But two recent developments indicate that Justice Thomas’ suggested closing of the *Lackey* claim experiment may have been premature. First, Justice Anthony Kennedy, often the crucial “swing vote” in high-profile cases that split an ideologically divided court,¹¹⁵ may have signaled his endorsement of the *Lackey* claim.¹¹⁶ In oral argument of *Hall v. Florida*, in March 2014, Justice Kennedy repeatedly asked Florida’s counsel whether average delays of twenty-five years were “consistent with the purposes of the death penalty.”¹¹⁷

¹¹⁰ See, e.g., *Foster*, 537 U.S. at 990 & n.* (Thomas, J., concurring in denial of certiorari) (“[T]his Court’s Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans.”); *Booker v. McNeil*, No. 1:08cv143/RS, 2010 WL 3942866, at *40-41 (N.D. Fla. Oct. 5, 2010) (denying prisoner’s claim that “binding norms of international law” prohibit his execution after twenty-nine years on death row).

¹¹¹ See, e.g., *Thompson v. Sec’y for the Dep’t of Corr.*, 517 F.3d 1279, 1284 (11th Cir. 2008) (denying prisoner’s *Lackey* claim “given the total absence of Supreme Court precedent”); *Gardner v. State*, 234 P.3d 1115, 1142 n.231 (Utah 2010) (“The courts . . . have uniformly rejected *Lackey* claims.”).

¹¹² See, e.g., *Knight*, 528 U.S. at 992 (Thomas, J., concurring in denial of certiorari) (contending that recognizing a *Lackey* claim would “prolong collateral review by giving virtually every capital prisoner yet another ground on which to challenge and delay his execution”); *Gardner*, 234 P.3d at 1143 (invoking the prospect of “endless delay”).

¹¹³ *McKenzie v. Day*, 57 F.3d 1461, 1467 (9th Cir. 1995); accord *Knight*, 528 U.S. at 992 (“[Reviewing courts might give] short shrift to a capital defendant’s legitimate claims so as to avoid violating the Eighth Amendment right suggested by Justice Breyer.”).

¹¹⁴ *McKenzie*, 57 F.3d at 1467; accord Alex Kozinski, *Tinkering with Death*, in *DEBATING THE DEATH PENALTY* 1, 7 (Hugo Adam Bedau & Paul G. Cassell eds., 2004) (characterizing prisoners’ efforts to challenge their sentence as “diminishing the severity of their sentence by endlessly postponing the day of reckoning”).

¹¹⁵ Newton, *Justice Kennedy*, *supra* note 5, at 979-80.

¹¹⁶ See *id.* at 980.

¹¹⁷ See *id.* at 991 (quoting Transcript of Oral Argument at 46, *Hall v. Florida*, 134 S. Ct. 1986 (2014) (No. 12-10882), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-10882_6kh7.pdf). Newton suggested that Justice Kennedy’s questioning is significant for two reasons:

Justice Kennedy “may be on the brink of joining Justice Breyer and former Justice Stevens” in supporting *Lackey* claims and urging the full Court to address the issue.¹¹⁸

Second, in July 2014, *Jones v. Chappell*¹¹⁹ became the first federal court decision recognizing a *Lackey* claim. The district court in *Jones* held that execution following nineteen years on death row violated the Eighth Amendment prohibition against cruel and unusual punishment for two reasons.¹²⁰ First, because of systemic inordinate delay, so few death row prisoners will actually be executed (as opposed to dying of old age or other causes while on death row) as to make execution unconstitutionally arbitrary.¹²¹ Second, delays are sufficiently lengthy “that the death penalty is deprived of any deterrent or retributive effect it might once have had.”¹²²

C. The Trio of Principal Arguments Against Lackey Claims

This section presents each of the three principal arguments against *Lackey* claims more expansively. It identifies the origin of each argument, traces their subsequent use, reveals the breadth of their adoption by Justice Thomas and the lower courts, and briefly notes their criticisms.

1. Prisoner Choice and Fault

The principal argument used to deny *Lackey* claims is that prisoners choose to pursue appellate and collateral review of their sentence.¹²³

First, they did not appear to be off the cuff. In the oral argument of a case in which certiorari had been granted on a legal issue that had nothing to do with *Lackey*, Justice Kennedy clearly had prepared for his *Lackey*-related questions because he cited an arcane statistic about the average delay before executions in the past ten Florida cases. Second, his repeated question about “the purposes that the death penalty is designed to serve” certainly appears to allude to the primary arguments made by Justices Stevens and Breyer in addressing *Lackey* claims since 1995.

Id. at 992.

¹¹⁸ *Id.* at 980.

¹¹⁹ 31 F. Supp. 3d 1050 (C.D. Cal. 2014).

¹²⁰ *Id.* at 1053.

¹²¹ *Id.* at 1062-63.

¹²² *Id.* at 1063.

¹²³ See, e.g., Rapaport, *supra* note 75, at 1090 (“For many jurists, attribution of fault [between the prisoner and the State for the delay] is critical to resolving [the *Lackey* claim].”); *id.* at 1099 (referring to the attribution of fault for the delay as “the heart of the matter”); see also *supra* note 14.

The consequence of that choice — delay — is therefore attributable to the prisoners, not the State. First, this section examines the first case to advance the argument and considers all subsequent pre-*Lackey* cases. Second, it presents Justice Thomas' articulations of the argument. Third, it surveys post-*Lackey* state and lower federal courts' formulations of the argument. This section concludes with an analysis of the gradations of disagreement with the argument.

a. Pre-Lackey Precedent

Chessman v. Dickson in 1960 is perhaps the first case to utter a version of the prisoner fault argument: "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."¹²⁴ Citing *Chessman*, the court in *Richmond v. Ricketts*, in 1986, explained that a twelve-year delay failed to violate the Eighth Amendment because it "was prompted by Richmond's request . . . to have his challenges . . . heard by several courts."¹²⁵ Affirming *Richmond* in 1992, the Ninth Circuit supported its use of the prisoner fault argument by offering *Chessman* and *Andrews v. Shulsen* as "relevant, though not controlling, precedents."¹²⁶ The court explained that the *Andrews* "court reasoned that to accept the petitioner's argument would be 'a mockery of justice' given that the delay was attributable more to the petitioner's actions [of challenging his death sentence] than to the state's."¹²⁷ Decided shortly before *Lackey*, in 1995, the Seventh Circuit in *Free v. Peters* denied a *Lackey* claim because "any inordinate delay in the execution of Free's sentence is directly attributable to his own conduct."¹²⁸

b. Justice Thomas' 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

¹²⁴ *Chessman v. Dickson*, 275 F.2d 604, 607 (9th Cir. 1960). 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).

¹²⁵ *Richmond v. Ricketts*, 640 F. Supp. 767, 803 (D. Ariz. 1986). For a brief discussion of *Chessman*, see text accompanying notes 79–80.

¹²⁶ *Richmond v. Lewis*, 948 F.2d 1473, 1491 (9th Cir. 1992).

¹²⁷ *Id.* (quoting *Andrews v. Shulsen*, 600 F. Supp. 408, 431 (D. Utah 1984)). The prisoner in *Andrews* did not make a *Lackey* claim, but instead argued that the repeated setting and staying of execution dates violated the Eighth Amendment. See *Andrews v. Shulsen*, 600 F. Supp. 408, 431 (D. Utah 1984).

¹²⁸ *Free v. Peters*, 50 F.3d 1362, 1362 (7th Cir. 1995).

certiorari of *Lackey* claims. In *Knight v. Florida*, 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.”¹²⁹ In *Foster v. Florida*, 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.”¹³⁰ In *Thompson v. McNeil*, Justice Thomas stressed that the “petitioner chose to challenge his death sentence”¹³¹ and quoted from a Fourth Circuit concurring opinion: “[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.”¹³² Finally, in *Johnson v. Bredesen*, Justice Thomas reiterated the above statement from *Knight*.¹³³

c. *Post-Lackey Precedent*

Perhaps the most influential American case deciding a *Lackey* claim is *McKenzie v. Day*.¹³⁴ 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].”¹³⁵ *McKenzie* emphasized that delay is the choice of the prisoner:

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.¹³⁶

¹²⁹ *Knight v. Florida*, 528 U.S. 990, 990 (1999).

¹³⁰ *Foster v. Florida*, 537 U.S. 990, 991 (2002) (quoting *id.* at 993 (Breyer, J., dissenting from denial of certiorari)) (internal citation omitted).

¹³¹ *Thompson v. McNeil*, 556 U.S. 1114, 1117 (2009).

¹³² *Id.* (quoting *Turner v. Jabe*, 58 F.3d 924, 933 (4th Cir. 1995)).

¹³³ See *Johnson v. Bredesen*, 558 U.S. 1067, 1071 (2009).

¹³⁴ 57 F.3d 1461 (9th Cir. 1995).

¹³⁵ *Id.* at 1466-67.

¹³⁶ *Id.* at 1470 n.21.

Numerous other federal circuit court cases have denied *Lackey* claims by invoking the prisoner choice argument,¹³⁷ as well as federal district court cases¹³⁸ and state cases.¹³⁹

d. Criticisms

The gradations of disagreement with the prisoner choice argument, from narrowest to broadest, are as follows. First, prisoners should not

¹³⁷ 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 . . . has contested the judgments against him."); *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, 1028 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."); *Fearance v. Scott*, 56 F.3d 633, 639 (5th Cir. 1995) ("Fearance was not the unwilling victim of a *Bleak House*-like procedural system hopelessly bogged down; at every turn, he . . . sought extensions of time, hearings and reconsiderations."); *Turner v. Jabe*, 58 F.3d 924, 933 (1995) ("The delay of which he [the prisoner] now complains is a direct consequence of his own litigation strategy . . ."); *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.").

¹³⁸ 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 pursuits of collateral relief and not from the State's dilatory tactics."); *United States ex rel Delvecchio v. Ill. Dep't of Corrs.*, 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.").

¹³⁹ 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. State*, 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 conviction[s] and sentence.'" (quoting *Tompkins v. State*, 994 So. 2d 1072, 1085 (Fla. 2008))); *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. 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.").

be responsible for intentional delays by the State.¹⁴⁰ Second, prisoners should not be responsible for delays caused by automatic, mandated appeals.¹⁴¹ Third, prisoners should not be responsible for delays incurred because of negligence by the State.¹⁴² Some courts denying *Lackey* claims imply disagreement with the prisoner choice argument to this limited extent but inevitably fail to find appreciable delays from these sources.¹⁴³ Fourth, prisoners should not be responsible for delays stemming from discretionary, but successful post-conviction review revealing the State's employment of constitutionally defective procedures.¹⁴⁴ Fifth, prisoners should not be responsible for delays due to discretionary and unsuccessful review that was nonetheless legitimate and non-frivolous. This appears to be the position of Justice Stevens¹⁴⁵ as well as most supporters of the *Lackey* claim,¹⁴⁶ but it has

¹⁴⁰ See, e.g., *Chambers*, 157 F.3d at 570 (“[T]here is no evidence . . . that the State has deliberately sought . . . to prolong the time before it could secure a valid conviction and execute him.”); *McKenzie*, 57 F.3d at 1466 (“[T]he State of Montana has [not] set up a scheme to prolong the period of incarceration . . .”).

¹⁴¹ See, e.g., *Free v. Peters*, 50 F.3d 1362, 1362 (7th Cir. 1995) (denying *Lackey* claim based on distinguishing between delays incurred during prisoner's mandatory and discretionary appeals).

¹⁴² See, e.g., *White*, 79 F.3d at 439 (“[Prisoner] does not offer any evidence that Texas' delay in considering his petition was . . . negligent.”); *Porter*, 49 F.3d at 1485 (“We note that [the prisoner] has proffered no evidence to establish that delays in his case have been attributable to negligence . . . of the state.”).

¹⁴³ See cases cited *supra* notes 140 and 142.

¹⁴⁴ See, e.g., *Elledge v. Florida*, 525 U.S. 944, 945 (1998) (Breyer, J., dissenting from denial of certiorari) (“[The prisoner] has experienced that [twenty-three year] delay because of the State's own faulty procedures and not because of frivolous appeals on his own part.”); *State v. Smith*, 931 P.2d 1272, 1291 (Mont. 1996) (Leapheart, J., concurring) (rejecting prisoner fault argument where prisoner has been successful in appeals because “the blame properly rests with the State or the courts”).

¹⁴⁵ In *Lackey*, Justice Stevens acknowledged that some types of prisoner responsibility for delay was arguably relevant. *Lackey v. Texas*, 514 U.S. 1045, 1047 (1995) (respecting denial of certiorari) (“There *may* well be constitutional significance to the reasons for the various delays that have occurred in petitioner's case.” (emphasis added)). He noted that:

“It *may* be appropriate to distinguish” among the following three reasons for delay:

“(a) a petitioner's abuse of the judicial system by . . . repetitive, frivolous filings; (b) a petitioner's legitimate exercise of his right to review; and (c) negligence or deliberate action by the 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.”

been unpersuasive to nearly all courts.¹⁴⁷ Sixth, the prisoner choice argument lacks a convincing rationale explaining its relevance.¹⁴⁸ Seventh, reflecting the broadest disagreement, prisoner choice is irrelevant¹⁴⁹ because the years of death row incarceration suffered by

Id. (emphasis added) (citations omitted). Perhaps Justice Stevens conceded that at least some types of prisoner fault “may” be and “arguabl[y]” is relevant, in order to acknowledge an important English case decided shortly before *Lackey* (*Pratt v. Att’y Gen. of Jamaica*, [1994] 2 A.C. 1 (P.C.) (appeal taken from Jam.)). *Pratt* generally found delay the responsibility of the State. *Id.* at 33 (“[F]ault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it.”). But as to “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.” *Id.* at 29-30. 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. See, e.g., *Johnson v. Bredesen*, 558 U.S. 1067, 1067 (2009) (“[Petitioner] bears little, if any, responsibility for this delay.”).

¹⁴⁶ See, e.g., *People v. Simms*, 736 N.E.2d 1092, 1143 (Ill. 2000) (Harrison, C.J., dissenting) (rejecting prisoner fault argument and noting that nearly all *Lackey* claims are non-frivolous); Dwight Aarons, *Getting Out of This Mess: Steps Toward Addressing and Avoiding Inordinate Delay in Capital Cases*, 89 J. CRIM. L. & CRIMINOLOGY 1, 22 (1998) (“[D]efective [state] processing systems are the true cause of most of the delay in capital cases.”); Newton, *Slow Wheels*, *supra* note 3, at 64 (“[T]he delays occasioned by such discretionary appeals, at least non-frivolous ones, should not be attributed to inmates who pursue such appeals.”); Jeremy Root, Note, *Cruel and Unusual Punishment: A Reconsideration of the Lackey Claim*, 27 N.Y.U. REV. L. & SOC. CHANGE 281, 299 (2001–2002) (“Frivolous petitions account for an infinitesimal fraction of the typical period of delay . . .”).

¹⁴⁷ The lone federal case to recognize a *Lackey* claim, *Jones v. Chappell*, rejected the prisoner fault argument on empirical grounds, “find[ing] that much of the delay in California’s postconviction review process is created by the State itself, not by inmates’ own interminable efforts to delay.” *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1066 (C.D. Cal. 2014).

¹⁴⁸ See Russell L. Christopher, *The Irrelevance of Prisoner Fault for Excessively Delayed Executions*, 72 WASH. & LEE L. REV. 1, 14-15 (2015) (contending that the argument lacks an explicit rationale and that neither of its possible rationales — analogizing to attribution of fault in the Sixth Amendment speedy trial right context and waiver of the Eighth Amendment right against cruel and unusual punishment — are persuasive).

¹⁴⁹ See, e.g., *Johnson*, *supra* note 37, at 105-06 (“[I]t should not matter whether the inmate was the partial cause of his own delayed execution. The justice system does not allow inmates the right to starve themselves or to otherwise engage in self-harm. Prisoners should similarly be barred from punishing themselves with additional time on death row.”); Ryan S. Hedges, Note, *Justices Blind: How the Rehnquist Court’s Refusal to Hear a Claim for Inordinate Delay of Execution Undermines Its Death Penalty Jurisprudence*, 74 S. CAL. L. REV. 577, 581 (2001) (“[D]elay of execution, regardless of who is responsible and whether it is intentional or inadvertent . . . giv[es] rise to a claim for cruel and unusual punishment under the Eighth Amendment.”).

Like Justice Stevens, Justice Breyer’s view of the prisoner fault argument is not entirely clear. In individual cases he has maintained that delay was the fault of the

prisoners is the same regardless of whether the State or the prisoner is responsible.¹⁵⁰

2. Post-Conviction Review Necessary for Accuracy and Fairness

In addition to the prisoner choice argument, many courts reject *Lackey* claims on the basis that lengthy post-conviction review is necessary to ensure accuracy and fairness.¹⁵¹ Implicit in this argument is the conclusion that because accuracy and fairness are constitutionally valuable, any consequence of that pursuit of accuracy and fairness must be constitutionally acceptable. Delay between sentencing and execution is such a consequence. Therefore, such delay must be constitutionally acceptable. In short, accuracy trumps speed.¹⁵²

Federal courts' invocation of this argument perhaps began with the District Court of Arizona in 1986 in *Richmond v. Ricketts*.¹⁵³ *Ricketts* rejected that a twelve-year-delay constituted cruel and unusual punishment because "it is better to take the time to consider each issue [presented by the prisoner] thoroughly rather than quickly dispatching someone to the gas chamber."¹⁵⁴ Echoing this theme of delays stemming from the quest for accuracy and fairness, the Ninth

State and not the defendant. See *infra* note 236 and accompanying text. While he never explicitly states that prisoner fault is irrelevant, Justice Breyer comes close: "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." *Valle v. Florida*, 132 S. Ct. 1, 2 (2011) (Breyer, J., dissenting from denial of stay).

¹⁵⁰ See, e.g., *Furman v. Georgia*, 408 U.S. 238, 289 n.37 (1972) (Brennan, J., concurring) ("The State, of course, does not purposely impose the lengthy waiting period The impact upon the individual is not the less severe on that account."); *People v. Anderson*, 493 P.2d 880, 895 (Cal. 1972) ("An appellant's insistence on receiving the benefits of appellate review . . . does not render the lengthy period of impending execution any less torturous or exempt such cruelty from constitutional proscription."); *Dist. Att'y for Suffolk Dist. v. Watson*, 411 N.E.2d 1274, 1283 (Mass. 1980) ("[T]hat 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 . . . from inhuman treatment."); *Vatheeswaran v. State of Tamil Nadu*, (1983) 2 S.C.R. 348, 353 (India) ("We 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 dehumanising character of the delay.").

¹⁵¹ See, e.g., *Jones*, 31 F. Supp. 3d at 1065 ("[C]ourts often rely on two justifications for rejecting the [*Lackey* claim]: first . . . delay is reasonably related to . . . safeguard[ing] the inmate's constitutional rights by ensuring the accuracy of [the] death . . . sentence . . ."); see also *supra* note 14.

¹⁵² See *supra* notes 9–11 and accompanying text.

¹⁵³ 640 F. Supp. 767 (D. Ariz. 1986).

¹⁵⁴ *Id.* at 803.

Circuit, in *McKenzie v. Day*, contended that “[t]he delay has been caused by the fact that McKenzie [the prisoner] has availed himself of procedures our law provides to make sure that executions are carried out only in appropriate circumstances.”¹⁵⁵ The court in *McKenzie* explained that “most of these procedural safeguards have been imposed by the Supreme Court in recognition of the fact that the common law practice of imposing swift and certain executions could result in arbitrariness and error in carrying out the death penalty.”¹⁵⁶ The Sixth Circuit, in *Chambers v. Bowersox*, similarly declared that “delay, in large part, is a function of the desire of our courts, state and federal, to get it right, to explore exhaustively, or at least sufficiently, any argument that might save someone’s life.”¹⁵⁷ In *White v. Johnson*, the Fifth Circuit rejected a *Lackey* claim based on a seventeen-year delay because the prisoner’s “claim demands that capital punishment be carried out quickly in spite of the importance of thorough factfinding in capital cases and the state’s compelling interest in ensuring that it does not execute innocent defendants.”¹⁵⁸ Perhaps the last federal circuit case to emphasize this argument, *Thompson v. Secretary for the Department of Corrections*, denied a thirty-one year stay on death row as violating the Eighth Amendment by quoting approvingly the above language from *Chambers*.¹⁵⁹

State courts rejecting *Lackey* claims also invoke this argument. The Supreme Court of Montana quoted approvingly *McKenzie*’s argument that “the cause for the delay . . . [was that the prisoner] ‘availed himself of procedures our law provides to ensure that executions are carried out only in appropriate circumstances.’”¹⁶⁰ The Supreme Court of Nebraska quoted approvingly the identical language from *McKenzie*.¹⁶¹ The Supreme Court of Illinois quoted approvingly the

¹⁵⁵ *McKenzie v. Day*, 57 F.3d 1461, 1466-67 (9th Cir. 1995).

¹⁵⁶ *Id.* at 1467.

¹⁵⁷ *Chambers v. Bowersox*, 157 F.3d 560, 570 (8th Cir. 1998).

¹⁵⁸ *White v. Johnson*, 79 F.3d 432, 438 (5th Cir. 1996); *accord id.* at 440 (“On the merits, these claims would likewise fail because the delay that White complains of arises from post-conviction proceedings which exist to protect White and which White, himself, requested when he petitioned for habeas relief.”).

¹⁵⁹ *Thompson v. Sec’y for the Dep’t of Corr.*, 517 F.3d 1279, 1284 (11th Cir. 2008) (“[D]eath row delays do not constitute cruel and unusual punishment because delay results from the ‘desire of our courts, state and federal, to get it right, to explore . . . any argument that might save someone’s life.’” (quoting *Chambers*, 157 F.3d at 570)).

¹⁶⁰ *State v. Smith*, 931 P.2d 1272, 1288 (Mont. 1996) (quoting *McKenzie*, 57 F.3d at 1466-67).

¹⁶¹ *State v. Moore*, 591 N.W.2d 86, 94 (Neb. 1999).

above language from *Chambers*.¹⁶² The Indiana Supreme Court in *Moore v. State*, agreed with the reasoning of the above Nebraska decision¹⁶³ and concluded that “[t]o ensure the just administration of the death penalty the value of speed should not trump the value of accuracy.”¹⁶⁴ Similarly, the Supreme Court of Louisiana rejected a *Lackey* claim by maintaining that “[t]he value of speed should not trump the value of accuracy.”¹⁶⁵

3. Post-Conviction Review Necessary Under Eighth Amendment

The third principal argument used to reject *Lackey* claims is that delays that are a consequence of compliance with the Eighth Amendment or other constitutional mandates cannot be unconstitutional.¹⁶⁶ The clearest and most concise statement of this argument¹⁶⁷ is from *McKenzie v. Day*,¹⁶⁸ the first Ninth Circuit post-*Lackey* decision. *McKenzie* noted that the twenty-year delay “is a consequence of our evolving standards of decency, which prompt us to provide death row inmates with ample opportunities to contest their convictions and sentences.”¹⁶⁹ Because evolving standards of decency are a measure of the constitutionality of capital punishment under the Eighth Amendment,¹⁷⁰ *McKenzie* is, in effect, declaring that delay is a product of satisfying the Eighth Amendment. In rejecting the prisoner’s claim of cruel and unusual punishment, the court stated, “We cannot conclude that delays caused by satisfying the Eighth Amendment themselves violate it.”¹⁷¹

Other federal circuit courts have made similar arguments. In *White v. Johnson*, the Fifth Circuit rejected the prisoner’s *Lackey* claim

¹⁶² *People v. Simms*, 736 N.E.2d 1092, 1141 (Ill. 2000).

¹⁶³ *See Moore v. State*, 771 N.E.2d 46, 54 (Ind. 2002).

¹⁶⁴ *Id.* at 55.

¹⁶⁵ *State v. Sparks*, 68 So. 3d 435, 493 (La. 2011). For criticism of this argument, see *infra* notes 178–80 and accompanying text.

¹⁶⁶ *See, e.g.,* Karl S. Myers, Comment, *Practical Lackey: The Impact of Holding Execution After a Long Stay on Death Row Unconstitutional Under Lackey v. Texas*, 106 DICK. L. REV. 647, 661 (2002) (“[T]here are several fundamental reasons why . . . courts have rejected *Lackey* claims: . . . upholding the claim would result in an inconsistency with other Eighth Amendment requirements . . .”); *see also supra* note 14.

¹⁶⁷ For Justice Thomas’ articulation of a version of this argument, see *infra* note 232.

¹⁶⁸ *McKenzie v. Day*, 57 F.3d 1461 (9th Cir. 1995) (rejecting *Lackey* claim).

¹⁶⁹ *Id.* at 1467.

¹⁷⁰ *See Trop v. Dulles*, 356 U.S. 86, 101 (1958) (declaring that punishment which does not satisfy “evolving standards of decency that mark the progress of a maturing society” may be unconstitutionally cruel and unusual).

¹⁷¹ *McKenzie*, 57 F.3d at 1467.

involving seventeen years on death row because “there are compelling justifications for the delay between conviction and the execution of a death sentence. The state . . . [has an] interest in insuring that those who are executed receive fair trials with constitutionally mandated safeguards.”¹⁷² Two other circuit courts quoted approvingly *White*’s argument that such delays stem from compliance with “constitutionally mandated safeguards.”¹⁷³

State courts have also utilized the argument in rejecting *Lackey* claims. In a decision predating *McKenzie*, the California Supreme Court held that “[t]he existence of an automatic appeal under state law [that caused significant delay and prolonged the prisoner’s stay on death row] is not a constitutional defect; it is a constitutional safeguard.”¹⁷⁴ That is, delays caused by constitutional safeguards cannot be a constitutional defect. Citing *McKenzie* and *White*, the Supreme Court of Arkansas stated that “the very nature of capital litigation . . . suggests that delay . . . is the product of evolving standards of decency.”¹⁷⁵ Also finding the reasoning of *McKenzie* and *White* persuasive, another California Supreme decision declared that “the delays caused by satisfying the Eighth Amendment cannot violate it.”¹⁷⁶ The Supreme Court of Nebraska advanced this even more forcefully: “It would be a mockery of justice to conclude that delays caused by satisfying the Eighth Amendment themselves violate it.”¹⁷⁷

Because this argument and the previous argument (delay is a consequence of post-conviction review that is necessary for accuracy and fairness) are so similar, their criticisms tend to run together. The central criticism is that prisoners have two independent rights — the right to review their sentences and the right against cruel and unusual punishment — neither of which satisfies or precludes the other.¹⁷⁸

¹⁷² *White v. Johnson*, 79 F.3d 432, 439 (5th Cir. 1996).

¹⁷³ *Thompson v. Sec’y for the Dep’t of Corr.*, 517 F.3d 1279, 1284 (11th Cir. 2008) (quoting *White*, 79 F.3d at 439); *Allen v. Ornoski*, 435 F.3d 946, 959 (9th Cir. 2006) (quoting *White*, 79 F.3d at 439).

¹⁷⁴ *People v. Hill*, 839 P.2d 984, 1017 (Cal. 1992) (en banc).

¹⁷⁵ *Hill v. State*, 962 S.W.2d 762, 767 (Ark. 1998).

¹⁷⁶ *People v. Frye*, 959 P.2d 183, 262-63 (Cal. 1998).

¹⁷⁷ *State v. Moore*, 591 N.W.2d 86, 94 (Neb. 1999).

¹⁷⁸ See, e.g., *State v. Smith*, 931 P.2d 1272, 1292 (Mont. 1996) (Leaphart, J., concurring) (“I see no simple answer to the conundrum which results from the conflict between a defendant’s right to due process and appellate review and his right to be free from cruel and unusual punishment.”); DAVID PANNICK, *JUDICIAL REVIEW OF THE DEATH PENALTY* 84 (1982) (“[A] death sentence becomes unconstitutionally cruel unless carried out within a reasonable time . . . and without the incidental infringement of any of the other rights (such as the right to appeal against conviction

Justice Brennan was perhaps the first to voice this criticism: “The right not to be subjected to inhuman treatment [prolonged death row incarceration] cannot, of course, be played off against the right to pursue due process of law.”¹⁷⁹ That is, prisoners have the right to both speed and accuracy.¹⁸⁰ Courts denying *Lackey* claims have ignored these criticisms, however, maintaining that prisoners must choose between speed and accuracy.¹⁸¹ The next Part shows that the trio is unsound in a way that is not so easily ignored.

II. THE TRIO ABSURDLY DENIES CONSTITUTIONAL RIGHTS

This Part demonstrates that the trio would deny numerous clearly existing constitutional rights; by generating such absurd consequences, the trio is unsound.¹⁸² Understanding the following

and sentence) guaranteed by due process.”); Newton, *Slow Wheels*, *supra* note 3, at 64 (“[I]t is axiomatic in our legal system that a person should not have to waive one constitutional right in order to exercise another.”); Jessica Feldman, Comment, *A Death Row Incarceration Calculus: When Prolonged Death Row Imprisonment Becomes Unconstitutional*, 40 SANTA CLARA L. REV. 187, 218 (1999) (“Requiring a prisoner to forgo either the right to appeal his sentence or an Eighth Amendment claim [unconstitutionally] forces the prisoner to choose the protection of one constitutional guarantee over another.”); Root, *supra* note 146, at 326 (“To suggest that a citizen loses the protection of the Eighth Amendment because he chooses to pursue appellate review of his capital sentence seems highly improper.”).

¹⁷⁹ *Furman v. Georgia*, 408 U.S. 238, 289 n.37 (1972) (Brennan, J., concurring); *accord* Dist. Att’y for Suffolk Dist. v. Watson, 411 N.E.2d 1274, 1283 (Mass. 1980) (“[T]he right to pursue due process of law must not be set off against the right to be free from inhuman treatment.”).

¹⁸⁰ See *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1067 (C.D. Cal. 2014) (rejecting that a prisoner must choose between speed and accuracy); Rapaport, *supra* note 75, at 1126-27 (“[T]he proper way to frame the Eighth Amendment debate is not as a choice between dispatch and delay . . .”).

¹⁸¹ See, e.g., *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 to denial of certiorari))).

¹⁸² The *reductio ad absurdum* method of argument may informally be explained as follows:

The technique is particularly powerful because it allows us, for the purpose of argument, to grant for a moment what our opponent believes. We say, ‘Let’s suppose you are right. What would be the consequences?’ If we can then show the consequences are absurd, we can force the opponent to admit something is wrong in his or her position: ‘If you believe X, you must believe Y. Yet Y is absurd. So, do you really believe X?’

BAGGINI & FOSL, *supra* note 19, at 117-18. For the most recent use of the *reductio ad absurdum* method of proof in a Supreme Court opinion, see *Pliva, Inc. v. Mensing*, 131

underlying structure of the trio helps to see how the trio could absurdly deny clearly existing constitutional rights: If *X* is (i) chosen by the defendant/prisoner, (ii) necessary for accuracy and fairness, and (iii) necessary to satisfy the Constitution, then any consequence of *X* is necessarily constitutional. The trio would therefore deny any constitutional right *Y* that is violated by the consequences of *X*. So for any two constitutional rights, *X* and *Y*, in which the consequences of exercising *X* violate *Y*, the trio would deny constitutional right *Y*.

For an example, as discussed in the Introduction,¹⁸³ the Sixth Amendment right to the assistance of counsel (*X*) is chosen by the defendant, necessary for accuracy and fairness, and necessary to satisfy the Constitution. As a consequence of the exercise of the right to the assistance of counsel, ineffectiveness of counsel is, according to the trio, necessarily constitutional. But there is also a Sixth Amendment right to effective assistance of counsel (*Y*). Because the consequences of exercising the right to counsel are necessarily constitutional, despite violating the right to the effective assistance of counsel, the trio absurdly denies the Sixth Amendment right to the effective assistance of counsel.

This Part applies the trio to six additional contexts involving constitutional rights that share the above *X/Y* structure or relationship. The trio absurdly denies the following long-standing, clearly existing constitutional rights expressly guaranteed by the Supreme Court: (i) the Sixth Amendment right to a jury pool representative of the community, (ii) the Sixth and Fourteenth Amendment right to an impartial jury, (iii) the Fourteenth Amendment Equal Protection Clause right against the State's discriminatory use of peremptory challenges of prospective jurors, (iv) the Fifth Amendment right to a no-adverse-inference jury instruction regarding a defendant choosing not to testify, (v) the Fifth Amendment right against negative

S. Ct. 2567, 2590 (2011) (Sotomayor, J., dissenting). For notable examples of its use by the philosophers Plato, Immanuel Kant, and St. Thomas Aquinas, see SALMON, *supra* note 19, at 31-32, 48-49.

More informally, the *reductio ad absurdum* method of argument is sometimes termed "proving too much." See Moti Mizrahi, *On Proving Too Much*, 28 ACTA ANALYTICA 353, 355 (2013) (discussing the relationship between the two forms of argument). To prove too much is simply "to make an overbroad argument." BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 710 (2d ed. 1995). For a recent example of its use in support of the constitutionality of capital punishment, see *Hall v. Florida*, 134 S. Ct. 1986, 2012 n.14 (2014) (Alito, J., dissenting). The "proves too much" method of argument has also been employed by a court to deny a *Lackey* claim. See *Fearance v. Scott*, 56 F.3d 633, 636-37 (5th Cir. 1995).

¹⁸³ See *supra* text accompanying notes 20-29.

comment to the jury regarding a defendant choosing not to testify, and (vi) the Sixth Amendment right to a speedy trial.¹⁸⁴ Finally, this Part presents and counters four possible objections to this Part's claim that the trio is unsound.

A. *No Sixth Amendment Right to Representative Jury Pool*

Suppose a defendant invokes her Sixth Amendment right to a jury trial.¹⁸⁵ Though women comprise roughly half of the population of the community where the trial occurs, the State's jury-selection process systematically excludes women. Out of the nearly 200 persons in the jury pool for the defendant's trial, none were women. After the all-male jury convicts, the defendant appeals claiming that her right to a jury pool representative of and reflecting a fair cross-section of the community was violated based on the Supreme Court decision of *Taylor v. Louisiana*.¹⁸⁶ As *Taylor* explained, "[t]he unmistakable import of this Court's opinions, at least since 1940 . . . and not repudiated by intervening decisions, is that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial."¹⁸⁷ The hypothetical appellate court denies the *Taylor* claim based on the following application, to this Sixth Amendment context, of the trio.

First, the defendant chose trial by jury.¹⁸⁸ As chosen by the defendant, a consequence of that choice — a non-representative jury pool — is attributable to the defendant, not the State.¹⁸⁹ It makes a

¹⁸⁴ It might seem like overkill to demonstrate that the trio absurdly denies seven clearly existing constitutional rights, rather than just a few. But it is important to show the extent of the trio's conflict with existing constitutional rights. As discussed in an anticipated objection to this Part's claim, *see infra* Part II.G.2, the greater the extent of this conflict the more difficult it is for proponents of the trio to argue that the trio is right and the Supreme Court was wrong in recognizing constitutional rights conflicting with the trio.

¹⁸⁵ U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by . . . jury . . ."). *Duncan v. Louisiana* extended this right to defendants in state courts. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) ("Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment's guarantee.").

¹⁸⁶ 419 U.S. 522, 530-32 (1975) (holding that systematically excluding women from the jury pool violated defendant's Sixth Amendment right to a jury pool reflecting a fair-cross section of the community).

¹⁸⁷ *Id.* at 528 (citing *Smith v. Texas*, 311 U.S. 128, 130 (1940)).

¹⁸⁸ Compare statement in text, with *supra* note 6 and accompanying text.

¹⁸⁹ Compare statement in text, with *supra* note 7 and accompanying text.

mockery of our system of justice for a defendant to invoke the right to a jury trial and, after that jury trial is furnished, then to complain that the non-representativeness of the jury pool renders her conviction unconstitutional.¹⁹⁰ Second, the right to a jury trial is necessary for accuracy and fairness.¹⁹¹ A consequence of what is necessary to ensure accuracy and fairness — a non-representative jury pool — must be constitutionally permissible.¹⁹² Providing a jury trial cannot result in a Sixth Amendment violation because it stems from the desire of our courts, state and federal, to get it right, to furnish any assistance that might prevent a wrongful conviction.¹⁹³ Third, supplying a jury trial is necessary to satisfy the Sixth Amendment.¹⁹⁴ It would be a mockery of justice for a non-representative jury pool caused by satisfying the Sixth Amendment to violate it.¹⁹⁵

The trio denies the Sixth Amendment right to a jury pool representative of and reflecting a fair cross-section of the community. The trio did not deny the defendant's Sixth Amendment claim because she did receive a representative jury pool. Nor did the trio deny the claim because the defendant failed to meet her evidentiary burden in proving non-representativeness. Nor did the trio deny her claim because of some defendant-specific reason that *she* lacked the Sixth Amendment right. Rather, the trio establishes that no defendant has a right to a representative jury pool.

But, of course, all defendants do have a Sixth Amendment right to a jury pool representative of and reflecting a fair cross-section of the community. In affirming this right, the Supreme Court in *Taylor* (on facts almost identical to this hypothetical) held “that the fair cross-section requirement is violated by the systematic exclusion of women, who in the judicial district involved here amounted to 53% of the citizens eligible for jury service. . . . [If women] are systematically eliminated from jury panels, the Sixth Amendment's fair-cross-section requirement cannot be satisfied.”¹⁹⁶ By denying a clearly existing Sixth Amendment right, the trio leads to an absurd or false conclusion. By leading to an absurd or false conclusion, the trio is unsound.

¹⁹⁰ Compare statement in text, with *supra* note 8 and accompanying text.

¹⁹¹ Compare statement in text, with *supra* note 9 and accompanying text. For the Supreme Court's view that jury trials are necessary for accuracy and fairness, see *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

¹⁹² Compare statement in text, with *supra* note 10 and accompanying text.

¹⁹³ Compare statement in text, with *supra* note 11 and accompanying text.

¹⁹⁴ Compare statement in text, with *supra* note 12 and accompanying text.

¹⁹⁵ Compare statement in text, with *supra* note 13 and accompanying text.

¹⁹⁶ *Taylor v. Louisiana*, 419 U.S. 522, 531 (1975).

B. No Sixth/Fourteenth Amendment Right to an Impartial Jury

Suppose a defendant invokes his Sixth Amendment right to a jury trial.¹⁹⁷ During voir dire, a prospective juror reveals his bias and partiality by declaring that he would vote for the death penalty without regard to mitigating evidence presented at the capital sentencing hearing. The defendant exercises a “for cause” challenge requesting the prospective juror’s exclusion from serving on the jury. The trial court refuses and empanels the biased prospective juror on the jury. After the jury convicts and imposes a death sentence, the defendant appeals claiming a violation of his Sixth and Fourteenth Amendment right to an impartial jury.¹⁹⁸

The hypothetical appellate court denies the claim based on the following application, to this Sixth and Fourteenth Amendment context, of the trio.¹⁹⁹ First, the defendant chose trial by jury. As chosen by the defendant, a consequence of that choice — a biased jury — is attributable to the defendant, not the State. It makes a mockery of our system of justice for a defendant to invoke the right to a jury trial and, after that jury trial is furnished, then to complain that the partiality of the jury renders his conviction unconstitutional. Second, the right to a jury trial is necessary for accuracy and fairness. A consequence of what is necessary to ensure accuracy and fairness — a biased jury — must be constitutionally permissible. Providing a trial by jury cannot result in a Sixth Amendment violation because it stems from the desire of our courts, state and federal, to get it right, to furnish any assistance that might prevent a wrongful conviction. Third, supplying a trial by jury is necessary to satisfy the Sixth Amendment. It would be a mockery of justice for a biased jury caused by satisfying the Sixth Amendment to violate it.

The trio denies the Sixth and Fourteenth Amendment right to an impartial jury. But, of course, all defendants do have a constitutional right to an impartial jury. The literal text of the Sixth Amendment provides this right and the Supreme Court has construed the Fourteenth Amendment Due Process Clause to independently supply

¹⁹⁷ See *supra* note 185 and accompanying text.

¹⁹⁸ U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury”); see *Morgan v. Illinois*, 504 U.S. 719, 726 (1992) (“[T]he Fourteenth Amendment’s Due Process Clause itself independently [from the Sixth Amendment right to an impartial jury] required the impartiality of any jury”); *id.* at 727 (“[D]ue process alone has long demanded that . . . the jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment.”).

¹⁹⁹ For the original formulations of these arguments, see *supra* notes 6–13 and accompanying text. For a more comprehensive discussion of the trio, see *supra* Part I.C.

this right.²⁰⁰ In *Morgan v. Illinois*, on similar facts as the above hypothetical, the Court held that defendants do have a right to an impartial jury under the Fourteenth Amendment Due Process Clause.²⁰¹ By absurdly denying a clearly existing Sixth and Fourteenth Amendment right, the trio is unsound.

C. *No Fourteenth Amendment Equal Protection Clause Right Against Discriminatory Peremptory Challenges*

Suppose a defendant invokes her Sixth Amendment right to a jury trial.²⁰² During voir dire, the prosecutor employs all of her peremptory challenges to exclude African-Americans from serving on the jury. The defendant objects but the trial court overrules the defendant's objection, insisting that peremptory challenges may be used to exclude anyone for any reason. After the all-white jury convicts, the defendant appeals claiming that her Fourteenth Amendment Equal Protection Clause right²⁰³ against the prosecution's use of race-based peremptory challenges was violated based on the Supreme Court's decision in *Batson v. Kentucky*.²⁰⁴ As *Batson* explained, "[m]ore than a century ago, the Court decided that the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded."²⁰⁵

The hypothetical appellate court denies the defendant's claim based on the following application, to this Fourteenth Amendment context, of the trio.²⁰⁶ First, the defendant chose trial by jury. As chosen by the defendant, a consequence of that choice — racial discrimination in jury selection — is attributable to the defendant, not the State. It makes a mockery of our system of justice for a defendant to invoke the right to a jury trial and, after that jury trial is furnished, then to complain that the discriminatory practices in jury selection renders

²⁰⁰ See *supra* note 198 and accompanying text.

²⁰¹ *Morgan*, 504 U.S. at 729 ("A juror who will automatically vote for the death penalty in every case [violates] . . . the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment.").

²⁰² See *supra* note 185 and accompanying text.

²⁰³ U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

²⁰⁴ *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) ("[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race . . .").

²⁰⁵ *Id.* at 85 (citing *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880)).

²⁰⁶ For the original formulations of these arguments, see *supra* notes 6–13 and accompanying text. For a more comprehensive discussion of the trio, see *supra* Part I.C.

her conviction unconstitutional. Second, the right to a jury trial is necessary for accuracy and fairness. A consequence of what is necessary to ensure accuracy and fairness — racial discrimination in jury selection — must be constitutionally permissible. Providing a trial by jury cannot result in a Fourteenth Amendment violation because it stems from the desire of our courts, state and federal, to get it right, to furnish any assistance that might prevent a wrongful conviction. Third, supplying a trial by jury is necessary to satisfy the Sixth Amendment. It would be a mockery of justice for racial discrimination in jury selection caused by satisfying the Sixth Amendment to violate the Constitution.

The trio denies the Fourteenth Amendment Equal Protection Clause right against the prosecution's use of race-based peremptory challenges. But, of course, all defendants do have this Fourteenth Amendment Equal Protection Clause right. The Supreme Court reaffirmed this right in *Swain v. Alabama* in 1965²⁰⁷ and held in *Batson* in 1986 (on facts similar to that of the hypothetical) that a prosecutor's use of race-based peremptory challenges violates the Fourteenth Amendment Equal Protection clause.²⁰⁸ By absurdly denying a clearly existing Fourteenth Amendment Equal Protection Clause right, the trio is unsound.

D. No Fifth Amendment Right to a No-Adverse-Inference Jury Instruction Regarding Defendant's Silence

Suppose a defendant invokes his Fifth Amendment right, choosing not to testify in his defense.²⁰⁹ The defendant requests that the trial court instruct the jury not to draw a negative inference from his failure to testify. The trial court refuses. After the defendant is convicted, the defendant appeals claiming a violation of his Fifth Amendment

²⁰⁷ *Swain v. Alabama*, 380 U.S. 202, 203-04 (1965) (“[A] State’s purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause. . . . And [this principle] has been consistently and repeatedly applied in many cases coming before this Court.”).

²⁰⁸ See *Batson*, 476 U.S. at 100 (“[P]etitioner made a timely objection to the prosecutor’s removal of all black persons on the venire. Because the trial court flatly rejected the objection without requiring the prosecutor to give an explanation for his action, we remand this case for further proceedings.”).

²⁰⁹ U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself . . .”).

privilege against self-incrimination based on the Supreme Court decision of *Carter v. Kentucky*.²¹⁰

The hypothetical appellate court denies his claim by the following application, to this Fifth Amendment context, of the trio.²¹¹ First, the defendant chose not to testify. As chosen by the defendant, a consequence of that choice — a court's refusal to issue a no-adverse-inference jury instruction — is attributable to the defendant, not the State. It makes a mockery of our system of justice for a defendant to choose to take advantage of the right not to testify and, after that right is granted, then to complain that a court's refusal to issue a no-adverse-inference jury instruction renders his conviction unconstitutional. Second, the Fifth Amendment right against self-incrimination is necessary to ensure accuracy and fairness.²¹² A consequence of what is necessary to ensure accuracy and fairness — a court's refusal to issue a no-adverse-inference jury instruction — must be constitutionally permissible. Providing the opportunity for a defendant not to testify cannot result in a Fifth Amendment violation because the right against self-incrimination stems from the desire of our courts, state and federal, to get it right, to furnish any assistance that might prevent a wrongful conviction. Third, allowing defendants to not testify in their own defense is necessary to satisfy the Fifth Amendment. It would be a mockery of justice for a court's refusal to issue a no-adverse-inference jury instruction that is caused by satisfying the Fifth Amendment to violate it.

The trio denies the Fifth Amendment right to a no-adverse-inference jury instruction. But, of course, all defendants do have this Fifth Amendment right. As the Court held in *Carter*, “the Fifth Amendment requires that a criminal trial judge must give a ‘no-adverse-inference’ jury instruction when requested by a defendant to do so.”²¹³ By

²¹⁰ *Carter v. Kentucky*, 450 U.S. 288, 300 (1981) (“The principles enunciated in our cases construing this privilege [against compelled self-incrimination], against both statutory and constitutional backdrops, lead unmistakably to the conclusion that the Fifth Amendment requires that a criminal trial judge must give a ‘no-adverse-inference’ jury instruction when requested by a defendant to do so.”).

²¹¹ For the original formulations of these arguments, see *supra* notes 6–13 and accompanying text. For a more comprehensive discussion of the trio, see *supra* Part I.C.

²¹² See *Griffin v. California*, 380 U.S. 609, 613 (1965) (“It is not every one who can safely venture on the witness stand, though entirely innocent Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character . . . will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him.” (quoting *Wilson v. United States*, 149 U.S. 60, 66 (1893))).

²¹³ *Carter*, 450 U.S. at 300.

absurdly denying a clearly existing Fifth Amendment right, the trio is unsound.

E. No Fifth Amendment Right Against Negative Comments to Jury Regarding Defendant's Silence

Suppose a defendant invokes her Fifth Amendment right, choosing not to testify in her defense.²¹⁴ The prosecution negatively comments to the jury regarding the defendant's silence. After the defendant is convicted, the defendant appeals claiming a violation of her Fifth Amendment privilege against self-incrimination based on the Supreme Court decision of *Griffin v. California*.²¹⁵

The hypothetical appellate court denies the claim by the following application, to this Fifth Amendment context, of the trio.²¹⁶ First, the defendant chose not to testify. As chosen by the defendant, a consequence of that choice — the prosecution negatively commenting to the jury regarding the defendant's silence — is attributable to the defendant, not the State. It makes a mockery of our system of justice for a defendant to choose to take advantage of the right not to testify and, after that right is granted, then to complain that the prosecution negatively commenting to the jury regarding the defendant's silence renders her conviction unconstitutional. Second, allowing defendants not to testify is necessary for accuracy and fairness. A consequence of what is necessary to ensure accuracy and fairness — the prosecution negatively commenting to the jury regarding the defendant's silence — must be constitutionally permissible. Providing the opportunity for a defendant not to testify cannot result in a Fifth Amendment violation because the right against self-incrimination stems from the desire of our courts, state and federal, to get it right, to furnish any assistance that might prevent a wrongful conviction. Third, allowing defendants not to testify is necessary to satisfy the Fifth Amendment. It would be a mockery of justice for the prosecution's negative comment to the jury regarding the defendant's silence caused by satisfying the Fifth Amendment to violate it.

The trio denies the Fifth Amendment right against the prosecution negatively commenting to the jury regarding a defendant's silence.

²¹⁴ See *supra* note 209 and accompanying text.

²¹⁵ See *Griffin*, 380 U.S. at 613 (holding that a court or prosecutor making negative comments to the jury concerning the defendant's silence violates the defendant's Fifth Amendment right against self-incrimination).

²¹⁶ For the original formulations of these arguments, see *supra* notes 6–13 and accompanying text. For a more comprehensive discussion of the trio, see *supra* Part I.C.

But, of course, all defendants do have this Fifth Amendment right. As the Court in *Griffin* held, “the Fifth Amendment, in its direct application to the Federal Government and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused’s silence or instructions by the court that such silence is evidence of guilt.”²¹⁷ By absurdly denying a clearly existing Fifth Amendment right, the trio is unsound.

F. No Sixth Amendment Right to Speedy Trial

Suppose an indigent defendant invokes his Sixth Amendment right to the appointment of counsel.²¹⁸ Because of both numerous delays by the trial court and limited resources within the Public Defender’s office, the defendant is not assigned counsel until three years later. The delay in the appointment of counsel results in his trial not commencing until more than three years after his indictment.²¹⁹ The defendant asserts a Sixth Amendment speedy trial right violation.²²⁰ Assessments of claims of speedy trial right violations are conducted pursuant to the Supreme Court’s balancing test in *Barker v. Wingo* involving the following four factors: “Length of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.”²²¹ Delays of about one year are generally considered presumptively prejudicial.²²² The trial court denies the defendant’s claim and the defendant is convicted. The defendant appeals, claiming a Sixth Amendment speedy trial right violation.

²¹⁷ *Griffin*, 380 U.S. at 615.

²¹⁸ See *supra* note 20 and accompanying text.

²¹⁹ Cf. *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1056 (C.D. Cal. 2014) (explaining that convicted capital offenders are entitled to the assistance of appointed counsel for their automatic appeal to the California Supreme Court but must wait “on average, between three and five years — until counsel is appointed to represent them”); Judge Arthur L. Alarcón, *Remedies for California’s Death Row Deadlock*, 80 S. CAL. L. REV. 697, 721 (2007) (citing an average delay in California of over three years for the appointment of counsel for the automatic appeal); Scott W. Howe, *Can California Save Its Death Sentences? Will Californians Save the Expense?*, 33 CARDOZO L. REV. 1451, 1464 (2012) (noting a wait of “8 to 10 years’ from sentencing for counsel to be appointed for state habeas”).

²²⁰ U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . .”).

²²¹ *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

²²² 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.”).

Rather than applying the *Barker* four-factor balancing test, the hypothetical appellate court denies his claim by the following application, to this Sixth Amendment context, of the trio.²²³ First, the defendant chose to have appointed counsel. As chosen by the defendant, a consequence of that choice — delay in the commencement of the trial — is attributable to the defendant, not to the State. It makes a mockery of our system of justice for a defendant to request the appointment of counsel at State expense and, after that counsel is furnished, then to complain that the very provision of that counsel delayed his trial and violated his constitutional rights. Second, the appointment of counsel for indigents is necessary to ensure accuracy and fairness. A consequence of what is necessary to ensure accuracy and fairness — delay in the commencement of the trial — must be constitutionally permissible. The appointment of counsel cannot result in a Sixth Amendment violation because appointment of counsel stems from the desire of our courts, state and federal, to get it right, to furnish any assistance that might prevent a wrongful conviction. Third, the appointment of counsel for indigents (charged with a felony) is necessary to satisfy the Sixth Amendment. It would be a mockery of justice for a delay caused by satisfying the Sixth Amendment to violate it.

The trio establishes that no indigent defendant exercising the Sixth Amendment right to appointed counsel also has a Sixth Amendment right to a speedy trial. But, of course, all defendants, even those invoking the right to appointed counsel, have a Sixth Amendment right to a speedy trial.²²⁴ The Supreme Court affirmed this right as early as 1905,²²⁵ established the modern test for assessing claims of violation of the right in *Barker* in 1972,²²⁶ and found that a defendant's speedy trial right was violated in *Doggett v. United States* in 1992.²²⁷ Moreover, the Court, in its latest decision on the speedy trial right,

²²³ For the original formulations of these arguments, see *supra* notes 6–13 and accompanying text. For a more comprehensive discussion of the trio, see *supra* Part I.C.

²²⁴ The defendant in *Barker* had appointed counsel. See *Barker*, 407 U.S. at 516. The defendant in the most recent Supreme Court case recognizing the Sixth Amendment right to speedy trial also had appointed counsel. See *Vermont v. Brillion*, 556 U.S. 81, 84–85 (2009).

²²⁵ See *Beavers v. Haubert*, 198 U.S. 77, 86 (1905) (“Undoubtedly a defendant is entitled to a speedy trial . . .”).

²²⁶ See *Barker*, 407 U.S. at 530 (establishing a four-factor “balancing test [that] necessarily compels courts to approach speedy trial cases on an ad hoc basis”).

²²⁷ *Doggett*, 505 U.S. at 658 (“When the Government’s negligence thus causes delay six times as long as that generally sufficient to trigger judicial review . . . the defendant is entitled to relief [for a violation of the Sixth Amendment Speedy Trial Clause].”).

declared that delays stemming from the exercise of the right to appointed counsel can lead to a speedy trial right violation.²²⁸ By absurdly denying a clearly existing Sixth Amendment right, the trio is unsound.

G. Objections

This section anticipates and replies to four possible objections to this Part's claim that the trio leads to absurd or false conclusions and is therefore unsound. First, as applied to some contexts, the trio does not lead to absurd or false conclusions. Second, that the trio leads to absurd conclusions does not make the trio unsound. Third, while delay is a necessary consequence of post-conviction review, the seven constitutional rights the trio would absurdly deny involve only possible consequences. And fourth, the trio is inapplicable outside the context of delayed executions.

1. The Trio Sometimes Does Not Lead to Absurd or False Conclusions

One might object that the trio sometimes does correctly deny recognition of non-existent constitutional rights. For example, suppose a defendant exercises her Sixth Amendment right of self-representation²²⁹ with the consequence that her self-representation is ineffective. She appeals her conviction claiming that her Sixth Amendment right to effective representation was violated.²³⁰ The trio would establish that a self-representing defendant has no Sixth Amendment right to effective assistance of counsel. But this time the trio gets it right. Self-representing defendants do not have a Sixth Amendment right to effective representation.²³¹ As a result, the trio does not always lead to absurd or false conclusions.

²²⁸ See *Vermont*, 556 U.S. at 85 (“The State may be charged with [delays that] resulted from the trial court’s failure to appoint . . . counsel with dispatch. Similarly, the State may bear responsibility if there is ‘a breakdown in the public defender system.’” (quoting *Brillon v. Vermont*, 955 A.2d 1108, 1111 (Vt. 2008))).

²²⁹ See *Faretta v. California*, 422 U.S. 806, 832 (1975) (“The Framers selected in the Sixth Amendment a form of words that necessarily implies the right of self-representation.”).

²³⁰ See *supra* notes 30–32 and accompanying text.

²³¹ See *Faretta*, 422 U.S. at 834 n.46 (noting that “a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of ‘effective assistance of counsel’”).

Though the objection is correct, it does not undermine this Part's claim that the trio absurdly denies clearly existing constitutional rights. It merely shows that the trio does not do so in every possible context. That the trio does not absurdly deny clearly existing constitutional rights in every context does not negate that the trio does so in some contexts. By doing so in some contexts simply means that the trio does absurdly deny clearly existing constitutional rights and is unsound.

2. The Trio Entails Absurd Consequences, but Is Not Unsound

One might object that the trio absurdly denying clearly existing rights expressly guaranteed by the Supreme Court fails to establish the trio as unsound. The trio is right and the Supreme Court is simply wrong. The trio correctly denies those seven constitutional rights that the Supreme Court has incorrectly guaranteed. The conflict between the trio and the Supreme Court does not necessarily establish the trio as unsound, but merely forces a choice: accept the absurd consequences or reject the trio. Proponents of the trio are free to choose to accept the absurd consequences.

Even if true, the objection is not plausible. Consider the extent of the absurd consequences that proponents of the trio would be forced to accept. They would be forced to maintain that not just one or even several constitutional rights do not exist, but that seven long-standing, fundamental constitutional rights guaranteed by the Supreme Court do not exist. Moreover, they would be forced to maintain that not only was the Supreme Court wrong, but also the literal text of the Constitution was wrong in granting some of these rights. As a practical matter, how does a lower court denying a *Lackey* claim in reliance on the trio repudiate seven Supreme Court rulings? Even the Supreme Court, if and when it addresses a *Lackey* claim, would have difficulty under principles of *stare decisis* in overruling seven, long-standing Court precedents (ranging across multiple constitutional amendments) in order to assert the trio.

3. Delay as a Necessary Consequence

One might object that delay between sentencing and execution is a necessary, not merely possible, consequence of the post-conviction review process necessary for satisfying the Eighth Amendment. In contrast, many of the contexts in which the trio absurdly denies clearly existing constitutional rights do not involve necessary consequences. For example, ineffectiveness of counsel is a possible,

but not necessary, consequence of exercising the right to counsel. Non-representative jury pools, biased juries, and discrimination in jury selection are possible, but not necessary, consequences of exercising the right to a jury trial. While the objection is true, it fails to gain any traction.

Courts denying *Lackey* claims generally carefully avoid terming the delay a necessary consequence of post-conviction review.²³² Rather, they argue that post-conviction review is necessary for both accuracy and fairness as well as for satisfying the Eighth Amendment.²³³ While *some* delay may be a necessary consequence of post-conviction review, the *entirety* of the delay might well be unnecessary and avoidable.²³⁴ A court denying a *Lackey* claim on the ground that some delay was a necessary and unavoidable consequence of post-conviction review would leave itself no basis to deny a claim where the entirety of the delay was unnecessary and avoidable. For example, how could the entirety of twenty-five year average delays in California and Florida be necessary and unavoidable given the national average of nearly sixteen years?²³⁵ Consider a more specific example. Death row prisoner Joe Smith's thirty-year delay stemmed in part from two different

²³² See *supra* Part I.C.2–3. Even the atypical references to delay as a necessary consequence are not clearly claiming that the *entirety* of the delay was necessary and unavoidable. See *Bell v. State*, 938 S.W.2d 35, 53 (Tex. Crim. App. 1997) (en banc) (“The existence of delays in appellant’s case have *arguably* been necessary to ensure that his conviction and sentence are proper and not inhumane.” (emphasis added)). Note that the court caveats its claim by use of the term “arguably.” Justice Thomas also refers to delay as a necessary consequence. *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.”). Two considerations should be noted. First, Justice Thomas fails to clearly state that the entirety of a delay in a *Lackey* claim is a necessary consequence. Second, Justice Thomas’ statement is conditioned on, and only applies to, those who “accept our death penalty jurisprudence as a given.” It does not apply to a *Lackey* claimant who need not accept that. Rather, his statement is directed to Justices generally opposed to the death penalty that have insisted on the extensive post-conviction review process in order for capital punishment to be constitutional.

²³³ See *supra* Part I.C.2–3.

²³⁴ See, e.g., *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1066-67 (C.D. Cal. 2014) (maintaining that excessive delays are “reasonably necessary [neither] to the fair administration of justice” nor “to protect an inmate’s rights”); *People v. Simms*, 736 N.E.2d 1092, 1143 (Ill. 2000) (Harrison, C.J., dissenting) (“I am unpersuaded by the suggestion that United States courts must tolerate greater delays than the courts of Europe because the American judicial system is more concerned with addressing meritorious claims and achieving correct results.”).

²³⁵ See *supra* notes 66–68 and accompanying text.

“constitutionally defective sentencing proceedings.”²³⁶ Just as ineffectiveness of counsel and biased juries are neither necessary nor unavoidable, so also multiple constitutionally defective sentencing hearings are neither necessary nor unavoidable. A court denying Smith’s *Lackey* claim thus could not argue that the entirety of the thirty-year delay was a necessary and unavoidable consequence of post-conviction review. Similarly, for capital offenders, the average delays in California of three to five years for the appointment of counsel for direct appeal and eight to ten years for the appointment of state habeas counsel are hardly necessary and unavoidable.²³⁷ As a result, while some delay may be a necessary consequence, particularly lengthy delay — excessive delay — is only a possible consequence. Therefore, just as ineffectiveness of counsel and biased juries are possible (not necessary) consequences, so also excessive delay is merely a possible (not a necessary) consequence. For these very reasons courts generally do not claim that the delay objected to by the prisoner was a necessary consequence of post-conviction review.

4. The Trio Is Inapplicable Outside the Context of Delayed Executions

Perhaps the most likely objection is that the trio is inapplicable and unfairly applied outside the context of delayed executions. The objection is unpersuasive for several reasons. First, the three arguments are not deeply embedded in an Eighth Amendment-specific framework. Not only is there little about them relevant *only* to the Eighth Amendment, but also there is little about them relevant to the Eighth Amendment at all. Consider how little these arguments have to say about the central concerns of the Eighth Amendment cruel and unusual punishment clause — punishment, proportionality, the penological purposes of retribution and deterrence, and evolving standards of decency. Numerous commentators and judges have criticized the courts denying *Lackey* claims for failing to engage in any substantive Eighth Amendment analysis.²³⁸ To the three arguments a

²³⁶ *Smith v. Arizona*, 552 U.S. 985, 985-86 (2007) (Breyer, J., dissenting from denial of certiorari). *See also, e.g., Foster v. Florida*, 537 U.S. 990, 993 (2002) (Breyer, J., dissenting from denial of certiorari) (noting that much of the twenty-seven year delay stemmed from “the State’s repeated procedural errors”); *Elledge v. Florida*, 525 U.S. 944, 945 (1998) (Breyer, J., dissenting from denial of certiorari) (calculating that “18 of the 23 years of delay” resulted from “the State’s own faulty procedures”).

²³⁷ *See Jones*, 31 F. Supp. 3d at 1066.

²³⁸ *See, e.g., Smith v. Mahoney*, 611 F.3d 978, 1005 (9th Cir. 2010) (Fletcher, J., dissenting) (“We have always found a way to avoid addressing *Lackey* claims on the

fair response is to ask even if they are true, so what? What do they have to do with the Eighth Amendment's prohibition against cruel and unusual punishment? Where is the analysis demonstrating that execution following as much as thirty years or more of death row incarceration is not cruel and unusual punishment?²³⁹ The trio fails to even address whether decades of death row incarceration is or is not punishment. The trio may hardly be defended as Eighth Amendment-specific (and thus not subject to application to other constitutional contexts) while simultaneously hiding from any substantive Eighth Amendment analysis.

Second, it is perhaps because the courts denying *Lackey* claims strategically wish to avoid substantive Eighth Amendment analysis that these arguments are stated as broad propositions about constitutional law and constitutional rights. They are meant to appeal to our intuitions, common sense, and sense of reason. For example, the following broadly framed statements used by courts to deny

merits We are out of excuses.”); *McKenzie v. Day*, 57 F.3d 1461, 1489 (9th Cir. 1995) (Norris, J., dissenting) (“[T]he majority ignores the relevant ‘penological justification’ analysis In fact, the majority evaluates the merits of McKenzie’s Eighth Amendment claim without engaging in any legal analysis whatsoever.”); *Jones*, 31 F. Supp. 3d at 1065 (“When courts have rejected [*Lackey* claims] . . . they have often not addressed whether any penological purpose of the death penalty continues to be served more than two decades after the death sentence was imposed.”); Aarons, *supra* note 146, at 42 (“[C]ourts have generally refused to consider the merits of the [*Lackey* claim] argument”); Rapaport, *supra* note 75, at 1126 (noting that courts typically fail “[t]o meet *Lackey* proponents on the ground on which they are arguing”); *Recent Cases*, 114 HARV. L. REV. 648, 650 (2000) (“[T]he . . . majority failed to address adequately [the prisoner’s] constitutional claims. The majority never refuted the argument that excessive delays constitute cruel and unusual punishment”); Root, *supra* note 146, at 310 (“Justice Thomas’ treatment of the [*Lackey*] claim has pragmatic appeal, but he did not undertake a genuine assessment of the question of delay”); Kara Sharkey, Comment, *Delay in Considering the Constitutionality of Inordinate Delay: The Death Row Phenomenon and the Eighth Amendment*, 161 U. PA. L. REV. 861, 886 (2013) (“[P]rocedural issues dispose of a number of *Lackey* claims without consideration of the claim’s substantive arguments.”); Angela April Sun, Note, “Killing Time” in the Valley of the Shadow of Death: Why Systematic Preexecution Delays on Death Row Are Cruel and Unusual, 113 COLUM. L. REV. 1585, 1596-97 (2013) (“Courts often avoid the [*Lackey*] claim by imposing procedural obstacles, or reject it based on precedent that itself provides little explanation . . . [or exploit] its procedural complexity to avoid reaching the substantive issues.”).

²³⁹ Cf. *McKenzie*, 57 F.3d at 1489 (Norris, J., dissenting) (“Instead [of substantive analysis], the majority substitutes a policy lecture . . . [on disruptions to] ‘the orderly administration of the death penalty’ But what does this have to do with whether the Eighth Amendment’s ban on cruel and unusual punishment will be violated if McKenzie is executed after . . . [decades] on death row?”).

Lackey claims hardly seem to be limited to *Lackey* claims and the Eighth Amendment: “The value of speed should not trump the value of accuracy.”²⁴⁰ “[The petitioner] ‘has benefitted from this careful and meticulous process and cannot now complain that the expensive and laborious process of habeas corpus appeals which exists to protect him has violated other of his rights.’”²⁴¹ “[I]t would indeed be a mockery of justice if the delay incurred during the prosecution of claims that fail on the merits could itself accrue into a substantive claim to the very relief that had been sought and properly denied in the first place.”²⁴² “A defendant must not be penalized for pursuing his constitutional rights, but he should also not be able to benefit from the ultimately unsuccessful pursuit of those rights.”²⁴³ All of the above statements are broadly framed and not specific to *Lackey* claims or even the Eighth Amendment. By being so broadly framed, and arguably purposefully broadly framed, it is fair game to apply the three arguments as broadly as they are framed.

Third, some aspects of the three arguments are themselves based on other constitutional contexts. Consider the following argument: “Having sought the aid of the judicial process and realizing the deliberateness that a court employs in reaching a decision, the defendants are not now able to criticize the very process which they so frequently called upon.”²⁴⁴ This could easily be an argument asserted by Justice Thomas in one of his concurrences to the denial of certiorari of *Lackey* claim petitions.²⁴⁵ Or it could easily be an argument asserted by a court denying a *Lackey* claim.²⁴⁶ But it is

²⁴⁰ *State v. Sparks*, 68 So. 3d 435, 493 (La. 2011).

²⁴¹ *Thompson v. Sec’y for the Dep’t of Corr.*, 517 F.3d 1279, 1284 (11th Cir. 2008) (quoting *White v. Johnson*, 79 F.3d 432, 439 (5th Cir. 1996)).

²⁴² *Allen v. Ornoski*, 435 F.3d 946, 959 (9th Cir. 2006) (quoting *McKenzie*, 57 F.3d at 1466).

²⁴³ *Richmond v. Lewis*, 948 F.2d 1473, 1491-92 (9th Cir. 1991).

²⁴⁴ *United States v. Loud Hawk*, 474 U.S. 302, 316-17 (1986) (quoting *United States v. Auerbach*, 420 F.2d 921, 924 (5th Cir. 1969)).

²⁴⁵ Compare statement in text accompanying note 244, with *Knight v. Florida*, 528 U.S. 990, 990 (1999) (Thomas, J., concurring in denial of certiorari) (“I am unaware of any support in the American constitutional tradition or in this Court’s precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed.”).

²⁴⁶ Compare statement in text accompanying note 244, with *Turner v. Jabe*, 58 F.3d 924, 933 (1995) (Luttig, J., concurring) (“It is a mockery of our system of justice . . . for a convicted murderer, who, through his own interminable efforts of delay and systemic abuse has secured the almost-indefinite postponement of his sentence, to then claim that the almost-indefinite postponement renders his sentence unconstitutional.”), and *Gardner v. State*, 234 P.3d 1115, 1143 (Utah 2010)

neither. It is an argument used to reject a Sixth Amendment speedy trial right violation claim.²⁴⁷ Consider as well the following argument: “Virtually all of the delays of which the petitioner complains occurred in the course of appellate proceedings and resulted either from the actions of the petitioner or from the need to assure careful review of an unusually complex case.”²⁴⁸ This argument as well could easily be from Justice Thomas or a court denying a *Lackey* claim. Instead, it is from the Supreme Court decision of *Harrison v. United States* denying a Sixth Amendment speedy trial right violation claim.²⁴⁹ Note that the *Harrison* argument is essentially the first two arguments of the trio. That is, the delays cannot be unconstitutional because they result from (i) the actions of the petitioner, not the State, and (ii) the necessity of ensuring that the outcome is accurate and fair. Moreover, several courts have explicitly relied on the *Harrison* argument in denying *Lackey* claims.²⁵⁰ If aspects of the three arguments themselves look to the analysis of constitutional rights outside the Eighth Amendment, one can hardly maintain that the trio is limited to the narrow context of the Eighth Amendment and *Lackey* claims. At the very least, the three arguments may fairly be applied to the very context from which they borrow — the Sixth Amendment speedy trial right. Ironically, as Part II.F demonstrated, the three arguments deny the very right from which they borrow — the Sixth Amendment speedy trial right. There could be no better demonstration that the three arguments are

(“[B]ecause 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 that process makes the petitioner’s sentence unconstitutional.”).

²⁴⁷ *Loud Hawk*, 474 U.S. at 317 (“We cannot hold, on the facts before us, that the delays asserted by respondents weigh sufficiently in support of their speedy trial claim to violate the Speedy Trial Clause.”).

²⁴⁸ *Harrison v. United States*, 392 U.S. 219, 221 n.4 (1968).

²⁴⁹ *See id.* (“The petitioner’s further contention that he was denied the right to a speedy trial is wholly without merit and was properly rejected by the Court of Appeals.”).

²⁵⁰ *See Richmond v. Lewis*, 948 F.2d 1473, 1491 (9th Cir. 1991) (denying *Lackey* claim based on, and by citing to, *Harrison*, 392 U.S. at 221 n.4); *Richmond v. Ricketts*, 640 F. Supp. 767, 803 (D. Ariz. 1986) (same); *People v. Frye*, 959 P.2d 183, 263 (Cal. 1998) (same). As a result, not only do courts denying *Lackey* claims rely on cases addressing Sixth Amendment speedy trial right violation claims, but the very arguments courts use to deny *Lackey* claims are nearly identical with and may be derived from arguments used to reject speedy trial right violation claims. Therefore, arguments nearly identical to and derived from the analysis of other constitutional rights may fairly be applied to other constitutional rights, especially those rights from which they borrow.

unsound than their denial of the very constitutional right from which they draw support.

III. WHY THE TRIO IS UNSOUND

Part II demonstrated that the three arguments, individually and collectively, are unsound. Applying the arguments to a wide variety of constitutional claims revealed them to lead to absurd or false conclusions. They denied numerous clearly existing constitutional rights. By leading to absurd or false conclusions, the arguments themselves are unsound. While that more than suffices as a basis to reject them, it still might be helpful to understand why they are unsound. This might especially be helpful given these arguments have enjoyed enormous influence in persuading courts to reject *Lackey* claims. For nearly twenty years nearly every court addressing a *Lackey* claim invoked them, and not a single court disagreed with them.²⁵¹ How could arguments that have been so persuasive be unsound?

Part III explains both why the arguments seem so intuitively appealing and why they are unsound. It identifies the flaw in each of the three arguments. The flaw in the first argument — a defendant/prisoner is responsible for the consequences of the constitutional rights she chooses to exercise — is the false assumption that the defendant/prisoner is ultimately responsible for the type of trial the State conducts and the type of punishment the State imposes. The flaw in the second and third arguments — the consequences of what is necessary for accuracy, fairness, and satisfying the Constitution cannot violate it — is the false assumption that what is necessary to satisfy the Constitution is also sufficient. The identification of these false assumptions provides an additional basis, independent from Part II, for rejecting the trio.

A. Prisoner Choice and Fault

The underlying structure of the first argument is that if a defendant/prisoner chooses *X*, then the defendant/prisoner, not the State, is responsible for the consequences of *X*. With the defendant/prisoner responsible for those consequences, those consequences do not constitute a State violation of the defendant/prisoner's constitutional rights. As applied to the *Lackey* claim context, prisoners choose appellate and collateral review with the consequences of delayed execution and prolonged death row incarceration. Prisoners are

²⁵¹ See *supra* notes 14–17 and accompanying text.

responsible for the consequences of their choices. Therefore, lengthy delay and prolonged pre-execution incarceration cannot constitute a State violation of prisoners' constitutional rights. Both in the abstract and as applied to the delayed execution context, the argument is facially plausible if not persuasive. The argument appeals to our intuitions. The argument is essentially stating that persons should be responsible for the consequences of their choices. Who could disagree with that? The argument also draws on some parallels with such homespun wisdom as "you made your bed, now lie in it," "as you reap you shall sow," "take the good with the bad," "in for a penny in for a pound," and "with choices comes responsibility."

But constitutional law simply does not follow such conventional wisdom. As seen in Part II, that defendants choose to exercise constitutional rights does not preclude consequences of those choices from being unconstitutional. Defendants choosing the assistance of appointed counsel may have the consequences of ineffective assistance of counsel²⁵² and delayed trials.²⁵³ Despite these being consequences of defendants' choices, they are no less unconstitutional. Defendants choosing jury trials may have the consequences of jury pools unrepresentative of the community,²⁵⁴ biased juries,²⁵⁵ or prospective jurors excluded for race-based reasons.²⁵⁶ Despite these being consequences of defendants' choices, they are no less unconstitutional. Defendants choosing not to testify may have the consequences of courts refusing to instruct juries not to draw negative inferences regarding defendants' silence²⁵⁷ and prosecutors inviting juries to draw such negative inferences.²⁵⁸ Despite these being consequences of defendants' choices, they are no less unconstitutional. Despite the intuitive appeal of holding defendants responsible for the consequences of their choices, the above examples demonstrate that constitutional law often holds the State responsible for the consequences of defendants' choices.

Moreover, constitutional law may hold the State responsible for the consequences of defendants' choices even in the arguable absence of any State action. For example in *Cuyler v. Sullivan*, the Supreme Court addressed whether the ineffectiveness of privately retained (not State-

²⁵² See *supra* text accompanying notes 20–23.

²⁵³ See *supra* Part II.F.

²⁵⁴ See *supra* Part II.A.

²⁵⁵ See *supra* Part II.B.

²⁵⁶ See *supra* Part II.C.

²⁵⁷ See *supra* Part II.D.

²⁵⁸ See *supra* Part II.E.

appointed) counsel constituted a Sixth Amendment violation of the defendant's right to the assistance of counsel.²⁵⁹ Not only did the defendant choose to exercise his right to the assistance of counsel, but also the defendant chose his counsel. If the consequence of those choices by the defendant was the ineffectiveness of counsel, how could the State be responsible when seemingly it was not the State's fault? The State seemingly did nothing to contribute to the ineffectiveness of counsel. The state of Pennsylvania made this very argument: ineffectiveness of "retained counsel does not involve state action" and thus cannot be the basis for a constitutional violation.²⁶⁰ In ruling that defendants have the constitutional right to effective assistance of even privately retained counsel,²⁶¹ the Court explained that "[t]his Court's decisions establish that a state criminal trial, a proceeding initiated and conducted by the State itself, is an action of the State within the meaning of the Fourteenth Amendment."²⁶² *Cuyler* further explained that "[w]hen a State obtains a criminal conviction through such a trial [a trial in which the defendant lacks effective assistance of counsel], it is the State that unconstitutionally deprives the defendant of his liberty."²⁶³ Thus, it is the State that is prosecuting the defendant, and it is the State that has the ultimate constitutional duty and responsibility to provide the defendant with a fair trial, which includes the effective assistance of counsel.²⁶⁴ As a result, the State, not defendants, may be responsible for the consequences of defendants' choices even in the arguable absence of any State action. The State has the ultimate constitutional duty to conduct a fair trial.

Just as with trials, the State is also ultimately constitutionally responsible for the nature of the punishment it imposes and the manner of its imposition.²⁶⁵ For example, suppose one chooses to

²⁵⁹ *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980) ("[W]e must decide whether the failure of retained counsel to provide adequate representation can render a trial so fundamentally unfair as to violate the Fourteenth Amendment.")

²⁶⁰ *Id.* at 342.

²⁶¹ *See id.* at 344 ("A proper respect for the Sixth Amendment disarms [the State's] contention that defendants who retain their own lawyers are entitled to less protection than defendants for whom the State appoints counsel.")

²⁶² *Id.* at 343 (citing *Lisenba v. California*, 314 U.S. 219, 236-37 (1941); *Moore v. Dempsey*, 261 U.S. 86, 90-91 (1923)).

²⁶³ *Id.* at 343.

²⁶⁴ *See id.* at 344 ("[T]he State's conduct of a criminal trial itself implicates the State in the defendant's conviction . . .").

²⁶⁵ *See, e.g., Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014) ("[T]he Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons."); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) ("[I]f a State wishes to

commit a crime. A possible consequence of that choice is punishment for the commission of the crime. That punishment is a consequence of the defendant's choice does not preclude that the nature of the punishment or manner of its imposition might violate the Eighth Amendment. Why? The State is ultimately responsible for the type of punishment and manner of its imposition. Despite the crime being the defendant's choice, the punishment being a consequence of that choice, and the State not at fault for or the cause of the defendant's choice to commit the crime, the State has the ultimate constitutional responsibility and duty to not impose cruel and unusual punishment.

Consider another example. Suppose a death row prisoner intentionally consumes illegal drugs, ingests toxic substances, or sustains a head injury in an attempt to become insane with the purpose of delaying or permanently preventing execution. The prisoner succeeds and is pronounced insane. Not only did the prisoner choose to commit a capital crime, with the consequence of the risk of capital punishment, but also the prisoner chose to harm himself with the consequence of the risk of insanity. The prisoner is the sole cause of and at fault for everything — the commission of the crime, the punishment, and the insanity. Surely the State can constitutionally execute the prisoner? It cannot. As the Supreme Court in *Ford v. Wainwright* held, “the Eighth Amendment prohibits a state from carrying out a sentence of death upon a prisoner who is insane.”²⁶⁶ Executing an insane person constitutes cruel and unusual punishment.²⁶⁷ Affirmed by the Court in *Panetti v. Quarterman*,²⁶⁸ *Ford* announced a categorical bar against executing the insane.²⁶⁹ That a

authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.”); *Furman v. Georgia*, 408 U.S. 238, 270 (1972) (Brennan, J., concurring) (“The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings.”); *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.”); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 683 (2005) (“The purpose of the Eighth Amendment ban on ‘cruel and unusual punishments,’ however, is to place constraints on the ways in which we pursue [the penological purposes of punishment].”).

²⁶⁶ *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986).

²⁶⁷ *See id.*

²⁶⁸ 551 U.S. 930, 934 (2007) (noting the Eighth Amendment prohibition against executing the insane (citing *Ford*, 477 U.S. at 409-10)).

²⁶⁹ *See, e.g.*, Jonathan Greenberg, Note, *For Every Action There Is a Reaction: The Procedural Pushback Against Panetti v. Quarterman*, 49 AM. CRIM. L. REV. 227, 229

person is insane is sufficient to trigger the bar, how or why the person is insane is irrelevant.²⁷⁰ Therefore, despite all of the prisoner's choices and fault for the consequences of those choices, the State has the ultimate responsibility not to impose cruel and unusual punishment. That the insanity was a consequence (even intended) of the prisoner's choices does not preclude imposition of capital punishment on this prisoner from being unconstitutionally cruel and unusual.²⁷¹

Similarly, that a death row prisoner chooses appellate and collateral review, with the (perhaps even intended) consequences of excessively delaying execution and prolonging pre-execution incarceration does not necessarily preclude execution following as much as thirty years or more of death row incarceration from being unconstitutionally cruel and unusual punishment. No matter what a prisoner chooses, causes or intends, the State has the ultimate constitutional responsibility of not imposing cruel and unusual punishment. As a result, the flaw of the prisoner choice argument is the false assumption that death row prisoners are necessarily responsible for the consequences of their choices, the type of punishment the State imposes, and the manner of its imposition.

Interestingly, in addition to the State, the Supreme Court may bear responsibility. Three justices supportive of the death penalty have assigned blame to the Court itself for delays between sentencing and execution. Objecting to a delay of eight years, former Chief Justice William Rehnquist stated, "I do not think that this Court can continue to evade some responsibility for this mockery of our criminal justice system."²⁷² Referring to the average delays of nearly twenty-five years in Florida, Justice Antonin Scalia admitted that "most of the delay has

(2012) ("*Ford* . . . establish[ed] a categorical exclusion shielding [insane] defendants from capital punishment . . .").

²⁷⁰ The State, however, may be permitted to take measures to restore the prisoner to sanity. *See, e.g., Singleton v. Norris*, 319 F.3d 1018, 1027 (8th Cir. 2003) ("A State does not violate the Eighth Amendment as interpreted by *Ford* when it executes a prisoner who became incompetent during his long stay on death row but who subsequently regained competency through appropriate medical care.").

²⁷¹ For another example, suppose a juvenile whose age makes him ineligible for capital punishment lies about his age claiming that he is above the age of capital punishment eligibility. Despite the juvenile choosing to make himself eligible for the death penalty and being responsible for the consequences of that choice, executing the juvenile would nonetheless constitute a cruel and unusual punishment in violation of the Eighth Amendment. *See Roper v. Simmons*, 543 U.S. 551, 575 (2005) (imposing a categorical bar on execution of persons under the age of eighteen).

²⁷² *Coleman v. Balkcom*, 451 U.S. 949, 958 (1981) (Rehnquist, J., dissenting from denial of certiorari).

been because of rules that we have imposed.”²⁷³ Even Justice Thomas conceded that “in most cases raising this novel [*Lackey*] claim, the delay in carrying out the prisoner’s execution stems from this Court’s Byzantine death penalty jurisprudence.”²⁷⁴ Whether excessive delay is claimed to be the fault of the State, the Court, or the prisoner, execution following excessively prolonged death row incarceration is no more or less a constitutional violation; it is no more or less a cruel and unusual punishment.

B. Post-Conviction Review Necessary for Accuracy and Fairness

The underlying structure of the second argument is that if *X* is necessary to ensure accuracy and fairness, then any consequence of *X* must be constitutionally permissible. In the delayed execution context, appellate and collateral review is necessary to ensure accurate and fair death sentences. Consequences of that review are delay between sentencing and execution and prolongation of the pre-execution death row incarceration. Therefore, delay and prolongation of the death row incarceration must be constitutionally permissible. In short, in a hierarchy of constitutional values, speed should not trump accuracy. Both in the abstract and as applied to the delayed execution context, the argument seems facially plausible and perhaps even persuasive.

But applying the argument to other contexts helps reveal its flaws. As seen in Part II, that the exercise of some right is necessary to ensure accuracy and fairness does not preclude a consequence of the exercise of that right from violating another constitutional right. The right to counsel is necessary to ensure an accurate and fair verdict.²⁷⁵ Exercising the right may have the consequences of ineffective assistance of counsel²⁷⁶ and delayed trials.²⁷⁷ That these consequences stem from what is necessary to ensure an accurate and fair verdict makes them no less unconstitutional. The right to a jury trial is necessary to ensure an accurate and fair verdict.²⁷⁸ Exercising the right may have the consequences of jury pools unrepresentative of the

²⁷³ Transcript of Oral Argument at 47, *Hall v. Florida*, 134 S. Ct. 1986 (2014) (No. 12-10882), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-10882_6kh7.pdf.

²⁷⁴ *Knight v. Florida*, 528 U.S. 990, 991 (1999) (Thomas, J., concurring in denial of certiorari).

²⁷⁵ See *supra* note 20 and accompanying text.

²⁷⁶ See *supra* text accompanying notes 20–23.

²⁷⁷ See *supra* Part II.F.

²⁷⁸ See *supra* note 185 and accompanying text.

community,²⁷⁹ biased juries,²⁸⁰ and prospective jurors excluded for race-based reasons.²⁸¹ That these consequences stem from what is necessary to ensure an accurate and fair verdict makes them no less unconstitutional. The right not to testify is necessary to ensure an accurate and fair verdict.²⁸² Exercising the right may have the consequences of courts refusing to instruct juries not to draw negative inferences regarding defendants' silence²⁸³ and prosecutors inviting juries to draw such inferences.²⁸⁴ That these consequences stem from what is necessary to ensure an accurate and fair verdict makes them no less unconstitutional.

The flaw in this second argument rests on the necessary/sufficient distinction.²⁸⁵ The second argument conflates what is necessary for accuracy and fairness with what is sufficient to satisfy the Constitution. The second argument assumes that what is necessary to ensure accuracy and fairness is sufficient to satisfy the Constitution.²⁸⁶

²⁷⁹ See *supra* Part II.A.

²⁸⁰ See *supra* Part II.B.

²⁸¹ See *supra* Part II.C.

²⁸² See *supra* note 212 and accompanying text.

²⁸³ See *supra* Part II.D.

²⁸⁴ See *supra* Part II.E.

²⁸⁵ See, e.g., BAGGINI & FOSSL, *supra* note 19, at 158 (“Sufficient conditions are what is *enough* for something to be the case. Necessary conditions are what is *required* for something to be the case.”); BORUCH A. BRODY, *Glossary of Logical Terms*, in 5 THE ENCYCLOPEDIA OF PHILOSOPHY 57, 60 (Paul Edwards ed., 1967) (“A *necessary condition* is a circumstance in whose absence a given event could not occur or a given thing could not exist. A *sufficient condition* is a circumstance such that whenever it exists a given event occurs or a given thing exists.”). “Confusion may result if the [necessary/sufficient] distinction is not heeded.” SIMON BLACKBURN, THE OXFORD DICTIONARY OF PHILOSOPHY 73 (1st ed. 1996). A condition may be necessary without being sufficient. For example, being able to lift at least 50 pounds is a necessary but not sufficient condition for being able to lift 100 pounds. Conversely, a condition may be sufficient without being necessary. For example, being able to simultaneously lift two items that weigh 50 pounds each is a sufficient condition for being able to lift 100 pounds but is not a necessary condition when there are other ways of being able to lift 100 pounds — for example, by being able to simultaneously lift one item weighing 75 pounds and another item weighing 25 pounds. A single condition may be both necessary and sufficient. For example, “[b]eing composed of H₂O is a necessary *and* sufficient condition for something being water.” BAGGINI & FOSSL, *supra* note 19, at 159. And some conditions may be individually necessary and jointly sufficient. For example, “to be ice, a substance must both be H₂O *and* at [a freezing temperature].” *Id.*

²⁸⁶ Cf. *Recent Cases*, *supra* note 238, at 650-51 (“The court [denying the Lackey claim] failed to acknowledge the possibility that extensive post-trial procedures could be both necessary *and* cruel — necessary because they satisfy a constitutional mandate, and cruel because they generate delays prohibited by the Eighth Amendment.” (emphasis added)).

If that assumption were true, the second argument would be sound.²⁸⁷ But that assumption is false. As demonstrated in Part II, the exercise of many different constitutional rights may be necessary to ensure accuracy and fairness but are not individually sufficient to satisfy the Constitution. As a result, the consequences of that which is necessary to ensure accuracy and fairness sometimes do violate the Constitution. Because the assumption of the second argument that what is necessary must also be sufficient is false, the second argument is unsound.²⁸⁸

C. *Post-Conviction Review Necessary Under Eighth Amendment*

The underlying structure of the third argument is if *X* is necessary to satisfy the Constitution, then any consequence of *X* cannot violate the Constitution. In the delayed execution context, appellate and collateral review is necessary to satisfy the Eighth Amendment. Consequences of that review are delay between sentencing and

²⁸⁷ If what is necessary to ensure accuracy and fairness is also sufficient to satisfy the Constitution, then any consequence of what is necessary to ensure accuracy and fairness cannot violate the Constitution.

²⁸⁸ The flaw in the alternatively formulated second argument — that speed should not trump accuracy — rests on the implicit assumption that those represent the only two options. Applied to a Sixth Amendment context, *see supra* Part II.F, the argument suggests defendants have the choice of either an excessively delayed trial with counsel or a speedy trial without counsel. But because defendants are constitutionally entitled to both speed and accuracy, the assumption is false. If the State cannot provide the third option of both speed and accuracy, there is an available remedy: no trial and the indictment or charges dismissed with prejudice. There is no constitutional obligation that the defendant be prosecuted. Each of the first two options is unconstitutional; only the third option (or its remedy) is constitutional.

Similarly, in the *Lackey* claim context, the argument that speed should not trump accuracy suggests that there are only two options. First, an expeditious execution but without the review that ensures execution is warranted; second, an excessively and unreasonably delayed execution with full review. Because that assumption that there are only two options is false in the Sixth Amendment context above, that assumption may also be false in the *Lackey* claim context. Just as exercise of the right to counsel does not preclude a speedy trial right violation, so also exercise of the right to full review of a capital sentence does not necessarily preclude execution following as much as thirty years or more of death row incarceration from being cruel and unusual punishment. Rather than speed trumping accuracy or accuracy trumping speed, both speed and accuracy may constitutionally be required. Because both are required in the above Sixth Amendment context, both may be required in the *Lackey* claim context. If the State cannot provide the third option of both full review and freedom from cruel and unusual punishment there is an available remedy: reduce the capital punishment to life imprisonment without parole. There is no constitutional obligation that death row prisoners be executed. Each of the first two options may be unconstitutional; only the third option (or its remedy) *cannot* be unconstitutional. Neither speed nor accuracy necessarily supplants the other; rather, the right to each may supplement the other.

execution and prolongation of the pre-execution death row incarceration. As consequences of what is necessary to satisfy the Eighth Amendment, delay and prolongation of the death row incarceration cannot violate it. Both in the abstract and as applied to the delayed execution context, the argument seems facially plausible and perhaps even persuasive.

But applying the argument to other contexts helps reveal its flaws. As seen in Part II, that some right is necessary to satisfy one aspect or part of the Constitution does not preclude a consequence of the exercise of that right from violating another constitutional right. The right to counsel is necessary to satisfy the Sixth Amendment.²⁸⁹ Exercising the right may have the consequences of ineffective assistance of counsel²⁹⁰ and delayed trials.²⁹¹ That these consequences stem from what is necessary to satisfy the Constitution makes them no less unconstitutional. The right to a jury trial is necessary to satisfy the Sixth Amendment.²⁹² Exercising the right may have the consequences of jury pools unrepresentative of the community,²⁹³ biased juries,²⁹⁴ and prospective jurors excluded for race-based reasons.²⁹⁵ That these consequences stem from what is necessary to satisfy the Sixth Amendment makes them no less unconstitutional. The right not to testify is necessary to satisfy the Fifth Amendment.²⁹⁶ Exercising the right may have the consequences of courts refusing to instruct juries not to draw negative inferences regarding defendants' silence²⁹⁷ and prosecutors inviting juries to draw such inferences.²⁹⁸ That these consequences stem from what is necessary to satisfy the Fifth Amendment makes them no less unconstitutional.

Just as in the second argument, the flaw in this third argument rests on the necessary/sufficient distinction.²⁹⁹ The third argument conflates what is constitutionally necessary with what is constitutionally sufficient. The third argument assumes that what is necessary to

²⁸⁹ See *supra* note 20 and accompanying text.

²⁹⁰ See *supra* text accompanying notes 20–23.

²⁹¹ See *supra* Part II.F.

²⁹² See *supra* note 185 and accompanying text.

²⁹³ See *supra* Part II.A.

²⁹⁴ See *supra* Part II.B.

²⁹⁵ See *supra* Part II.C.

²⁹⁶ See *supra* note 209 and accompanying text.

²⁹⁷ See *supra* Part II.D.

²⁹⁸ See *supra* Part II.E.

²⁹⁹ For an example of the Supreme Court's utilization of the necessary/sufficient distinction, see *Hudson v. McMillian*, 503 U.S. 1, 23 (1992) (Thomas, J., dissenting). See also *supra* note 285.

satisfy the Constitution is sufficient to satisfy the Constitution. If that assumption were correct, the third argument would be sound.³⁰⁰ But that assumption is false. As demonstrated in Part II, the exercise of many different constitutional rights may be necessary to satisfy the protections the Constitution affords criminal defendants but are not individually sufficient to satisfy the Constitution. As a result, the consequences of what is necessary to satisfy the Constitution sometimes do violate the Constitution. Because the assumption of the third argument that what is necessary must also be sufficient is false, the third argument is unsound.

CONCLUSION

Upholding the constitutionality of execution following as much as thirty years or more of post-sentence, pre-execution death row incarceration rests principally on a trio of arguments. This trio, however, leads to absurd or false conclusions. In addition to denying Eighth Amendment protection to *Lackey* claims, the trio absurdly denies seven clearly existing constitutional rights emanating from the Fifth, Sixth, and Fourteenth Amendments and expressly guaranteed by the Supreme Court. Ironically, the trio even denies the very right — the Sixth Amendment right to a speedy trial — from which the trio draws support. By denying long-standing constitutional rights, the trio establishes too high a bar for a claimed constitutional right to meet. If seven fundamental constitutional rights guaranteed by the Supreme Court cannot meet this too-high standard, then a *Lackey* claim's failure to meet this too-high standard is no longer evidence that it fails to warrant constitutional protection. Moreover, by leading to absurd or false conclusions — denying clearly existing constitutional rights — the trio is itself unsound. True, demonstrating that the primary support for the constitutionality of excessively delayed executions is unsound does not affirmatively establish the *unconstitutionality* of such executions. But eliminating the support of the trio does eliminate the principal obstacle to courts recognizing that execution following as much as thirty years or more of death row incarceration violates the Eighth Amendment prohibition against cruel and unusual punishment. It clears the path for courts to recognize *Lackey* claims.

³⁰⁰ If what is necessary to satisfy the Constitution is sufficient to satisfy the Constitution, then any consequence of what is necessary to satisfy the Constitution cannot violate it.