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Jones, Lackey, and Teague, 48 J. Marshall L. Rev. 961 (2015)

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JONES, LACKEY, AND TEAGUE

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ABSTRACT

In a recent, high-profile ruling, a federal court finally recognized that a substantial delay in executing a death row inmate violated the Eighth Amendment's ban on cruel and unusual punishments. Courts have repeatedly rejected these so-called "Lackey claims," making the federal court's decision in *Jones v. Chappell* all the more important. And yet it was deeply flawed. This paper focuses on one of the major flaws in the *Jones* decision that largely escaped attention: the application of the non-retroactivity rule from *Teague v. Lane*. By comprehensively addressing the merits of the *Teague* bar as applied to *Lackey* claims, and making the case for applying the bar, this paper adds to, and challenges, the existing literature on capital punishment, *Lackey* claims, and *Teague* doctrine. This paper dissects the *Jones* ruling on the application of *Teague*, examining the Supreme Court's "new rule" case law and concluding that *Lackey* claims, when viewed at the appropriate level of generality, propose a new rule. It then addresses the more complicated aspect of applying *Teague* in this context, recognizing that the first *Teague* exception poses the most likely basis for avoiding the *Teague* bar on a *Lackey* claim. At a minimum, *Lackey* claims (like *Miller v. Alabama* claims, now the subject of substantial Eighth Amendment litigation on collateral review) sit at the intersection of procedural and substantive rules. Nonetheless, this paper makes the case for viewing the claim as procedural and therefore *Teague*-barred. Ultimately, then, this paper emphasizes a point that could substantially influence existing litigation: litigators and federal judges should take the *Teague* bar more seriously when considering *Lackey* claims on federal habeas review, particularly when viewed in light of modern habeas rules

and doctrine that limit relief and protect the interests of the states. But the paper also emphasizes an important point about death penalty policy and politics: if the state is to have a death penalty at all, it should be prepared, and willing, to ensure that death sentences are actually carried out.

I. INTRODUCTION

The use of courts to attack the legality – and often the political wisdom or desirability – of capital punishment is hardly novel. Although capital punishment opponents have never been able to secure a majority of votes on the Supreme Court for the proposition that the death penalty is itself and in all circumstances unconstitutional, they have been able to use litigation to substantially narrow the death penalty’s availability and to shape the procedures available in capital cases.¹ Yet, courts give and courts take away – or to be more accurate, sometimes they reject completely. One claim, though popular in the academic literature on capital punishment,² has consistently fallen upon deaf judicial ears: that the death penalty is unconstitutional where the state fails to carry out the execution quickly enough.³ Not unlike other claims

¹ See J. Richard Broughton, *The Second Death of Capital Punishment*, 56 FLA. L. REV. 639 (2006).

² Unsurprisingly, the academic literature has been, for some time, far more friendly to the claim. See, e.g., Dwight Aarons, *Getting Out of this Mess: Steps Toward Addressing and Avoiding Inordinate Delay in Capital Cases*, 89 J. CRIM. L. & CRIMINOLOGY 1 (1998) (discussing the procedural complications of the claim); Dwight Aarons, *Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?*, 29 SETON HALL L. REV. 147 (1998) (discussing whether the claim is enough for cruel and unusual punishment); Kathleen M. Flynn, *The “Agony of Suspense”: How Protracted Death Row Confinement Gives Rise to An Eighth Amendment Claim of Cruel and Unusual Punishment*, 54 WASH. & LEE L. REV. 291 (1997) (arguing that the claim is enough to violate the Eighth Amendment); Ryan S. Hedges, *Justice 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 (2001) (arguing for the right to be heard and have case decided on the merits); Jeremy Root, *Cruel and Unusual Punishment: A Reconsideration of the Lackey Claim*, 27 N.Y.U. REV. L. & SOC. CHANGE 281 (2001-02) (discussing the questions surrounding delays in capital punishment); Erin Simmons, *Challenging An Execution After Prolonged Confinement on Death Row [Lackey Revisited]*, 59 CASE W. RES. L. REV. 1249, 1264 (2009) (noting barriers to making the claim); Kara Sharkey, *Delay in Considering the Constitutionality of Inordinate Delay: The Death Row Phenomenon and the Eighth Amendment*, 161 U. PA. L. REV. 861 (2013) (addressing the Lackey claim).

³ See *Smith v. Mahoney*, 611 F.3d 978, 998-99 (9th Cir. 2010) (rejecting the Lackey claim); *Allen v. Ornoski*, 435 F. 3d 946, 960 (9th Cir. 2006) (denying claim); *Stafford v. Ward*, 59 F.3d 1025, 1028 (10th Cir. 1995) (denying relief); *Fearance v. Scott*, 56 F. 3d 633, 636-40 (5th Cir. 1995) (same); *Parker v. State*, 873 So.2d 270, 294 (Fla. 2004) (concluding the lower court did not abuse its discretion and thus denying the defendant’s request); *People v. Massie*, 967 P.2d

that have failed over and over again, however, this strange claim has recently found a friend not just in the abolition-friendly confines of academia or the capital defense bar, but also in the federal judiciary.

It is not unfair to describe the claim as “strange,” at least in some sense of the term. After all, the execution-delay claim is raised by the very inmates and capital defense lawyers who deliberately engage in litigation that produces delays in carrying out executions.⁴ This is not to say that such litigation should be forbidden; it should not. The criminal justice system and the well-being of the political community are better served by a process that allows for rigorous, if carefully circumscribed, review of capital convictions and sentences. But however legitimate or well-intentioned, extensive capital litigation quite obviously delays executions. Surely, inmates and their lawyers will file their legal challenges to conviction and sentence with the expectation that the litigation will to some degree prolong the inmate’s life. So it seems indeed bizarre that an inmate filing the claims designed to protect and prolong his life would simultaneously claim that the state is acting unlawfully by not killing him sooner.⁵ How, one might imagine, would death row inmates and opponents of capital punishment react if the State affirmatively took steps to *accelerate* post-conviction review and pending executions?⁶ How, moreover,

29, 45 (Cal. 1998) (deciding it was not cruel and unusual punishment to execute a defendant after 16 years of imprisonment).

⁴ See, e.g., *Fearance*, 56 F.3d at 639 (“What [the record] shows is that Fearance was not the unwilling victim of a *Bleak House*-like procedural system hopelessly bogged down; at every turn, he, without complaining about the accumulating period on death row, sought extensions of time, hearings, and reconsiderations.”).

⁵ See *Thompson v. McNeil*, 556 U.S. 1114 (2009) (Thomas, J., concurring in the denial of certiorari) (“I remain ‘unaware of any support in 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.”) (quoting *Knight v. Florida*, 528 U.S. 990 (1999) (Thomas J., concurring in denial of certiorari); *Free v. Peters*, 50 F.3d 1362 (7th Cir. 1995) (denying *Lackey* claim because delays were attributable to defendant’s own conduct). But see Russell L. Christopher, *The Irrelevance of Prisoner Fault for Excessively Delayed Executions*, 72 WASH. & LEE L. REV. 3 (2015) (arguing against the prisoner fault rationale for rejecting delay-in-execution claims).

⁶ Note, for example, that 28 U.S.C. § 2261 *et seq.* provides for expedited federal habeas review for jurisdictions that satisfy the fast-track “opt-in” criteria. This provision has never had much effect, in part because of questions about which jurisdictions satisfy the criteria and in part because of protracted efforts by the Department of Justice to issue implementing regulations. Still, some groups advocating greater legal protections for death row inmates have said that the provisions should be repealed, and have also argued that the statute of limitations for federal habeas review be either repealed or extended, and the other procedural limits on federal habeas review be repealed. See, e.g., SMART ON CRIME: RECOMMENDATIONS FOR THE ADMINISTRATION AND

would this unusual argument – made, and rejected, time and again – ultimately prevail in court?

A federal court in California recently gave us an example. In *Jones v. Chappell*, the district court ruled that California violated the federal Constitution by maintaining a system in which inmates languished on death row for inordinately long periods of time without being executed.⁷ According to the court in *Jones*, the delays in California were attributable not primarily to inmates seeking relief but to the State’s “dysfunctional post-conviction review process,” where litigation takes too long to resolve and where there is little chance that a death row inmate will ever actually be executed.⁸ Such a system violates the Eighth Amendment’s ban on cruel and unusual punishments, the court said, because it results in arbitrariness in imposing the death penalty and serves no legitimate penological goal.⁹ The *Jones* holding attracted substantial media attention and commentary,¹⁰ and has already found its way into legal scholarship on the death penalty.¹¹

Though it has never ruled on the merits of this kind of claim, the Supreme Court has consistently declined to even hear one on its certiorari review. The most notable rejection came in *Lackey v. Texas*¹² (thus producing the “*Lackey* claim”). And yet in that case, Justices Stevens and Breyer, in a memorandum respecting the denial of certiorari, signaled that they would be willing to entertain the argument on its merits.¹³ Those same justices later articulated the same rationale in subsequent cases.¹⁴ But the Court has never

CONGRESS, REPORT OF THE SMART ON CRIME COALITION 195-97 (2010) (making these recommendations). Notably, the groups that contributed to this section of the full “Smart on Crime” Report include the American Bar Association, Amnesty International, The Constitution Project, and the NAACP Legal Defense Fund – none of these groups would be generally regarded as friendly toward capital punishment.

⁷ See *Jones v. Chappell*, 31 F. Supp.3d 1050, 1069 (C.D. Cal. 2014).

⁸ *Id.* at 1062.

⁹ *Id.* at 1063-1069.

¹⁰ See, e.g., Edvard Petterson & Alison Vekshin, *California’s Death Penalty System Ruled Unconstitutional*, Bloomberg.com, available at www.bloomberg.com/news/2014-07-16/california-death-penalty-system-ruled-unconstitutional.html (posted July 17, 2014).

¹¹ See, e.g., Brent E. Newton, *Justice Kennedy, the Purposes of Capital Punishment, and the Future of Lackey Claims*, 62 BUFF. L. REV. 979, 999 (2014) (discussing *Jones*); Sam Kamin & Justin F. Marceau, *Waking the Furman Giant*, 48 U.C. DAVIS L. REV. 981, 983 (2015) (same); Christopher, *supra* note 5, at 11 (same); Russell L. Christopher, *Death Delayed is Retribution Denied*, 99 MINN. L. REV. 421, 444 (2014) (citing *Jones*); James Gibson & Corinna Lain, *Death Penalty Drugs and the International Moral Marketplace*, 103 GEO. L.J. 1215, 1270 (2015) (noting *Jones* and explaining how the international marketplace has had an effect on the ability of states to carry out executions by making lethal injection drugs unavailable).

¹² 514 U.S. 1045 (1995).

¹³ See *id.* (Stevens & Breyer, JJ, respecting denial of certiorari).

¹⁴ See, e.g., *Muhammad v. Florida*, 134 S. Ct. 894 (2014) (Breyer, J.,

subscribed to those minority views. The *Lackey* claim, then, has consistently failed, at the Supreme Court and in the lower courts.¹⁵ Until now, thanks to *Jones*. The Supreme Court even recently granted a stay of execution to Texas death row inmate Lester Bower,¹⁶ who raised in his certiorari petition – and citing *Jones* – a claim that his wait on death row for over thirty years violated the Eighth Amendment.¹⁷ Although the Court’s order granting the stay did not state its reasons for doing so, it is not hard to imagine that some Justices may have afforded the delay-in-execution claim some weight, in addition to the other claims that Bower raised. Bower’s petition was eventually denied,¹⁸ but signaled that references to *Jones*, and to delays in execution more generally, are likely to continue to crop up in capital litigation before the Court, and in the lower courts. This is particularly true as the average time between

dissenting from denial of certiorari); *Thompson v. McNeil*, 556 U.S. 1114, 1114-21 (2009) (Stevens, J., respecting denial of certiorari & Breyer, J., dissenting from denial of certiorari); *Foster v. Florida*, 537 U.S. 990, 992 (2002) (Breyer, J., dissenting from denial of certiorari); *Knight v. Florida*, 528 U.S. 990, 990-99 (1999) (Stevens, J., respecting denial of certiorari). One commentator (Lackey’s former lawyer, in fact) has suggested that Justice Kennedy might be prepared to join Justices Stevens and Breyer. Newton, *supra* note 11, at 999.

¹⁵ See, e.g., *Valle v. Florida*, 132 S. Ct. 1 (2011); *Johnson v. Bredesen*, 558 U.S. 1067 (2009) (holding the *Lackey* claim should not “accrue until an execution date is set”); *Thompson*, 556 U.S. at 1114; *Foster*, 537 U.S. at 990. See also *supra* n.3 (citing lower court cases rejecting *Lackey* claims).

¹⁶ See *Bower v. Texas*, No. 14-292 (U.S., Feb. 5, 2015) (granting order for stay of execution).

¹⁷ Pet. For Cert., *Bower v. Texas*, No. 14-292, at i, 31 (U.S., filed Sept. 9, 2014). Two points about Bower’s claim are noteworthy here. First, the procedural posture of his case differed somewhat from that in *Jones* and other cases involving *Lackey* claims raised on collateral review – Bower was appealing the denial of a state habeas petition in the Texas Court of Criminal Appeals; he is not raising the claim on appeal from denial of federal habeas review. *Id.* at 10. Second, as Texas’s brief in opposition rightly pointed out: “Texas is not California.” Respondent’s Brief in Opp., *Bower v. Texas*, No. 14-292, at 35 (U.S., filed Nov. 13, 2014). With respect to the willingness of the State to carry out executions, that is quite correct and an obvious ground for distinguishing *Jones*.

Of course, Bower also raised a *Penry* claim and a *Brady* claim in his petition, see Pet. for Cert., *supra* this note, at i, and it is certainly possibly that one of those claims warranted further consideration by the Court. It may also be significant that Bower has consistently maintained his innocence, though this would hardly make him unique among death row inmates. Bower was convicted and sentenced to death for the 1983 murders of four men at an airplane hangar. See Mark Berman, *Supreme Court stays execution of Texas inmate on death row for 30 years*, WashingtonPost.com, www.washingtonpost.com/news/post-nation/wp/2015/02/05/supreme-court-stays-execution-of-texas-inmate-on-death-row-for-30-years (posted Feb. 5, 2015) (discussing the inmate’s stay of execution).

¹⁸ See *Bower v. Texas*, 135 S. Ct. 1291 (2015) (noting that Justice Breyer, joined by Justices Ginsburg and Sotomayor, would have granted the petition, and focused upon the *Penry* claim in their dissent from the denial of certiorari). The dissent did not mention *Jones* or the delay-in-execution claim more generally.

sentencing and execution widens, if the execution ever occurs at all.¹⁹ So there is every reason to believe, particularly after *Jones*, that these claims will arise with some frequency in future capital habeas cases, perhaps with more frequency than in years past.

A mountain of sound reasons exist to reject *Lackey* claims on the merits and to conclude that *Jones* was wrong. The opinion seems to misunderstand retribution,²⁰ for example, and it utterly fails to give any precise guidance as to how long of a stay on death row is too long for the Eighth Amendment to tolerate. Moreover, had the district court found that the petition was subject to the Anti-Terrorism and Effective Death Penalty Act (AEDPA), the claim could easily have been rejected using the deference provisions of that law, which permit federal habeas relief only where a state court judgment on the merits was contrary to, or an unreasonable application of, clearly established law.²¹ These concerns are the tip of the iceberg, and others have more carefully articulated the lack of merit in the *Jones* opinion.²² The one ground for disposing of the issue, however, that largely escaped attention in the wake of the *Jones* ruling is based on the Supreme Court's 1989 decision in *Teague v. Lane*.²³ Indeed, in the Fifth Circuit litigation of Clarence Allen Lackey's delay-in-execution claim, it was *Teague* that principally served as the barrier to habeas relief.²⁴ Other courts

¹⁹ According to the Bureau of Justice Statistics, the average elapsed time between sentence and execution is 186 months (about fifteen-and-a-half years). U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT 2013 – STATISTICAL TABLES, at 14 (Dec. 2014). According to news reports, for example, the average time on death row in Arizona is 23 years, see Cooper Rummel, *The real cost of the death penalty in Arizona*, KTAR.com, available at <http://ktar.com/22/1770745/The-real-cost-of-the-death-penalty-in-Arizona> (posted Sept. 30, 2014); and the average time between sentence and execution in Florida is a little over sixteen years, see *A Look at Florida's Death Row*, NBCMiami.com, available at www.nbcmiami.com/news/A-Look-at-Floridas-Death-Row-245208951.html (posted Feb. 12, 2014).

See also R.G., *Why so many death row inmates in America will die of old age*, The Economist explains blog, <http://www.economist.com/blogs/economist-explains/2014/02/economist-explains-0> (posted Feb. 3, 2014) (discussing delays in execution).

²⁰ *Jones*, 31 F. Supp.3d at 1064-65.

²¹ See generally 28 U.S.C. § 2254(d). The court found that AEDPA did not apply because the state court never reached the merits of Jones's Eighth Amendment delay-in-execution claim. *Jones*, 31 F. Supp.3d at 1068 n.23.

²² See Kent Scheidegger, *Why Jones v. Chappell is Wrong, Part 2*, Crime and Consequences Blog (posted July 21, 2014) www.crimeandconsequences.com/crimblog/2014/07/why-jones-v-chappell-is-wrong-.html (giving reasons why *Jones* was wrong); Kent Scheidegger, *The Lackey Claim, Again*, Crime and Consequences Blog (posted July 16, 2014) (noting delays are the problem). Notably, one court has already refused to follow *Jones*. See generally *Hulett v. State*, 766 S.E.2d 1 (Ga. 2014).

²³ 489 U.S. 288 (1989).

²⁴ See *Lackey v. Scott*, 52 F.3d 98 (5th Cir. 1995) (vacating the stay of

have followed suit.²⁵ The *Teague* doctrine, ever complicated but now well-developed over twenty-five years, states that new rules of constitutional criminal procedure – those that were not dictated by precedent when the conviction became final – are barred from recognition on federal post-conviction collateral review.²⁶ This general law of non-retroactivity for new rules has two notable exceptions: when the new rule is substantive, rather than procedural;²⁷ or when the new rule is a watershed rule of procedure that is implicit in the concept of ordered liberty and essential to ensuring the fairness and accuracy of trial and punishment.²⁸

Teague developed at a time when the Court was engaged in the process of narrowing the ability of inmates to use federal habeas corpus litigation as a means for benefitting from the explication of new constitutional norms.²⁹ Federal habeas petitioners should not have the benefit of those new norms in federal court, *Teague* held, when previous decisions faithfully applied the law that existed at the time of conviction, sentence, and finality.³⁰ Along with exhaustion and procedural default doctrines,³¹ as well as the more government-friendly standard for harmless error review on habeas,³² *Teague* fit nicely into a habeas doctrine that was now emphasizing important differences between direct review and federal habeas review. Habeas doctrine, by the 1980s, was also now giving greater primacy to state court adjudication on collateral review of state convictions and sentences.³³ In so doing, it emphasized the roles of the state courts in the federal system and the limits of federal jurisdiction when reviewing the decisions of a

execution).

²⁵ *Smith v. Mahoney*, 611 F.3d 978, 998-99 (9th Cir. 2010) (rejecting *Lackey* claim on *Teague* grounds); *White v. Johnson*, 79 F.3d 432, 439 (5th Cir. 1996) (rejecting the *Lackey* claim also on *Teague* grounds).

²⁶ *Teague*, 489 U.S. at 299-301.

²⁷ *Id.* at 311.

²⁸ *Id.*

²⁹ See Patrick Higginbotham, *Notes on Teague*, 66 S. CAL. L. REV. 2433, 2437-38 (1993) (discussing the different approaches). For reference to the extensive criticism of *Teague* in the academic literature, see Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to Teague v. Lane and the Anti-Terrorism and Effective Death Penalty Act of 1996*, 25 AM. J. CRIM. L. 203, 206 n. 11 (2008) (citing the literature as of the mid-1990s).

³⁰ *Teague*, 489 U.S. at 309-10.

³¹ See *Edwards v. Carpenter*, 529 U.S. 446 (2000) (holding that ineffective assistance of counsel could be procedurally defaulted); *Coleman v. Thompson*, 501 U.S. 722 (1991) (discussing procedural default doctrine); *Francis v. Henderson*, 425 U.S. 536 (1976) (discussing doctrine); *Wainwright v. Sykes*, 433 U.S. 72 (1977) (same).

³² See *Brecht v. Abrahamson*, 507 U.S. 619 (1993) (holding the standard is whether error had substantial and injurious effect of influence in determining jury's verdict).

³³ See J. Richard Broughton, *Habeas Corpus and the Safeguards of Federalism*, 2 GEO. J. L. & PUB. POL'Y 109, 134-35 (2004) (discussing cases with similar reasoning that federalism justified limits).

sovereign entity responsible for the definition, enforcement, and administration of its own criminal laws.³⁴ In its *Teague* jurisprudence in particular, the Court connected the purposes of the writ to the protection of good-faith (even if incorrect) action on the part of state courts. “Foremost among” these purposes, the Court said, “is ensuring that state courts conduct criminal proceedings in accordance with the Constitution as interpreted at the time of those proceedings.”³⁵ This means that the habeas court “need only apply the constitutional standards that prevailed at the time the original proceedings took place.”³⁶ Congress took that emphasis a step further when it adopted the deference provisions of the AEDPA, which arguably codified *Teague*.³⁷ Still, *Teague* stands independent of AEDPA and its strictures differ slightly from those under the habeas statute. It applies even in cases that are not governed by AEDPA (like, arguably, *Jones*).³⁸ *Teague*, then, is another of the modern habeas rules that promote comity, finality, and federalism during federal adjudication of a state prisoner’s claims.³⁹ Unlike AEDPA’s legislative mandate, though, *Teague* and its sister doctrines are judicially-enforced constraints on federal court power. And they formed an important, if less-noticed, part of the Rehnquist Court’s larger effort to revive judicially-enforced federalism.⁴⁰

As it relates to *Teague*, the *Jones* opinion is notable in two ways. First, California did not raise the *Teague* bar as a defense.⁴¹

³⁴ *Id.* at 116. See also Stephen F. Smith, *The Rehnquist Court and Criminal Procedure*, 73 U. COLO. L. REV. 1337, 1344-45 (2002) (describing the *Teague* doctrine as “utterly devastating to the Warren Court’s federal vision of criminal procedure.”). Cf. Barry Friedman, *Habeas and Hubris*, 45 VAND. L. REV. 797 (1992) (explaining that *Teague* was less about retroactivity rules and really about “curtailing” habeas relief).

³⁵ *Saffle v. Parks*, 494 U.S. 484, 488 (1990).

³⁶ *Teague*, 489 U.S. at 306.

³⁷ 28 U.S.C. § 2254(d).

³⁸ In *Jones*, the court found that AEDPA deference did not apply because the state court never adjudicated Jones’s *Lackey* claim in the merits. See *Jones*, 31 F. Supp.3d at 1068 n. 23.

³⁹ See Broughton, *supra* note 33, at 135-54 (discussing the modern trend). But see Richard H. Fallon Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733 (1991) (criticizing *Teague* as too narrow and stringent); James S. Liebman, *More Than “Slightly Retro”*: *The Rehnquist Court’s Rout of Habeas Jurisdiction in Teague v. Lane*, 18 N.Y.U. J. L. & SOC. CHANGE 537 (1990-91) (arguing that *Teague* would do damage to the ability of prisoners to obtain the writ).

⁴⁰ Broughton, *supra* note 33, at 160-62.

⁴¹ *Jones*, 31 F. Supp.3d at 1068. California has now appealed the judgment in *Jones* to the Ninth Circuit, and has asserted the *Teague* bar in its briefing. See Appellant’s Opening Brief, *Jones v. Davis*, No. 14-56373 at 33-37 (9th Cir. filed Dec. 1, 2014). The Criminal Justice Legal Foundation has filed an amicus brief siding with California, and has also raised *Teague* in its briefing. See Brief of Criminal Justice Legal Foundation as Amicus Curiae in Support of Appellant and Supporting Reversal (hereinafter “CJLF Brief”); *Jones v. Davis*, No. 14-56373 at 13-16 (9th Cir. filed Dec. 9, 2014). Both of these briefs rely on many of

The district court therefore did not have the benefit of reasoned briefing and argument from the State that would have explained how *Teague* operated to bar Jones's *Lackey* claim. And second, the State's failure notwithstanding, Judge Carney addressed the *Teague* problem *sua sponte* and, in a single paragraph, found that *Teague* did not apply.⁴² The rule that Jones sought, according to the court, was "that the state may not arbitrarily inflict the death penalty" and *that* rule "is not new. Rather, it is inherent in the most basic notions of due process and fair punishment embedded in the core of the Eighth Amendment."⁴³ The opinion cites the concurring opinions of Justices Brennan and Douglas in *Furman v. Georgia* for that proposition,⁴⁴ then states that the rule is "so deeply embedded in the fabric of due process that everyone takes it for granted."⁴⁵

This article challenges the *Teague*-based conclusion in *Jones* and offers an argument – the one that California could have made (and should also have made in its appellate briefing) and that states defending themselves against execution delay claims in future cases should make – for why *Lackey* claims are *Teague*-barred. In doing so, this article seeks to offer a deeper and more nuanced assessment of *Teague* in the *Lackey* context than the few existing cases do. The article first contends that, contrary to the *Jones* opinion, an inmate raising a *Lackey* claim is asking for a new rule. Next, because the claim would not fit the Court's understanding of a watershed rule, the article grapples with the more complicated problem of whether the rule is procedural or substantive, and offers a plausible argument for why the rule is procedural. At a minimum, this article concludes, federal courts hearing *Lackey* claims should take the *Teague* bar seriously, and afford *Teague* doctrine more careful consideration than it was given in the early *Jones* litigation. The article also demonstrates why Eighth Amendment claims can be subject to the *Teague* bar, and are not subject to wholesale exemption from *Teague*'s general rule of non-retroactivity.

II. LACKEY CLAIMS AS NEW RULES

The threshold consideration in determining whether *Teague* applies to a delay-in-execution claim is whether the petitioner is seeking the benefit of a "new rule." The core sentiment expressed in the *Jones* opinion is that delay-in-execution claims do not propose new rules.⁴⁶ This is wrong.

According to Judge Carney's opinion, the *Lackey* claim is

the same cases and doctrine to which I refer in this Article.

⁴² *Jones*, 31 F. Supp.3d at 1068-69.

⁴³ *Id.* at 1068.

⁴⁴ *Id.*

⁴⁵ *Id.* at 1069.

⁴⁶ *Id.* at 1068.

based on the application of a well-established principle from *Furman v. Georgia*, that the death penalty cannot be imposed arbitrarily and must serve legitimate penological goals.⁴⁷ *Teague* is no bar where the petitioner seeks to have a settled precedent simply apply to a new set of facts, but does nothing more and imposes no additional obligations on the government.⁴⁸ Therefore, the argument runs, the rule upon which a *Lackey* claimant relies is simply a logical extension of settled Eighth Amendment principle.

But this is not, and cannot be, correct. At least, it cannot be correct based upon the Supreme Court's extensive "new rule" jurisprudence. This kind of analysis – which, it is important to note, also ignores Ninth Circuit precedent finding that a *Lackey* claim proposes a new rule,⁴⁹ precedent that should have bound the district court in *Jones* – fails to properly apply the standard for "new rules" and exists at a level of generality that is too high to enable the *Teague* doctrine to function effectively.

The Court has kept the definition of a "new rule" broad, and the key to the analysis is whether the rule was dictated by precedent at the time the conviction became final. In *Butler v. McKellar*, the Court stated that a rule is new if it "breaks new ground or imposes a new obligation on the States or the Federal Government."⁵⁰ This standard helps to validate "reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions."⁵¹ A rule does not avoid the non-retroactivity bar merely because it is "within the logical compass of" or even "controlled by" a prior decision.⁵² Rather, upon surveying the legal landscape as it existed when the conviction became final,⁵³ if reasonable judicial minds could debate whether the rule was mandated by precedent, then it is by definition "new."⁵⁴ The Court has said that *Teague* "serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions when entered."⁵⁵ If the conviction and sentence complied with existing federal law at the time of finality, then, the emergence of a new doctrine should not be used to permit continued reexamination of the state's judgment. *Teague*, the Court has said, "asks state court judges to act reasonably, not presciently."⁵⁶ If the unlawfulness of the conviction would not be "apparent to all reasonable jurists" –

⁴⁷ *Id.* at 1068-69.

⁴⁸ *Teague*, 489 U.S. at 307.

⁴⁹ *See Smith*, 611 F.3d at 998-99 (rejecting the new rule).

⁵⁰ 494 U.S. 407, 412 (1990).

⁵¹ *Id.* at 414.

⁵² *Id.* at 415.

⁵³ *Graham v. Collins*, 506 U.S. 461, 468 (1993).

⁵⁴ *O'Dell v. Netherland*, 521 U.S. 151, 160 (1997).

⁵⁵ *Sawyer v. Smith*, 497 U.S. 227, 234 (1990).

⁵⁶ *O'Dell*, 521 U.S. at 166.

that is, if there is any other reasonable interpretation – then the rule is new and can only be applied retroactively if it meets one of the two exceptions.⁵⁷

Consequently, arguments like the one that the court makes in *Jones* – that the rule articulated there is based on the Eighth Amendment’s prohibition on arbitrary death penalties, per *Furman* – exist at a level of abstraction that is too high to satisfy *Teague*. Indeed, if the new rule standard was meant to be understood at such a level of generality, one would be hard-pressed to imagine how the Court’s “new rule” jurisprudence would have developed as it has. Unsurprisingly, the Court has rejected similar efforts.

As Kent Scheidegger has properly explained, the Court has confronted the level-of-generality problem in the *Teague* context and has favored specificity rather than appeals to general Eighth Amendment (or other constitutional) principles.⁵⁸ Scheidegger helpfully cites *Sawyer v. Smith*,⁵⁹ which posed the question of whether the Court’s holding in *Caldwell v. Mississippi* – which prohibits prosecutors from arguing to the sentencing jury that responsibility for the defendant’s sentence lies with others⁶⁰ – was a “new rule.” In describing the case, the brutality of Sawyer’s actions should not be overlooked. Sawyer and an accomplice beat Frances Arwood, dragged her naked body into a bathroom, kicked her into the bathtub, and scalded her with hot water.⁶¹ Sawyer then kicked her in the chest and caused her head to strike something in the bathroom, which left her unconscious.⁶² After beating her more, Sawyer doused her body (including her genital area) with lighter fluid and set her on fire.⁶³ Sawyer argued that the Louisiana prosecutor in his case violated *Caldwell*, which was decided a year after Sawyer’s conviction became final, when the prosecutor informed the jury that other decision-makers in the system would

⁵⁷ *Lambrix v. Singletary*, 520 U.S. 518, 528, 539 (1997).

⁵⁸ See Kent Scheidegger, *Why Jones v. Chappell is Wrong, Part 3 – Teague v. Lane*, posting at Crime and Consequences Blog, available at www.crimeandconsequences.com/crimblog/2014/07/why-jones-v-chappell-is-wrong.html (posted July 22, 2014) (discussing the level-of-generality problem). See also CJLF Brief, *supra* note 41, at 14 (arguing that the Supreme Court has consistently rejected efforts to avoid the “new rule” standard by merely invoking broad constitutional principles).

⁵⁹ 497 U.S. 227 (1990).

⁶⁰ 472 U.S. 320 (1985).

⁶¹ *Sawyer*, 497 U.S. at 229-30.

⁶² *Id.* at 230.

⁶³ *Id.* An even fuller account of the events is contained in the Louisiana Supreme Court’s original decision on direct review, affirming the conviction and sentence. See generally *State v. Sawyer*, 422 So.2d 95 (La. 1982), *vacated by Sawyer v. Louisiana*, 463 U.S. 1223 (1983). The state supreme court’s opinion referred to the conduct of Sawyer and his accomplice as “bizarre,” “frightful,” and “sadistic.” *Id.* at 97-98. In its opinion on remand, the court described the facts as “gruesome and depraved.” *Sawyer v. State*, 442 So.2d 1136 (La. 1983).

review the jury's decision.⁶⁴ To establish that *Caldwell* was not a new rule, Sawyer argued that *Caldwell* fit within the scope of prior Eighth Amendment cases that generally require reliability in the capital sentencing decision.⁶⁵ The Court rejected this kind of argument by requiring a more specific level of abstraction in order to establish his claim. "In petitioner's view, *Caldwell* was dictated by the principle of reliability in capital sentencing. But the test would be meaningless if applied at this level of generality."⁶⁶ The Court had never decided, prior to *Caldwell*, that a prosecutor's argument to a capital sentencing jury violated the Eighth Amendment.⁶⁷ Consequently, a state court reviewing Sawyer's claim at the time would not have felt compelled to find the prosecutor's argument constitutionally problematic under the Eighth Amendment.⁶⁸ Scheidegger is therefore correct in asserting that *Sawyer* fundamentally undermines Judge Carney's effort to ground the *Lackey* claim in a highly abstract version of Eighth Amendment rights.

Other examples in the Court's *Teague* jurisprudence lend further support to this point, which is fatal to Judge Carney's *Teague* analysis. In *O'Dell v. Netherland*, a federal habeas petitioner – who had been convicted of capital murder, rape, and sodomy in Virginia, after physically and sexually assaulting a woman and strangling her "with such violence that bones in her neck were broken and finger imprints were left on her skin"⁶⁹ – argued that he was entitled to relief under a line of Supreme Court decisions that culminated in *Simmons v. South Carolina*.⁷⁰ That case, decided in 1994, held that a capital defendant may inform the sentencing jury that he is not parole-eligible under existing state law, where the prosecution introduces evidence of the defendant's future dangerousness.⁷¹ Eight years earlier, in *Skipper v. South Carolina*, the Court held that, where the prosecutor had argued that the defendant would pose disciplinary problems in prison and would likely rape other prisoners, the defendant was entitled under the Eighth Amendment to have the jury consider evidence that he would not be a danger to others if incarcerated.⁷² Still nine years earlier, in *Gardner v. Florida*, a plurality of the Court held that it

⁶⁴ *Sawyer*, 497 U.S. at 232.

⁶⁵ *Id.* at 235-36.

⁶⁶ *Id.* at 236 (citing *Anderson v. Creighton*, 483 U.S. 635 (1987) (concerning qualified immunity standard "[i]f the test of 'clearly established law' were to be applied at this level of generality, [p]laintiffs would be able to convert the rule of qualified immunity into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights")).

⁶⁷ *Id.* at 236.

⁶⁸ *Id.* at 237.

⁶⁹ 521 U.S. 151, 153 (1997).

⁷⁰ 512 U.S. 154 (1994).

⁷¹ *Id.*

⁷² 476 U.S. 1 (1986).

was unconstitutional to impose the death sentence on the basis of information that the defendant had no opportunity to deny or explain (there, the judge imposed the death sentence based on a presentence report that was not available to Gardner).⁷³ O'Dell, who also was denied an opportunity to introduce evidence of his parole ineligibility and whose conviction became final in 1988, argued that *Simmons* applied retroactively to his case because it was “merely a variation of the facts of *Skipper*,”⁷⁴ which in turn relied upon *Gardner*, and thus was not a new rule.⁷⁵

The Supreme Court disagreed. *Simmons*, it turns out, was a problematic case for finding a legal mandate because it was merely a plurality opinion and the separate opinions articulated views ranging from Justice Blackmun’s due process holding for the plurality to the Eighth Amendment view expressed by Justices Souter and Stevens.⁷⁶ “The array of views expressed in *Simmons* itself suggests that the rule announced there was, in light of this Court’s precedent, ‘susceptible to debate among reasonable minds.’”⁷⁷ *Simmons* was thus “an unlikely candidate for ‘old-rule’ status.”⁷⁸ Still, neither *Gardner* nor *Skipper* dictated the result in *Simmons*, because other Supreme Court decisions – *California v. Ramos* and *Caldwell* – complicated the legal landscape relative to the information that must be made available to the sentencing jury.⁷⁹ Reasonable judges at the time of O'Dell’s case “could have drawn a distinction between information about a defendant and information concerning the extant legal regime.”⁸⁰

Based on the Court’s observation in *O'Dell* about the status of *Simmons*, it is apparent that reliance on *Furman* for a *Lackey* claim poses a similar problem for a habeas petitioner. *Furman* was a *per curiam* opinion which stated only the conclusion, with no reasoning, that the sentence of death in the relevant cases constituted Cruel and Unusual Punishment.⁸¹ Beyond that, *Furman* included separate opinions from each Justice that expressed a similarly wide array of views about the precise legal problem created by the then-existing capital punishment regimes at issue. Justice Stewart’s opinion focused on the arbitrariness of the death penalty by likening it to being struck by lightning.⁸² Justice Douglas alluded to the arbitrariness of the death penalty with respect to race and

⁷³ 430 U.S. 349 (1977).

⁷⁴ *O'Dell*, 521 U.S. at 161.

⁷⁵ *Id.*

⁷⁶ *Id.* at 159.

⁷⁷ *Id.* at 159-60.

⁷⁸ *Id.* at 159.

⁷⁹ *Id.* at 162-63.

⁸⁰ *Id.* at 165.

⁸¹ *Furman v. Georgia*, 408 U.S. 238 (1972).

⁸² *Id.* at 309-10 (Stewart, J., concurring).

poverty.⁸³ Justice White said that “there is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.”⁸⁴ Justices Brennan and Marshall would have found the death penalty unconstitutional in all circumstances (the only two justices to hold that view).⁸⁵ It is undoubtedly true, then, that arbitrariness and caprice were a consistent theme of the *Furman* majority.⁸⁶ To say, however, that a majority of the *Furman* Court indisputably held that “a state may not arbitrarily inflict the death penalty,”⁸⁷ and that this holding necessarily means that lengthy stays on death row are unconstitutionally arbitrary, is to overstate *Furman’s* reach. To draw such a lesson from what is merely a connected theme of five separate opinions is to describe *Furman’s* reach at a level of generality that *Teague* simply does not countenance.

The better articulation of *Furman* is to say that a majority of the Court held that the Eighth Amendment forbids arbitrary infliction of the death penalty through a system that gives the sentencer unbridled discretion to impose death without meaningful consideration of the particularized circumstances of the case. This, in fact, is the way that the joint opinion in *Gregg v. Georgia* describes *Furman*, and that opinion was written by two of the Justices in the *Furman* majority – Justices Stewart and Stevens (Justice Powell also wrote the joint opinion, but he was a dissenter in *Furman*).⁸⁸ Notice the difference in the level of generality. Had the Court in *O’Dell* applied *Teague* at the level of abstraction that Judge Carney employed in *Jones*, surely *Teague* would not have barred O’Dell’s *Simmons* claim. It would have been enough to say that as of 1988, the Court’s prior decisions had set forth a well-settled general principle that a jury must be permitted to consider evidence of the defendant’s character and background. That statement, as such, would be accurate. In fact, it could even fall within the kind of sweeping description of Eighth Amendment law after *Furman* that we see in Judge Carney’s *Jones* opinion. But it would not capture the more narrow, and more nuanced, claim that *Simmons* and O’Dell were attempting to make.

Another example that undermines the *Jones* analysis is *Saffle v. Parks*.⁸⁹ There, the defendant Parks was convicted of first-degree murder in Oklahoma, after shooting and killing a gas station employee because Parks believed the employee would tell police

⁸³ *Id.* at 242-52 (Douglas, J., concurring).

⁸⁴ *Id.* at 313 (White, J., concurring).

⁸⁵ *Id.* at 279-80 (Brennan, J., concurring); *id.* at 324 (Marshall, J., concurring).

⁸⁶ See LINDA E. CARTER, ET AL., UNDERSTANDING CAPITAL PUNISHMENT 29 (3rd ed. 2012) (discussing the different views).

⁸⁷ *Jones*, 31 F. Supp.3d at 1068.

⁸⁸ *Gregg v. Georgia*, 428 U.S. 153, 200 (1976).

⁸⁹ 494 U.S. 484 (1990).

that Parks had used a stolen credit card to buy gas.⁹⁰ During the penalty phase of trial, the trial court instructed the jury that in determining the appropriate punishment it had to “avoid any influence of sympathy” for the defendant.⁹¹ Parks argued that this was tantamount to telling the jury it could not make effective use of his mitigating evidence, and thus violated the Eighth Amendment.⁹² In response to the State’s invocation of *Teague*, Parks argued that the Eighth Amendment rule he proposed was not “new” because it was merely an extension of Eighth Amendment principles established by *Lockett v. Ohio* and *Eddings v. Oklahoma*.⁹³ Together those cases held that the Eighth Amendment requires that a defendant be permitted to offer mitigating evidence and that the State not forbid jurors from considering it.⁹⁴ These were two of the early cases giving effect to the even more general Eighth Amendment principle, derived from Court’s decisions in *Woodson v. North Carolina*⁹⁵ and *Roberts v. Louisiana*,⁹⁶ that the Eighth Amendment requires the jury to give individualized consideration to the facts and circumstances of the defendant’s case in deciding whether to impose the death penalty.

At the level of generality employed by Judge Carney in *Jones*, Parks would have prevailed in avoiding the *Teague* bar. Yet he did not. The Court held that although the *Lockett-Eddings* rule prohibits the State from barring the consideration of mitigating evidence, it does not impose a rule regarding *how* jurors consider and weigh mitigation.⁹⁷ Moreover, nothing about Oklahoma’s anti-sympathy instruction bars the jury from using mitigation to render a reasoned *moral* response to the evidence; it simply forbids a purely *emotional* response.⁹⁸ Nor could Parks make use of the Court’s decision in *California v. Brown*, which actually upheld another anti-sympathy instruction against an Eighth Amendment challenge on direct appeal.⁹⁹ Consequently, Parks was asking for a rule of law that was not dictated by any Eighth Amendment precedent, and

⁹⁰ *Id.* at 486.

⁹¹ *Id.* at 487.

⁹² *Id.*

⁹³ *Id.* at 488-89.

⁹⁴ See *Eddings v. Oklahoma*, 455 U.S. 104, 113-114 (1982) (stating “[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.”); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (stating “the sentencer, in all but the rarest kind of capital case, [sic] not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”).

⁹⁵ 428 U.S. 280 (1976) (plurality opinion).

⁹⁶ 428 U.S. 325 (1976) (plurality opinion).

⁹⁷ *Saffle*, 494 U.S. at 490-91.

⁹⁸ *Id.* at 493.

⁹⁹ *Id.* at 493-94.

was therefore new.¹⁰⁰

The Court's most recent decision on non-retroactivity makes this point, as well, and would have been an important case for the *Jones* opinion to consider despite the fact that it was not an Eighth Amendment case. In *Chaidez v. United States*, the Court held that its 2010 ruling in *Padilla v. Kentucky* was not retroactive to cases on collateral review.¹⁰¹ *Padilla* applied the settled ineffective assistance of counsel test from *Strickland v. Washington* and held that an attorney performs in a constitutionally deficient manner if he fails to provide accurate advice to a client about the immigration consequences of a conviction arising from a guilty plea.¹⁰² Again, viewed at a relatively high level of generality, one could have said (as did *Chaidez*) that *Padilla* merely applied the general principle of *Strickland* to a new set of facts.¹⁰³ But, Justice Kagan's opinion for the Court found, *Padilla* "did something more."¹⁰⁴ *Padilla* also concluded as a threshold matter that legal advice about deportation consequences – which are typically viewed as collateral consequences and not direct ones – was subject to the *Strickland* ineffective assistance standard, a matter that prior decisions had left unresolved.¹⁰⁵ This special nuance in the claim thus made *Padilla's* rule new. Reasonable jurists could have (and did) disagree about the ineffective assistance rule that *Padilla* adopted.¹⁰⁶ That more specific rule was not "dictated" by precedent.¹⁰⁷

Based on this understanding of the Court's "new rule" cases, the *Lackey* claim proposes a new rule. Particularly in light of the Court's repeated rejection of the claim, a reasonable jurist would not feel compelled by *Furman* or any other precedent to conclude that the Eighth Amendment bars imposition of the death penalty upon an inmate whose execution has not been carried out within a particular (as yet unstated) time period. It is true that some commentators have argued that the Eighth Amendment prevents imposition of the sentence after inordinate delay.¹⁰⁸ But this, combined with consistent judicial rejection of the claim, merely reinforces the point that reasonable minds could differ as to whether *Furman* and its progeny require the rule. As in *Chaidez*, the fact that courts have uniformly rejected *Lackey* claims until

¹⁰⁰ *Id.* at 489.

¹⁰¹ 133 S. Ct. 1103 (2013).

¹⁰² 559 U.S. 356 (2010). *Strickland v. Washington*, 466 U.S. 668, 694 (1984), held that to prove ineffective assistance of counsel, the inmate must prove objectively deficient performance by the attorney and that counsel's performance prejudiced the inmate.

¹⁰³ *Chaidez*, 133 S. Ct. at 1111.

¹⁰⁴ *Id.* at 1108.

¹⁰⁵ *Id.* at 1110.

¹⁰⁶ *Id.* at 1111.

¹⁰⁷ *Id.*

¹⁰⁸ *See supra* note 2.

Jones demonstrates why the rule is new: the right that *Jones* recognized was not “apparent to all reasonable jurists.”¹⁰⁹ The district court’s opinion in *Jones* wholly fails to consider any of these relevant new rule cases, which are fatal to the court’s analysis.

III. WHETHER THE *LACKEY* CLAIM IS PROCEDURAL OR SUBSTANTIVE

Having established that *Lackey* claims propose “new” rules, the next inquiry is whether the claim falls under one of the two exceptions to the general principle of non-retroactivity for new rules.

The second exception is far easier to dispose of. The Court has said that new rules can be applied on collateral review if they are “watershed rules” of criminal procedure.¹¹⁰ The Court has also said, however, that this exception is “extremely narrow” and has consistently rejected every effort to characterize a new rule as a watershed one.¹¹¹ To qualify, the rule must create an “impermissibly large risk” of an inaccurate conviction, as well as “alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.”¹¹² Here, the delay-in-execution claim (assuming it is a procedural one, which is the subject of the following discussion) has nothing to do with the accuracy of the conviction or the fairness of the trial mechanism. Therefore, it is quite clearly not a watershed rule.¹¹³

Instead, the first *Teague* exception presents a far more complicated problem for the government than determining whether the rule is new.

It also requires capital litigators and reviewing courts to dig somewhat deeper than the Ninth Circuit did in *Smith v. Mahoney*, where it applied the *Teague* bar solely on the ground that the *Lackey* claim proposed a new rule but did not ask whether the rule was substantive or procedural.¹¹⁴ Judge Fletcher’s dissent, to its credit,

¹⁰⁹ *Lambrix*, 520 U.S. at 527-28.

¹¹⁰ *Teague*, 489 U.S. at 311.

¹¹¹ See *Whorton v. Bockting*, 549 U.S. 406, 417-18 (2007) (listing cases in which the claim was rejected).

¹¹² *Id.* at 418 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 356 (2004)).

¹¹³ See CJLF Brief, *supra* note 58, at 17 (arguing that *Jones* is not asking for a watershed rule). For interesting commentary on application of the second exception in other constitutional contexts, see Ezra Landes, *A New Approach to Overcoming the “Watershed Rule” Exception to Teague’s Collateral Review Killer*, 74 MO. L. REV. 1 (2009) (arguing that watershed rules can develop from lines of cases taken together). See also Eric Schab, *Departing From Teague: Miller v. Alabama’s Invitation to the States to Experiment with New Retroactivity Standards*, 12 OHIO ST. J. CRIM. L. 213 (2014) (arguing for *Miller v. Alabama* retroactivity based on the “watershed” rule exception, where the case is taken together with other similar cases).

¹¹⁴ 611 F.3d 978 (9th Cir. 2010).

at least argued that *Teague* did not apply because it was substantive, though her analysis was conclusory and did not fully explore the matter.¹¹⁵ Her dissent merely repeated the language of the first *Teague* exception.¹¹⁶ Still, Judge Fletcher seemed to be targeting the right kind of argument and analysis. Whether her legal conclusion was ultimately correct is a different matter. A few other lower federal court judges have considered the question, but their analyses also do not quite capture the nuance and depth of the problem.¹¹⁷

The Supreme Court's procedural-versus-substantive jurisprudence is less developed than its new rule cases. But the Court has had occasion to apply the framework. Reiterating Justice Harlan's separate opinion in *Mackey v. United States*,¹¹⁸ the Court has explained that applying the rule of non-retroactivity to procedural, but not substantive, rules helps to ensure that the criminal law's interest in finality is properly protected.¹¹⁹ Rules are substantive when they "prohibit a certain category of punishment for a class of defendants because of their status or offense."¹²⁰ So if the rule would categorically forbid punishment for a class of offenders, it matters not what procedure the state follows – the Constitution always disallows the punishment.¹²¹ A new rule is also considered substantive where it "alters the range of conduct or class of persons that the law punishes."¹²² Finally, the Court has said that a new rule is substantive when it "narrows the scope of a criminal statute by interpreting its terms."¹²³ So if the rule would, in light of the new interpretation of the statute, forbid imposition of criminal punishment for the defendant's act, then the defendant ought to benefit from the new interpretation.

In most of the Court's "new rule" cases, it was clear that the rule was procedural rather than substantive. But the cases that have grappled with the issue provide only limited guidance for a *Lackey* claim. In *Schriro v. Summerlin*,¹²⁴ the Court held that its decision in *Ring v. Arizona*¹²⁵ announced a new procedural rule.

¹¹⁵ *Id.* at 1005 (Fletcher, J., dissenting).

¹¹⁶ *Id.*

¹¹⁷ See generally, e.g., *Lackey v. Scott*, 52 F.3d 98, 100 (5th Cir. 1995); *White*, 79 F.3d 432; *McKenzie v. Day*, 57 F.3d 1461, 1479 (9th Cir. 1995) (Norris, J., dissenting).

¹¹⁸ 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part).

¹¹⁹ See generally *Penry v. Lynaugh*, 492 U.S. 302 (1989).

¹²⁰ *Id.* at 329-30.

¹²¹ See *Saffle*, 494 U.S. at 495 (discussing that the rule Parks wanted would not "prohibit the imposition of capital punishment on a particular class of persons.").

¹²² *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004).

¹²³ *Id.* at 351.

¹²⁴ *Id.*

¹²⁵ 536 U.S. 584 (2002).

Summerlin sexually assaulted his victim, crushed her skull, and wrapped her body in a bedspread from his own home.¹²⁶ His mother-in-law was his initial accuser and he later made incriminating statements to his wife.¹²⁷ After an Arizona jury convicted Summerlin on charges of first-degree murder and sexual assault, the trial court – pursuant to then-existing capital sentencing procedure in Arizona – found two aggravating factors and no mitigating factors, and sentenced Summerlin to death.¹²⁸ During his federal habeas proceedings, the Court decided *Ring*, which held that the Sixth Amendment requires that aggravating factors in a capital case be proven to the jury beyond a reasonable doubt.¹²⁹ In finding *Ring* to have announced a procedural rule, the Court emphasized that procedural rules “do not produce a class of persons convicted of conduct that the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise.”¹³⁰ If a rule regulates “only the *manner of determining* the defendant’s culpability,” it is procedural and not substantive.¹³¹ *Ring*, according to the Court, did not change the conduct for which Arizona could seek the death penalty, nor did it entirely forbid the death penalty.¹³² Rather, it simply determined how the fact-finder could constitutionally determine whether the defendant’s conduct makes him death-eligible.¹³³ “Rules that allocate decisionmaking authority in this way are prototypical procedural rules,” the Court held.¹³⁴

The mere fact that the rule implicates the Eighth Amendment’s ban on cruel and unusual punishments is not enough to make the rule substantive. In *Graham v. Collins*,¹³⁵ a Texas death row inmate claimed that he was entitled to federal habeas relief because the Texas “special issues” – questions that the sentencing jury must answer affirmatively in order to impose capital punishment – were inadequate to allow the jury to give effect to mitigating evidence of Graham’s youth and good character traits. Graham relied upon *Penry v. Lynaugh*¹³⁶ and other cases, which found that the defendant’s mitigating evidence was beyond the effective reach of the sentencer.¹³⁷ But the Court found that

¹²⁶ *Id.* at 350.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Ring*, 530 U.S. at 603.

¹³⁰ *Summerlin*, at 352.

¹³¹ *Id.* at 353.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ 506 U.S. 461 (1993).

¹³⁶ 492 U.S. 302 (1989).

¹³⁷ *Graham*, 506 U.S. at 465.

Graham's evidence was placed before the jury and the jury was not forbidden from considering it as mitigating under the existing special issues.¹³⁸ At a minimum, reasonable jurists in 1984 could have disagreed about whether the Eighth Amendment required a new instruction for Graham's mitigating evidence.¹³⁹ So Graham sought a new rule because neither *Penry* nor its predecessors dictated the rule that Graham sought.¹⁴⁰ Moreover, the Court found that the rule was procedural because it neither decriminalized a class of conduct nor did it prohibit imposition of the death penalty upon a class of persons.¹⁴¹ The Court used similar language three years earlier when it decided *Saffle v. Parks*, concluding that Parks's proposed new rule – that an anti-sympathy instruction violated the Eighth Amendment because it effectively prohibited the jury from giving effect to his mitigating evidence – was also procedural.¹⁴²

The difficulty of drawing the substantive/procedural line, particularly in Eighth Amendment cases, is apparent in the ongoing litigation over the retroactivity of the Court's holding in *Miller v. Alabama*.¹⁴³ There the Court held that the Eighth Amendment forbids mandatory imposition of life in prison without the possibility of parole for a homicide that the defendant committed before reaching age eighteen.¹⁴⁴ Rather, although the state may impose such a sentence, it can only be done under a discretionary sentencing regime where the trial court weighs a variety of factors in arriving at the sentence.¹⁴⁵ Whether the case applies retroactively on collateral review has confounded the lower courts and been the subject of scholarly commentary.¹⁴⁶ The Court recently granted certiorari in a *Miller* retroactivity case, *Montgomery v. Louisiana*,¹⁴⁷ which will give the Court the opportunity to resolve the dilemma over whether *Miller* announced a substantive or procedural rule. The Court had previously granted review of a case that later became moot, before granting certiorari

¹³⁸ *Id.* at 475.

¹³⁹ *Id.* at 477.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Saffle*, 494 U.S. at 494.

¹⁴³ 132 S. Ct. 2455 (2012).

¹⁴⁴ *Id.* at 2469.

¹⁴⁵ *Id.*

¹⁴⁶ *See, e.g.,* Ex Parte Maxwell, 424 S.W.3d 66, 75 (Tex. Crim. App. 2014) (stating the question is “a close call”). For scholarly treatment of the issue, *see* Schab, *supra* note 113, at 215 (arguing for *Miller*'s retroactivity); Brandon Buskey & Daniel Korobkin, *Elevating Substance Over Procedure: The Retroactivity of Miller v. Alabama Under Teague v. Lane*, 18 CUNY L. REV. (forthcoming 2015) (arguing that *Miller* was not about process but rather substantive sentencing outcomes for juvenile offenders).

¹⁴⁷ *Montgomery v. Louisiana*, 135 S. Ct. 1546 (2015).

in *Montgomery*.¹⁴⁸

Those courts that have applied *Miller* retroactively have described the holding as forbidding life without parole for juveniles in the absence of individualized consideration – that is, forbidding mandatory life without parole as a distinct sentence.¹⁴⁹ Viewed this way, the rule is substantive because it forbids the imposition of the relevant punishment – life without parole – on a class of defendants (the relevant class being those juveniles who have not received individualized consideration). Some have also assumed that *Miller* was retroactive because its companion case – *Jackson v. Hobbs* – was brought on collateral review and the petitioner there received the benefit of the *Miller* holding.¹⁵⁰

Those courts that have found *Miller* not to be retroactive have focused on the argument that *Miller* was based on reasoning more akin to the individualized sentencing strand of cases in the Supreme Court’s capital punishment jurisprudence.¹⁵¹ The Michigan Supreme Court, for example, recently held that *Miller* was not retroactive under *Teague* because it did not bar a particular penalty for a particular class of offenders or a type of crime (i.e., it left life without parole intact as a punishment for juvenile homicide defendants),¹⁵² it did not foreclose the punishment that the defendants were serving (life without parole),¹⁵³ and it did not rest on statutory interpretation grounds, thus making the third type of substantive rule inapplicable.¹⁵⁴ The court also found it significant that the Court’s language in *Miller* tended to employ the rhetoric of non-retroactivity, noting that the *Miller* Court stated multiple times that it was not announcing a “categorical bar” and that it was only requiring “that a sentencer follow a certain process.”¹⁵⁵

Lackey claims, like *Miller* claims, sit at the intersection of the

¹⁴⁸ See generally *Toca v. Louisiana*, 141 So. 3d 265 (La. 2014), *cert granted*, 135 S. Ct. 781 (2014), *cert. dismissed*, 135 S. Ct. 1197 (2015).

¹⁴⁹ See *Aiken v. Byars*, 765 S.E.2d 572 (S.C. 2014); *State v. Mares*, 335 P.3d 487 (Wyo. 2014); *Jones v. State*, 122 So.3d 698 (Miss. 2013); *State v. Ragland*, 836 N.W.2d 107, 116 (Iowa 2013); *People v. Davis*, 6 N.E.3d 709 (Ill. 2014).

¹⁵⁰ See *Mares*, 335 P.3d at 508; *Aiken*, 765 S.E.2d at 576; *Ragland*, 836 N.W.2d at 116. This is a dubious conclusion, and others have explained why it is problematic. See, e.g., *People v. Carp*, 828 N.W.2d 685, 713 (Mich. 2014) (explaining that the State did not raise non-retroactivity as a defense in *Jackson*); Craig S. Lerner, *Sentenced to Confusion: Miller v. Alabama and the Coming Wave of Eighth Amendment Cases*, 20 GEO. MASON L. REV. 25, 29 n.32 (2012) (speculating that “perhaps the Court was oblivious to the retroactivity issue” in *Miller* and *Jackson*, but concluding that “I, like others, assume the Court intends to apply *Miller* retroactively.”).

¹⁵¹ See *Carp*, 828 N.W.2d at 716; *Chambers v. State*, 831 N.W.2d 311 (Minn. 2013); *State v. Tate*, 130 So.3d 829 at 838 (La. 2013); *Commonwealth v. Cunningham*, 81 A.3d 1 at 3 (Pa. 2013).

¹⁵² *Carp*, 828 N.W.2d at 710.

¹⁵³ *Id.* at 723.

¹⁵⁴ *Id.* at 708.

¹⁵⁵ *Id.* at 701.

substantive/procedural divide. Neither seems to neatly fit into either category.¹⁵⁶

A sensible argument exists that the rule sought on a *Lackey* claim is a substantive one that fits the first *Teague* exception.¹⁵⁷ The claim, one might argue, relates to an entire system of imposing capital punishment that results in arbitrary infliction of death. A select few may be executed, most will not be, and everyone on death row must live under a system in which the legal machinery of the State operates so slowly and with such disregard as to the importance of bringing the sentence to finality that the ultimate fate of any given inmate is merely a product of happenstance rather than reasoned judgment about achieving legitimate penological goals. Death as a punishment cannot exist in such a system, the argument runs, and also be consistent with the Eighth Amendment. The State therefore is forbidden from imposing capital punishment upon anyone so long as it maintains a system of imposing punishment that functions with such extraordinary delays. To demonstrate the appeal of this argument, consider the capital cases that have imposed substantive rules that would apply retroactively – for example, *Atkins v. Virginia*, which held that state cannot impose the death penalty on those who are mentally disabled;¹⁵⁸ *Roper v. Simmons*, which said the state cannot impose the death penalty upon a person who committed the offense before reaching age eighteen;¹⁵⁹ or *Kennedy v. Louisiana*, which held that the state cannot impose the death penalty for a non-homicide crime against the person.¹⁶⁰ In those cases, there is no procedure the state could adopt that would make anyone in those categories death-eligible. Similarly, one could argue, a *Lackey* claim involves a class of persons who have already spent so much time awaiting execution that their death sentence is now a product of an arbitrariness that renders the sentence itself cruel and unusual, and there is now no procedure that the state could follow or adopt to turn back the clock as to that class of death row inmates. Consequently, because the rule here would “prohibit the imposition of capital punishment on a particular class of persons,”¹⁶¹ it is, the argument goes,

¹⁵⁶ See Schab, *supra* note 113, at 214 (noting cases in which lower courts have struggled to place *Miller* claims into either category). See e.g. *State v. Mantich*, 842 N.W.2d 716, 731 (Neb. 2014) (characterizing the claim as “more substantive than procedural”).

¹⁵⁷ See *McKenzie v. Day*, 57 F.3d 1461, 1479 (9th Cir. 1995) (Norris, J., dissenting) (detailing the exception). See also Flynn, *supra* note 2, at 317-18 (arguing that under *Teague*, *Lackey* claims are substantive because an entire class of prisoners are rendered ineligible for the death penalty); Root, *supra* note 2, at 333 (suggesting that *Lackey* claims could fall within first *Teague* exception); Simmons, *supra* note 2, at 1264 (same).

¹⁵⁸ 536 U.S. 304 (2002).

¹⁵⁹ 543 U.S. 551 (2005).

¹⁶⁰ 554 U.S. 407 (2008).

¹⁶¹ *Saffle*, 494 U.S. at 485.

quintessentially substantive. This is easily the most compelling ground for finding that a delay-in-execution claim survives the *Teague* bar.

But alluring as this argument for a substantive new rule might be, it is less compelling once one considers how the ruling would apply. To fall within the first *Teague* exception, the rule would have to apply to all persons on death row who fall into the same class as the inmate proposing the rule. But how, in the case of a *Lackey* claim, could we possibly determine what the relevant classification is?¹⁶² If the *Jones* court is saying that the systemic delays in California render the entire system unconstitutional, then the State could not impose the death penalty upon anyone. And every inmate on death row could file a habeas petition alleging a *Lackey* claim and be entitled to relief, even if that person had been on death row for only a very short time. Surely that cannot be correct. The essence of the *Lackey* claim, for it to be taken at all seriously as an Eighth Amendment matter, is that it should be reserved only for extraordinary delays not attributable to the inmate. Some delay, after all, is both inevitable and desirable, so as to allow for thorough judicial and executive review of a given capital conviction and death sentence. Therefore, only those on death row for extremely long periods could even qualify for relief. But what, exactly, is the minimum length of time that would implicate the Eighth Amendment? The *Jones* court is unclear on this, as is virtually every other commentary that would permit relief on such a claim.¹⁶³ That is as it should be, for there seems to be no way – textually, historically, structurally, or by reference to precedent – to accurately determine the maximum time on death row that the Eighth Amendment would tolerate.

So one reason why the claim might best be characterized as procedural rather than substantive is because it does not ultimately seek to identify a particular class of persons who cannot be subjected to the death penalty because of their status or class.¹⁶⁴ It does not establish a categorical ban. Rather, the claim is actually directed at the State, and in particular, the malfunction in its processes for carrying a death sentence to finality in a timely way. Some death row inmates will have had their executions delayed for reasons that do not implicate the Eighth Amendment, such as their own repeated attempts to litigate their claims on appellate and post-

¹⁶² See *White*, 79 F.3d at 438 (holding that the claim does not fit first *Teague* exception because, *inter alia*, it does not place defendant in a class of offenders for whom the death penalty could not apply).

¹⁶³ But see *Aarons*, *supra* note 2, at 207 (arguing that a delay-in-execution claim is ripe when the inmate has spent twice the national average of time on death row, and tying this standard to the Court's standard for determining violations of the Sixth Amendment right to a speedy trial).

¹⁶⁴ See CJLF Brief, *supra* note 41, at 16 (arguing that *Jones* does not fall into a class or category of offenders for whom the law forbids capital punishment).

conviction review. Others will face delay not because of abusive or deliberately dilatory litigation tactics, but because courts have taken long periods to issue rulings. Still others may have had their executions delayed because of misconduct by the State, although this would likely be far more rare. Yet surely, to the extent that Eighth Amendment relief should even be available for a delay-in-execution claim (a dubious assertion), those in the latter category would have a far greater claim to Eighth Amendment relief than those in the former category, who arguably should have no claim to relief whatsoever.¹⁶⁵ The *Lackey* claim, if meritorious at all, would therefore not apply to an entire class of persons. Rather, it would apply only on a case-by-case basis to those few prisoners whose executions have been delayed to intolerable extremes because the State failed to follow procedures that would have ensured timely execution.

This leads to the next reason why the claim should be characterized as procedural and not substantive. That is, what distinguishes the *Lackey* claim is that, at bottom, it requires a *process* that the State must follow – its executive actors as well as its courts – in order to ensure timely execution and avoid an Eighth Amendment violation (assuming, again, such a violation exists). If the State follows such a process, then the prisoner has no Eighth Amendment claim for relief, even if his execution is substantially delayed. The *Jones* court's effort to characterize this as a systemic problem in California that renders the entire system unconstitutional is grossly overstated. Rather, what matters is whether those systemic problems have resulted in inordinate delays that are not meaningfully attributable to the prisoner. An inmate who has been on death row for twenty-five years because of inexcusable judicial delay or because of misconduct on the part of the State simply does not have the same Eighth Amendment claim as an inmate who has been on death row for twenty-five years and has continually sought to stave off execution with multiple successive petitions, challenges to the execution procedure, or other litigation tactics. An inmate may well be legally entitled to pursue some of those avenues of relief, but they will inevitably delay his or her execution date to varying degrees. Consequently, it seems disingenuous for that same inmate to then claim that the Constitution simultaneously permits him or her to seek all means for relief *and* that a delay caused by the inmate's pursuit of relief can be cruel and unusual.

In fact, notwithstanding some language suggesting that the ruling was substantive, the *Jones* opinion – in multiple places, including the statement of its holding – flatly contradicts any such

¹⁶⁵ See Sharkey, *supra* note 2, at 894-96 (distinguishing between various causes for delay, and concluding that an Eighth Amendment violation occurs only where the delay is caused by state misconduct or negligence).

conclusion.

First, Judge Carney's reliance on *Furman* and the arbitrariness standard suggests a procedural rule. *Furman*, after all, was itself a *process* case.¹⁶⁶ Only two of the five Justices in the *Furman* majority (Brennan and Marshall) were willing to go as far as to declare the death penalty cruel and unusual in all circumstances. The other three Justices in the majority – Stewart, White, and Douglas – did not. Rather, as the joint opinion in *Gregg* explained, those three *Furman* concurrences focused “on the procedures by which convicted defendants were selected for the death penalty rather than on the actual punishment inflicted.”¹⁶⁷ And *Furman*'s arbitrariness standard is the constitutional principle that ushered in a new era of judicially-enforced “super” process for capital cases. That is, it has since been invoked to ensure that a state's capital punishment regime offers the kind of *procedural* protections necessary to avoid *Furman*-type arbitrariness – such as guided jury discretion and individualized consideration of aggravators and mitigators.¹⁶⁸ Had the *Jones* court been applying a categorical ban, it would most likely have used the two-prong framework developed since *Coker v. Georgia*¹⁶⁹ and applied in cases

¹⁶⁶ See *Furman*, 408 U.S. at 311 (White, J., concurring) (explaining that the issue before the Court is not whether the death penalty is per se unconstitutional but, rather, whether it is unconstitutional as applied to murder or rape where it is imposed infrequently); *id.* at 306-310 (Stewart, J., concurring) (finding it unnecessary to reach question of whether death penalty is per se unconstitutional, and limiting consideration to constitutionality of death penalty under a system in which it is “wantonly and freakishly imposed.”). See also Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 16 (2007) (“the arbitrariness that *Furman* denounced was a procedural problem.”).

¹⁶⁷ *Gregg*, 428 U.S. at 179 (joint opinion). See also *id.* at 188 (stating that “*Furman* held [the death penalty] could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.”).

¹⁶⁸ See, e.g., *Gregg*, 428 U.S. at 196-200 (stating that, because *Furman* requires that sentencing discretion be channeled and limited, Georgia's new statute was valid because it appropriately narrowed the class of death-eligible offenders, directed the sentence to the circumstances of the offense, and provided for automatic appeal); *Woodson v. North Carolina*, 428 U.S. 280, 302-04 (1976) (holding that North Carolina's mandatory capital sentencing statute fails to provide procedural safeguards to satisfy *Furman*'s concerns about unbridled jury discretion and therefore requires individualized consideration of each capital defendant's case, character, and background); *Lockett*, 438 U.S. at 602-04 (holding that individualized sentencing, derived from *Furman*'s concerns, requires fact-finder to consider evidence in mitigation).

For a fresh take on *Furman* and the doctrine that followed from its holding, see Kamin & Marceau, *supra* note 11. For an excellent discussion of how *Lockett* interpreted *Furman* and *Woodson*, see Scott Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147 (1991).

¹⁶⁹ 433 U.S. 584, 613 (1977).

like *Atkins*,¹⁷⁰ *Roper*,¹⁷¹ and *Kennedy*.¹⁷² That framework first evaluates the objective indicia of societal attitudes toward a particular death penalty practice, seeking evidence of a consensus in favor of or against that particular application of capital punishment.¹⁷³ Having ascertained the objective evidence (which, it seems, is not enough to dispose of the case, regardless of what the evidence shows), the court then employs a subjective analysis as to whether the practice is consistent with the Eighth Amendment.¹⁷⁴ This categorical exemption framework applies to cases challenging the death penalty for a particular crime (as in *Coker*, for rape of an adult woman, and *Kennedy*, for aggravated rape of a child) or for a particular class of capital defendant with reduced culpability (as in *Atkins*, for the mentally disabled, and *Roper*, for those who commit their crimes before age eighteen).¹⁷⁵ Yet there is not even a hint of this framework in the *Jones* opinion. There is only reliance on the process cases like *Furman* and its progeny. Indeed, if one were to select an Eighth Amendment case establishing a guiding framework for substantive, categorical bans on capital punishment, *Furman* would be quite a poor choice. *Coker* and its progeny would be far better.

Perhaps more starkly, the *Jones* court's opinion stated that "the Court holds that *where the State permits the post-conviction review process* to become so inordinately and unnecessarily delayed that only an arbitrarily selected few of those sentenced to death are executed, the State's *process* violates the Eight [sic] Amendment."¹⁷⁶ This language implicitly recognizes that all death row inmates are not similarly situated as to the application of the principle that the court set forth. The holding is not directed mainly at identifying a protected class of inmates who are absolutely shielded from the imposition of the death penalty, but rather is directed at the State, insisting that capital punishment is permissible only when the

¹⁷⁰ 536 U.S. 304 (2002).

¹⁷¹ 543 U.S. 551, 552 (2005).

¹⁷² 554 U.S. 407, 408 (2008).

¹⁷³ *Roper*, 543 U.S. at 564-67.

¹⁷⁴ *Id.* at 563.

¹⁷⁵ One might also include in this category the imposition of the death penalty for a non-triggerman accomplice to a criminal homicide. See generally *Enmund v. Florida*, 458 U.S. 782 (1982). *Enmund*, however, was subsequently limited. See *Tison v. Arizona*, 481 U.S. 137 (1987) (finding that the death penalty is not necessarily disproportionate for an accomplice who demonstrates reckless disregard for human life). Therefore, because the *Enmund-Tison* rule directs courts to consider the defendant's culpable state of mind in determining whether the death penalty is proportionate, those cases might also fall into this second category of offenders, whose exemption from the death penalty is predicated upon reduced culpability. For a fuller discussion of this and other matters related to the consequences of the Court's Eighth Amendment capital proportionality framework, see J. Richard Broughton, *Kennedy and the Tail of Minos*, 69 LOUISIANA L. REV. 593 (2009).

¹⁷⁶ *Jones*, 31 F. Supp.3d at 1067 (emphasis added).

State follows certain procedures to ensure that the punishment is brought to finality in a timely manner. Only those who are subjected to an “inordinate and unnecessary” delay (whatever that is), that is the fault of the State and not substantially attributable to the inmate, would qualify for relief. But where the State has implemented and followed a procedure that attempts to mitigate extraordinary delays, the death sentence does not violate the Eighth Amendment. So when the *Jones* court refers to the “system” that is “unconstitutional,”¹⁷⁷ it apparently is referring to the system as applied to those inmates who have languished for extreme periods of time not because of their mere efforts to obtain post-conviction relief but because the State (and its courts) has not followed such a procedure to ensure that post-conviction relief is adjudicated in a timely manner. This kind of rule thus bears the hallmarks of a procedural rule, and not a substantive one, pursuant to the Court’s *Teague* jurisprudence.

Of course, the remedy for an Eighth Amendment delay-in-execution claim might tell us something about how to resolve the substantive/procedural dilemma. The district court in *Jones* purported to “vacate” Jones’s death sentence,¹⁷⁸ but was otherwise silent about the precise nature and scope of the remedy for the constitutional violation that Jones supposedly suffered. What, then, is the sentence that Jones would have to serve for his conviction? Does the sentence default to life without parole? This has been suggested by some as the appropriate remedy.¹⁷⁹ And if it is, it would go some distance toward establishing that the rule here is substantive and not procedural. But if that is the remedy, then it is a truly bizarre remedy. The claim here, after all, is that the State has taken too long to carry out the prisoner’s execution, thus forcing him to endure what is tantamount to life in prison.¹⁸⁰ The prisoner *is complaining about languishing in prison*. And so the

¹⁷⁷ *Id.* at 29.

¹⁷⁸ *Id.* Scheidegger notes that Judge Carney’s vacatur was improper, and that all Judge Carney could do was to issue a conditional writ until Jones is resentenced. See Kent Scheidegger, *Does A California District Attorney Have Standing to Intervene in a Federal Habeas Corpus Case?*, Crime and Consequences Blog, available at www.crimeandconsequences.com/crimblog/2014/07/does-a-california-district-att.html (posted July 28, 2014).

¹⁷⁹ See *McKenzie v. Day*, 57 F.3d 1461, 1478 (9th Cir. 1995) (Norris, J., dissenting) (stating that the majority’s opinion that a prisoner must “affirmatively demonstrate” why he failed to file his petition sooner was the “exact opposite of the requirements.”). See also Hedges, *supra* note 2, at 607 (arguing that commutation to life is the proper remedy); Sharkey, *supra* note 2, at 895 (arguing for commutation to life, but only where the delay is caused by state misconduct or negligence).

¹⁸⁰ See *Jones*, 31 F. Supp.3d at 1053 (“For all practical purposes, then, a sentence of death in California is a sentence of life imprisonment with the remote possibility of death – a sentence no rational legislature or jury could ever impose.”).

remedy is to give the prisoner . . . life in prison? How could *that* be a remedy for a complaint that the state has allowed the prisoner to languish in prison? The better remedy would be to order resentencing, which could include another capital sentence, which would have to be carried out according to procedures that do not cause inordinate delay.¹⁸¹ *That* remedy, incidentally, would mean functionally that the rule does not put Jones beyond the reach of California's capital murder or capital sentencing law, and is therefore most likely procedural. The only way to avoid this result is to say that Jones can never be resentenced to death, even under a new procedural regime that mitigates extraordinary State-based delays. Yet the *Jones* court is not clear about the consequences of its ruling, which only complicates the present matter. But authority exists for the proposition that imposition of the death penalty upon resentencing, after an initial extended period on death row from the original sentencing, does not violate the Eighth Amendment.¹⁸²

So the call is admittedly a close one. The *Lackey* claim seems to exist in some quasi-substantive/quasi-procedural jurisprudential purgatory. But resolution of the matter may come down to this: if the claim is that the Eighth Amendment bars the imposition of a death sentence upon *any person* who has been on death row for *x* number of years, then the claim is substantive. If, however, the claim is that the state's post-conviction review processes have resulted in the prolonged delay of a *particular person's* execution in violation of the Eighth Amendment, then the claim is procedural. Though it hints at both, *Jones* appears to create the latter rule, not the former. Still, in light of this *Teague* purgatory, the underlying goals of habeas review could serve as a kind of tiebreaker. And they militate in favor of finding that the rule is procedural.¹⁸³ Again, the

¹⁸¹ See Aarons, *supra* note 2, at 210 (stating that even if the delay in execution violates the inmate's Eighth Amendment rights, the prosecution could still seek the death penalty in another proceeding).

¹⁸² See *Hill v. State*, 962 S.W.2d 762, 767 (Ark. 1998) (where inmate initially spent 15 years awaiting execution after conviction, then resentenced to death after remand from federal habeas proceedings).

¹⁸³ It has been argued that *Teague* should not apply at all to a *Lackey* claim because the claim arises solely post-conviction and could not have been raised on direct appeal. See *McKenzie*, 57 F.3d at 1463. See also Flynn, *supra* note 2, at 316 (same). Other courts have disagreed with this, including the Ninth Circuit in *Smith v. Mahoney*, and have applied *Teague* to *Lackey* claims. *Smith v. Mahoney*, 611 F.3d 978 (9th Cir. 2010). But it is noteworthy that if this argument has merit, then it raises the question of whether a civil rights action under 42 U.S.C. §1983, rather than a habeas petition, is the better vehicle for a *Lackey* claim. *But see* *Johnson v. Bredesen*, 558 U.S. 1067, 1068-69 (2009) (statement of Stevens, J., respecting denial of certiorari) (stating that habeas, and not §1983, would be appropriate vehicle for consideration of *Lackey* claim). If the claim can be raised on habeas, then it is subject to the *Teague* analysis. Resolving this particular dispute is beyond the scope of this piece, which assumes, as other courts have, that *Lackey* claims can be raised on habeas and that they can be subjected to *Teague* analysis.

Court has, for the better part of the last two to three decades, consistently found that the habeas rules and doctrines should further the interests of comity, finality, and federalism.¹⁸⁴ Those interests also apparently motivated Congress in its creation of the AEDPA.¹⁸⁵ The *Teague* doctrine fits neatly within this framework.¹⁸⁶ Justice O'Connor's *Teague* opinion noted the costs that are imposed upon the States not simply by federal habeas review but specifically by the retroactive application of new constitutional rules.¹⁸⁷ "In many ways," she wrote, "the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions, for it continually forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards."¹⁸⁸ The Court has subsequently offered repeated variations on this same theme, connecting the rule of non-retroactivity to the broader purposes of habeas review and the protection of state interests there.¹⁸⁹

As explained here, though the procedural/substantive question is a close one, the "new rule" question is not. In such a situation, the burdens that habeas review and relief would impose upon the States strongly suggest that the *Lackey* claim should be deemed procedural. After all, if the *Lackey* claim was subject to AEDPA deference under section 2254(d), it would (and should) likely fail.¹⁹⁰ Consequently, finding that the rule is not only new but also procedural, and therefore *Teague*-barred, would be consistent with and best serve the interests that the Congress and the modern Court have repeatedly emphasized in limiting the scope of federal habeas relief. Perhaps as a way of incentivizing greater alacrity in processing and reviewing capital litigation, the death penalty states would be free to create an avenue of relief for a delay-in-execution

¹⁸⁴ See Broughton, *supra* note 33, at 135-54.

¹⁸⁵ See, e.g., 141 CONG. REC. 15,062 (1995) (statement of Sen. Hatch); *id.* at 15,035 (statement of Sen. Hatch); *id.* at 15,037 (statement of Sen. Nickels).

¹⁸⁶ Broughton, *supra* note 33, at 146-47.

¹⁸⁷ *Teague*, 489 U.S. at 310.

¹⁸⁸ *Id.*

¹⁸⁹ See, e.g., *Sawyer v. Smith*, 497 U.S. 227, 234 (1990) (stating that habeas must "ensure that state convictions comply with the federal law in existence at the time the conviction became final" but does not "provide a mechanism for continued reexamination of final judgments based upon emerging legal doctrine."); *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993) (stating that *Teague* "was motivated by a respect for a State's strong interest in" finality). See also Higginbotham, *supra* note 29, at 2452 (describing *Teague* favorably as being consistent with "the purposes of habeas and the role of lower federal courts in our constitutional scheme").

¹⁹⁰ See *Harrington v. Richter*, 562 U.S. 86, 103 (2001) (stating that to satisfy §2254(d), the habeas petitioner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was error well understood and comprehended in existing law *beyond any possibility for fairminded disagreement*") (emphasis added).

claim.¹⁹¹ Absent that, however, and absent greater certainty on the *Lackey* claim as a substantive one, there is little good reason to penalize the government when its courts have shown fidelity to prevailing constitutional norms with respect to the timing of capital litigation and executions.

IV. CONCLUSION

Any state facing an Eighth Amendment challenge on federal habeas review to a death sentence based on inordinate delay has a range of sound arguments that should be sufficient to result in the denial of relief. But before proceeding to the merits, the state and the reviewing court should first carefully consider the application of *Teague's* nonretroactivity rule to such a claim. The weight of authority strongly suggests that *Teague* bars relief. Yet for all of the problems – the *Teague* analysis included – in the *Jones v. Chappell* opinion, the decision at least has had the virtue of prompting a serious conversation about capital punishment reform in California and many other death penalty states where actual execution is a distant and increasingly unlikely event. Policymakers in active death penalty jurisdictions should give serious thought to statutory changes that would – without compromising a death row inmate's ability to fairly and lawfully contest the validity of his conviction and death sentence – ensure more expeditious consideration of capital cases, as well as prompt resolution of claims. The same should apply to federal courts, which sometimes also unnecessarily contribute to delays in moving toward execution. Even where resolution is timely, however, government authorities responsible for carrying out executions should, once all legal impediments to execution have been removed, do just that. Though it selected the wrong form for doing so, *Jones* implicitly sends a message worth heeding: if the government is to have a death penalty at all, its actors must accept the realities that come with enforcing it. That means actually executing killers who no longer have a claim to judicial relief or to mercy.

¹⁹¹ See Sharkey, *supra* note 2, at 892 (advocating model legislation to address delay-in-execution claims).