DELAY IN THE SHADOW OF DEATH

LEE KOVARSKY*

There is a widely held belief that, in order to delay executions, American death-row prisoners strategically defer litigation until the eleventh hour. After all, the logic goes, the incentives for prisoners who face the death penalty differ from those who do not. Noncapital prisoners typically try to move the terminal point of a sentence (release) forward, and capital prisoners typically try to push that point (execution) back. This theory of litigant behavior—what I call the "Strategic Delay Account," or the "SDA"—underwrites an extraordinarily harsh institutional response. It primes courts to discount real constitutional grievances and to punish participating lawyers, and it spurs legislatures to restrict crucial remedies.

In this Article, I explain that the SDA inaccurately describes condemned prisoner behavior, both because it assumes a non-existent incentive structure and because it ignores the major structural causes of delayed litigation. First, deferred litigation is risky, and fortune disfavors the bold. Procedural doctrines that operate across post-conviction law strongly incentivize the promptest conceivable presentation of claims. Second, prisoners often omit challenges from early rounds of litigation not because they have done so strategically, but instead because some claims are inherently incapable of being asserted at that time. Third, the volume of end-stage litigation reflects the comprehensive failure of American jurisdictions to provide adequate legal services; condemned prisoners are often functionally unrepresented from the moment early-stage proceedings conclude until the state sets an execution date.

 For input on various drafts or assistance in understanding features of state post-conviction systems, I thank David Anthony, Michael Ausbrook, John Blevins, Brian Bornstein, Michele Brace, Jenny Carroll, Danielle Citron, Eric Freedman, Eisha Jain, Thomas Maher, John Mills, Justin Murray, Mike Pappas, John Rappaport, Tivon Schardl, Jeremy Schepers, Colin Starger, and Benjamin Wolff. I would also like to thank participants from the Duke University Law School Criminal Justice Workshop.

INTRODUCTION

At least in its stylized form, the popular account strikes many as intuitive enough. Death-sentenced prisoners strategically withhold allegations of constitutional error until the eleventh hour, the theory goes, waiting to assert those claims as the reckoning approaches.[1] By sitting on viable challenges until the eve of execution, a prisoner plays a high-stakes game of chicken[2]: The state must choose between, on

[1] *See* Graham Hughes, *Sandbagging Constitutional Rights*, *Federal Habeas Corpus and the Procedural Default Principle*, 16 N.Y.U. REV. L. & SOC. CHANGE 321, 322 (1987–88) (describing a view of postconviction relief that stresses the "obvious" self-interest of prisoners in reopening proceedings in costly or frivolous inquiries and thus suggests scaling back habeas review for those who have not raised matters in a timely fashion).

[2] *See, e.g.*, Turner v. Jabe, 58 F.3d 924, 933 (4th Cir. 1995) (Luttig, J., concurring) ("The delay of which he now complains is a direct consequence of his own litigation strategy, coupled (ironically, although not surprisingly) with the customary leniency allowed him by

the one hand, a potentially wrongful execution, and, on the other, a last-minute stay necessary to provide the comfort of judicial process.

Priming decision-makers to view eleventh-hour capital litigation as gamesmanship on the steps of the guillotine, this account of prisoner strategy underwrites a harsh-but-familiar institutional response. Courts are skeptical of the underlying constitutional grievances and punish participating lawyers, while legislatures craft increasingly restrictive rules for prisoners who litigate in suspicious procedural postures. Complaining of "last-minute capital habeas filings," for example, the former Chief Judge of the Fifth Circuit recently called upon her colleagues to hold the lawyers accountable: "[It is] high time not only to issue a warning to [the prisoner's lawyer] that no further manipulation of habeas proceedings will be tolerated by this court, but to place all capital habeas counsel on notice that disorderly presentation of cases is an affront to the judicial process."[3]

This narrative of litigant behavior—what I call the "Strategic Delay Account" or the "SDA"—does not square with the conditions under which most condemned prisoners actually make litigation decisions. In this Article, I demonstrate that the SDA both ignores the major causes of eleventh-hour litigation and assumes a non-existent incentive structure, and I identify the grim consequences of those mistakes. The condemned often present claims at the final stages of the capital punishment sequence not as grand strategy, but instead because those claims remained functionally unavailable before that time.[4] Phrased more simply, there is so much warrant litigation—litigation undertaken after the state sets an execution date—because that is the first time that many capital prisoners have the legal representation necessary to enforce certain rights.

I proceed in four parts. In Part I, I sketch the SDA and the institutional response that it predicates. Prisoners serving a term of years usually want their sentences to conclude quickly, whereas prisoners facing execution generally want their punishment delayed. The SDA posits that in order to achieve such delay, death-sentenced prisoners strategically omit claims from earlier phases of litigation, instead pressing those arguments only after an execution date is set.[5] Given that American jurisdictions struggle mightily to execute offenders on

---

the courts to press his claims as effectively as possible."); *see also*, *e.g.*, *infra* Section I.C (collecting various decisional references to the idea that prisoners strategically delay litigation).

[3] *In re* Sparks, 944 F.3d 572, 572 (5th Cir. 2019) (Jones, J., specially concurring).

[4] *See infra* Parts III and IV.

[5] *See, e.g.*, *supra* note 2 (collecting sources).

their death rows,[6] and given that even the "successful" executions often take place more than twenty years after sentencing,[7] many observers draw a direct line between the timing of capital litigation and the inability to carry out punishment.[8] The SDA ultimately underwrites institutional responses that risk wrongful punishment, protect official misconduct, and chill zealous advocacy.

In Part II, I explain that the SDA assumes non-existent litigation incentives. All else being equal, rational death-row prisoners would withhold claims that could be fruitfully asserted during warrant litigation. But all other things are not equal: State and federal post-conviction laws harshly punish prisoners who omit claims from earlier filings,[9] and statutes of limitation severely constrain the post-conviction calendar.[10] Therefore, prisoners behaving rationally do not withhold constitutional challenges that they are positioned to assert sooner.[11] Such gamesmanship would nontrivially reduce the expected return on the deferred litigation.

In Part III, I explain that prisoners often fail to assert claims during the early stages of capital litigation because certain claim categories—categories of "intrinsically delayed claims"—are simply unavailable at that time. For many existing trial rights,[12] newly

---

[6] *See* TRACY L. SNELL, DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT, 2013–STATISTICAL TABLES 9 (2014), https://perma.cc/L5AQ-FST7 (showing that of the more than three thousand prisoners on death row in the United States at the start of 2013, only thirty-nine were executed in that year).

[7] For the twenty-two executions carried out in 2019, the average time on death row was approximately twenty-one years. *See Execution List 2019*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/2019 (last updated Dec. 11, 2019). For the twenty-five executions carried out in 2018, the average time on death row was just over twenty years. *See Execution List 2018*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/2018 (last visited Dec. 12, 2019).

[8] *See, e.g.*, *supra* note 2 (collecting sources).

[9] *See* Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1670–99 (2008) (summarizing limits on the ability of post-conviction claimants to obtain and use DNA and other evidence of innocence); Jennifer E. Laurin, *Criminal Law's Science Lag: How Criminal Justice Meets Changed Scientific Understanding*, 93 TEX. L. REV. 1751, 1760–61 (2015) (explaining restrictions on claimants seeking relief on the basis of changed science). I take up the issue of incentives more comprehensively in Part II, *infra*.

[10] *See, e.g.*, 28 U.S.C. § 2244(d) (2018) (federal limitations provision); 42 PA. STAT. AND CONS. STAT. ANN. § 9545(b)(1) (West 2018) (analogous Pennsylvania provision); TENN. CODE ANN. § 40-30-102 (West 1996) (analogous Tennessee provision).

[11] *See* BRANDON L. GARRETT & LEE KOVARSKY, THE DEATH PENALTY 195 (2018) ("Given the steep challenges associated with litigating a delayed claim, there is little incentive for an inmate to withhold it.").

[12] For example, a claim that a prosecutor suppressed exculpatory information, in violation of the trial right to due process and of *Brady v. Maryland*, 373 U.S. 83 (1963), is often discovered long after convictions become final and initial rounds of post-conviction proceedings conclude. *See* Melanie D. Wilson, *Anti-Justice*, 81 TENN. L. REV. 699, 742

announced trial rights,[13] and post-trial rights,[14] the most meaningful enforcement must occur in a subsequent round of post-conviction proceedings. And in many cases, advances in forensic knowledge mean that important evidence of innocence may not surface until long after initial rounds of litigation conclude.[15] For intrinsically delayed claims, the nature of the constitutional challenge itself thwarts early-phase litigation.

Still, even if claims are unavailable during early phases of litigation, then why do prisoners so frequently press them after the state sets an execution date? In Part IV, I give the surprisingly straightforward answer: Warrant litigation is so common because so many condemned prisoners are functionally unrepresented from the moment a prior post-conviction proceeding concludes until a death warrant goes into effect.[16] Only after the prisoner can access meaningful representation may they assert whatever claims may have materialized after the end of the earlier proceeding.[17]

A few caveats are in order before I begin. I naively suggest neither that every condemned prisoner litigates every claim as soon as they discover it, nor that warrant-stage litigation always involves meritorious claims. I am necessarily generalizing, and I am generalizing about litigant behavior for which there is no reliable empirical data. Qualitatively speaking, however, there are good reasons to believe

---

(2014) (noting that most instances of prosecutorial discretion are only uncovered years after a defendant's conviction becomes final).

13 For example, the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), which barred the death penalty for intellectually disabled offenders, had to be enforced retroactively. *See* Lee Kovarsky, *Structural Change in State Postconviction Review*, 93 NOTRE DAME L. REV. 443, 455–56 (2017) (discussing principles of nonretroactivity for new constitutional rules touching on criminal substantive law and procedure); *see also* Penry v. Lynaugh, 492 U.S. 302, 329 (1989), *abrogated by Atkins*, 536 U.S. 304 ("If we were to hold that the Eighth Amendment prohibits the execution of mentally retarded persons such as Penry, we would be announcing a 'new rule.'").

14 For example, the state cannot actually execute a prisoner who is insane at the time the execution is to take place. *See* Panetti v. Quarterman, 551 U.S. 930, 934 (2007) (quoting Ford v. Wainwright, 477 U.S. 399, 409–10 (1986)) (reaffirming that the Eighth Amendment prevents a state from carrying out a death sentence against an insane person). By definition, these claims do not ripen until long after initial rounds of litigation conclude. *See id.* at 943.

15 *See generally* Laurin, *supra* note 9 (discussing how arguments based on newer forensics pose challenges for finality doctrines in criminal law).

16 *See* GARRETT & KOVARSKY, *supra* note 11, at 195 (identifying the "distribution of resources" after the conclusion of early rounds of post-conviction proceedings as a major reason why litigation is delayed).

17 For example, in his widely read book *Just Mercy*, law professor and civil rights lawyer Bryan Stevenson vividly recounts how his organization, the Equal Justice Initiative, had to triage resources in favor of previously unrepresented Alabama prisoners facing imminent execution dates. *See* BRYAN STEVENSON, JUST MERCY 67–74 (2014).

that the SDA substantially overstates strategic delay. It ignores doctrinal incentives to present claims sooner, as well as structural phenomena that explain why prisoners ultimately litigate them later. It also gives courts license to ignore claim content and case history that ought to dictate more careful scrutiny of late-stage constitutional challenges. My argument is not about the merits of warrant-stage claims so much as it is an argument that claims should be decided *on the merits*—and not atmospherically discounted on a theory of elective delay.

I
THE SDA

Capital and noncapital prisoners have incentives to push their punishment's terminal point in different directions. The modal noncapital prisoner is trying to move the terminal point of a sentence (release) as far forward as possible, and the modal capital prisoner is trying to push that point (execution) back.[18] In Part I, I specify the SDA's particulars, devoting special attention to the incentive structure it assumes and its relationship to the increasing length of death-row incarceration. The SDA is not a theory about the incidence of *frivolous* claims asserted under warrant; it is a theory about *meritorious* claims asserted in that posture because the prisoner has electively delayed litigation.

A. Structure of the Capital Punishment Sequence

In order to evaluate the SDA, readers ought to have at least some familiarity with the capital punishment sequence—that is, the different phases of trial and post-trial litigation in which there exist opportunities to allege challenges to convictions and sentences. The punishment sequence starts with a murder, an investigation, an arrest, and a charge. Under controlling constitutional law, American jurisdictions may only sentence a subset of first-degree murderers to death,[19] and may only do so after a separate punishment-phase proceeding in which the trial jury considers, among other things, whether there is

---

[18] Some death row prisoners do "volunteer" by refusing appellate and post-conviction remedies, thereby seeking to accelerate the imposition of punishment. *See Execution Volunteers*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/executions-overview/execution-volunteers (last updated Nov. 7, 2019).

[19] *See* Zant v. Stephens, 462 U.S. 862, 877 (1983) (citing Furman v. Georgia, 408 U.S. 238 (1972)) (requiring states to have genuine and narrowing sets of aggravating circumstances from which to justify imposing a more severe sentence for some defendants compared to others found guilty of murder); *see also* Sam Kamin & Justin Marceau, *Waking the* Furman *Giant*, 48 U.C. DAVIS L. REV. 981, 983–1008 (2015) (setting forth comprehensively the narrowing rule).

sufficient mitigating evidence to spare the offender's life.[20] The existence of distinct punishment-phase proceedings triggers several unique constitutional protections. For example, there are special constitutional rules for picking juries,[21] for the obligations of defense lawyers,[22] and for sentencing-phase jury instructions.[23]

Capital sentencing-phase proceedings involve baroque Sixth, Eighth, and Fourteenth Amendment law that trial courts must enforce, but effective enforcement also requires judicial activity following a death verdict.[24] That post-verdict activity can target rights

[20] The requirement of bifurcation, which entails a separate punishment-phase proceeding, traces to the state death penalty scheme approved in *Gregg v. Georgia*, 428 U.S. 153, 191–92 (1976) (plurality opinion). A case decided on the same day as *Gregg*, *Woodson v. North Carolina*, 428 U.S. 280 (1976), barred a mandatory death penalty and highlighted the reasoning behind the bifurcation requirement. *See id.* at 305 (noting that "the death penalty is qualitatively different from a sentence of imprisonment" and that, therefore, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."). Among other things, *Gregg* validated a Georgia capital punishment scheme that required separate punishment phases and permitted defendants to introduce evidence showing that they were unworthy of death sentences. *See id.* at 163–68 (describing the bifurcation scheme); *see also* Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21, 23 (1997) ("Every death penalty statutory scheme seeks to effectuate the requirement of individualized sentencing through a bifurcated proceeding.").

[21] *See*, *e.g.*, Witherspoon v. Illinois, 391 U.S. 510, 522–23 (1968) (constitutionally restricting the ability of courts and litigants to remove potential jurors based on skepticism about the death penalty).

[22] *See* Wiggins v. Smith, 539 U.S. 510, 522–23 (2003) (establishing that constitutional inquiry must be directed at, among other things, whether a mitigation investigation that led to trial decisions was itself reasonable); AM. BAR ASS'N GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES guideline 10.7, at 1021 (AM. BAR ASS'N 2003) [hereinafter 2003 ABA Guidelines], *reprinted in* 31 HOFSTRA L. REV. 913, 1021 (2003) ("Counsel's duty to investigate and present mitigating evidence is now well established."); AM. BAR ASS'N GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES guideline 11.4.1(C) (1989) (AM. BAR ASS'N, amended 2003) (articulating the capital defense norm that mitigation investigation in the punishment-phase proceeding "should comprise efforts to discover all reasonably available mitigating evidence . . .").

[23] *See*, *e.g.*, Brewer v. Quarterman, 550 U.S. 286, 295–96 (2007) (holding that the jury has to be able to give full mitigating effect to mitigating evidence); Abdul-Kabir v. Quarterman, 550 U.S. 233, 264 (2007) (holding that "the sentencing process is fatally flawed" when a sentencing court cannot give "meaningful effect" or a "reasoned moral response to mitigating evidence"); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) (holding that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor").

[24] Elsewhere I have argued that certain claims are incapable of resolution in either trial courts or the direct-review chain and require a separate post-conviction forum. *See* Kovarsky, *supra* note 13, at 453 (noting four different claim categories which require a post-conviction forum: "a nontrial right accruing after a conviction becomes final, a new trial right announced after a conviction becomes final, an extant trial right nonetheless incapable of being enforced by reference to the trial record, or new evidence of innocence" (footnotes omitted)).

unique to capital prisoners, but it is also necessary to enforce constitutional rights that capital and non-capital prisoners share. Both groups have, for instance, a right to effective assistance of counsel, a right against prosecutorial misconduct, and so forth.[25] The most familiar post-verdict forum is the appeal, and the appellate process has time limits that are reasonably well known.[26]

The process that follows the appeal is less familiar. By that point, death-row prisoners will begin post-conviction litigation, which is an extremely broad category of activity that takes place in varied state and federal forums. After any unsuccessful state appellate process concludes, state condemnees will initiate *state* post-conviction proceedings,[27] during which they may raise challenges that, for one reason or another, they did not or could not litigate on appeal. If those prisoners fail to obtain state post-conviction relief, then they will seek federal habeas relief. Death-sentenced *federal* prisoners go straight to federal post-conviction review that is not technically denominated as a habeas corpus proceeding, but that works the same way.[28]

After a first round of state and federal post-conviction litigation concludes, there still remains the theoretical possibility of judicial relief. Although the availability of "successive" post-conviction process is severely restricted, prisoners can get relief in such proceedings under certain outlier conditions.[29] A court could announce a decision that applies retroactively,[30] or a new discovery might either suggest

---

[25] *See id.* at 456–58 (discussing examples of constitutional trial rights that are practically capable of enforcement only during post-conviction proceedings, including ineffective assistance of counsel (IATC) claims and *Brady* claims).

[26] *See, e.g.*, 28 U.S.C. § 2107 (2018) (requiring by statute that appeal be undertaken "within thirty days after . . . [the] judgment, order or decree" in most cases); FED. R. APP. P. 4(a)(1)(A) (providing by rule that "the notice of appeal . . . must be filed with the district clerk within 30 days after entry of the judgment or order appealed from" in most cases).

[27] Although the trial-and-direct-review process obviously begins before the post-conviction process, there are jurisdictions in which state post-conviction appointments are made while direct appeals are pending. *See*, *e.g.*, TEX. CODE CRIM. PROC. ANN. art. 11.071 § 2(b) (West 2015) (requiring the convicting court to appoint state post-conviction counsel upon offender's request).

[28] *See* 28 U.S.C. § 2255 (2018) (statutorily providing for the equivalent of a federal habeas proceeding to take place in the sentencing court rather than in the court with territorial jurisdiction over the place of custody).

[29] *See, e.g.*, 28 U.S.C. § 2244(b) (2018) (federal); 42 PA. STAT. AND CONS. STAT. ANN. § 9543(a)(3) (West) (Pennsylvania); TENN. CODE ANN. § 40-30-117 (West 2011) (Tennessee); TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a) (Texas). Some jurisdictions foreclose successive post-conviction litigation entirely. *See, e.g.*, MO. SUP. CT. R. 29.15 ("The circuit court shall not entertain successive motions.").

[30] *See, e.g.*, 28 U.S.C. § 2244(b)(2)(A) (federal rule providing express exception for retroactive decisions); TENN. CODE ANN. § 40-30-117(a)(1) (Tennessee rule doing same); TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a)(1), 5(d) (Texas rule providing an

innocence or disclose previously unknown constitutional violations.[31] In such situations, jurisdictions might disable otherwise-applicable prohibitions on post-conviction litigation, permitting condemned prisoners access to resources, representation, and the judicial process necessary to challenge criminal punishment.[32]

At some point during the post-verdict litigation, a jurisdiction acquires authority to set an execution date, usually by signing a death warrant.[33] Some "symbolic" jurisdictions, like California, no longer actively perform executions.[34] The jurisdictions that do set execution dates tend not to do so while an appeal or the first round of post-conviction litigation remains pending,[35] meaning jurisdictions don't normally execute prisoners until sometime later.

In short, capital punishment litigation is in some ways serialized. The appeal is followed by post-conviction proceedings—in both state and federal court, if the punisher is a state jurisdiction. Then there

---

exception for claims with an "unavailable" legal basis, which occurs if the "basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date"); *see also*, *e.g.*, Atkins v. Virginia, 536 U.S. 304 (2002) (announcing a rule against capital punishment for intellectually disabled offenders). To take another example, Florida prisoners can raise claims that were not and could not have been raised at the time of the initial application. *See* Christopher v. State, 489 So. 2d 22, 24 (Fla. 1986) (explaining how FLA. R. CRIM. P. 3.850 permits judges to dismiss successive motions "unless the movant alleges that the asserted grounds were not known and could not have been known to the movant at the time the initial motion was filed").

[31] *See, e.g.*, 28 U.S.C. § 2244(b)(2)(B) (federal rule providing express exception for claims based on newly discovered facts); TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a)(1) (Texas rule doing same); *see also, e.g.*, Schlup v. Delo, 513 U.S. 298, 321 (1995) (setting forth the decisional standard for "miscarriage of justice" exceptions to procedural bars in cases involving new evidence of innocence); *Christopher*, 489 So. 2d at 24 (denying successive litigation but noting that the prisoner may have been able to proceed if he had "assert[ed] that he did not know and could not have known about the facts supporting this claim at the time he filed his initial motion for relief").

[32] For rules permitting access to judicial process, see *supra* notes 30–31. Federal law, 18 U.S.C. § 3599(f) (2018), permits indigent people facing the death penalty to obtain expert and investigative services that are "reasonably necessary" to the representation. In Texas, a death-sentenced prisoner becomes entitled to state-appointed counsel if the prisoner is able to show that he might be able to satisfy an exception to the generally applicable rule against the filing of successive state applications. *See* TEX. CODE CRIM. PROC. ANN. art. 11.071 § 6(b-1).

[33] *See* PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 147(a)(c)(1) n.15 (2019).

[34] *See Inmates Executed 1978 to Present*, CAL. DEP'T CORRECTIONS & REHABILITATION, https://www.cdcr.ca.gov/capital-punishment/inmates-executed-1978-to-present (last visited June 12, 2020); *see also* Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in "Executing" Versus "Symbolic" States in the United States*, 84 TEX. L. REV. 1869, 1870 (2006) (explaining the concept of the "symbolic" jurisdiction that retains the death penalty but carries out few executions).

[35] *See* FRANK R. BAUMGARTNER, DEADLY JUSTICE: A STATISTICAL PORTRAIT OF THE DEATH PENALTY 42 (2018).

might be subsequent rounds of post-conviction proceedings, and there can be more than one. Under certain conditions, the availability of such a serialized process could present an opportunity for delay. If prisoners have abstract incentives to delay, if they have unfettered discretion over how litigation is sequenced, and if jurisdictions generally do not execute prisoners during the pendency of judicial proceedings, then prisoners can divide and sequence the litigation such that the case remains under perpetual consideration. Such is the fear at the core of the SDA.

B. Intuited Incentives

The generalized intuition that capital and noncapital prisoners have different incentives for delay—that their payoff matrix differs with respect to the timing of litigation—is what endows the SDA with its explanatory force. Given the theoretical incentive to delay, the SDA assumes that many death-sentenced prisoners deliberately omit claims from earlier litigation phases in order to assert them later, and particularly during warrant litigation. I explain that calculus now.

At this point, two different-but-related incentives are worth specifying. First, the SDA describes incentives for delay that exist because subsequent litigation might either delay the setting of an execution date or yield a stay of execution necessary to consider the claim ("stay incentive"). Second, it describes incentives for delay that exist because a claim may have a higher chance of producing relief *on the merits* if it is asserted in subsequent litigation ("success incentive"). These incentives operate simultaneously and theoretically reinforce one another. Where necessary, I distinguish between them in order to give a maximally precise account of the SDA.

1. The Stay Incentive

The stay incentive—roughly, the incentive to serially relitigate convictions and sentences so as to forestall executions—has been assumed for almost a century.[36] In 1924, *Salinger v. Loisel* first articulated the problem.[37] In *Salinger*, the Court explained that res judicata does not formally apply to federal habeas proceedings,[38] so—absent some other statutory or decisional constraint—prisoners could simply file the same piece of litigation, over and over.[39] The Court then

[36] Prisoners might assert weaker claims under warrant in hopes of obtaining a stay, but any such strategy is beyond the scope of what I address here, because these challenges are not the subject of elective delay.

[37] 265 U.S. 224 (1924).

[38] *See id.* at 230.

[39] *See id.* at 230–31.

explained that, although not formally preclusive, a prior judgment in a previous habeas proceeding has "bearing" and "weight" during a subsequent application.[40] In *Wong Doo v. United States* (decided the same day as *Salinger*),[41] the Court again emphasized that a habeas claimant with a theoretical incentive to delay would not be permitted to serially relitigate the same challenges.[42]

The stay incentive itself operates in two ways, at least theoretically. First, rules permitting serial relitigation would allow a prisoner to initiate a subsequent round of state post-conviction proceedings *before* a jurisdiction attempts to enter an execution date—thereby achieving delay by operation of a common, but not universal, norm that jurisdictions not schedule executions while litigation is pending.[43] Second, rules permitting serial relitigation would allow a prisoner with an existing execution date to argue that the date should be withdrawn or the execution stayed so as to permit orderly adjudication of the claim.[44]

For each of these two mechanisms, a prisoner might theoretically reassert a claim that was adjudicated in a prior proceeding or might assert for the first time a claim that was available for prior litigation. If there are no restrictions on relitigation and if execution dates are not set during the pendency of litigation, then it is not difficult to see how a death-sentenced prisoner would be incentivized to slow-roll constitutional challenges to a conviction and sentence.

2. The Success Incentive

The success incentive describes the idea that prisoners can enhance the likelihood of obtaining ultimate relief *on the merits* by waiting to present a claim in a different forum, or in the same forum at a later time. The Supreme Court used *Wainwright v. Sykes*[45] to super-

---

[40] *See id.* at 230. *Salinger* was not a death penalty case but was instead a multiple-challenge scenario involving an order of inter-jurisdictional removal. *See id.* at 226–30. Because the state action challenged was removal effectuated at a discrete moment in time, rather than a sentence to be served over a term of years, the incentive to delay paralleled what is present in a death penalty proceeding.

[41] 265 U.S. 239 (1924).

[42] *See id.* at 240–41. Rules that prevent serial habeas relitigation continue to this day. *See infra* Section II.A.2.

[43] *See* Lee Kovarsky, *The American Execution Queue*, 71 STAN. L. REV. 1163, 1174 (2019) (explaining that carrying out death sentences is attributable in part to the time necessary to complete post-conviction litigation because there is a common norm against scheduling executions during pendency).

[44] This mechanism is the primary focus of a collection of decisional language I cite later. *See infra* notes 61–87.

[45] 433 U.S. 72 (1977).

charge its account of the success incentive, or what the opinion termed "sandbagging."[46]

In *Sykes* (a non-capital case), the Supreme Court considered the rule for excusing a prisoner's failure to lodge a constitutional objection at a state trial.[47] Before *Sykes*, and under *Fay v. Noia*,[48] federal courts would consider the merits of such forfeited claims unless the forfeiture represented a state prisoner's attempt at "deliberately bypassing" the state forum.[49] In *Sykes*, the Court changed the forfeiture rule to a cause-and-prejudice standard,[50] effectively holding prisoners accountable for the negligence of their trial lawyers. Writing for the Court, Justice Rehnquist observed the following:

> We think that the rule of *Fay v. Noia*, broadly stated, may encourage "sandbagging" on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off.[51]

Sykes' reference to "sandbagging" introduced the term to the Supreme Court reporter, but it soon became a staple of its federal habeas opinions.[52] The Justices eventually expanded the sandbagging rationale to reach not just claims forfeited by trial counsel, but also claims forfeited on appeal of a state conviction,[53] claims omitted from objections to a federal magistrate recommendation,[54] evidence not included in support of a state claim that was included to support a

---

[46] *See id.* at 89.

[47] *See id.* at 74.

[48] 372 U.S. 391 (1963).

[49] *See id.* at 439.

[50] *See Sykes*, 433 U.S. at 90–91.

[51] *Id.* at 89.

[52] *See, e.g.*, Henderson v. United States, 568 U.S. 266, 286 (2013) (Scalia, J., dissenting) (quoting Puckett v. United States, 556 U.S. 129, 134 (2009)) ("The happy-happy thought that counsel will not 'deliberately forgo objection' is not a delusion that this Court has hitherto indulged, worrying as it has . . . about counsel's 'sandbagging the court . . . .'"); Engle v. Isaac, 456 U.S. 107, 129 n.34 (1982) (citing *Sykes*, 433 U.S. at 89–90) ("[A] defendant's counsel may deliberately choose to withhold a claim in order to 'sandbag'—to gamble on acquittal while saving a dispositive claim in case the gamble does not pay off.").

[53] *See* Murray v. Carrier, 477 U.S. 478, 490 (1986) (finding "unpersuasive" the argument that defendant would not "sandbag" a claim on appeal).

[54] *See* Thomas v. Arn, 474 U.S. 140, 148 (1985) (explaining that rule barring appellate consideration of objections not made to magistrate prevents "sandbagging").

follow-on federal claim,[55] and allegations of error not appearing in responsive pleadings before the Supreme Court itself.[56]

For each forfeiture scenario, the theorized incentive worked the same way and favored the same doctrinal shift. The idea was that prisoners would forfeit claims at early stages of litigation because the forum would shift and opposing evidence would degrade, and so the prisoners could more successfully litigate those claims later.[57]

C. The SDA and Modern Delay

The SDA has an especially strong grip on the American imagination in part because jurisdictions now have such trouble clearing their death rows. Sixty years ago, the average execution took place about two years after the death sentence,[58] but that number has drifted up to two decades.[59] One of the two major reasons for that delay involves the judicial process necessary to enforce the panoply of constitutional rights that attach in death penalty cases.[60] The conspicuous failure to expeditiously impose punishment triggers a corresponding assignment of blame, and prisoners bear the brunt of it.

More extreme concerns about the role of delayed post-conviction litigation surfaced in the mid-1980s, particularly in the opinions of Chief Justice Warren Burger and Associate Justice Lewis Powell.[61] By the 1990s, opinions began to include language admonishing lower

---

[55] *See* Cullen v. Pinholster, 563 U.S. 170, 180 (2011) (agreeing with lower court dissent and citing from dissenting opinion the observation that the claimant was litigating "habeas-by-sandbagging"); Miller-El v. Dretke, 545 U.S. 231, 279 (2005) (Thomas, J., dissenting) ("AEDPA does not permit habeas petitioners to engage in this sort of sandbagging of state courts.").

[56] *See* Roper v. Weaver, 550 U.S. 598, 607 (2007) (Scalia, J., dissenting) (observing that Supreme Court Rule 15.2 was "promulgated . . . precisely to prohibit . . . sandbagging" in the form of raising arguments omitted from the brief in opposition).

[57] All of the cases cited in notes 52 to 56, *supra*, fall into that category.

[58] Dwight Aarons, *Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?*, 29 SETON HALL L. REV. 147, 181 (1998).

[59] *See supra* note 7.

[60] I discuss these phenomena in greater detail below. *See infra* Part III. *See generally* Kovarsky, *supra* note 43, at 1169–76 (explaining the drivers of delay in American executions).

[61] *See, e.g.*, Woodard v. Hutchins, 464 U.S. 377, 377–78 (1984) (Powell, J., concurring in vacatur of stay) ("This is another capital case in which a last-minute application for a stay of execution and a new [habeas] petition . . . have been filed with no explanation as to why the claims were not raised earlier or . . . in one petition. It is another example of abuse of the writ."); Sullivan v. Wainwright, 464 U.S. 109, 112 (1983) (Burger, C.J., concurring in denial of stay) ("The argument so often advanced by the dissenters that capital punishment is cruel and unusual is dwarfed by the cruelty of 10 years on death row inflicted upon this guilty defendant by lawyers seeking to turn the administration of justice into the sporting contest that Roscoe Pound denounced . . . .").

courts to expeditiously resolve warrant litigation[62] and to favor the rejection of otherwise meritorious execution stays when prisoners delayed the presentation of claims.[63] The contention reached an early crescendo in *Herrera v. Collins*,[64] in which four Justices voted to grant certiorari in a warrant-stage case but no remaining Justice would provide a "courtesy fifth" vote for a stay.[65] A Texas court ultimately stayed the litigation, presumably in order to avoid the spectacle of executing a prisoner while his case was pending on the merits before the Supreme Court.[66]

Concerns about dilatory warrant litigation remained throughout the 2000s[67] and have exploded in the last decade—particularly in the last two years. The outbreak of a hot war over the SDA has taken place primarily in the context of two types of warrant litigation: challenges to the failure of certain states to permit non-majority spiritual advisors into execution chambers and challenges to execution methods.

In *Dunn v. Ray*, the Supreme Court dissolved a stay that the Eleventh Circuit had entered on Establishment Clause grounds.[68] On November 6, 2018, the State of Alabama had activated a death warrant that scheduled a prisoner for execution on February 7, 2019.[69] The Eleventh Circuit had stayed the execution, reasoning that because Alabama permitted Christian chaplains but not Muslim imams into the execution chamber, the procedure likely violated the First

---

62 *See, e.g.*, Delo v. Stokes, 495 U.S. 320, 323 (1990) (Kennedy, J., concurring) ("It is the duty of the courts of appeals to adopt and follow procedures which ensure all parties expeditious determinations with respect to any request for a stay. Prompt review and determination is necessary to enable criminal processes to operate without undue interference from the federal courts . . . .").

63 *See, e.g.*, Gomez v. U.S. Dist. Court for N. Dist. of Cal., 503 U.S. 653, 654 (1992) ("There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process. A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.").

64 506 U.S. 390 (1993).

65 *See* Herrera v. Collins, 502 U.S. 1085 (1992) (granting certiorari but denying a stay); Tom Goldstein, *Death Penalty Stays*, SCOTUSBLOG (Oct. 13, 2007), https://www.scotusblog.com/2007/10/death-penalty-stays (explaining that, on the Rehnquist Court, a Justice would frequently grant "a courtesy fifth vote for a stay of execution when there [were] four votes to grant certiorari").

66 *See Herrera*, 506 U.S. at 398; Eric M. Freedman, *No Execution if Four Justices Object*, 43 HOFSTRA L. REV. 639, 646–47 (2015) (discussing the scenario in *Herrera*).

67 *See, e.g.*, Nelson v. Campbell, 541 U.S. 637, 649–50 (2004) ("[A] district court must consider . . . [whether] the inmate has delayed unnecessarily in bringing the claim. . . . [T]here is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring . . . a stay.").

68 139 S. Ct. 661, 661 (2019).

69 *Id.*

Amendment.[70] The only reason the Supreme Court provided for dissolving the stay was that Ray had waited too long to allege the Establishment Clause claim.[71] The order vacating the lower court stay drew a terse dissent from four Justices, who accused the majority of "short-circuit[ing] . . . ordinary process . . . just so the State can meet its preferred execution date."[72]

Less than two months later, the Supreme Court confronted a similar issue in *Murphy v. Collier*.[73] A prisoner had alleged that Texas would violate religious anti-discrimination law if it abided by its policies of permitting Christian or Muslim prisoners to have spiritual advisors in the execution room but not permitting Buddhist prisoners to do so.[74] This time the Court stayed the execution, which provoked a lengthy, detailed, and sometimes angry dissent from Justice Alito, who was joined by Justices Thomas and Gorsuch.[75] Justice Alito observed that "inexcusably late stay applications present a recurring and important problem,"[76] and that "in the great majority of cases, no good reason for the late filing is apparent."[77]

The SDA was certainly on the mind of the Justices in *Ray* and *Murphy*, because the Court was about to announce its decision in *Bucklew v. Precythe*,[78] which is now the leading Supreme Court case on so-called method-of-execution challenges. *Bucklew* ultimately held that a prisoner challenging a jurisdiction's chosen method of execution must plead a feasible and readily implemented alternative, and the majority opinion was laced with palpably frustrated references to delay.[79] Writing for the Court, Justice Gorsuch closed his opinion by

---

70 Ray v. Comm'r, Ala. Dep't of Corr., 915 F.3d 689, 693, 695 (11th Cir. 2019).

71 *Ray*, 139 S. Ct. at 661.

72 *Id.* at 662 (Kagan, J., dissenting from grant of application to vacate stay).

73 139 S. Ct. 1475 (2019).

74 *Id.* at 1475 (Kavanaugh, J., concurring in grant of application for stay).

75 *Id.* at 1478–85 (Alito, J., dissenting from grant of application for stay).

76 *Id.* at 1478.

77 *Id.* at 1482.

78 139 S. Ct. 1112 (2019).

79 *See, e.g.*, *id.* at 1118–19 ("Mr. Bucklew raised this claim for the first time less than two weeks before his scheduled execution. He received a stay of execution and five years to pursue the argument, but in the end [all courts found it meritless]."); *id.* at 1119 ("After a decade of litigation, Mr. Bucklew was seemingly out of legal options. . . . As it turned out, though, Mr. Bucklew's case soon became caught up in a wave of litigation over lethal injection procedures."); *id.* at 1120 ("As a result [of pressure from anti-death penalty groups on execution drug suppliers], the State was unable to proceed with executions until it could change its lethal injection protocol again."); *id.* at 1133–34 ("'Both the State and the victims . . . have an important interest in the timely enforcement of a sentence.' Those interests have been frustrated in this case. . . . [The instant] suit has . . . yielded two appeals to the Eighth Circuit, two 11th-hour stays of execution, and plenary consideration in this Court." (internal citation omitted) (quoting Hill v. McDonough, 547 U.S. 573, 584 (2006))).

lamenting the time devoted to what he perceived to be a meritless claim:

> The people of Missouri, the surviving victims of Mr. Bucklew's crimes, and others like them deserve better. . . . Courts should police carefully against attempts to use such challenges as tools to interpose unjustified delay. Last-minute stays should be the extreme exception, not the norm, and "the last-minute nature of an application" that "could have been brought" earlier, or "an applicant's attempt at manipulation," "may be grounds for denial of a stay." . . . If litigation is allowed to proceed, federal courts "can and should" protect settled state judgments from "undue interference" by invoking their "equitable powers" to dismiss or curtail suits that are pursued in a "dilatory" fashion or based on "speculative" theories.[80]

Bucklew thereby moved the most aggressive statements of the SDA from the pages of auxiliary opinions into the central logic of what is bound to be one of its most important death penalty cases.[81]

Eleven days after *Bucklew* was decided, the Court dissolved two lower court stays pending consideration of challenges to the Alabama lethal injection protocol. The Supreme Court reasoned that the prisoner had simply waited too long to file a form electing nitrogen hypoxia as an alternative execution method and to initiate litigation on the basis of Alabama's failure to honor the election.[82] Given the procedural posture of the case—the lower courts had stayed the execution—it was actually the State who asked the Supreme Court for relief at about 9:00 PM on the eve of the execution.[83] Recognizing that his request would result in a resetting of the execution date, Justice Breyer nonetheless asked, unsuccessfully, that the Court not decide the State's applications until all Justices could convene the next day.[84]

---

[80] *Id.* at 1134 (internal citations omitted) (quoting *Hill*, 547 U.S. at 584–85).

[81] *See* Jenny-Brooke Condon, *A Cruel and Unusual Term: The Distortion of Decency and Restraint in the Supreme Court's 2018–2019 Death Penalty Decisions*, 32 FED. SENT'G REP. 15, 17 (2019) ("*Bucklew* was the most important death penalty decision in the 2018 Term because of the Court's aggressive hostility to post-warrant execution claims and the majority's elision of the 'evolving standards of decency' doctrine."); Harry Sandick & Kathrina Szymborski, *New Supreme Court Term to Look at Major Questions Involving Death Penalty and Double Jeopardy*, 33 CRIM. JUST. MAG. 34, 36 (2019) ("*Bucklew* will be another important chapter in the Supreme Court's assessment of whether the death penalty as it is applied in the United States is consistent with the standards of decency that are inherent in the Eighth Amendment."); *see also infra* Section III.C.2 (setting forth modern method-of-execution precedent for which *Bucklew* is the capstone).

[82] Dunn v. Price, 139 S. Ct. 1312, 1312 (2019).

[83] *Id.* at 1314 (Breyer, J., dissenting from grant of application to vacate stay).

[84] *Id.*; *see also* Adam Liptak, *Supreme Court Won't Stay Alabama Execution After Bitter Clash*, N.Y. TIMES (May 30, 2019), https://www.nytimes.com/2019/05/30/us/politics/supreme-court-alabama-death-penalty.html (describing the circumstances surrounding Justice Breyer's request).

Justice Breyer got his public response a month later, when the Supreme Court ultimately denied the certiorari petition in *Price*.[85] Justice Thomas published a statement concurring in the denial of certiorari (joined by Justices Alito and Gorsuch), citing *Bucklew* and *Ray* and observing that "[t]here is simply no plausible explanation for the delay other than litigation strategy."[86] Justice Thomas concluded his concurring statement by remarking that Price's "strategy is no secret, for it is the same strategy adopted by many death-row inmates with an impending execution: bring last-minute claims that will delay the execution, no matter how groundless."[87]

D. The Costs of Misattribution

The SDA's footprint is staggering—in terms of doctrine, procedure, and atmosphere. Under the guise of throttling strategic delay, the SDA underwrites rules that elevate the risk of wrongful punishment. In so doing, it also suppresses the discovery of and response to the misconduct of police, prosecutors, juries, and judges. Finally, it produces laws and public discourse that dissuade lawyers representing death-sentenced prisoners from engaging in certain types of zealous advocacy.

1. Wrongful Punishment

As a descriptive matter, incremental restrictions on post-conviction remedies entail incremental risk of wrongful punishment, and the SDA represents a basic justificatory account for many of the pertinent restrictions. By "wrongful punishment," I mean to capture several related phenomena: criminal punishment that is unwarranted because the prisoner should not have been convicted of capital murder, executions that should not take place under any circumstances because an otherwise guilty prisoner should not be death-eligible, and executions that are unlawfully painful.

Start with procedural default rules, which restrict federal consideration of claims that, because of a procedural defect, do not or would

---

[85] Price v. Dunn, 139 S. Ct. 1533 (2019).

[86] *Id.* at 1538 (Thomas, J., concurring in the denial of certiorari). Justice Thomas expressly cited *Bucklew* and *Ray* in explaining that, "A stay under . . . circumstances[ ] in which the petitioner inexcusably filed additional evidence hours before his scheduled execution after delaying bringing his challenge in the first place[ ] only encourages the proliferation of dilatory litigation strategies that we have recently and repeatedly sought to discourage." *Id.*

[87] *Id.* at 1540.

not qualify for state merits adjudication.[88] *Wainwright v. Sykes* was the case in which the Supreme Court elevated the showing necessary to excuse a default in state proceedings, from a deliberate bypass standard to a cause-and-prejudice rule.[89] In so doing, the Court expressly referenced the SDA success incentive (i.e., sandbagging) when reasoning that the lesser standard failed to effectively foreclose strategic delay.[90]

The SDA also nurtures restrictions on claims appearing in successive habeas litigation.[91] In *McCleskey v. Zant*,[92] the Supreme Court raised the threshold for permitting federal merits review of claims not asserted in prior federal habeas proceedings, and did so expressly in the interest of aligning the policies of the successive-petition and procedural-default doctrines.[93] The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[94] raised the threshold necessary to qualify for successive consideration even further,[95] and the decisional law has justified the pertinent provisions by reference to the SDA.[96] Various state abuse-of-the-writ statutes track the logic of the federal provision, further amplifying the SDA's doctrinal effect.[97]

---

[88] *See* Coleman v. Thompson, 501 U.S. 722, 729–30 (1991) (applying the adequate and independent state grounds rule foreclosing federal review in scenarios where there were forfeitures in state post-conviction proceedings).

[89] 433 U.S. 72, 87–88 (1977).

[90] *Id.* at 90; *see also* Hughes, *supra* note 1, at 322, 333 (explaining that procedural default rules involve buying into the SDA).

[91] Throughout this Article, I will refer to later-in-time post-conviction litigation as "successive" litigation, even though different jurisdictions have different terms to refer to this species of activity.

[92] 499 U.S. 467 (1991).

[93] *Id.* at 490–96.

[94] Pub. L. No. 104-132, §§ 101–108, 110 Stat. 1214, 1217–26 (1996) (codified in relevant part at 28 U.S.C. §§ 2244–2267).

[95] *See* 28 U.S.C. § 2244(b)(2) (2018) (categorically eliminating miscarriage-of-justice gateway for previously omitted claims and replacing an ordinary prejudice standard capable of applying to sentencing outcomes with a requirement that a claimant adduce "clear and convincing" new evidence sufficient to show that "no reasonable factfinder would have found the applicant guilty of the underlying offense").

[96] *See, e.g.*, Solorio v. Muniz, 896 F.3d 914, 920–21 (9th Cir. 2018) (linking section 2244(b) to an incentive to act without delay); Alaimalo v. United States, 645 F.3d 1042, 1057–58 (9th Cir. 2011) (Korman, J., dissenting) (discussing linkage between delay and abuse-of-the-writ provisions in challenges to federal convictions under 28 U.S.C. § 2255); *In re* Davis, 565 F.3d 810, 817–18 (11th Cir. 2009) (identifying reductions in delay as a reason for enacting section 2244(b)); Lambert v. Davis, 449 F.3d 774, 780 (7th Cir. 2006) (Ripple, J., dissenting) (same); Neal v. Gramley, 99 F.3d 841, 846 (7th Cir. 1996) (same).

[97] *See infra* notes 161–65 and accompanying text (noting the similarity between AEDPA and several of its state counterparts).

The federal statute of limitations is SDA-derived, too.[98] Its legislative history contains multiple references to strategic delay.[99] The very first substantive sentence of the Joint Explanatory Statement of the Congressional Conference Committee reads: "This title incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases."[100] Concerns about timely punishment were the driving force for a coalition of senators, led by Arlen Specter, who insisted that AEDPA include a limitations rule.[101] The decisional implementation of the federal limitations period also invokes features of the SDA. For example, federal judicial opinions often position 28 U.S.C. § 2244(d) as necessary to prevent prisoners from holding onto claims in order to assert them in later litigation.[102] State decisions about timeliness rules often do the same.[103]

The SDA orientation also holds with respect to restrictions on the introduction of new *evidence* in federal court. The fear that prisoners might strategically withhold evidence in support of a claim was part of the logic from *Keeney v. Tamayo-Reyes*,[104] which raised the federal showing for introducing new evidence from deliberate bypass to cause-and-prejudice.[105] And it certainly animated section 2254(e)(2), AEDPA's statutory restriction on federal habeas hearings—which barred new evidence that did not go to innocence[106] and which transformed *Tamayo-Reyes*' cause-and-prejudice standard from a rule

98 28 U.S.C. § 2244(d).

99 *See* H.R. CONF. REP. NO. 104-518 at 111 (1996) (Conf. Rep.).

100 *Id.*

101 Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 467–68, 472, 479 (2007).

102 *See, e.g.*, Mayle v. Felix, 545 U.S. 644, 662 (2005) (observing that "Congress enacted AEDPA to advance the finality of criminal convictions" and that "it adopted a tight time line" "[t]o that end"); Pace v. DiGuglielmo, 544 U.S. 408, 413 (2005) (referring to the "purpose of AEDPA" as curbing "abusive delay").

103 *See, e.g.*, *In re* Clark, 855 P.2d 729, 760 (Cal. 1993) ("Although we conclude here that it should not be inflexible, the general rule is still that, absent justification for the failure to present all known claims in a single, timely petition for writ of habeas corpus, successive and/or untimely petitions will be summarily denied."); Hill v. State, No. 40570, 2014 WL 1207970, at *3 (Idaho Ct. App. Mar. 24, 2014) (discussing Idaho limitations period as consistent with the national norm that exceptions to timeliness rules are limited to situations where delay was beyond an offender's control); People v. Harris, 862 N.E.2d 960, 975 (Ill. 2007) (explaining operation of and justification for the then-controlling Illinois post-conviction timeliness rule); *cf.* 725 ILL. COMP. STAT. ANN. 5/122-1(c) (West) (setting forth six-month limitations period not to be forgiven in cases of "culpable negligence").

104 504 U.S. 1 (1992).

105 *Id.* at 7–8.

106 28 U.S.C. § 2254(e)(2)(B) (2018).

about when federal hearings were *required* into one in which they were *permitted*.[107]

Finally, the formal doctrine of execution stays now bears the SDA's unmistakable imprint, especially in the wake of method-of-execution litigation. Recall from *Bucklew* the declaration that "[l]ast-minute stays should be the extreme exception,"[108] and that "'the last-minute nature of an application' that 'could have been brought' earlier, or 'a[ ] [prisoner's] attempt at manipulation,' 'may be grounds for denial of a stay.'"[109] Notwithstanding Justice Sotomayor's observation that such language was "inessential" to the decision,[110] it has quickly normalized inquiry into delay during warrant litigation.[111]

The SDA pushes all of this doctrine in the same direction: As it becomes more responsive to concerns about strategic delay, it becomes more restrictive. And the more restrictive it becomes, the greater the wrongful-execution risk it produces—greater risk of executing offenders with insufficient culpability, greater risk of executing offenders who do not meet statutory or constitutional criteria for death-penalty eligibility, and greater risk of executing formally eligible offenders whose punishment is the result of serious constitutional violations. The presence of *weaker* claims during warrant litigation is unsurprising, but the greatest concerns should be about *stronger* claims that are not taken as seriously because of the SDA.

2. Regulatory Effects

The SDA has two regulatory effects worth mentioning. First, insofar as it justifies the increasingly restrictive orientation of post-conviction law, it suppresses responses to the misconduct of institutional actors that administer criminal justice: police, prosecutors, jurors, and judges.[112] In suppressing what amounts to a regulatory response to the underlying misconduct, the SDA promotes more of it. The problem with measuring such a regulatory effect, or even speculating about its magnitude, is that it involves an unmeasurable

---

[107] *See* 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 20.2[b] (7th ed. 2019).

[108] Bucklew v. Precythe, 139 S. Ct. 1112, 1134 (2019).

[109] *Id.* (quoting Hill v. McDonough, 547 U.S. 573, 584 (2006)).

[110] *Id.* at 1146 (Sotomayor, J., dissenting).

[111] *See, e.g.*, Price v. Comm'r, Ala. Dep't of Corr., 920 F.3d 1317, 1329 (11th Cir. 2019) (acknowledging that, per *Bucklew*, the court must address whether litigation was abusively undertaken for delay).

[112] *See generally* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2540–51 (1996) (describing the consequences of having formal rules of criminal procedure that are under-enforced by judicial institutions).

counterfactual. Phrased colloquially, we don't know what we don't know—the misconduct that would have been disclosed had courts, instead of issuing SDA-influenced orders, granted relief or otherwise emphasized the offending official behavior.

There is nevertheless anecdotal evidence from which to infer that the regulatory effect on state misconduct is nontrivial. The inference involves two steps. First, the forensic science revolution has disclosed that official misconduct produces wrongful punishment far more frequently than many people had thought.[113] Second, courts systematically under-estimated the risk that juries would convict innocent people,[114] and eleventh-hour litigation that the SDA throttles often involves new allegations of innocence.[115] Anyone can do the math. American jurisdictions probably proceed with wrongful executions, and official misconduct is often a major reason why such cases exist in the first place.

The SDA's second regulatory effect is that it meaningfully chills lawyers. Although I have frequently referred to prisoners as the decision-makers in the capital litigation scenarios that the SDA describes, their attorneys are usually making the choices about what, where, and when to file.[116] When courts write opinions premised on

---

[113] *See* EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 224–32 (2019) (describing cases in which suspects admitted guilt due to official misconduct when DNA evidence later proved their innocence); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 959 (2004) (observing that "[t]he advent of DNA technology and its application to the criminal justice system . . . [demonstrates] . . . that wrongful convictions occur . . . with troubling frequency and regularity[,]" and noting that prosecutor and police misconduct are among the leading causes); Samuel R. Gross, Barbara O'Brien, Chen Hu & Edward H. Kennedy, *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PNAS 7230 (2014) (estimating the false conviction rate in capital cases between 1973 and 2004 at 4.1 percent); Kovarsky, *supra* note 13, at 459 (highlighting as "diagnostic function" of DNA evidence that it discloses sources of wrongful convictions); *Exonerations in the United States Map*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (last visited June 13, 2020) (tracking known exonerations since 1989).

[114] *Cf.* Meghan J. Ryan & John Adams, *Cultivating Judgment on the Tools of Wrongful Conviction*, 68 SMU L. REV. 1073, 1119–20 (2015) (discussing more modern attempts to estimate the wrongful conviction rate, and nonetheless concluding that the figures underestimate the actual rate).

[115] One of the most famous pieces of innocence litigation under warrant was in *Herrera v. Collins*, 506 U.S. 390 (1993), which is discussed in notes 64 to 66 and accompanying text, *supra*.

[116] The responsibilities of post-conviction counsel are murky, and clients frequently follow the advice of their post-conviction lawyers—so the important post-conviction decisions track the decision-making of the lawyers. Although a defendant has the ability to override a lawyer as to a "fundamental objective of the defendant's representation" at trial, McCoy v. Louisiana, 138 S. Ct. 1500, 1510 (2018), for non-fundamental elements of

the SDA, they will frequently single out attorneys as the agents of delay.[117] The consequences of the discourse are not just tonal. When a court calls a lawyer out for what it perceives to be unnecessarily delayed litigation, it projects a clear message: Filing under warrant comes with risks to professional reputations. The SDA also gives rise to a set of rules requiring attorneys to explain certain warrant-stage litigation and punishing them if the courts find the justification insufficiently persuasive.[118]

For those reasons, the SDA is a way to discipline the capital defense bar. Lawyers are held disproportionately accountable for institutional failures, and that accountability takes the disproportionate form of sanctions and decisional attacks. To the extent that the livelihood of many lawyers depends on their good standing generally and the willingness of courts to reappoint them specifically, the SDA represents a very real threat to the ability of capital defense attorneys to perform as effective agents for their clients.

---

the trial defense, the lawyer's professional obligation is to "keep the client reasonably and currently informed about developments in and the progress of the lawyer's services." AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION Standard 4-3.9 (4th ed. 2017). Before "significant decision-points" at trial, defense counsel should "advise" the client, and "aid" the client in selecting a course of action. *Id.* at Standard 4-5.1. After appellate proceedings concluded, however the appellate lawyer is not ethically obligated to continue representation. *Id.* at Standard 4-9.5. Moreover, the rules and circumstances of attorney agency are very different during post-conviction litigation, especially in death penalty cases. Although capital post-conviction counsel must "maintain close contact with the client regarding litigation developments[,]" the most important ethical guidelines do not include trial-like obligations to confer with and actively advise the client. *Compare* 2003 ABA Guidelines, *supra* note 22, guideline 10.15.1, at 1079 (listing Guideline 10.15.1 on "Duties of Postconviction Counsel"), *with id.* guideline 10.5, at 1006 (listing Guideline 10.5 on "Relationship with the Client" requiring that "[c]ounsel at all stages of the case should engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case[.]").

117 *See, e.g.*, *supra* notes 3, 52, 61 (describing cases in which courts have drawn attention to counsel's delay).

118 For example, in the Fifth Circuit, death penalty lawyers filing anything within seven days of an execution "must attach to the proposed filing a detailed explanation stating under oath the reason for the delay." 5TH CIR. R. 8.10. The pertinent rule authorizes the court to direct the offending lawyer to file a statement of good cause, and to sanction the lawyer if he or she cannot do so. *Id.* Texas courts have a similar seven-day rule, declaring anything filed within the seven-day window "untimely" and requiring that all untimely filings be accompanied by a good-cause statement explaining under penalty of perjury "the reason for the delay and why counsel found it physically, legally, or factually impossible to file a timely request, motion, or other pleading." Procedures in Death Penalty Cases Involving Requests for Stay of Execution and Related Filings in Texas State Trial Courts and the Court of Criminal Appeals, Mic. Docket No. 11-003 (Tex. Crim. App. June 30, 2011), https://www.txcourts.gov/cca/practice-before-the-court/rules-procedures.

II
Experienced Incentives

The SDA assumes a payoff matrix that condemned prisoners do not actually face. Even if they could choose rationally, elective delay would still require prisoners to believe that the returns on deferred litigation exceed the returns from litigating immediately. The respective payoffs would reflect: (1) the likelihood that a procedural rule forecloses merits consideration; (2) the quality of evidence bearing on the merit of the underlying constitutional claim; and (3) other effects of deferred litigation on execution timing. (The first two combine to form the success incentive, and the third is the stay incentive.) Contrary to the SDA, the better return comes from immediate litigation because the decline in procedural viability swamps other effects.

A. The Success Incentive and Procedural Viability

The SDA ignores the enormous loss in procedural viability that delay produces. The costs of delay may have been less clear many decades ago, but unforgiving procedural rules now severely degrade the value of deferred litigation. Those procedural rules—time bars, successive litigation limits, and other, somewhat less universal restrictions—operate throughout the post-conviction sequence, and at every level of the state and federal judiciary.

1. Time Bars

One reason that a claim's procedural viability generally declines over time is the presence of state and federal timeliness rules, which have gotten far stricter over the last twenty-five years. Consider the history of the federal doctrine. Before 1977, there was no time limitation whatsoever.[119] Then, Habeas Rule 9(a) went into effect, creating a laches defense against prejudicially delayed federal filings.[120] This defense certainly helped the state, but it hardly had the bite of AEDPA's limitations statute, which has been operative since 1996.[121]

The current federal limitations periods, which appear in 28 U.S.C. § 2244(d) (state prisoners) and § 2255(f) (federal prisoners), are one

---

[119] *See* United States v. Smith, 331 U.S. 469, 475 (1947) ("[H]abeas corpus provides a remedy for jurisdictional and constitutional errors at the trial without limit of time.").

[120] *See* Vikram David Amar, 17B Federal Practice and Procedure: Jurisdiction § 4268.2 (3d ed. 2020).

[121] For example, when the Supreme Court approved Rule 9(a) as drafted by the Advisory Committee on Criminal Rules, it included a rebuttable presumption that any filing more than five years after the judgment was prejudicial, but Congress struck the presumption when it put Rule 9(a) into effect. *See id.*

year.[122] The periods ordinarily run from the day that direct review of the conviction concludes,[123] and, for state prisoners, are tolled while any state post-conviction review remains pending.[124] After a limitations period lapses, a prisoner cannot obtain merits consideration without meeting a strict exception.[125] Absent an overwhelming showing of innocence,[126] those exceptions do not allow a prisoner to obtain merits review of a claim that was deliberately withheld, of course.[127]

Nor can condemned prisoners smuggle strategically withheld claims by claiming ignorance. For each federal limitations provision, the exceptions are for the cessation of state-created impediments to litigation,[128] the announcement of new and retroactive legal rules,[129] and the discovery of new facts that reasonably diligent counsel could not have discovered earlier.[130] Moreover, these exceptions merely reset a separate one-year limitations period that runs from the date that the triggering exception activates.[131]

---

[122] 28 U.S.C. § 2244(d)(1) (2018) (providing one-year limitations period for state prisoners); *id.* § 2255(f) (same for federal prisoners).

[123] *Id.* § 2244(d)(1)(A) (state prisoners); *id.* § 2255(f)(1) (federal prisoners).

[124] *Id.* § 2244(d)(2).

[125] For example, a federal claimant whose constitutional challenge involves a compelling allegation of "actual innocence" can disable an otherwise applicable statutory time-bar through an equitable tolling mechanism. *See* McQuiggin v. Perkins, 569 U.S. 383, 386 (2013) ("[A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . [or] expiration of the statute of limitations.").

[126] *See id.*

[127] *Cf. McQuiggin*, 569 U.S. at 386 (announcing rule that sufficient showing of innocence can overcome a statute of limitations bar); Holland v. Florida, 560 U.S. 631, 651–52 (2010) (noting that "a garden variety claim of excusable neglect" would not "warrant equitable tolling" reserved for "extraordinary" attorney misconduct).

[128] 28 U.S.C. § 2244(d)(1)(B) (2018) (state prisoners); *id.* § 2255(f)(2) (federal prisoners).

[129] *Id.* § 2244(d)(1)(C) (state prisoners); *id.* § 2255(f)(3) (federal prisoners).

[130] *Id.* § 2244(d)(1)(D) (state prisoners); *id.* § 2255(f)(4) (federal prisoners).

[131] *Id.* § 2244(d)(1)(B)–(D) (state prisoners); *id.* § 2255(f)(2)–(4) (federal prisoners). The various tolling mechanisms do not help preserve the timeliness of the claim either. There is a statutory tolling mechanism for state prisoners, but it only tolls during the pendency of state post-conviction litigation. *Id.* § 2244(d)(2). Moreover, if a claim is omitted from state post-conviction litigation, it is not even clear that the limitations period is tolled *as to the omitted claim*. Section 2244(d)(2) provides that the limitations period is tolled during the pendency of state post-conviction litigation over the "pertinent *judgment or claim*." *Id.* (emphasis added). The Supreme Court has recognized a narrow equitable tolling mechanism that applies in "extraordinary circumstances," such as when an attorney abandons a client, *see Holland*, 560 U.S. at 651–53 ("[T]he circumstances of a case must be 'extraordinary' before equitable tolling can be applied . . . .").

The state limitations statutes work more or less like their federal counterparts.[132] For example, in Texas—far and away the highest execution-activity jurisdiction and therefore a site of some relatively specific statutory law—a capital post-conviction application is presumptively untimely if it is filed after the later of (1) the 180th day following the appointment of state post-conviction counsel at the conclusion of trial, or (2) the 45th day following the State's filing of its brief on direct appeal.[133] Any claim appearing in an application after that is not subject to a limitations period *per se*, although it is subject to all of the Texas restrictions on successive habeas applications.[134] More importantly, there is a strong incentive to bring *every* claim back to state court as quickly as possible, because only after the claim is lodged in a *state* post-conviction application will the *federal* limitations period toll.[135]

In Pennsylvania—which is one of the more active capital sentencing states, having sentenced over four hundred prisoners to death since 1976[136]—there is a one-year period of limitations that runs from the date the conviction and sentence become final.[137] The exceptions parallel those present in the federal limitations statute: for the cessation of state interference,[138] for new facts not capable of having been discovered with reasonable diligence,[139] and for new and retroactive rules of constitutional law.[140] And, as is the case with the federal limitations period, satisfaction of an "exception" does not automatically mean that the timeliness rule is disabled; the date the exception is activated simply initiates a new one-year limitations period.[141]

In Tennessee, there is a one-year limitations period that runs from the date the conviction becomes final, and the limitations period "shall not be tolled for any reason . . . ."[142] Tennessee state courts lack jurisdiction to consider untimely state post-conviction applications,

---

132 For examples of state limitations provisions in addition to the three discussed below, see *supra* note 103. For another example, see also FLA. R. CRIM. P. 3.851(d) (providing for one-year limitations period in capital cases, with exceptions for new facts, new law and postconviction counsel neglect).

133 *See* TEX. CODE CRIM. PROC. ANN. art. 11.071 § 4(a) (West 2015).

134 *See id.* § 5 (outlining exceptions).

135 *Compare* 28 U.S.C. § 2244(d)(2) (2018) (covering state prisoners), *with id.* § 2255(f) (covering federal prisoners and lacking a tolling provision).

136 *See State and Federal Info: Pennsylvania*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/pennsylvania (last visited June 20, 2020).

137 42 PA. STAT. AND CONS. STAT. ANN. § 9545(b)(1) (West 2018).

138 *Id.* § 9545(b)(1)(i).

139 *Id.* § 9545(b)(1)(ii).

140 *Id.*

141 *See id.* § 9545(b)(2).

142 TENN. CODE ANN. § 40-30-102 (West 1996).

with exceptions for new and retroactive law, claims of actual innocence based on new scientific evidence, and enhanced sentences predicated on invalidated convictions.[143]

Cumulatively, these timeliness provisions illustrate a straightforward point. State and federal limitations periods provide extraordinary incentives to present claims as soon as possible, because prisoners will have a very hard time obtaining merits consideration after those periods lapse.

2. Successive Litigation Limits

The SDA's assumed payoff matrix also ignores the effects of distinct restrictions on "successive" litigation—that is, post-conviction litigation that follows an initial post-conviction proceeding. Virtually every state and federal jurisdiction has rules against the successive litigation of claims that were not presented in prior litigation,[144] which are limits that operate on top of limitations periods. These successive litigation restrictions, moreover, have gotten far more severe over time.

The federal doctrine involving the successive litigation of claims that were omitted from a prior application is called "abuse-of-the-writ" law, and I use that term here.[145] As explained in Section I.A.3, *Wong Doo* and *Salinger* established that a habeas corpus judgment does not, as a formal matter, have res judicata effect on a subsequent habeas proceeding.[146] Then, in 1963, *Sanders v. United States* held that successive relitigation of an omitted claim was precluded if a prisoner "deliberately abandons" litigation in a prior federal post-conviction proceeding.[147] In 1991, *McCleskey v. Zant* ratcheted up the showing necessary to obtain merits review of a claim omitted from a previous piece of federal post-conviction litigation, requiring that there have been "cause" for the omission and that the failure to consider the claim was prejudicial.[148] "Cause" was something external to the pris-

---

143 *Id.* § 40-30-102(b)(1)–(b)(3).

144 *See, e.g.*, 28 U.S.C. § 2244(b)(2) (2018) (federal provision); 42 PA. STAT. AND CONS. STAT. ANN. §§ 9543(a)(3) & 9544(b) (West 1995) (Pennsylvania); TENN. CODE ANN. § 40-30-117 (West 2011) (Tennessee); TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a)(1) (West 2015) (Texas); *see also infra* note 165 and accompanying text (explaining that successive post-conviction litigation in Tennessee takes place through restricted motions to reopen).

145 *See generally* McCleskey v. Zant, 499 U.S. 467, 479–89 (1991) (providing the standard history of the abuse-of-the-writ doctrine).

146 *See* Salinger v. Loisel, 265 U.S. 224, 230–31 (1924); Wong Doo v. United States, 265 U.S. 239, 240–41 (1924); *see also supra* notes 37–42 and accompanying text (discussing *Salinger* and *Wong Doo* holdings).

147 *See* 373 U.S. 1, 18 (1963).

148 *See McCleskey*, 499 U.S. at 494.

oner, and did not include the negligence of the prisoner's lawyer.[149] To the extent that *Sanders* preserved the opportunity to pass off a deliberate omission as attorney negligence, *McCleskey* eliminated it.

In 1996, AEDPA further raised the threshold. Specifically, 28 U.S.C. § 2244(b)(2) contains two grounds, roughly corresponding to new law and newly discovered facts, for disabling the otherwise applicable bar on omitted-claim litigation. Under section 2244(b)(2)(A), a prisoner can bring a claim omitted from a prior application if it was based on new law that the Supreme Court has declared to be retroactive.[150] Under section 2244(b)(2)(B), a prisoner can bring a new claim if the claim has a factual predicate that "could not have been discovered previously through the exercise of diligence," and if that fact generates clear and convincing evidence that, but for constitutional error, a jury would have acquitted.[151]

These gateways are familiar, but warrant further discussion both because section 2244(b)(2) exhibits subtle differences from its judge-made antecedents and because it is the template for many state abuse-of-the-writ provisions.[152] Most crucially for this Article's purposes, section 2244(b)(2) eliminates entirely the gateway for claims that go to matters other than guilt—such as claims about the constitutionality of a capital sentence.[153] It further narrows the "actual innocence" exception that does remain, permitting a court to consider new evidence of innocence on the merits only if a prisoner can make a sufficient showing of diligence.[154] Moreover, section 2244(b)(2) reformulates the "cause" requirement from the judge-made law as a stricter diligence requirement.[155] Finally, and unlike prior abuse-of-the-writ doctrine, section 2244(b)(2) sets forth a jurisdictional rule rather than an affirmative defense.[156]

---

149 *See* Coleman v. Thompson, 501 U.S. 722, 753 (1991) ("[C]ause . . . must be something *external* to the petitioner, something that cannot be fairly attributed to him . . . .") (emphasis in original); *McCleskey*, 499 U.S. at 493–94 ("Attorney error short of ineffective assistance of counsel . . . does not constitute cause . . . .").

150 28 U.S.C. § 2244(b)(2)(A) (1996).

151 *Id.* § 2244(b)(2)(B).

152 *See infra* notes 159–64 and accompanying text (describing the successive petition rules of Texas, Pennsylvania, and Tennessee).

153 *See* BRIAN R. MEANS, POSTCONVICTION REMEDIES § 22:9 n.6 (2019) (collecting case citations).

154 *See* WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, 7 CRIM. PROC. § 28.5(d) (4th ed. 2019) (explaining section 2244(b)(2)(B)). By "diligence," the statute refers to the efforts of the prisoner to include the claim in the first application. *See id.*

155 *See id.*

156 *See* Kovarsky, *supra* note 101, at 451 ("AEDPA reconstituted the abuse of the writ defense as a jurisdictional bar to most successive federal petitions.").

Assuming that a death-sentenced prisoner has full information and is capable of evaluating the returns on timing,[157] the presence of section 2244(b)(2) *severely* degrades the payoffs for delay. Even the maximally diligent prisoner who omits a claim that is rooted in existing law and that goes to the validity of the death sentence will lose that claim; there is simply no exception for new evidence that goes to anything other than the guilt/innocence determination.[158] And prisoners whose claims do go to the guilt/innocence determination still have to show diligence,[159] which represents an almost impossible hurdle for claims that a prisoner has deliberately withheld.

The content of the federal successive petition rules are generally representative of the state counterparts.[160] In Texas, if a death-sentenced prisoner omits a claim from a prior application, then state courts will not entertain it unless the prisoner can show that the claim was based on new law,[161] on new evidence not capable of having been discovered with due diligence,[162] or on new evidence that would sufficiently show that the prisoner was not guilty or was ineligible for the death penalty.[163] In Pennsylvania, there is simply a categorical bar on new claims that a prisoner "could have raised" in prior state proceedings.[164] In Tennessee, successive litigation formally takes place through motions to reopen the initial proceeding, which contain exceptions like those present for similar litigation in Texas and federal courts.[165]

Worth emphasizing is that, for death-sentenced state prisoners who must seek both state and federal post-conviction relief, the two abuse-of-the-writ mechanisms are mutually reinforcing. A prisoner who omits a claim from a first round of post-conviction litigation in

---

157 I sincerely doubt that any death-sentenced prisoner actually has that level of information and capacity. *Cf.* Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 620 (2005) (noting that most capital post-conviction claimants are "indigent and unsophisticated").

158 *See* 28 U.S.C. § 2244(b)(2)(B)(ii) (1996) (providing the only exception based on new evidence).

159 *See id.* § 2244(b)(2)(B)(i) (requiring that the new evidence "could not have been discovered previously through the exercise of due diligence").

160 In addition to the examples discussed below, see also FLA. R. CRIM. P. 3.851(e)(2) (successive petition bar with exception for "good cause").

161 TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a)(1) (West 2015).

162 *Id.* § 5(a)(1) & (e).

163 *Id.* § 5(a)(2) & (a)(3). The Texas legislature also enacted an exception when the conviction was based on debunked forensic evidence. *See* TEX. CODE CRIM. PROC. ANN. art. 11.073 (West 2015) (providing habeas relief where "relevant scientific evidence" was previously not available to be offered at trial or contradicts the state's evidence).

164 *See* 42 PA. STAT. AND CONS. STAT. ANN. §§ 9543(a)(3) & 9544(b) (West 1997).

165 TENN. CODE ANN. § 40-30-117(a) (West 2011).

state and federal court would not only have to overcome both state and federal abuse-of-the-writ restrictions, but also show that the procedural default of the state claim should be excused in federal court.[166] The presence of such extraordinary restrictions on litigating previously omitted claims means that the value of electively delayed claims falls dramatically after the first post-conviction proceeding.

3. Other Restrictions

There are other, less universal procedural restrictions that effectively suppress returns on delayed litigation. In federal habeas proceedings, courts will not entertain claims that were procedurally defaulted—meaning claims that were or would be denied on adequate and independent state grounds.[167] Whereas abuse-of-the-writ rules represent a federal penalty for failing to include a claim in a prior piece of *federal* litigation, procedural default is a parallel penalty for having failed to properly include a claim in a prior piece of *state* litigation.[168] Defaults can be excused for the familiar reasons—upon a showing of cause and prejudice or on an overwhelming showing of innocence[169]—but the presence of these exceptions does not meaningfully affect incentives. Any whiff of strategic delay will torpedo a showing of cause, and no attorney withholds *overwhelming* evidence of innocence simply to prolong a capital proceeding. If evidence plainly shows innocence, delay just keeps innocent people behind bars.

Moreover, some states have rules other than formal timeliness or successive-litigation provisions that substantially discourage strategic delay. For example, a claim by a death-sentenced Pennsylvania prisoner cannot trigger relief if the "failure to litigate the issue [earlier] . . . [was] . . . the result of any rational, strategic or tactical decision by counsel."[170] Even if the claim is "eligible" for relief, Pennsylvania law includes a further limit on litigation. An "eligible" claim cannot be considered on the merits if the prisoner's delay in presenting it

---

166 *See infra* notes 168–70 and accompanying text (explaining how state penalties may operate as further restrictions in successive federal litigation).

167 *See* Trevino v. Thaler, 569 U.S. 413, 421 (2013) (setting forth standard federal doctrine that federal courts will give effect to adequate and independent state forfeiture rules).

168 *Cf.* McCleskey v. Zant, 499 U.S. 467, 490–91 (1991) ("The doctrines of procedural default and abuse of the writ implicate nearly identical concerns flowing from the significant costs of federal habeas corpus review.").

169 *See* House v. Bell, 547 U.S. 518, 536–37 (2006).

170 42 PA. STAT. AND CONS. STAT. ANN. § 9543(a)(4) (West 2018).

prejudiced either the State's ability "to respond to the petition" or "its ability to re-try" the prisoner.[171]

These rules, and many others like them, simply bolster the already powerful incentives that exist by way of limitations periods and successive litigation restrictions. They combine to severely curtail the procedural viability of claims asserted in later phases of post-conviction litigation, and therefore to dramatically suppress the payoff to any delay.

B. The Success Incentive and the Underlying Claim

A rational, death-sentenced prisoner would decide the sequence of claim presentation based not only on the procedural viability of the claim, but also on their ability to prevail on the merits. At least theoretically, a strong, positive effect on the ability to prove the underlying constitutional violation might swamp the strong, negative effect involving the claim's procedural viability.

Indeed, the effect of time on the underlying merits is probably less negative than its effect on procedural viability, but it is not nearly positive enough to be offsetting. The effect on available evidence over time may be close to neutral, with relatively unbiased degradation. In other words, there is little reason to believe the effect of evidence available to a claimant degrades more slowly than evidence available to the State. More importantly, there are fairly stringent restrictions on (even undegraded) evidence that a claimant is permitted to *introduce* in order to litigate underlying merits questions. These restrictions operate in much the same way as do the procedural doctrines identified above: they are powerful incentives to present evidence as soon as it becomes available.

1. Underlying Information

To the extent that the SDA is premised on asymmetric degradation of evidence in the prisoner's favor, it is problematic; there is little reason to believe that delay compromises evidence *disproving* the violation any more than the evidence *proving* it. Condemned prisoners "win" a post-conviction proceeding—and obtain either discharge or retrial—by prevailing on a claim, which usually means that they establish that their conviction or sentence involved a constitutional violation. Like any other litigant seeking any other form of relief, they usually demonstrate constitutional violations with evidence that proves various elements. According to the leading statistical study of

171 *Id.* § 9543(b).

habeas litigation in federal district courts,[172] the habeas claims that death-sentenced prisoners most frequently assert include: Sixth Amendment violations for ineffective assistance of counsel (IATC);[173] due process violations associated with inappropriate prosecutor conduct;[174] due process violations associated with false, lost, or undisclosed evidence;[175] various constitutional violations associated with improper instructions or comments to juries;[176] due process violations associated with insufficient evidence of guilt;[177] and Fifth and Fourteenth Amendment violations associated with improper use of confessions.[178] Because these claims make up the overwhelming majority of post-conviction litigation, they suffice to illustrate the limits to any deferral strategy.

For many of these claims, evidence about the underlying allegation of constitutional error neither improves nor degrades, because the claim is based entirely on the record. For example, so-called *Jackson* violations about insufficient evidence of guilt simply require a court to evaluate the face of the trial record, and nothing else.[179] The same is true of claims about improper judicial instructions or comments, as well as some Sixth Amendment right-to-counsel violations that require no speculation about what the record would have looked like but for counsel's deficiency.[180] The more complex effects involve claims that are *not* capable of being resolved on the face of the record,

---

172 *See* NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf.

173 *Id.* at 28 (81% of capital cases).

174 *Id.* at 30 (48% of capital cases).

175 *See id.* (43.1% of capital cases).

176 *See id.* (68.3% of capital cases).

177 *See id.* at 29–30 (25.5% of capital cases).

178 *See id.* at 29 (18.2% of capital cases).

179 *See* Jackson v. Virginia, 443 U.S. 307, 318–19 (1979); *see also* House v. Bell, 547 U.S. 518, 538 (2006) (contrasting *Jackson* claims with claims requiring courts to look at evidence outside of the trial record).

180 The familiar standard for ineffective assistance of counsel, which involves a showing of deficiency and prejudice, is set forth in the text accompanying notes 182 to 183, *infra*. One easy-to-understand scenario in which the prejudice from counsel's deficiency is often evident from the trial record involves defense counsel's deficient failure to seek Fourth Amendment suppression of dispositive evidence. *But cf.* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 682 (2007) (explaining that IATC claims *often* require content that sits outside the trial record).

because such claims necessarily depend on extra-record evidence that *can* degrade.[181]

For example, Sixth Amendment IATC claims require a showing of trial counsel's deficiency *and* prejudice therefrom;[182] the prejudice showing requires proof of what the record would have looked like but for the offending attorney conduct.[183] The passage of time would usually have indeterminate effects on the ability of a prisoner to show deficiency. It could make the deficiency showing easier because trial counsel, who have incentives to present their trial representation in the best light, may have died or may be otherwise incapable of using testimony or affidavits to show a strategic reason for questionable trial choices. But the time lapse also makes deficiency harder to show because trial counsel's files tend to get lost as cases age,[184] and so ascertaining the information previously available to trial counsel becomes more difficult.

With respect to prejudice, however, the time lapse will usually complicate a condemned prisoner's ability to prove the underlying constitutional violation. For guilt-phase IATC claims, witnesses capable of disclosing what a competent representation would have produced forget information and disappear. The same is true of penalty-phase IATC claims, but to an even greater extent. Many of these penalty-phase claims turn on information about a prisoner's childhood functioning,[185] so timely litigation is essential. The crucial witnesses—those with information about environmental stressors, family life, academic performance, cognitive functioning, and mental health—disappear, forget, or become otherwise incapable of providing supporting information.[186]

A similar dynamic plays out with respect to certain claims related to prosecutor misconduct—specifically, claims under *Brady v.*

---

[181] *Cf.* Engle v. Isaac, 456 U.S. 107, 127–28 (1982) ("Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible.").

[182] *See* Wiggins v. Smith, 539 U.S. 510, 521 (2003) (citing Strickland v. Washington, 466 U.S. 668 (1994)).

[183] *See, e.g.*, *id.* at 534–38 (performing prejudice inquiry by comparing actual sentencing record with hypothetical state of record that was untainted by deficiency).

[184] *See* Barry C. Scheck, *Conviction Integrity Units Revisited*, 14 OHIO ST. J. CRIM. L. 705, 728 (2017) ("Very frequently innocence cases are old, the lawyers are unavailable, and files have been lost or destroyed.").

[185] *See, e.g.*, *Wiggins*, 539 U.S. at 530–31 (evaluating IATC claim where trial counsel conducted limited investigation into petitioner's childhood functioning and stressors); *see also* Miriam S. Gohara, *In Defense of the Injured: How Trauma-Informed Criminal Defense Can Reform Sentencing*, 45 AM. J. CRIM. L. 1, 41–45 (2018) (discussing Supreme Court precedent establishing the importance of inquiry into childhood functioning in punishment-phase capital IATC litigation).

[186] *See supra* note 181 (describing the degradation of evidence over time).

Maryland[187] that the State suppressed evidence that would have been favorable to the defendant at trial,[188] and claims under *Giglio v. United States*[189] that the prosecution failed to disclose a source of bias from one of its witnesses.[190] In these cases, the ability to prove materiality—essentially the same concept as IATC prejudice[191]—falls over time, and for many of the same reasons. The undisclosed information must be paired with a showing that the result of the trial had a reasonable probability of being different,[192] and making that showing becomes more difficult as time passes. The documents and witness testimony unlocked by the disclosure will degrade and disappear.[193]

For capital post-conviction litigation, then, making categorical statements about time's effect on evidence of the underlying constitutional violation is difficult. They are difficult in part because the effect differs considerably with respect to the type of claim at issue, and in part because the symmetricity of any evidence degradation—as between the prisoner and the State—is quite unpredictable.

2. *Evidence Rules*

Whatever the effect of delay on the availability of information, its effect on admissibility is unambiguous. As it does with claims that are successive or procedurally defaulted, federal law severely restricts the delayed presentation of evidence. 28 U.S.C. § 2254(e)(2) contains powerful limits on federal habeas hearings, and the Supreme Court has interpreted those limits to apply to the rules governing expansion of the existing state record in federal court.[194]

Section 2254(e)(2), like AEDPA's successive-litigation provisions, codifies longstanding judge-made rules about the circumstances

---

187 373 U.S. 83 (1963).

188 *See id.* at 87.

189 405 U.S. 150 (1972).

190 *See id.* at 154–55.

191 Kyles v. Whitley, 514 U.S. 419, 434 (1995).

192 Strickler v. Greene, 527 U.S. 263, 280 (1999) (citing United States v. Bagley, 473 U.S. 667, 682 (1985)).

193 Imagine, for example, a prisoner's discovery that the State suppressed information about a crucial punishment-phase witness: someone who could have testified that the prisoner did not in fact start the jail fight that the State used to prove the prisoner's dangerousness. That witness will be harder to find the longer the defense team waits, as will virtually any other witness or documentary information that would complement the *Brady* claim. To be fair to SDA defenders, however, delay could still cut in the other direction. If capable of being located, the previously jailed witness might be more willing to talk because the jailhouse pressure has dissipated, because she might be dying, or because the subject of the revised accusation might have become unable to retaliate.

194 *See* Holland v. Jackson, 542 U.S. 649, 652–53 (2004) (holding that the 28 U.S.C. § 2254(e)(2) restrictions on federal hearings apply to any mechanism that might be used to expand the record in federal court).

under which prisoners may introduce new evidence in federal habeas proceedings.[195] *Brown v. Allen* held that, when entertaining a habeas claim, a federal court could presume the truth of state factfindings unless those findings, or the process that produced them, had a "vital flaw."[196] The Supreme Court decided *Townsend v. Sain* in 1963,[197] beginning to set forth more precise rules for when federal courts could find new facts.[198] Congress largely incorporated the rules from *Townsend* in a 1966 statute.[199] Two features of *Townsend* and the 1966 statute merit emphasis. First, they set forth conditions under which a hearing was *mandatory*; it was *permitted* at all other times.[200] Second, they required new-evidence hearings when the new evidence was sufficiently likely to show that the state decision was wrong, without reference to diligence.[201]

In *Keeney v. Tamayo-Reyes*,[202] the Supreme Court continued the process of buddy-taping its procedural doctrines to one another by changing the rules for evidentiary hearings so as to parallel the stricter ones for procedural default and successive petitions.[203] Citing the policy concerns expressed in those other pockets of habeas law—concerns that include elements of the SDA—the Court discarded a deliberate bypass rule for a more stringent cause-and-prejudice standard.[204] After *Tamayo-Reyes*, a state prisoner who failed to develop a claim could not demand a federal hearing unless there was some external cause for that failure, and unless it was prejudicial.[205]

As with virtually every other habeas doctrine,[206] things got considerably more restrictive in 1996. AEDPA included section 2254(e)(2), which bars federal hearings when prisoners "failed to develop" claims in state court,[207] with two familiar exceptions: for new

---

195 *See* Williams v. Taylor, 529 U.S. 420, 433 (2000) ("[P]risoners who are at fault for the deficiency in the state-court record must satisfy a heightened standard to obtain an evidentiary hearing.").

196 344 U.S. 443, 506 (1953) (Frankfurter, J.).

197 372 U.S. 293 (1963).

198 *See id.* at 313 (holding that a habeas evidentiary hearing must be held under six specific circumstances).

199 Act of Nov. 2, 1966, Pub. L. No. 89-711, § 2, 80 Stat. 1104, 1105–06.

200 *See* Act of Nov. 2, 1966 § 2; *Townsend*, 372 U.S. at 313.

201 *See* Act of Nov. 2, 1966 § 2; *Townsend*, 372 U.S. at 313.

202 504 U.S. 1 (1992).

203 *See id.* at 7–10.

204 *See id.* at 8.

205 *See id.* There was also an exception to the rule against hearings for forfeited fact development when the result would be a "miscarriage of justice." *Id.* at 12.

206 *See* Kovarsky, *supra* note 101, at 447–53 (specifying restrictive developments in AEDPA).

207 28 U.S.C. § 2254(e)(2) (2018).

and retroactive law,[208] and for new and sufficiently exculpatory facts that could not have been discovered by reasonably diligent counsel sooner.[209] Unlike *Tamayo-Reyes*, which set forth a set of conditions for when hearings were *required*, section 2254(e)(2) provides a set of conditions for when they are *permitted*.[210] The restrictions on hearings, moreover, actually operate as limits on all forms of evidence introduction.[211] Given the presence of such restrictions, whatever the time-based effect on the *discoverability* of evidence, a prisoner's ability to *introduce* it falls precipitously—further suppressing any incentive to delay.

C. The Stay Incentive

There is perhaps a rejoinder to the fairly clear reduction in expected claim success over time. Prisoners are not delaying litigation because they think they have a better chance of warrant-stage success, but instead because the return on delayed litigation comes in the form of a stay that issues in the shadow of an execution.[212] In other words, a positive stay incentive dominates a success disincentive. The notion that prisoners undertake delay because of a stay incentive, however, is also strained.[213]

The first reason is because the stay and success incentives travel together. Tactics that have the effect of degrading a claim's likelihood of success—either because they diminish its procedural viability or a claimant's ability to win it on the merits—have the corresponding effect of reducing the likelihood of a stay. That correspondence exists because the various criteria that state and federal courts use to decide whether to grant stays *all* include a requirement that a prisoner have a threshold chance of prevailing on the claim.[214] In fact, courts frequently identify the potential merit of an asserted claim as the single

---

208 28 U.S.C. § 2254(e)(2)(A)(i).

209 *See* 28 U.S.C. § 2254(e)(2)(A)(ii)–(B).

210 *See* HERTZ & LIEBMAN, *supra* note 107 (explaining the transformation of the cause-and-prejudice standard).

211 *See supra* note 194 and accompanying text (describing the Supreme Court's interpretation of 28 U.S.C. § 2254(e)(2)).

212 *See supra* Section I.B.1 (discussing the stay incentive).

213 Prisoners certainly have theoretical incentives to assert nonfrivolous-but-weaker claims at the eleventh hour in order to extract a stay, but it is precisely the weakness of these claims that remove them from the scope of the SDA, which is about elective delay of claims that are *stronger* in a subsequent federal forum.

214 *See, e.g.*, Hill v. McDonough, 547 U.S. 573, 584 (2006) ("[Prisoners challenging death sentences] must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits."); Nken v. Holder, 556 U.S. 418, 426 (2009) (setting forth the traditional stay factors, which include a merits inquiry).

most important determinant of whether the stay request should be granted.[215]

The second reason rational lawyers lack a meaningful stay incentive involves the recklessness of delay, and fortune disfavors the bold.[216] The incremental likelihood of a stay should rarely outweigh the value of early claim presentation; stays are simply too risky a proposition, with payoffs that are too low. For example, American courts granted roughly seventeen stays of execution in 2018,[217] but even that number is deceptive: Four of the stays were for litigation that was unripe before the death warrant, and could not have been undertaken earlier;[218] two of the stays were a direct response to the Supreme Court's decision in *Moore v. Texas*, a 2017 decision that invalidated the standard that Texas courts had used to reject claims that intellectually disabled prisoners were categorically ineligible for death sentences;[219] one of the stays was granted because the federal court had to provide additional time to a newly appointed lawyer who was unprepared to litigate the case;[220] and one of the stays issued because the death warrant was invalid.[221] Only nine of the stays, then, were for issues that were even theoretically capable of having been asserted during an earlier phase of capital post-conviction litigation.[222]

Nor is the delay always valuable. For example, the same 2018 data shows that the Florida Supreme Court stayed the execution of

---

215 *See, e.g.*, Ray v. Comm'r, Ala. Dep't of Corr., 915 F.3d 689, 695 (11th Cir. 2019) ("We begin, as we must, with the 'first and most important question' concerning a stay of execution: whether [petitioner] is substantially likely to succeed on the merits of his claims." (quoting Jones v. Comm'r, Ga. Dep't of Corr., 811 F.3d 1288, 1292 (11th Cir. 2016))); Adams v. Thaler, 679 F.3d 312, 318–19 (5th Cir. 2012) (finding abuse of discretion where district court granted stay although petitioner had not made a strong showing of likelihood of success on the merits).

216 *Cf.* Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 897 (1984) (observing that the SDA assumes a "fantastically risk-prone" set of litigants).

217 *See Stays of Execution in 2018*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/stays-of-execution-in-2018 (last visited May 25, 2020).

218 Two of the stays were for competency litigation and two were for method-of-execution challenges. *See id.* (Vernon Madison and Kwame Rockwell's executions were stayed for competency litigation, and Russell Bucklew and Scott Raymond Dozier's executions were stayed for lethal injection challenges). I discuss intrinsically delayed claims related to the execution process in Section III.C, *infra*.

219 *See Stays of Execution in 2018*, *supra* note 217 (Clifton Williams, Juan Segundo); Moore v. Texas, 137 S. Ct. 1039 (2017).

220 *See Stays of Execution in 2018*, *supra* note 217 (Ruben Gutierrez).

221 *See id.* (Shawn Grate).

222 Even the number nine overstates somewhat the incidence of contested litigation that produces stays. At least one of the nine stays—that awarded to Emanuel Kemp, Jr.—was uncontested by the State. *See* Deanna Boyd, *State Agrees Texas Inmate Shouldn't Die Next Month for 1987 Rape, Murder. Here's Why*, FORT WORTH STAR-TELEGRAM (Oct. 4, 2018, 11:15 AM), https://www.star-telegram.com/news/local/crime/article219481385.html.

Jose Antonio Jimenez on August 10,[223] yet the U.S. Supreme Court allowed it to go forward four months later.[224] The U.S. Supreme Court stayed Russell Bucklew's execution on March 20,[225] but Missouri executed him on October 1, 2019, after it resolved his method-of-execution challenge.[226] Jimenez's and Bucklew's cases illustrate my basic point: Not only is the likelihood of a stay lower than the stay incentive assumes, but the magnitude of its return is often quite limited.[227]

The final reason why lawyers do not strategically withhold claims in order to hunt stays is that they are constrained by ethics rules.[228] The American Bar Association Criminal Justice Standards for the Defense Function provide that an attorney "should act with diligence and promptness in representing a client, and should avoid unnecessary delay in the disposition of cases."[229] Those rules require that lawyers not knowingly mislead courts or other lawyers when requesting delay, that they should "cause delay only when there is a legitimate basis[,]"[230] and that a lawyer "should not accept a representation for the purpose of delaying a trial or hearing."[231] These norms are reflected in a number of established mechanisms that punish lawyers who unnecessarily delay ligation.[232]

In short, believing that the stay incentive meaningfully increases the incidence of strategic delay requires unrealistic assumptions about the degree to which the stay and success incentives can actually diverge, the return necessary to offset the diminution in claim value,

---

223 *See Stays of Execution in 2018*, *supra* note 217.

224 Tamara Lush, *Florida Executes Miami Murderer Jose Jimenez After Last-Ditch Appeal Denied by U.S. Supreme Court*, ORLANDO SENTINEL (Dec. 13, 2018), https://www.orlandosentinel.com/news/os-ne-florida-execution-20181213-story.html.

225 *See Stays of Execution in 2018*, *supra* note 217 (Russell Bucklew).

226 Holly Yan & Steve Almasy, *Missouri Inmate Executed Despite Activists' Concerns He Could Suffer Because of His Rare Disease*, CNN (Oct. 1, 2019, 10:03 PM), https://www.cnn.com/2019/10/01/us/missouri-execution-russell-bucklew-rare-disease-trnd/index.html.

227 The other seven prisoners who had claims that could theoretically have been asserted before the entry of the death warrant remain alive, however. Each of these cases has its own story and drawing any major conclusions from them requires understanding the underlying merits of the claims in each piece of litigation.

228 *But see* Hughes, *supra* note 1, at 336–37 (explaining that there is no *explicit* rule against deferred litigation in the ethics rules because it would run too high a risk of denying lawyers the ability to make tactical decisions at trial).

229 AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION Standard 4-1.9(a) (4th ed. 2017).

230 *Id.* at Standard 4-1.9(b).

231 *Id.*

232 *See supra* notes 117–30 and accompanying text (describing how courts call out attorneys for delay, as well as the decline in the procedural viability of claims as a result of delay).

and the degree to which lawyers are willing to disregard ethics rules. It also ignores the disutility of death-row incarceration, which deferred litigation necessarily protracts.[233] As with other elements of the SDA, the actual payoff matrix simply cannot sustain the significance attributed to the stay incentive.

III
Intrinsically Delayed Claims

Having addressed the incentives that the SDA incorrectly assumes, I now to turn to structural phenomena that it ignores. In Part III, I explain that prisoners frequently omit claims from earlier phases of litigation not because of strategy, but instead because of the nature of the claims themselves. Prisoners often assert important claims during later phases of the capital litigation sequence because identifying, developing, and presenting them earlier is either theoretically or practically impossible. There are four "intrinsically delayed" claim categories that require initial—and sometimes subsequent—collateral proceedings: (1) claims asserting extant trial rights that are practically incapable of being enforced in the direct review chain; (2) claims asserting trial rights that are announced or established after a conviction becomes final; (3) claims asserting non-trial rights bearing only on subsequent steps of the capital punishment sequence; and (4) claims based on new evidence of innocence discovered at some point after direct review of the conviction and the sentence concludes.

A. Extant Trial Rights Incapable of Early-Phase Enforcement

The first category of intrinsically delayed claims is comprised of existing trial rights that, for practical reasons, require enforcement in later-phase proceedings. This category includes the most basic rights applicable at a criminal trial: the Sixth Amendment right to a decent lawyer and the due process right to a state adversary who does not cheat.[234] These rights are almost always the subject of downstream collateral litigation because that is the only way such rights can be meaningfully enforced.

---

233 *See* Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128, 1198 (1986).

234 *See generally* Strickland v. Washington, 466 U.S. 668 (1984) (specifying the modern standard for effective assistance of counsel); Brady v. Maryland, 373 U.S. 83, 87 (1963) (announcing the rule against prosecutorial suppression of exculpatory and material evidence).

1. Sixth Amendment Right to Counsel

Start with a criminal defendant's "bedrock"[235] Sixth Amendment right to effective assistance of counsel,[236] enforced against states through the Fourteenth Amendment's Due Process Clause.[237] An IATC claim generally requires showing: (1) that trial counsel's performance was objectively unreasonable ("deficiency"), and that (2) the deficient performance had a reasonable probability of affecting the trial outcome ("prejudice").[238] The leading study of federal post-conviction activity shows that death-sentenced prisoners included IATC claims in eighty-one percent of their federal habeas petitions.[239]

Prisoners face nearly insurmountable practical impediments to early-phase litigation of IATC claims. The trial is where the violation actually takes place, which creates three interrelated challenges for any trial-phase enforcement. The first is that the violation is not actually complete and litigable until the trial concludes. The second is that the deficiency usually results in a defective record,[240] meaning that a trial court lacks the information necessary to evaluate deficiency or prejudice. The third is a massive conflict of interest: Trial lawyers ordinarily fail to flag deficiencies in their own performance.

The second and third problems from *trial-phase* consideration also make meaningful *direct appellate* enforcement practically impossible. The appeal is necessarily limited to the trial record, which means that prejudice taking the form of a defective record is not detectable.[241] Appellate counsel is frequently one of the trial lawyers, meaning that the trial-phase conflict of interest is simply reproduced in the reviewing court.[242] For these reasons, many jurisdictions

---

235 Martinez v. Ryan, 566 U.S. 1, 12 (2012).

236 *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."); *Strickland*, 466 U.S. at 687 (setting forth pervasive doctrinal test for Sixth Amendment requirement).

237 *See* Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (incorporating against the states the right to assistance of counsel in all felony cases).

238 *See* Wiggins v. Smith, 539 U.S. 510, 521 (2003).

239 KING ET AL., *supra* note 172, at 28.

240 The fact that deficiencies are not evident from the trial record is the reason why so much IATC litigation must be conducted collaterally. *Cf.* Trevino v. Thaler, 569 U.S. 413, 422 (2013) (observing that resolution of IATC claims often involves information outside the trial record).

241 *See* Primus, *supra* note 180, at 689 (explaining link between inability to enforce right and the inability to expand record on appeal).

242 *See* Eve Brensike Primus, *Effective Trial Counsel After* Martinez v. Ryan*: Focusing on the Adequacy of State Procedures*, 122 YALE L.J. 2604, 2618–19 (2013).

encourage or require prisoners to litigate Sixth Amendment IATC claims in post-conviction proceedings, rather than on appeal.[243]

There is now widespread recognition, however, that many prisoners cannot raise their IATC claims in their first state post-conviction proceedings because many jurisdictions do not guarantee the post-conviction representation necessary to enforce the underlying Sixth Amendment right.[244] There is no constitutional right to state post-conviction counsel,[245] and the general quality of representation in state collateral proceedings—though improving—has been historically disastrous.[246] The Supreme Court has indirectly acknowledged this problem in *Martinez v. Ryan*[247] and *Trevino v. Thaler*[248] by permitting federal habeas claimants to obtain merits consideration of claims otherwise forfeited by inadequate state post-conviction counsel.[249] The Supreme Court has explained that, without the rules set forth in *Martinez* and *Trevino*, there was no realistic way of enforcing the underlying Sixth Amendment in many cases.[250] That observation in turn reflects the point that I underscore here: there are intrinsic qualities of the Sixth Amendment right that require later-phase enforcement.

2. *Prosecutor Misconduct*

The due process clauses of the Fifth and Fourteenth Amendments originate rights against prosecutor misconduct that also require delayed enforcement as a practical matter. I use the term "prosecutor misconduct" to capture a range of constitutional violations,[251] but for

---

243 *See* Rebecca Sharpless & Andrew Stanton, Teague *New Rules Must Apply in Initial-Review Collateral Proceedings: The Teachings of* Padilla*,* Chaidez *and* Martinez, 67 U. MIAMI L. REV. 795, 804 (2013).

244 *See generally* 2003 ABA Guidelines, *supra* note 22, guideline 1.1, at 932–33 n.47 (explaining the structural inadequacies in state post-conviction litigation); Kovarsky, *supra* note 13, at 448–50 (cataloguing problems with legal representation in state post-conviction review).

245 *See* Coleman v. Thompson, 501 U.S. 722, 752 (1991).

246 *See supra* note 244.

247 566 U.S. 1 (2012).

248 569 U.S. 413 (2013).

249 *See Trevino*, 469 U.S. at 417; *Martinez*, 566 U.S. at 9.

250 *See Trevino*, 469 U.S. at 428; *Martinez*, 566 U.S. at 11–12.

251 *See, e.g.*, Giglio v. United States, 405 U.S. 150, 154–55 (1972) (holding that the prosecution must disclose deals made with its witnesses); Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that the prosecution must disclose material, exculpatory evidence); Napue v. Illinois, 360 U.S. 264, 269 (1959) (holding that the prosecution must correct witness testimony that it knows to be false when the testimony goes to witness credibility); Alcorta v. Texas, 355 U.S. 28, 31 (1957) (per curiam) (holding that the prosecution must correct witness testimony that it knows to be false when it goes to substantive evidence of guilt); Mooney v. Holohan, 294 U.S. 103, 112 (1935) (holding that the prosecution may not knowingly use perjured testimony).

the purposes of illustration here I focus on rights under *Brady v. Maryland*,[252] which held that there is a constitutional violation when the prosecution suppresses evidence that is exculpatory and material.[253]

Brady obviously constrains the prosecution in the sense that the State litigates in its shadow at trial, but a violation is, in its very nature, undetectable by the defense. As a result, prisoners frequently discover *Brady* material long after trial and direct review has concluded.[254] Because of the separate punishment-phase proceeding in death-penalty cases,[255] moreover, the universe of potential *Brady* material is larger than it is in noncapital contexts.

The timing of disclosures about prosecutor misconduct obviously lies largely beyond a prisoner's control, and so the timing of associated litigation is likewise something over which a prisoner exercises very little discretion. Depending on the circumstances, meaningful enforcement of the due process right requires that *Brady* litigation be permitted to occur during initial post-conviction litigation, or in successive rounds thereof.[256]

B. New and Retroactive Trial Rights

The second category of intrinsically delayed claims are those involving new and retroactive trial rights. Prisoners cannot enforce such rights, by definition. In fact, prisoners cannot enforce such rights at any point before the Supreme Court announces them and declares them to be retroactive. Although the category of new and retroactive trial rights is relatively small, it disproportionately affects prisoners serving death sentences.[257]

---

[252] *Brady*, 373 U.S. 83.

[253] *See id.* at 87.

[254] *See* Wilson, *supra* note 12, at 742 (2014) ("Any prosecutorial transgression is typically uncovered years after a defendant's conviction becomes final—if ever—through a post-conviction proceeding, such as habeas corpus.").

[255] *See supra* Section I.A (explaining the special constitutional requirements for a capital trial).

[256] *See* Kovarsky, *supra* note 13, at 457–58 (setting forth the post-conviction implications for delayed disclosure of *Brady* material).

[257] Of rights declared new and retroactive, most have been in capital cases, because the only retroactivity exception that is ever used arises in cases where there is a categorical exemption from punishment. *See* William W. Berry III, *Normative Retroactivity*, 19 J. CONST. L. 485, 501–03 (2016); *see, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 413, 446–47 (2008) (holding that offenders who commit crimes against individuals without taking a life are not eligible for the death penalty); Roper v. Simmons, 543 U.S. 551, 578–79 (2005) (offenders who were minors at the time of offense are not eligible for the death penalty); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (same with respect to offenders with intellectual disabilities); Ford v. Wainwright, 477 U.S. 399, 401 (1986) (same with respect to offenders suffering from insanity at the time of execution); Enmund v. Florida, 458 U.S.

The modern nonretroactivity framework traces back to *Teague v. Lane*,[258] decided in 1989. Nonretroactivity is a complex and evolving body of law, but I provide only the skeletal background necessary to make my point about intrinsic delay. When the Supreme Court announces a decision, its content is not automatically "retroactive" in the sense that already-convicted prisoners can use it to relitigate convictions and sentences.[259] As explained below, if the Supreme Court were to declare that the accused had a procedural right to coffee during trial proceedings taking place before noon, that rule would apply going forward, but convicted prisoners who were under-caffeinated defendants would be out of luck.

There is a general rule of nonretroactivity under which prisoners whose convictions are final upon direct review cannot invoke "new rules," which translates roughly as law that does not follow straightforwardly from existing precedent.[260] Prisoners can rely on legal developments that follow the conviction and affirmance on appeal, however, if the "new rule" falls into one of two very narrow exceptions.[261] The first exception is for new "substantive rules," meaning a holding that a particular punishment is forbidden in the presence of certain offense or offender attributes.[262] The second exception is for new rules that are "watershed procedure."[263] The Supreme Court has a very restrictive view of what constitutes "old law" (as opposed to "new rules")[264] and has never found a decision to satisfy the "watershed rule" exception,[265] so most of the nonretroactivity decisions center on the applicability of the substantive law exception.

782, 794, 801 (1982) (same with respect to accomplices who did not kill, intend to kill, or "contemplat[e] that life would be taken). *But see, e.g.*, Miller v. Alabama, 567 U.S. 460, 465 (2012) (sustaining a proportionality challenge to life without parole for juvenile offenders).

258 489 U.S. 288, 307, 310 (1989) (plurality opinion); *see also* Penry v. Lynaugh, 492 U.S. 302, 315, 329 (1989) (formally adopting *Teague* in controlling opinion), *abrogated on other grounds by Atkins*, 536 U.S. 304.

259 *Penry*, 492 U.S. at 329.

260 *See Teague*, 489 U.S. at 301 ("To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.").

261 *See id.* at 311.

262 Montgomery v. Louisiana, 136 S. Ct. 718, 728 (2016) (citing *Penry*, 492 U.S. at 330) (describing the first *Teague* exception as one for "substantive rules"); *see Teague*, 489 U.S. at 311.

263 *See Teague*, 489 U.S. at 311; *see also id.* at 311–13 (defining "watershed" rules of procedure to include procedures that affect "the fundamental fairness of the trial . . . [and are] central to an accurate determination of innocence or guilt").

264 *See* Joseph L. Hoffmann, *Retroactivity and the Great Writ: How Congress Should Respond to* Teague v. Lane, 1990 BYU L. REV. 183, 212 n.127.

265 *See* Dov Fox & Alex Stein, *Constitutional Retroactivity in Criminal Procedure*, 91 WASH. L. REV. 463, 466 (2016).

As mentioned above, the substantive law exception is disproportionately populated with rules for death-sentenced prisoners. Those exceptions are either offense- or offender-based.[266] With respect to offense-based substantive law, for example, *Coker v. Georgia* held that jurisdictions may not impose death sentences on offenders convicted of raping adults,[267] and *Kennedy v. Louisiana* later held that capital punishment cannot be imposed for any crime against individuals that does not result in a killing.[268] In felony murder scenarios—when a killing occurs in the course of committing some other felony—*Enmund v. Florida* and *Tison v. Arizona* together held that the death penalty cannot be imposed on defendants that either lacked sufficient mens rea or participation.[269] With respect to offender-based substantive law, *Atkins v. Virginia*[270] and *Roper v. Simmons*[271] barred death sentences for intellectually disabled and juvenile offenders, respectively.[272] In each of these cases, the Supreme Court decision was treated as having announced a rule that was retroactive because it fit within *Teague*'s substantive law exception.[273]

If a Supreme Court decision announcing a substantive right is retroactive, then a capitally sentenced prisoner must necessarily initiate a new round of post-conviction litigation to enforce it. Some of the new substantive rights require adversarial litigation, but many do not. What dictates the degree of litigation necessary to enforce a new rule depends on how objectively determinable membership in an exempt category is. For example, applying the *Roper* exemption for juvenile offenders or the *Kennedy* exemption for non-homicide offenses does not command much in the way of deliberative resources. Ascertaining an offender's eligibility under *Roper* involves looking at a birth certifi-

---

266 *See* cases cited *supra* note 257 (describing offender- and offense-based exemptions in death penalty cases); *see also* Kovarsky, *supra* note 13, at 479 (describing these cases as offense- or offender-based exemptions).

267 *See* 433 U.S. 584, 592 (1977).

268 *See* 554 U.S. 407, 413 (2008).

269 *See* Tison v. Arizona, 481 U.S. 137, 158 (1987) (requiring "major participation" in a felony and "reckless indifference to human life"); Enmund v. Florida, 458 U.S. 782, 801 (1982) (barring the death penalty in absence of intent to kill, actual killing, or "contemplat[ion] that life would be taken").

270 536 U.S. 304 (2002).

271 543 U.S. 551 (2005).

272 *See id.* at 578 (juveniles); *Atkins*, 536 U.S. at 321 (intellectual disability).

273 *See* Steven W. Allen, *Toward a Unified Theory of Retroactivity*, 54 N.Y.L. SCH. L. REV. 105, 125 (2009) (*Roper*); John Blume & William Pratt, *The Changing Face of Retroactivity*, 58 UMKC L. REV. 581, 597 n.130 (1990) (*Coker*, *Enmund*, and *Tison*); J. Richard Broughton, Jones, Lackey, *and* Teague, 48 J. MARSHALL L. REV. 961, 982 (2015) (*Kennedy*, *Roper*, and *Atkins*); Jason M. Zarrow & William H. Milliken, *The Retroactivity of Substantive Rules to Cases on Collateral Review and the AEDPA, with a Special Focus on* Miller v. Alabama, 48 IND. L. REV. 931, 960 n.221 (2015) (*Atkins*).

cate and ascertaining it under *Kennedy* requires looking at a verdict form.

Membership in other exempt categories defined by substantive rules, however, can be less objectively determinable. For example, prisoners asserting that their intellectual disability renders them death-ineligible under *Atkins* will frequently meet state opposition on, among other things, the validity of otherwise qualifying IQ test scores and the degree of adaptive impairment.[274] Prisoners asserting ineligibility for felony or accomplice murder under *Enmund* will often be opposed by the State, which will naturally argue (under *Tison*) that the prisoner had sufficient intent and participation in the felonious conspiracy.

In cases where prisoners are enforcing substantive rights corresponding to these categories, the crucial enforcement mechanism is post-conviction litigation that necessarily follows the decision announcing the new and retroactive rule. That litigation is therefore subject to intrinsic delay, and the delay is unlikely to be the result of some strategic behavior.

C. Rights in Later-Phase Process

Some claims are intrinsically delayed not because a prisoner challenges a death sentence *per se*, but instead because she alleges that an otherwise lawful sentence is *carried out* unlawfully. The constitutional violations underlying such claims do not occur at trial and are almost always unripe or speculative when post-conviction litigation begins. Many of these claims are newer phenomena, arising out of the bifurcated process that American jurisdictions now use to impose death sentences.

In the interest of succinct illustration, I focus on three claims belonging to this category: (1) Eighth Amendment challenges under *Ford v. Wainwright*[275] to a prisoner's execution competency (sanity); (2) Eighth Amendment and due process challenges to a jurisdiction's method of execution; and (3) Eighth Amendment challenges to the delay between a death sentence and an execution. In each case, the challenges are litigated under (death) warrant, but not because the prisoners have strategically deferred the challenge.

---

274 *See* Zarrow & Milliken, *supra* note 273, at 963 (explaining that, even upon the announcement of a categorical rule of ineligibility, "resource-consuming litigation may ensue" because a claimant will need to establish membership in the category).

275 477 U.S. 399 (1986).

1. Execution Competency

In *Ford*, the Supreme Court held that the Eighth Amendment barred the execution of prisoners that were incompetent at the time of potential execution.[276] The *Ford* majority did not agree on the precise definition of competence,[277] nor the procedures constitutionally required to adjudicate it,[278] but coalesced around the basic substantive rule.[279]

Twenty-one years later, in *Panetti v. Quarterman*,[280] the Court further clarified the substantive competency standard and the constitutionally required auxiliary procedure.[281] Under *Panetti*, a *Ford* claimant must allege that, at the time of his execution, he will not be able to forge a retributive link between his execution and sentence.[282] *Panetti* also entitles *Ford* claimants to certain judicial process upon a "substantial showing of incompetency."[283]

Ford claims involve the mental functioning of a prisoner at the time of an *execution*, and should not be confused with rules barring the trial of incompetent offenders or providing a not-guilty-by-reason-of-insanity verdict.[284] Nor is a *Ford* claim a proportionality challenge to a jurisdiction's authority to impose a death sentence to someone who has serious mental illness (SMI) at trial; the SMI exemption is a frequently litigated challenge, notwithstanding the failure of the

---

276 *See id.* at 410.

277 *See id.* at 418, 422 (Powell, J., concurring) ("The Court's opinion does not address the [meaning of insanity] . . . . I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.").

278 *See id.* at 424–25 (Powell, J., concurring) (explaining that he would recognize something less than a full-blown trial as constitutionally required, although the plurality did not specify the procedures for *Ford* adjudication that are constitutionally required).

279 *See id.* at 410 (plurality opinion); *id.* at 418 (Powell, J., concurring).

280 551 U.S. 930 (2007).

281 *See id.* at 952.

282 *Panetti* rejected a Fifth Circuit rule that a prisoner could be executed simply because he had "bare factual awareness" of an execution, even if he did not believe he was actually being executed as punishment for his criminality. *Panetti*, 551 U.S. at 960; *see* Panetti v. Dretke, 401 F. Supp. 2d 702, 710, 712 (W.D. Tex. 2004) (discussing and applying Fifth Circuit Rule), *aff'd*, 448 F.3d 815 (5th Cir. 2006), *rev'd sub nom. Panetti*, 551 U.S. 930. In so holding, the Supreme Court effectively adopted the position that Justice Powell took in his *Ford* concurrence. *See Ford*, 477 U.S. at 422 (Powell, J., concurring) ("Accordingly, I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.").

283 *See Panetti*, 551 U.S. at 952 ("After a prisoner has made the requisite [substantial] threshold showing, *Ford* requires, at a minimum, that a court allow a prisoner's counsel the opportunity to make an adequate response to evidence solicited by the state court.").

284 "NGRI" is a negative verdict as to guilt. *See generally* Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777 (1985) (exploring justifications for and potential reforms to the insanity defense).

Supreme Court to recognize the ineligibility category.[285] Because *Ford* claims are about a prisoner's functioning at the time of execution, they can remain unripe even long after initial rounds of post-conviction proceedings conclude.[286]

To be clear, the law is not just that *Ford* claimants are *permitted to raise* their competency challenges as the execution approaches; the Supreme Court has observed that a court *is unable to adjudicate* them earlier.[287] *Panetti* observed that *Ford* claims are unripe until an execution is "imminent,"[288] and executions are imminent only once a state sets an execution date, usually by signing a death warrant.[289]

Nor may a prisoner assert a *Ford* claim the moment a jurisdiction sets an execution date, because mental functioning can degenerate over time[290] and the prisoner needs to develop the claim before presenting it to a court.[291] *Ford* and *Panetti* provide that a prisoner who can make a "substantial showing of incompetency" has rights to a "fair hearing" and an "opportunity to be heard," which in turn entitle that prisoner to, among other things, submit her own psychiatric evidence.[292] Under *Ford* and *Panetti*, then, the triggering threshold is a "substantial showing" of incompetency—but how does a prisoner make that showing?

In order to work up a *Ford* claim, a prisoner's attorneys will not only have to continue to collect medical records,[293] but will also need to have the prisoner examined by mental health professional(s) qualified to make appropriate diagnoses.[294] To do so, those professionals will often have to perform an in-person evaluation and, in many cases,

---

285 *See* Ripkowski v. Thaler, 438 F. App'x 296, 303 (5th Cir. 2011) ("The Supreme Court has never held that mental illness removes a defendant from the class of persons who are constitutionally eligible for a death sentence.").

286 *See Panetti*, 551 U.S. at 943, 946–47.

287 *See id.* at 946; Stewart v. Martinez-Villareal, 523 U.S. 637, 644–45 (1998).

288 *Panetti*, 551 U.S. at 946.

289 *See* GARRETT & KOVARSKY, *supra* note 11, at 186.

290 *E.g.*, Lindsay H. Dewa, Elizabeth Cecil, Lynne Eastwood, Ara Darzi & Paul Aylin, *Indicators of Deterioration in Young Adults with Serious Mental Illness: A Systematic Review Protocol*, SYSTEMATIC REVS. (2018), https://systematicreviewsjournal.biomedcentral.com/articles/10.1186/s13643-018-0781-y.

291 *See infra* notes 292–96 and accompanying text.

292 *Panetti*, 551 U.S. at 949–50, 952.

293 *See* 2003 ABA Guidelines, *supra* note 22, guideline 10.7, at 1018 (including documents related to the applicability of the death penalty as elements of an "appropriate investigation"); *id.* guideline 10.15.1, at 1080 (imposing earlier duties, including section 10.7, in the post-conviction context). In his *Panetti* dissent, Justice Thomas argued that the failure to include such material was fatal to the claim. *See Panetti*, 551 U.S. at 969–70 (Thomas, J., dissenting).

294 *Cf.* 2003 ABA Guidelines, *supra* note 22, guideline 1.1, at 925 ("Counsel must promptly obtain . . . all professional expertise appropriate to the case.").

administer neuropsychological testing instruments. These experts cost money and virtually all death-sentenced prisoners are indigent.[295] As a result, they cannot develop crucial evidence necessary to support *Ford* claims until a court allocates resources to do so.[296] A *Ford* claim, however, does not formally exist until an execution is imminent,[297] and courts do not ordinarily allocate resources to unripe claims.[298]

2. *Lethal Injection Litigation*

Death-sentenced prisoners can challenge the method the state intends to use to execute them.[299] Although method-of-execution litigation can take place before a jurisdiction actually schedules an execution, much of it necessarily takes place following that moment. After all, a prisoner cannot know a jurisdiction's intended execution method until she knows what law prescribes at the moment that the jurisdiction schedules it. The recent litigation over federal executions, and whether the anticipated protocol is consistent with a statutory directive that it mirror protocols for execution in the sentencing state, belongs in this category.[300]

---

[295] *See, e.g.*, Phyllis Goldfarb, *Matters of Strata: Race, Gender, and Class Structures in Capital Cases*, 73 WASH. & LEE L. REV. 1395, 1431 & n.149 (2016) (observing that "ninety-five percent of [Alabama's] death row inmates are indigent" (citing AM. CIVIL LIBERTIES UNION, SLAMMING THE COURTHOUSE DOORS: DENIAL OF ACCESS TO JUSTICE AND REMEDY IN AMERICA 7–8 (2010), https://www.aclu.org/files/assets/HRP_UPRsubmission_annex.pdf)); Bradley A. MacLean & H. E. Miller, Jr., *Tennessee's Death Penalty Lottery*, 13 TENN. J.L. & POL'Y 85, 87–88 (2018) (observing that "all defendants on [Tennessee's] death row are indigent").

[296] *See, e.g.*, Panetti v. Davis, 863 F.3d 366, 373–74 (5th Cir. 2017) (holding that state's *Ford* process was unconstitutional because it denied resources and procedures necessary to factually develop a claim); Battaglia v. Stephens, 824 F.3d 470, 471, 475 (5th Cir. 2016) (granting motion for stay of execution and appointing counsel for indigent prisoner who needed to investigate and develop *Ford* claim under 18 U.S.C. § 3599(f) (2018)).

[297] *See supra* notes 286–87 and accompanying text.

[298] *Cf., e.g.*, 18 U.S.C. § 3599(f) (permitting the use of court-appointed experts and investigators only when those services are "reasonably necessary" to the representation).

[299] *See* Hill v. McDonough, 547 U.S. 573, 580 (2006).

[300] *See In re* Fed. Bureau of Prisons' Execution Protocol Cases, 955 F.3d 106 (D.C. Cir. 2020), *petition for cert. docketed sub nom.* Roane v. Barr, No. 19-1348 (U.S. June 5, 2020). A federal statute requires a federal execution to proceed in the same "manner" as it would in the state that the sentencing court sits, and the federal prisoners scheduled for execution successfully sought a stay in order to determine whether the contemplated methods of federal execution were in compliance. *See id.* at 108 (discussing the statute). Indeed, this Article was near completion and publication when the federal government executed three—Daniel Lewis Lee, Wesley Ira Purkey, and Dustin Lee Honken—within a span of four days in July 2020. Among the challenges that the Supreme Court adjudicated in the run up to the executions was the legality of a pentobarbital-only cocktail. Consistent with the Court's developing approach in method of execution cases, the Court dissolved a lower-court stay and declared that "[l]ast-minute stays like that issued this morning should be the extreme exception, not the norm." Barr v. Lee, No. 20A8, 2020 WL 3964985, at *2 (U.S. July 14, 2020) (internal quotation marks and citations omitted). The federal prisoner,

At this point, some short background is probably in order. Since the Supreme Court decided the so-called 1976 cases—the five cases that lifted the judicial moratorium on the American death penalty[301]—American jurisdictions have used five methods to execute prisoners: lethal injection, electrocution, hanging, firing squad, and the gas chamber.[302] The overwhelming majority of these executions, however, have taken place by lethal injection, which remains the near-universal execution method today.[303]

"Lethal injection" is merely a category of execution protocols, however, and the litigation dwells in the details. For many years, jurisdictions used a three-drug "cocktail" of lethal injection drugs to execute prisoners. The sequence would begin with sodium thiopental (an anesthetic), continue with pancuronium bromide (a paralytic agent), and conclude with potassium chloride (to induce cardiac arrest).[304] There were certainly challenges to three-drug protocols, to be sure, but those challenges tended to involve the training of the execution team and whether facilities were properly equipped—rather than the legality of the mix of drugs itself. For example, when the Supreme Court decided *Baze v. Rees* in 2008,[305] it affirmed the constitutionality of Kentucky's staffing and protocol for implementing the traditional cocktail.[306]

Things began to change around 2010.[307] Under pressure from anti-death-penalty organizations, corporate shareholders, and members of the European Union, suppliers started to refuse distribution of sodium thiopental bound for the execution chamber.[308] When supply

---

however, had filed his challenge to the execution protocol only four days after the execution date had been set; the challenge was so close to the moment of execution because the federal government sought a date coming only a month after its motion. *See id.* at *3 (Sotomayor, J., dissenting).

301 *See* Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976).

302 *See Methods of Execution*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/methods-of-execution (last visited Jun. 11, 2020).

303 *See id.*

304 *See* Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 78 (2007).

305 555 U.S. 35 (2008).

306 *See id.* at 49 (finding Kentucky's procedure consistent with the Eighth Amendment).

307 Until then, this cocktail was in ready supply and used almost everywhere. *See* Denise Grady, *Three-Drug Protocol Persists for Lethal Injections, Despite Ease of Using One*, N.Y. TIMES (May 1, 2014), https://www.nytimes.com/2014/05/02/science/three-drug-protocol-persists-for-lethal-injections-despite-ease-of-using-one.html (reporting that since 2010 more death penalty states have moved to use single drugs for lethal injection).

308 *See* Deborah W. Denno, *The Firing Squad as "A Known and Available Alternative Method of Execution" Post-*Glossip, 49 U. MICH. J.L. REFORM 749, 768, 771 (2016).

flagged, American jurisdictions began to turn to other sources for, and combinations of, lethal injection drugs. Some jurisdictions tried to source lethal injection drugs from compounding pharmacies that were not regulated by the Food and Drug Administration, and from less reputable overseas suppliers.[309] Other jurisdictions began experimenting with combinations of other drugs, including midazolam and pentobarbital.[310]

The source and chemical changes provoked significant litigation touching not only on the effect of the drugs themselves, but also on what are often called execution-secrecy laws, which shield the identities of drug producers, and on the legality of the administrative processes used to select new drugs.[311] The changing cocktails caused the Supreme Court to return to the fray in 2015, when it decided *Glossip v. Gross*.[312] *Glossip* was a challenge to Oklahoma's reliance on a three-drug cocktail that replaced sodium thiopental with midazolam.[313] At oral argument, Justice Scalia chaffed repeatedly about the role of "abolitionists" in constricting the supply of sodium thiopental,[314] although that frustration did not make its way into the express test of the majority opinion upholding the protocol.

Glossip formally adopted the *Baze* plurality's view that a method-of-execution claimant must plead a known and available alternative,[315] and *Bucklew*, decided in 2019 and discussed in Section II.C, further specified the alternative-method rule. At oral argument in *Bucklew*, Justice Breyer expressly referenced the belief that lethal injection litigation was being used for delay because "[opponents of capital punishment] think that the death penalty [is] not appropriate."[316] And, as also explained above, the Justices' frustration with delay *did* assume a very prominent position in the Court's *Bucklew*

---

309 *See, e.g.*, Rebecca Hersher, *Virginia Executes Convict with Drug from Anonymous Compounding Pharmacy*, NPR (Jan. 18, 2017, 6:48 PM), https://www.npr.org/sections/thetwo-way/2017/01/18/510465004/virginia-moves-forward-with-execution-drug-from-anonymous-compounding-pharmacy (midazolam); Hannah Wiley, *Report: Houston-Based Pharmacy Is Supplier of State's Execution Drugs*, TEX. TRIB. (Nov. 28, 2018, 2:00 PM), https://www.texastribune.org/2018/11/28/report-houston-based-pharmacy-supplier-texas-execution-drugs (pentobarbital).

310 *See* James Gibson & Corinna Barrett Lain, *Death Penalty Drugs and the International Moral Marketplace*, 103 GEO. L.J. 1215, 1231–33 & nn.91–97 (2015) (documenting the various substitute drug combinations used by states).

311 *See id.* at 1235.

312 135 S. Ct. 2726 (2015).

313 *See id.* at 2731.

314 Transcript of Oral Argument at 15–16, Glossip v. Gross, 135 S. Ct. 2726 (No. 14-7955) (Scalia, J.).

315 *See Glossip*, 135 S. Ct. at 2737.

316 Transcript of Oral Argument at 38–39, Bucklew v. Precythe, 139 S. Ct. 1112 (2019) (No. 17-8151) (Breyer, J.).

opinion.[317] In sum, lethal injection litigation seems to provoke a particularly strong reaction from those who believe that the capital defense bar is engaged in a campaign of strategic delay.

Most method-of-execution challenges simply cannot be raised before an execution date is set, because until that time a prisoner does not know the applicable execution protocol or the administrative procedure for selecting it. In many cases, moreover, prisoners cannot lodge these claims the moment an execution is scheduled. They will often require discovery into the anticipated protocol, as well as into the availability and efficacy of alternatives, both of which implicate a number of additional legal issues that cause delay.[318] There is nothing strategic about such delay, as these claims could not be presented earlier in the litigation sequence and would represent nothing more than guesses about likely execution methods and available substitutes, and they would lack crucial evidence.

3. Lackey *Claims*

The last constitutional challenge necessarily litigated under warrant is the so-called "*Lackey* claim."[319] A *Lackey* claimant asserts that an execution is so temporally removed from the imposition of the death sentence that the punishment would violate the Eighth Amendment.[320] *Lackey* challenges generally allege that the death penalty is really two punishments—an execution stacked on top of a term of years—and that the compounded suffering is cruel and unusual punishment.[321] *Lackey* claims, while frequently the subject of warrant litigation, have never formed the basis for relief[322] and occupy

---

317 *See supra* notes 78–80 and accompanying text.

318 *See generally* Eric Berger, *Lethal Injection Secrecy and Eighth Amendment Due Process*, 55 B.C. L. REV. 1367, 1372, 1395–1432 (2014) (discussing the array of discovery issues that lethal injection challenges implicate).

319 The claim takes its name from an opinion by Justice Stevens respecting the denial of certiorari in a 1995 case, *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., memorandum respecting denial of certiorari).

320 *See* Chad Flanders, *Time, Death, and Retribution*, 19 U. PA. J. CONST. L. 431, 432–33 (2016) (describing the two basic elements of a *Lackey* claim); *see also* Russell L. Christopher, *Death Delayed Is Retribution Denied*, 99 MINN. L. REV. 421, 427–30 (2014) (discussing the wrong alleged by a *Lackey* claim by reference to a retributive theory of punishment).

321 *See Lackey*, 514 U.S. at 1045 (Stevens, J., memorandum respecting denial of certiorari) (observing that none of the justifications for the death penalty under the Eighth Amendment "retains any force for prisoners who have spent some 17 years under a sentence of death").

322 *See* Russell L. Christopher, *Inconsistent Rationales for Capital Punishment Plus*, 2017 U. ILL. L. REV. 1363, 1366 (2017) (observing that "there [are] no standing court decision[s]––state or federal––recognizing the [*Lackey*] claim").

only auxiliary decisional text in the U.S. Reporter.[323] Justice Breyer is the only sitting member of the Court who regularly signals interest in the issue.[324]

Even the *Lackey* claim's most ardent opponents must recognize that the litigation remains unripe until there is an execution date.[325] The sum of suffering entailed by the stacking of incarceration and execution remains undetermined until a jurisdiction fixes the first parameter by activating a death warrant. For a *Lackey* claim, the delay *is* the constitutional violation—and so there can be no violation until the extent of delay is fixed and known.

D. Evidence of Innocence

The last category of intrinsically delayed claims involves evidence of innocence that is "new" because of advances in forensic science.[326] Such claims tax the legal system during subsequent phases of capital

---

[323] *See, e.g.*, Boyer v. Davis, 136 S. Ct. 1446, 1446–47 (2016) (Breyer, J., dissenting from denial of certiorari) (finding that "unconscionably long delays . . . undermine the death penalty's penological purpose"); Glossip v. Gross, 135 S. Ct. 2726, 2765 (2015) (Breyer, J., dissenting) ("[A] lengthy delay in and of itself is especially cruel because it 'subjects death row inmates to decades of especially severe, dehumanizing conditions of confinement.'" (quoting Johnson v. Bredesen, 558 U.S. 1067, 1069 (2009) (Stevens, J., statement respecting denial of certiorari))); Valle v. Florida, 564 U.S. 1067, 1068 (2011) (Breyer, J., dissenting from denial of stay) (noting that "[t]he commonly accepted justifications for the death penalty are close to nonexistent in a case [involving significant delay]"); Thompson v. McNeil, 556 U.S. 1114, 1115 (2009) (Stevens, J., statement respecting denial of certiorari) ("In prior cases, both Justice Breyer and I have noted that substantially delayed executions arguably violate the Eighth Amendment's prohibition against cruel and unusual punishment."); Baze v. Rees, 553 U.S. 35, 80–81 (2008) (Stevens, J., concurring) (observing that trends toward humane methods of execution undermine the retributive rationale behind the punishment); Knight v. Florida, 528 U.S. 990, 993 (1999) (Breyer, J., dissenting from denial of certiorari) (suggesting that "a delay, measured in decades, reflects the State's own failure to comply with the Constitution's demands," and renders the punishment cruel and unusual).

[324] *See*, *e.g.*, Jordan v. Mississippi, 138 S. Ct. 2567, 2658 (2018) (Breyer, J., dissenting from denial of certiorari) (agreeing with petitioner that execution after a lengthy delay may violate the Eighth Amendment's prohibition on cruel and unusual punishments); Dunn v. Madison, 138 S. Ct. 9, 12 (2017) (Breyer, J., concurring) (characterizing the "unconscionably long periods of time that prisoners often spend on death row awaiting execution" as a basic problem with the administration of the death penalty); Sireci v. Florida, 137 S. Ct. 470, 471 (2016) (Breyer, J., dissenting from denial of certiorari) (remarking that cases involving significant delay between sentencing and execution provide additional evidence in favor of reconsidering the constitutionality of the death penalty).

[325] *See, e.g.*, *Bredesen*, 558 U.S. at 1070 (Stevens, J., statement respecting denial of certiorari) ("For these reasons, I am persuaded that a Lackey claim, like a [*Ford* claim], should, at the very least, not accrue until an execution date is set.").

[326] I adopt a broad definition of "forensic science" that is common to literature on the question. *See* COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY. ET AL., NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 111 (2009) [hereinafter 2009 NAS Report]

litigation, as legal institutions increasingly recognize the superiority of such evidence over the evidence that the jury used to determine guilt and punishment at trial.[327]

The superiority of subsequently discovered evidence is a new development. Confessions were once considered iron-clad proof of guilt,[328] and inconsistent human memories are necessarily degraded by the passage of time.[329] The forensic science revolution,[330] however, changed much about that state of affairs.[331]

Two effects of that revolution combine to produce more late-stage innocence litigation. First, advances in forensic science perform a diagnostic function, suppressing confidence in older criminal convictions and sentences. Those advances disclosed that juries over-credited confessions and other evidence categories previously believed to be highly reliable: eyewitness testimony, informants, and junk science.[332] As a result, many jurisdictions have enacted gateways for prisoners to reopen collateral litigation for no reason other than the presence of discredited forensic methods in securing a conviction—for example, convictions based on shaken-baby evidence, positive bite mark and ballistics "matches," and junk arson science.[333]

(observing that forensic science is comprised of a broad array of disciplines, each with its own methods and practices, and strengths and weaknesses).

327 *See, e.g.*, Melendez-Diaz v. Massachusetts, 557 U.S. 305, 319 (2009) ("Serious deficiencies have been found in the forensic evidence used in criminal trials. One commentator asserts that '[t]he legal community now concedes, with varying degrees of urgency, that our system produces erroneous convictions based on discredited forensics.'" (quoting Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 491 (2006))).

328 For example, famous evidence scholar John Henry Wigmore believed that false confessions were exceedingly rare. *See* 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 867, at 359 (3d ed. 1940); *see also* Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1052 (2010) (noting the representativeness of Wigmore's position).

329 *See* Brandon L. Garrett, *DNA and Due Process*, 78 FORDHAM L. REV. 2919, 2921 (2010) (noting that traditional postconviction law emphasized the finality of convictions as courts could not reliably revisit facts due to fading memory and degraded physical evidence).

330 The signal moment of that revolution was the release of a massive report by the National Academy of Sciences in 2009, which is now generally referred to as the "NAS Report." *See generally* 2009 NAS REPORT, *supra* note 326, at xix–xx (discussing the scope and significance of the report).

331 *See* Brandon L. Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. 395, 395–96 (2015) (observing the many waves of false confessions that come to light as a consequence of the increasing use of postconviction DNA testing).

332 *See* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 14–44, 45–83, 84–117, 118–44 (2011) (exploring the effects of false confessions, eyewitness misidentifications, flawed forensics, and motivated informant testimony, respectively).

333 *See, e.g.*, ARK. CODE ANN. § 16-112-201 (2020); CAL. PENAL CODE § 1473(e) (2017); CONN. GEN. STAT. § 52-582 (2020); MICH. R. CRIM. P. 6.502(G)(3) (2019); NEV. REV.

Second, the effect on confidence in judgments is increasingly salient because the forensic science revolution has established the credibility of new evidence categories—most notably, DNA.[334] Unlike memory of an event, which degrades as time passes, DNA test results remain powerful evidence of guilt or innocence long after juries render their verdicts.[335] Because many convictions and sentences became final before the legal community universally recognized DNA evidence as valid, and because others convicted later might be on death row when new biological sources of DNA evidence are discovered, there is considerable innocence-related litigation that takes place during later phases of the capital punishment sequence.[336]

IV
Resource Triage

As explained in Part III, there is rarely strategy involved in failing to litigate intrinsically delayed claims at upstream phases of the capital punishment sequence, because a prisoner is in no position to withhold them. In Part IV, I explain why litigation of such claims is not just intrinsically delayed, but why prisoners must often litigate these claims under warrant. Even though the subject matter of intrinsically delayed claims explains why prisoners cannot raise them at the front of the capital punishment sequence, it does not explain why litigation often happens at the very end: under warrant.[337] A modified SDA might explain warrant litigation as the coincidence of intrinsic delay and strategic decision-making. The subject matter of intrinsically delayed claims precludes early stage litigation, but might strategic delay explain why prisoners withhold them until jurisdictions set execution dates?

Even a modified SDA, however, is riddled with explanatory holes. There is a less sinister reason why prisoners litigate intrinsically delayed claims under warrant: what I call "resource triage." By resource triage, I refer to the process by which the community that provides legal services to death-sentenced prisoners allocates scarce

---

Stat. § 34.930 (2019); Tex. Code Crim. Proc. Ann. art. 11.073 (West 2015); Wyo. Stat. Ann. § 7-12-403 (2020).

334 *See generally* Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 Calif. L. Rev. 721 (2007) (giving comprehensive explanation for why DNA is at the vanguard of next-generation forensics, along with warnings about imperfections).

335 *See* Garrett, *supra* note 329, at 2921.

336 *Cf.* Garrett, *supra* note 9, at 1673–75 (explaining the connection between the rise of DNA evidence and new vehicles for post-conviction relief).

337 For a general discussion of warrant litigation, see Garrett & Kovarsky, *supra* note 11, at 183–95.

resources to cases towards the end of the capital punishment sequence. Because of the patchwork system of state and federal appointments, many death-sentenced prisoners are functionally unrepresented between the moment their initial federal habeas proceedings conclude and when a state sets an execution date.[338]

After the conclusion of initial federal habeas proceedings, and often times sooner, the legal interests of under-represented[339] prisoners are serviced primarily by a networked community of death penalty specialists who operate in an environment of extraordinary scarcity.[340] Because of that scarcity, the community allocates resources on the best proxy it has for "need," and the best proxy for need is whether the state scheduled an execution.[341] So much litigation happens under warrant because economic scarcity forces the broader community of capital post-conviction specialists to triage resources—often in the direction of intrinsically delayed claims—and not because prisoners systematically undertake strategic delay.

A. Gaps in Appointed Representation

Those who endorse the SDA might incorrectly believe that a prisoner is represented continuously, from charge to gurney. Direct representation during the capital punishment sequence, however, is frequently an incomplete patchwork of state and federal appointments. The scope of legal agency is particularly unclear after an initial round of federal post-conviction proceedings concludes, and that is when death-sentenced prisoners are most likely to be functionally unrepresented.

One crucial feature of capital litigation is worth flagging before I delve into the particulars below: the degree to which such litigation involves lawyers that the clients do not hire. Death penalty represen-

---

338 *See infra* Section IV.A (discussing the considerable gaps in appointed representation).

339 By "under-represented" I mean to indicate a range on a spectrum that includes a formal absence of representation. But it could also include scenarios where, for example, a prisoner formally has an appointed lawyer who is entitled to no compensation or investigative services for the representation.

340 *See infra* Section IV.B.

341 *See* GARRETT & KOVARSKY, *supra* note 11, at 195 (explaining that specialized resource scarcity results in legal resources being distributed to the capital inmate population by partial reference to how likely they are to receive an execution date); David R. Dow, Teague *and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 HASTINGS CONST. L.Q. 23, 78 (1991) ("Delay exists in the current system partly because the most creative and diligent lawyers do not enter the scene until an execution date has been set.").

tation is largely indigent representation,[342] so almost every death-sentenced prisoner will receive legal services from pro bono counsel, an institutional defender, or a court-appointed lawyer.[343] Except for pro bono counsel, those direct representatives have responsibilities that are limited to certain pieces of the capital litigation sequence, and state and federal jurisdictions generally do not coordinate the appointments.

The chunked-up approach to appointed representation means that there are areas of potential overlap and, more importantly, areas of severe under-coverage. The under-covered areas are particularly problematic for the SDA, because that under-coverage is most pronounced in the years and decades leading up to an execution date. Prisoners fail to press intrinsically delayed claims at this time not because they are strategically deferring litigation, but because they lack sufficient access to legal services.

1. State Post-Conviction Lawyers

The federal constitution, by operation of the Sixth and Fourteenth Amendments,[344] *Powell v. Alabama*,[345] and *Gideon v. Wainwright*,[346] requires that defendants facing the death penalty receive legal assistance at trial.[347] There is also a well-established thread of Sixth Amendment precedent, most frequently associated with *Strickland v. Washington*,[348] that requires such assistance to be "effective."[349] Under the Equal Protection Clause and *Douglas v. California*,[350] indigent defendants are also constitutionally entitled to

---

342 *See supra* note 295; *see also* Ankur Desai & Brandon L. Garrett, *The State of the Death Penalty*, 94 NOTRE DAME L. REV. 1255, 1303 tbl.5 (2019) (collecting state-by-state information about how jurisdictions pay for capital representation).

343 Some private law firms will represent prisoners pro bono, although such firms do not systematically show up at a consistent phase of capital litigation. *Cf.* Eric M. Freedman, *Add Resources and Apply Them Systemically: Governments' Responsibilities Under the Revised ABA Capital Defense Representation Guidelines*, 31 HOFSTRA L. REV. 1097, 1101 & n.13 (2003) (noting that pro bono firms have "to a small degree rescued the states from the consequences" of their failure to provide counsel). There is not, however, reliable data on how substantial the *pro bono* footprint is.

344 The Sixth Amendment provides for the appointment of counsel, and the Due Process Clause of the Fourteenth Amendment incorporates fundamental rights against the several states. *See* U.S. CONST. amends. VI, XIV, § 1.

345 287 U.S. 45 (1932).

346 372 U.S. 335 (1963).

347 *See id.* at 342–43 (extending Sixth and Fourteenth Amendment rights to counsel to all felony defendants); *Powell*, 287 U.S. at 71–72 (announcing a defendant's Sixth and Fourteenth Amendment rights to defense counsel in capital cases).

348 466 U.S. 668 (1984).

349 *See id.* at 686 (recognizing that "the right to counsel is the right to the effective assistance of counsel" (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970))).

350 372 U.S. 353 (1963).

appointed counsel during the first as-of-right appeal,[351] although that entitlement does not extend to subsequent or permissive appeals.[352] In order to comply with the federal constitution, every death penalty jurisdiction has passed compliant statutes effectuating the right to counsel on trial and direct appeal.[353]

As state prisoners move into state post-conviction review, however, things become more complicated—and in ways that frustrate the prompt litigation of intrinsically delayed claims. There is no constitutional right to a state post-conviction lawyer.[354] The lawyer who worked the trials and appeals cannot be post-conviction counsel because their performance will almost certainly be at issue in the state post-conviction proceeding,[355] thus presenting a massive conflict of interest.[356]

Each death penalty jurisdiction has its own rules of appointment. This state of affairs creates different gaps in appointed representation. A comprehensive discussion of the phenomenon, across every state, is therefore beyond the space-limited capacity of this Article. Where necessary, however, I use Texas examples, for several reasons. First, Texas executes far more prisoners than any other jurisdiction, accounting for almost forty percent of American executions since 1976.[357] To analyze the death penalty in Texas is to analyze the death penalty in the United States. Second, and perhaps because Texas has moved forward with so many executions, its law on questions of representation is fairly detailed relative to other jurisdictions. California still sentences more defendants to death than any other jurisdiction,[358]

---

351 *See id.* at 355.

352 *See* Ross v. Moffitt, 417 U.S. 600, 610–11 (1974) ("We do not believe that the Due Process Clause requires [a state] to provide [a prisoner] with counsel on his discretionary appeal . . . .").

353 *See* David E. Patton, *Federal Public Defense in an Age of Inquisition*, 122 YALE L.J. 2578, 2581 (2013) (federal defense function); Jeffrey H. Rutherford, Dziubak v. Mott *and the Need to Better Balance the Interests of the Indigent Accused and Public Defenders*, 78 MINN. L. REV. 977, 982 (1994) (state defense function).

354 *See* Pennsylvania v. Finley, 481 U.S. 551, 557 (1987).

355 *See* KING, *supra* note 172, at 28 (citing leading survey in which eighty-one percent of federal petitions had IATC claims).

356 Ethics rules operative in every jurisdiction bar a lawyer from representation in a case where they have a conflict of interest. *Cf.* MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N 2018) ("[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if . . . there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer.").

357 *See Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976 (last visited Jun. 11, 2020).

358 *See* Lee Kovarsky, *Muscle Memory and the Local Concentration of Capital Punishment*, 66 DUKE L.J. 259, 276 tbl.4 (2016).

but there is no warrant litigation related to those sentences because the state has not executed anyone since 2006.[359]

Although almost every state provides death-sentenced prisoners with lawyers for *initial* post-conviction proceedings,[360] there are few state guarantees beyond that point. For example, there may be provisions providing for appointed counsel *after* courts authorize state post-conviction proceedings, but no guarantee of counsel for a prisoner *seeking authorization*.[361] Texas gives trial courts authority to appoint counsel when its supreme court authorizes successive litigation,[362] but there is no mechanism for appointing the lawyer or providing the auxiliary resources necessary to develop evidence and legal arguments.[363]

---

[359] *See State and Federal Info: California*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/california (last visited June 11, 2020).

[360] In capital cases, every state except for Alabama and Georgia requires the appointment of counsel. *See* Maples v. Thomas, 565 U.S. 266, 272 (2012) ("Nearly alone among the States, Alabama does not guarantee representation to indigent capital defendants in postconviction proceedings."); AM. BAR ASS'N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE ALABAMA DEATH PENALTY ASSESSMENT REPORT 159 (2006), https://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/alabama/report.authcheckdam.pdf ("In fact, Alabama statutory law does not provide a right to post-conviction counsel for death-sentenced inmates and leaves the appointment of post-conviction counsel to the discretion of the post-conviction judge."); AM. BAR ASS'N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE GEORGIA DEATH PENALTY ASSESSMENT REPORT 155 (2006), https://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/georgia/report.authcheckdam.pdf ("[T]he State of Georgia does not require that indigent individuals charged with or convicted of a capital felony be appointed counsel and provided with resources for experts and investigators at every stage of the proceedings."); *see also* AM. BAR ASS'N DEATH PENALTY REPRESENTATION PROJECT, STATE STANDARDS FOR APPOINTMENT OF COUNSEL IN DEATH PENALTY CASES (2018), https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/state_standards_memo_aug2018.pdf (documenting counsel appointment standards in states with the death penalty).

[361] The Indiana Supreme Court has interpreted its post-conviction rules to bar lower courts from appointing lawyers to prepare successive applications. *See* IND. R. POST-CONV. REMED. 1; Order, In re: Post-Conviction Relief Representation, No. 95S00-9402-MS-181 (Ind. Feb. 25, 1994). In Virginia, there is no appointment of counsel for successive litigation because the state allows no post-conviction litigation to be initiated outside of a strict sixty-day window following the end of any certiorari or merits-phase litigation in the U.S. Supreme Court. *See* VA. CODE ANN. § 8.01-654.1 (2019). In Nevada, the appointment-of-counsel provision covers only an initial petition and contemplates only appointment of counsel for that proceeding. *See* NEV. REV. STAT. § 34.820; *see also id.* § 34.750(3) (contemplating the post-appointment filing only of *supplemental* documents).

[362] *See* TEX. CODE CRIM. PROC. ANN. art. 11.071 § 6(b-1) (West 2015).

[363] *Compare*, *e.g.*, *id.* (providing for appointment after successive litigation is authorized), *with Ex parte* Gallo, 448 S.W.3d 1, 3 (Tex. Crim. App. 2014) (holding that the appointment of counsel in an initial state post-conviction proceeding does not extend to preparation of subsequent state post-conviction application). *See also Ex parte* Alvarez, No. 7870007, slip op. at 4–6 (Tex. Dist. Ct. Jan. 27, 2014) (determining that, despite merit of

A closely related problem persists with respect to *Ford* litigation.[364] As discussed above, and in 2007, *Panetti v. Quarterman*[365] held that *Ford* claimants—prisoners claiming that their insanity bars their execution—enjoy certain due process protections upon a "substantial showing" of incompetence.[366] States that did not have procedures that satisfied *Panetti* thereafter enacted *Panetti*-compliant statutes.[367] Many states, however, failed to guarantee resources necessary to develop the "substantial showing,"[368] which created nontrivial confusion about precisely who is authorized to develop (and to seek auxiliary resources to develop) the *Ford* claim. The *Ford* scenario is a particularly vivid example of states' legislative failure to guarantee the appointed representation necessary to litigate intrinsically delayed claims.

The examples from Texas and involving *Ford* litigation illustrate a basic point. Prisoners will often have to raise intrinsically delayed claims in a successive post-conviction posture that state appointments do not effectively cover. States routinely provide appointments necessary to undertake successive litigation of claims that the prisoners have pleaded and substantiated,[369] but do not ensure the legal representation and auxiliary services necessary to identify and develop the claim to begin with. The failure to guarantee counsel for this phase of the process is particularly consequential, because prisoners cannot come to federal court before they exhaust state remedies.[370]

2. *Federal Lawyers*

State prisoners get new lawyers when they begin federal habeas proceedings,[371] but the federal appointment does not effectively cover

potential claim, prisoner was not entitled to resources necessary for fact development in successive state post-conviction proceeding).

364 *See supra* Section III.C.1.

365 551 U.S. 930 (2007).

366 *Id.* at 948.

367 *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 46.05(f)–(g) (West 2020) (Texas statute setting forth *Panetti*-compliant procedure for processing claims of execution incompetency).

368 *See, e.g.*, Panetti v. Davis, 863 F.3d 366, 376 (5th Cir. 2017) (describing the problem in one Texas case).

369 *See supra* notes 361–63 and accompanying text (discussing state policies that provide representation for certain post-conviction proceedings).

370 *See* 28 U.S.C. § 2254(b) (2018).

371 There are special qualifications for federal habeas appointees. *See, e.g.*, 18 U.S.C. § 3599(b)–(d) (2018) (specifying qualifications for lead and second federal habeas counsel appointed to represent state prisoners). Moreover, because of *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), there is a conflict of interest associated with the federal re-appointment of the state post-conviction lawyer. Because *Martinez* and *Trevino* make the performance of state post-conviction counsel a crucial issue in much of

the above-described gaps in state representation. 18 U.S.C. § 3599 entitles a death-sentenced prisoner to reasonably necessary representation in federal habeas proceedings, which covers lawyers, investigators, and experts.[372] Section 3599 requires that the appointee represent the prisoner through "every subsequent stage of available judicial proceedings, including . . . all available post-conviction process . . . ."[373] It also requires that, "together with applications for stays of execution and other appropriate motions and procedures, [the section 3599 appointee] shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant."[374]

Despite the plausibility of gap-filling readings, federal courts do not generally interpret section 3599 to cover state post-conviction proceedings. Until the Supreme Court decided *Harbison v. Bell* in 2009,[375] many section 3599 appointees operated on the assumption that the references to clemency and competency proceedings were references to *federal* process, and that corresponding state process was therefore outside the scope of the appointment.[376] Given the pervasiveness of that assumption, many death-sentenced state prisoners simply had no federal lawyer who had responsibility for *Ford* litigation in state court. And in *Harbison* the Supreme Court expressly stated that "all available post-conviction process" did *not* include state post-conviction litigation.[377] Moreover, whatever limitations apply to private section 3599 appointees apply to federal public defenders appointed under that same provision.[378]

If federal appointments do not cover a category of legal services, then the section 3599 appointee does not receive compensation for

---

the litigation, the re-appointment of the state post-conviction lawyer as state habeas counsel can create a serious conflict of interest. *See* John H. Blume & W. Bradley Wendel, *Coming to Grips with the Ethical Challenges for Capital Post-Conviction Representation Posed by* Martinez v. Ryan, 68 FLA. L. REV. 765 (2016).

372 *See* 18 U.S.C. § 3599(a) (attorneys); § 3599(f) (services).

373 18 U.S.C. § 3599(e).

374 *Id.*

375 556 U.S. 180 (2009).

376 *See, e.g.*, Clark v. Johnson, 278 F.3d 459, 462–63 (5th Cir. 2002) (holding that 21 U.S.C. § 848(q)(8), the predecessor to 18 U.S.C. § 3599, does not cover state clemency proceedings); *In re* Lindsey, 875 F.2d 1502, 1506 (11th Cir. 1989) (holding that § 848(q)(8) does not cover representation in state proceedings).

377 *See* 556 U.S. at 189–90, 190 n.7. *Harbison* did hold that § 3599 appointees could seek subsequent state relief on a "case-by-case basis" if a federal court found it "appropriate." *Id.* at 190 n.7.

378 *Cf.* David Rudovsky, Gideon *and the Effective Assistance of Counsel: The Rhetoric and the Reality*, 32 LAW & INEQ. 371, 401 & n.153 (2014) (describing how Pennsylvania prosecutors have taken the position that CHUs cannot represent clients in state post-conviction proceedings without doing so under circumstances specified in § 3599).

providing them.[379] Without a right to compensation, the prospects of the appointed federal habeas attorney seeking state post-conviction relief on intrinsically delayed claims are extremely low.[380] Even if there exist *formal* circuit precedents permitting section 3599 appointees to make a limited return to state court following the conclusion of the federal habeas proceeding, there are still two other problems. First, those rules are often applied in ways that operationally curtail that ability.[381] Second, only a fraction of the section 3599 appointees actually know they are capable of seeking such relief.[382]

3. The Gap

The upshot is that neither state nor federal appointments reliably cover the preparation and filing of subsequent state post-conviction applications. Texas, by orders of magnitude the most important death-sentencing jurisdiction,[383] statutorily forecloses the appointment of state post-conviction counsel for such purposes.[384] The appointment of counsel in less capitally active states works in basically the same way.[385] Although it is theoretically possible for section 3599 appoin-

---

[379] *Cf.* 18 U.S.C. § 3599(g) (setting forth rules for compensation in cases where attorney is appointed).

[380] The small set of prisoners represented by pro bono lawyers has a chance in the sense that the pro bono lawyers are not formally limited by the scope of an appointment-of-counsel statute, but such litigation is (by definition) uncompensated and pro bono litigators are frequently larger firms that lack the experience to navigate the byzantine underworld of successive state post-conviction review by themselves. *See* Norah Rexer, Note, *A Professional Responsibility: The Role of Lawyers in Closing the Justice Gap*, 22 GEO. J. ON POVERTY L. & POL'Y 585, 596 (2015) (documenting how pro bono service has been institutionalized within large law firms); *cf.* Larry Hammond & Robin M. Maher, *The* ABA Guidelines*: The Arizona Experience*, 47 HOFSTRA L. REV. 137, 142–44 (2018) (discussing the pro bono footprint in Arizona capital post-conviction litigation).

[381] For example, federal courts often refuse to "authorize" compensation for state post-conviction litigation in advance. *See, e.g.*, Barbee v. Davis, No. 4:09-CV-074-Y, 2019 U.S. Dist. LEXIS 148192, at *3 (N.D. Tex. Aug. 30, 2019) (dismissing motion to authorize attorney fees because the petitioner did not first seek state funding). Of course, in refusing pre-authorization, a section 3599 appointee would have to undertake the state post-conviction litigation on spec, hoping to obtain compensation later. For obvious reasons, then, pre-authorization refusals effectively obliterate the financial incentive for section 3599 appointees to seek state post-conviction relief under their appointment. *Cf.* AD HOC COMM. TO REVIEW THE CRIMINAL JUSTICE ACT, 2017 REPORT OF THE AD HOC COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT 197–98 (2018) [hereinafter CARDONE REPORT], https://cjastudy.fd.org (explaining the chilling effect of informal "caps" on attorneys' fees). In Texas, the Attorney General routinely opposes requests for funding necessary to develop claims. *See id.* at 209.

[382] As explained below, many section 3599 appointees may simply lack the expertise necessary to navigate the byzantine process of obtaining federal compensation for state post-conviction litigation. *See infra* note 416 and accompanying text.

[383] *See supra* note 357 and accompanying text.

[384] *See supra* note 363 and accompanying text.

[385] *See supra* note 361 and accompanying text.

tees to obtain compensation for doing that work, the practical availability of such funding is extremely limited.[386] Moreover, most of the appointed lawyers representing death-sentenced prisoners are not capital defense specialists.[387]

The choppy division of state and federal post-conviction representation, then, leaves a crucial litigation interval under-covered: the period after an initial federal habeas proceeding concludes. Exhaustion requirements require that any further litigation begin in state court,[388] but, generally speaking, neither the state nor the federal appointee's compensated portfolio includes the investigation, preparation, and filing of a subsequent state application.

Such under-coverage is so damaging to the SDA because it substantially explains the failure to litigate intrinsically delayed claims before there is an execution date. Death-sentenced prisoners are not deferring litigation of such claims because they are behaving strategically; the claims remain unasserted because the prisoners lack functional legal representation during the period where immediate litigation might otherwise be expected. Courts generally insist on the presence of appointed representation only once an execution date is in the offing.[389]

B. Resource Triage

There is one piece left to the structural puzzle that explains the volume of warrant litigation. One might be skeptical that gaps in the appointment structure really produce warrant litigation: If incomplete appointed representation is so problematic, then why does that litigation ultimately take place at all? The answer has to do with the way

386 *See* CARDONE REPORT, *supra* note 381, at 200–02 (describing how low compensation contributes to the difficulty of finding willing counsel for capital cases).

387 Most state public defender offices that do trial and appellate phase representation are conflicted out of state post-conviction representation. *See* Nancy J. King, *Enforcing Effective Assistance After* Martinez, 122 YALE L.J. 2428, 2442 (2013). As a result, most state post-conviction lawyers in death penalty cases are private practitioners. *See id.* at 2442–43; *see also* Hammond & Maher, *supra* note 380, at 143–44, 150 (detailing issues in Arizona with lawyers appointed to post-conviction cases who lacked the necessary training). On the federal level, too, there is consensus that the set of section 3599 appointees is severely under-qualified. *See* CARDONE REPORT, *supra* note 381, at 200, 202.

388 *See* 28 U.S.C. § 2254(b) (2018).

389 *See, e.g.*, McFarland v. Scott, 512 U.S. 849, 859 (1994) (granting a stay because the execution had been scheduled without appointed counsel); *see also* Justice Thurgood Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1, 5 (1986) ("Until an execution date is set, and the situation becomes urgent, captial [sic] defendants simply have been unable to secure counsel.").

the other source of legal services—death penalty specialists[390]—must allocate resources under conditions of extreme scarcity. For this group, the setting of execution dates serves a queueing function, signaling to that community how to triage its resources and attention.

Because these specialists are so profoundly resource-constrained, they cannot know every legal possibility in every death-eligible case; they necessarily triage the distribution of money and attention. There is no Archimedean point from which to ascertain the social return on potential choices, so specialists and their home institutions frequently queue their resource distribution by reference to the setting of executions. The pervasiveness of such triage means that warrant litigation is much less a strategic story about lawyers withholding claims than it is a structural story about how long it takes for institutions to ensure that qualified attorneys evaluate a case.[391]

At this juncture I ought to be more specific about the identities of "groups of death penalty specialists" who are forced to triage resources. I focus on the federally funded entities not because they are the only specialists, but because they are broadly reflective of specialization across the professionalized elements of the capital defense bar. The federal government funds several different specialist groups: (1) the Federal Death Penalty Resource Counsel Project, which monitors and consults with trial and direct-appeal attorneys working on *federal* death penalty cases;[392] (2) the Federal Capital Habeas Corpus Project, sometimes known as the "2255 Project," which monitors and consults with counsel working on federal post-conviction challenges to *federal* death sentences;[393] (3) Capital Habeas Units or "CHUs," which are units within federal defender offices that primarily do direct representation of death-sentenced state prisoners litigating in federal habeas proceedings;[394] and (4) Habeas Assistance and Training Counsel, usually called "HATs," which monitor and consult with attorneys representing death-sentenced state prisoners litigating in federal habeas proceedings.[395]

Because the first category of specialists deals only with trials and direct appeals, the federally funded specialists that I use as examples

---

390 The set of federally funded groups that work on these cases is listed in the Cardone Report. CARDONE REPORT, *supra* note 381, at 193–95. These groups are discussed in greater detail below.

391 *Cf.* Marshall, *supra* note 389, at 5–7 (explaining how qualified volunteer attorneys allocate attention by reference to the setting of execution dates); STEVENSON, *supra* note 17, at 67–74, 282 (describing how this process worked in Alabama).

392 *See* CARDONE REPORT, *supra* note 381, at 193.

393 *See id.*

394 *See id.* at 194.

395 *See id.* at 194–95.

here are only those in categories (2) through (4) above (i.e. those monitoring and consulting during post-conviction litigation in federal death penalty cases, HAT counsel who monitor and consult during federal habeas challenges to state death sentences, and the CHUs that provide direct representation in some capital habeas cases involving state prisoners). My analysis of this group also omits death penalty specialists with no federal institutional affiliation—including state-level groups,[396] as well as those known to the capital representation community or working in law school clinics[397]—though the omitted categories do not exhibit behavior that differs materially from that of the federally funded groups I do describe.

Each of these specialist categories has different expertise and has a different mandate. The most meaningful distinctions for the purposes of this Article are those between: (1) specialists working on federal death penalty cases and those working on state death penalty cases, and (2) specialists doing direct representation and specialists doing monitoring and consulting. Because there are so many more prisoners sentenced to death by the states, I focus primarily on how the state-sentence specialists operate, although I do mention the federal-sentence specialists when appropriate.

1. CHUs and Direct Representatives

Consider the twenty-two CHUs,[398] which resemble other public, institutional entities that do direct representation for indigent prisoners. The lawyers that work at such entities are specialists.[399] Unlike consulting counsel, they have a formal attorney-client relationship with condemned prisoners.[400] An ardent SDA proponent might argue that, within jurisdictions having such qualified public-defender repre-

396 Perhaps the most famous such group is the Equal Justice Initiative, helmed by Bryan Stevenson. Although its criminal justice footprint is now much larger, the organization's early mission was more centrally limited to the provision of legal services to Alabama's death row population. *See* Jeffrey Toobin, *The Legacy of Lynching, On Death Row*, NEW YORKER (Aug. 15, 2016), https://www.newyorker.com/magazine/2016/08/22/bryan-stevenson-and-the-legacy-of-lynching.

397 There are prominent death penalty clinics, for example, housed in law schools at the University of Texas, Cornell University, and the University of California, Berkeley. *See Capital Punishment Clinic*, UNIV. TEX. AUSTIN SCH. LAW, https://law.utexas.edu/clinics/capital-punishment (last visited May 25, 2020); *Capital Punishment: Post Conviction Litigation*, CORNELL LAW SCH., https://www.lawschool.cornell.edu/Clinical-Programs/capital-punishment/index.cfm (last visited May 25, 2020); *Death Penalty Clinic*, BERKELEY LAW, https://www.law.berkeley.edu/experiential/clinics/death-penalty-clinic (last visited May 25, 2020).

398 *See id.* (listing jurisdictions).

399 *See id.*

400 *See id.*

sentatives, litigation under warrant is usually litigation that the prisoners have deferred strategically.

For several reasons, however, the presence of CHUs or other public defender organizations in a particular jurisdiction does not enable death-sentenced prisoners to rapidly litigate claims. First, for a CHU to come into existence, its jurisdiction must already have had a large death row population.[401] For many cases, then, prior rounds of litigation will not have been helmed by the federally funded public defender, but instead by the less-qualified appointed counsel that preceded it in the jurisdiction.[402] Texas is notorious for housing a death row population represented by unqualified counsel,[403] but was not home to a CHU until 2018.[404]

Second, the authority of CHUs to litigate cases is coextensive with that of private counsel that federal courts appoint under 18 U.S.C. § 3599,[405] which means that the CHUs usually cannot seek subsequent state post-conviction relief.[406] Recall that *Harbison* construed section 3599(e)'s reference to all "available post-conviction process" as a reference only to *federal* habeas corpus proceedings,[407] so the appointment simply does not cover much of the litigation necessary to prepare, present, and plead later-disclosed claims. Someone else has to do it.

---

401 *See, e.g.*, *id*. at 194 (noting that the CHUs that would be located in Texas would start in fiscal year 2018); TRACY L. SNELL, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT, 2017: SELECTED FINDINGS 2 tbl.1 (2019), https://www.bjs.gov/content/pub/pdf/cp17sf.pdf (reporting 234 people on Texas death row at the end of 2017).

402 Justice Blackmun famously remarked on the poor state of appointed capital counsel in a 1994 dissent. *See* McFarland v. Scott, 512 U.S. 1256, 1257 (1994) (Blackmun, J., dissenting) (setting forth various reasons for inadequate appointed counsel in death penalty cases). *Cf.* Sherod Thaxton, *Leveraging Death*, 103 J. CRIM. L. & CRIMINOLOGY 475, 485 n.34 (2013) (collecting empirical work showing the inferiority of appointed capital counsel).

403 *See* CARDONE REPORT, *supra* note 381, at 198, 200–03, 210–11 (documenting shoddy appointed capital representation in Texas, attributable to, among other things, the absence of lists, the absence of training to handle specialized and technical litigation, crushing caseloads preventing re-appointment of lawyers who were qualified, and that qualified counsel are deterred by the possibility that appointed capital work swamps other work without being appropriately compensated).

404 *See id.* at 194.

405 *See* Rudovsky, *supra* note 378, at 401 n.153 (noting that the debate over whether federal capital habeas units should be able to provide counsel in state post-conviction proceedings revolves in part on the construction of section 3599).

406 *See supra* Section IV.A.2. *But see* Rudovsky, *supra* note 378, at 401–04 (documenting massive institutional resistance to the Philadelphia CHU's attempts to file in state courts).

407 556 U.S. 180, 190 n.7 (2009) (quoting 18 U.S.C. § 3599 (2018)).

Finally, CHUs, like any public defender doing direct representation, are resource constrained.[408] They can take on only so many cases per attorney, and they work on a budget that necessarily determines how many cases in a jurisdiction the lawyers at a CHU can take. Even if CHUs could meaningfully affect the timing of litigation on every case they touch, they are restricted in how many cases that is.[409]

Each of these issues with CHUs is, moreover, representative of issues that afflict parallel state-level entities: they often take many of their cases later in the litigation process, they have limited authority to litigate claims, and they are subject to resource limitations that prevent them from taking all cases.[410] The result is that the presence of such organizations does little to support the SDA, because the delayed presentation of claims is not the result of specialized counsel's strategic decision-making.

2. HATs and Consulting Counsel

The federal Office of Defender Services (DSO) employs lawyers to monitor and consult on cases involving death-sentenced prisoners,[411] and most death-sentenced prisoners are sentenced by the states.[412] There is a national HAT group, and there are four regional HAT groups, including one in the major death penalty jurisdiction: Texas.[413] These specialists work under contracts,[414] and they consult with appointed and pro bono counsel. The experience of HAT counsel is broadly representative of the relationship between specialists and warrant litigation, dating back decades.[415]

---

[408] *Cf.* Mark E. Olive, *Capital Post-Conviction Representation Models: Lessons from Florida*, 34 AM. J. CRIM. L. 277, 290–91 (2007) (explaining that no public defender organization constrained by case-load limits, among other things, could provide legal services to an entire jurisdiction).

[409] *See, e.g.*, Criminal Justice Act Plan, Misc. Order No. 3, at 24 (N.D. Tex., Dec. 20, 2018), http://www.txnd.uscourts.gov/sites/default/files/orders/misc/MiscOrder3Criminal.pdf (setting forth the jurisdiction's rule that the federal defender (the CHU) may not be appointed when it has exceeded its contractual capacity or "is otherwise prevented from accepting the appointment").

[410] *See, e.g.*, Judge Arthur L. Alarcón, *Remedies for California's Death Row Deadlock*, 80 S. CAL. L. REV. 697, 739 (2007) (California); Hammond & Maher, *supra* note 380, at 144–45 (Arizona); *see also* Olive, *supra* note 408 (explaining inherent limitations of resource-constrained offices).

[411] *See* CARDONE REPORT, *supra* note 381, at 193.

[412] *See Death Sentences in the United States Since 1977*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-in-the-united-states-from-1977-by-state-and-by-year (last visited Aug. 20, 2020).

[413] *See* CARDONE REPORT, *supra* note 381, at 194–95, 211. In the interest of full disclosure, I am a Texas HAT counsel.

[414] *See id.* at 195.

[415] *See* LaJuana Davis, *Reconsidering Remedies for Ensuring Competent Representation in Removal Proceedings*, 58 DRAKE L. REV. 123, 172 (2009) (reciting history of "capital

Specialists are necessarily better at identifying claims than lawyers that traditionally handled capital post-conviction litigation. They are more likely to have knowledge of applicable legal rules, but they are *also*: more capable of identifying the state actors that traditionally create constitutional problems; better able to identify constitutional deficiencies in the representation of predecessor counsel; more familiar with the process necessary to secure critical state records; and more knowledgeable of experts necessary to develop certain types of claims.[416] Indeed, it is the gap in expertise between death penalty specialists and lawyers handling earlier phases of post-conviction litigation that often causes claims to be presented under warrant.

The group of attorneys that consults on death penalty cases has the resources to cover only a fraction of America's death row.[417] These attorneys cannot possibly know every case's strengths and weaknesses. Because their expertise is a scarce resource, there must be some way of allocating that resource across cases. In a world of perfect information—a world in which those specialists could know the potential merit of every case—a greater percentage of specialist resources would find their way to prisoners with stronger claims at earlier phases of the capital punishment sequence. But that world does not exist. Indeed, one of the most substantial questions centers on how specialists decide on the cases about which they will acquire information. The entire enterprise is circular: Distribution of the scarce resource requires information about cases, but the scarce resource is itself necessary to acquire such information. If specialists are to provide maximally effective assistance in averting wrongful executions, and if they cannot optimize the distribution of their scarce resources by reference to information about cases, then they must distribute by reference to some other case attribute. The most triaged

---

postconviction resource centers" that performed jobs similar to modern HAT counsel before AEDPA eliminated their funding in 1996); Elisabeth Semel, *The Lone Star State Is Not Alone in Denying Due Process to Those Who Face Execution*, CHAMPION MAG. (1999), https://web.archive.org/web/20060427033631/http://www.criminaljustice.org/public.nsf/championarticles/99jul02?opendocument (explaining how resource center function was transferred to other entities, including Bryan Stevenson's Equal Justice Initiative); 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, 238–39 (2012) (describing the universe of "specialized death penalty attorneys, investigatory, and mitigation experts" who engage in "direct representation" and "consulting relationships" and work "in a variety of institutional settings").

416 *See* Olive, *supra* note 408, at 290 ("Conflicts, caseloads, and other factors will prevent a completely monolithic capital post-conviction defense system. Thus, by necessity, the private Bar will probably always have some involvement in a state's capital post-conviction defense effort.").

417 *See* Steiker & Steiker, *supra* note 415, at 239 (noting that specialized death penalty experts cannot assist every death-sentenced inmate).

variable in such an information-poor environment is the degree to which a prisoner is actually threatened with execution.

In other words, much of the warrant litigation happens because—even though some hypothetical prisoner could conceivably discover, develop, and present claims before the death warrant—the first time a highly qualified death penalty specialist will see the case is when a death warrant has sent a signal that it is especially worthy of attention. For intrinsically delayed claims that prisoners must litigate in a successive-application posture, prisoners are especially dependent on triaged attention from death penalty specialists, and the triage often directs the attention in a prisoner's direction only when the state sets an execution date.

Conclusion

Judges often feel frustrated with eleventh-hour death penalty litigation, and that frustration is understandable; it is deadline-driven judging with little judicial control over deadlines. The reasons for delay are complex and difficult to discern, and a human life hangs in the balance. But the Strategic Delay Account has the story all wrong, and the cracks in that account are not mere storytelling details. They are central defects in the behavioral theory that underwrites the harsh institutional response to death penalty litigation. Prisoners do not strategically withhold claims in hopes of jamming courts under death warrant. The timing of much warrant litigation is instead the combined result of intrinsic delay and structural decisions about how to route indigent legal services to death-sentenced prisoners.

Courts and other rulemaking institutions must tread more carefully. Statutes and decisional law need no longer be protectively configured in order to guard against elective delay, and jurisdictions must scale back any laws that punish zealous warrant-phase representation. Sure, lawyers that assume such representation will often allege a prisoner's weaker claims alongside stronger ones; *every lawyer* does that for *every client*. But warrant-phase presentation does not always signal weakness. When prisoners present their claims at the eleventh hour, judicial scrutiny and formal rules must be sensitive both to the type of claim presented, and *especially* to the history of legal representation in the case. The inference that a success or stay incentive caused elective delay is fair only for certain types of claims, and only when there is unusual continuity of legal representation. Indeed, some of the most important constitutional challenges to a death sentence will be presented at the eleventh hour, through no fault of the prisoner.