

UNIVERSITY *of* PENNSYLVANIA

JOURNAL *of* LAW & PUBLIC AFFAIRS

Vol. 5

June 2020

No. 4

SOMEWHERE BETWEEN DEATH ROW AND DEATH WATCH: THE PROCEDURAL TRAP CAPITAL DEFENDANTS FACE IN RAISING EXECUTION-RELATED CLAIMS

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For as long as the death penalty remains a viable punishment in the United States, safeguarding defendants' rights from sentencing through execution is crucial. As part of that effort, this Article focuses on a portion of the capital appellate process that is often overlooked and, in practice, effectively divests defendants of significant constitutional claims.

*As illustrated by the Supreme Court's recent decisions in *Bucklew v. Precythe* and *Dunn v. Price*, defendants face a significant procedural predicament in raising warrant- and execution-related claims. On one hand, courts have explained that these claims are not ripe, or are premature, when raised before a death warrant is issued. On the other hand, as in *Bucklew* and *Dunn*, when the defendant is under an active death warrant, courts are skeptical of the merits of these claims and often determine the defendant raised the claim too late, suspecting a game of delay. Since defendants are faced with increasingly short and arbitrary warrant periods, this Article explains, courts have essentially precluded defendants from properly raising and being heard on these critical issues.*

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Addressing this concern, this Article canvasses potential solutions, exploring the advantages and disadvantages of each. Ultimately, this Article concludes that the best solution is for states to enact and courts to enforce uniform warrant procedures. In doing so, this Article proposes language that would implement this solution. However, as states' former attempts to enact such procedures show, enforcement by courts is crucial for this solution to be effective and properly safeguard defendants' rights in last-minute, execution-related appeals.

INTRODUCTION	2
I. OVERVIEW OF THE CAPITAL APPELLATE PROCESS	6
II. GAPING HOLE IN THE CAPITAL APPELLATE PROCESS, AS ILLUSTRATED BY U.S. SUPREME COURT'S RECENT DECISIONS	13
A. <i>Supreme Court's Decision in Bucklew v. Precythe</i>	17
B. <i>Eleven Days After Bucklew: Supreme Court Issues 3 A.M. Decision in Dunn v. Price</i>	19
III. SEEMINGLY SIMPLE SOLUTIONS	21
A. <i>Allow Defendants to Raise Execution-Related Claims Sooner</i>	21
B. <i>Disallow Courts from Using Delay as a Reason for Denying Execution-Related Claims</i>	22
IV. ENACT AND ENFORCE UNIFORM WARRANT AND	23
EXECUTION-RELATED PROCEDURES	23
A. <i>Prior Attempts to Institute Uniform Warrant Procedures</i>	24
B. <i>States to Enact Uniform Warrant and Execution-Related Procedures</i>	26
C. <i>Courts to Enforce Such Procedures</i>	30
D. <i>Addressing Counterarguments</i>	30
CONCLUSION	33

INTRODUCTION

Anyone following the death penalty lately has likely wondered: why are executions being delayed later and later? Florida's most recent execution was of Gary Ray Bowles on August 22, 2019.¹ Bowles was pronounced dead at 10:58 P.M.—almost five hours after the scheduled execution time.² Just a

¹ Eric Levenson, *After Late Appeals Are Denied, Florida Executes Serial Killer Who Targeted Gay Men Across Southeast*, CNN (Aug. 23, 2019), <https://www.cnn.com/2019/08/22/us/gary-bowles-execution-florida/index.html> [<https://perma.cc/A9H9-K7BZ>].

² *Id.* Similarly, Michael Lambrix (Florida) was pronounced dead at 10:10 P.M. on October 5, 2017—over four hours after the scheduled execution time. Associated Press, *Florida Executes Double Murderer Michael Lambrix*, MIAMI HERALD (Oct. 6, 2017),

few months earlier, on June 20, 2019, Marion Wilson (Georgia) became the 1500th person executed in the United States since capital punishment and executions resumed in 1976 after *Furman v. Georgia*³ and *Gregg v. Georgia*.⁴ Wilson was pronounced dead at 9:52 P.M.—almost three hours after the scheduled execution time of 7 P.M.⁵ As of late, on-time executions seem to be the exception, not the rule.

Even defendants who receive last-minute stays of execution are experiencing delays at time of execution, when it ultimately occurs. Christopher Lee Price's Alabama execution, which was scheduled for April 11, 2019, was not stayed until after 11:34 P.M. on the night of his execution—five hours after the scheduled execution time.⁶

But these delays are not a result of the state unilaterally delaying executions. Rather, the answer lies in a procedural trap courts have created

<https://www.miamiherald.com/news/state/florida/article177484381.html> [<https://perma.cc/7TDR-WN4S>]. Patrick Hannon (Florida) was pronounced dead at 8:50 P.M. on November 7, 2018—almost three hours after the scheduled execution time. Associated Press, *Florida Executes Killer Patrick Hannon After Supreme Court Rejects Last-Ditch Appeal*, ORLANDO SENTINEL (Nov. 8, 2017), <https://www.orlandosentinel.com/politics/os-patrick-hannon-execution-20171108-story.html> [<https://perma.cc/2V4D-LFEX>].

³ See *Furman v. Georgia*, 408 U.S. 238 (1972) (holding the application of the death penalty unconstitutional under the Eighth Amendment); see also Stephen Wermiel, *SCOTUS for Law Students: The Supreme Court and the Death Penalty*, SCOTUSBLOG (Feb. 14, 2020), <https://www.scotusblog.com/2020/02/scotus-for-law-students-the-supreme-court-and-the-death-penalty/> [<https://perma.cc/CSC8-AA69>] (tracing the Supreme Court's death penalty jurisprudence).

⁴ See *Gregg v. Georgia*, 428 U.S. 153 (1976) (allowing states to reinstitute the death penalty if state statutes included individualized considerations to satisfy the concerns expressed in *Furman*); Nicole Chavez & Rebekah Riess, *Georgia Inmate is the 1,500th Person Executed in the U.S. Since the Death Penalty Was Reinstated*, CNN (June 20, 2019), <https://www.cnn.com/2019/06/20/us/marion-wilson-execution-georgia/index.html> [<https://perma.cc/N6V8-HSRF>].

⁵ *Id.* Press Release, Ga. Dep't of Corrs., Wilson Execution Media Advisory (June 13, 2019), <http://www.dcor.state.ga.us/NewsRoom/PressReleases/wilson-execution-media-advisory> [<https://perma.cc/8L44-KPXD>]. Also in Georgia, Scotty Morrow was pronounced dead at 9:38 P.M. on May 2, 2019—almost three hours after the 7 P.M. scheduled execution time. Press Release, Ga. Dep't of Corrs., Morrow Execution Final Media Advisory (May 2, 2019), <http://www.dcor.state.ga.us/NewsRoom/PressReleases/morrow-execution-final-media-advisory> [<https://perma.cc/MZ4J-HCTJ>]; see also Christian Boone, *Georgia Executes Scotty Morrow for 1994 Murders of 2 Women*, ATL. J. CONST. (May 2, 2019), <https://www.ajc.com/news/crime-law/georgia-set-execute-convicted-double-murderer-tonight/4r5Ibz4U8zNun6yEKqL02M/> [<https://perma.cc/9FN3-AJVV>].

⁶ *Dunn v. Price*, 139 S. Ct. 1312, 1313–14 (2019); *Alabama, Running Out of Time, Halts Execution of Sword and Dagger Killer of Pastor*, CBS NEWS (Apr. 12, 2019), <https://www.cbsnews.com/news/alabama-sword-dagger-killer-christopher-lee-price-execution-halted-pastor-bill-lynn/> [<https://perma.cc/6634-C5EP>]; Brendan O'Brien, *Alabama Set to Execute 46-Year-Old Man Convicted of Killing Minister in 1991*, REUTERS (May 30, 2019), <https://www.reuters.com/article/us-alabama-execution/alabama-executes-46-year-old-man-convicted-of-killing-minister-in-1991-idUSKCN1T018A> [<https://perma.cc/VBN4-E45D>].

and set for capital defendants that bottlenecks at the time of execution. In essence, courts force defendants to raise warrant- and execution-related claims challenging the constitutionality of their execution in last-minute proceedings. As a result, courts are forced to review these claims in a “fire drill approach” under increasingly short warrant periods.⁷ Ultimately, the Supreme Court is faced with last-minute petitions on the night of execution, the review of which often delays executions for several hours.⁸

Yet courts often deny these claims for being brought too late. The result: courts have essentially created a procedural bar that precludes defendants from meaningfully raising these substantive and important constitutional claims. Courts effectively deprive defendants of the ability to meaningfully raise and litigate warrant- and execution-related claims before execution. In short, the process defendants and their attorneys must follow for litigating warrant- and execution-related claims is fraught with procedural bars, rush, and chaos.

Despite the general consensus that America will eventually abolish the death penalty,⁹ the trend of states abolishing the death penalty or imposing moratoria on executions,¹⁰ and public support for capital punishment

⁷ *Jimenez v. State*, 265 So. 3d 462, 493 (Fla. 2018) (Pariente, J., dissenting) (arguing that, these “extremely short warrant period[s] create[] a fire drill approach” to reviewing defendant’s final claims for relief); see, e.g., *Outcomes of Death Warrants in 2020*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/outcomes-of-death-warrants-in-2020> [<https://perma.cc/Q265-XADQ>] (charting the outcomes of death warrants in 2020). See generally James E. Coleman, Jr., *Litigating at the Speed of Light: Postconviction Proceedings Under a Death Warrant*, 16 LITIG. 14 (1990) (describing the postconviction proceedings in the case of Ted Bundy). For more information regarding the term “warrant period,” see *infra* note 45 and accompanying text.

⁸ See, e.g., *Glossip v. Gross*, 135 S. Ct. 2726, 2763 (2015) (Breyer, J. dissenting) (“The studies bear out my own view, reached after considering thousands of death penalty cases and last-minute petitions over the course of more than 20 years.”). As Justice Breyer’s dissent in *Glossip* indicates, this issue has pervaded death penalty litigation for decades. See *id.* For ease of discussion, the U.S. Supreme Court is referenced as the “Supreme Court.”

⁹ See generally CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* (2016) (describing the history of the Supreme Court’s capital punishment jurisprudence); Austin Sarat et al., *The Rhetoric of Abolition: Continuity and Change in the Struggle Against America’s Death Penalty, 1900–2010*, 107 J. CRIM. L. & CRIMINOLOGY 757, 758 (2017) (documenting the evolving framing of the arguments against capital punishment).

¹⁰ See, e.g., *Colorado*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/colorado> [<https://perma.cc/Y4H6-2QP6>] (last visited May 19, 2020) (explaining Colorado abolished the death penalty in March 2020); Gretchen Frazee, *How States Are Slowly Getting Rid of the Death Penalty*, PBS (Mar. 13, 2019), <https://www.pbs.org/newshour/nation/how-states-are-slowly-getting-rid-of-the-death-penalty> [<https://perma.cc/24V4-YY2E>]; Sylvia Krohn, *Numerous States Consider Repeal of the Death Penalty*,

decreasing,¹¹ the death penalty will likely be around for a while longer. The federal government recently announced its intent to resume executions,¹² and the Supreme Court has indicated a renewed interest in the topic.¹³ As long as capital punishment remains on the books in the United States, we must ensure defendants' constitutional rights are protected—from sentencing through execution.¹⁴

The underlying judicial processes that must occur before an inmate reaches the execution chamber hold great significance in terms of protecting and safeguarding capital defendants' constitutional rights.¹⁵ Specifically, the processes that occur *after* trial—collectively, the capital appellate process—are critical in ensuring the constitutionality of capital punishment. In fact, the Death Penalty Information Center reported in 2011 that two-thirds of death sentences are overturned on appellate review.¹⁶ An important

AM. BAR ASS'N (May 10, 2019), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2019/spring/numerous-states-consider-repeal-of-the-death-penalty/ [https://perma.cc/RJ45-PC4X]; see also, e.g., John Gramlich, *California Is One of 11 States that Have the Death Penalty but Haven't Used it in More than a Decade*, PEW RES. CTR. (Mar. 14, 2019), <https://www.pewresearch.org/fact-tank/2019/03/14/11-states-that-have-the-death-penalty-havent-used-it-in-more-than-a-decade/> [https://perma.cc/47RD-P5L6].

¹¹ See DEATH PENALTY INFO. CTR., *THE DEATH PENALTY IN 2019: YEAR-END REPORT* (2019), <https://files.deathpenaltyinfo.org/reports/year-end/YearEndReport2019.pdf> [https://perma.cc/CS4H-VU93] (reporting that sixty percent of Americans “prefer life without parole to the death penalty” as punishment for capital offenses).

¹² Katie Benner, *U.S. to Resume Capital Punishment for Federal Inmates on Death Row*, N.Y. TIMES (July 25, 2019), <https://www.nytimes.com/2019/07/25/us/politics/federal-executions-death-penalty.html?smid=fb-nytimes&smtyp=cur&fbclid=IwAR1d-946v3RMBKUE41lzttdMNmej5YJuwhtcByXXuqIVpMFKfvJI0-57fo> [https://perma.cc/VE4Y-WP7S]; Sadie Gurman & Jess Bravin, *Federal Government Set to Resume Executions*, WALL ST. J. (July 25, 2019), <https://www.wsj.com/articles/federal-government-set-to-resume-executions-11564066216?mod=e2fb&sfns=mo> [https://perma.cc/TK3H-6YSX]; see also *Outcomes of Death Warrants in 2020*, *supra* note 7. However, since the federal government made this announcement, litigation surrounding the announcement has transpired and remains pending, which has delayed resuming executions. See, e.g., Mark Berman & Robert Barnes, *Supreme Court Won't Let Justice Dept. Immediately Resume Federal Executions After Hiatus*, WASH. POST (Dec. 6, 2019), https://www.washingtonpost.com/politics/courts_law/supreme-court-wont-let-justice-dept-immmediately-resume-federal-executions-after-hiatus/2019/12/06/7103d8e6-1773-11ea-a659-7d69641c6ff7_story.html [perma.cc/NP6V-47DC]; Lawrence Hurley, *U.S. Appeals Court Hands Win to Trump Plan to Resume Federal Executions*, REUTERS (Apr. 7, 2020), <https://www.reuters.com/article/us-usa-court-deathpenalty/us-appeals-court-hands-win-to-trump-plan-to-resume-federal-executions-idUSKBN21P2LN> [http://perma.cc/X6ZZ-BMMY].

¹³ See *infra* note 62 (discussing the Supreme Court's decision in *Bucklew v. Precythe* and the Court's seemingly renewed interest in death penalty issues).

¹⁴ *Glossip v. Gross*, 135 S. Ct. 2726, 2776 (2015) (Breyer, J., dissenting) (“[W]e are left with a judicial responsibility.”).

¹⁵ E.g., *infra* note 44 (reviewing scholarship on the processes).

¹⁶ See DEATH PENALTY INFO. CTR., *STRUCK BY LIGHTNING: THE CONTINUING ARBITRARINESS OF THE DEATH PENALTY THIRTY-FIVE YEARS AFTER ITS RE-INSTATEMENT*

part of the capital appellate process is the death warrant process, which scholarship has generally overlooked.¹⁷

Focusing on the death warrant process, this Article argues that states should implement and enforce uniform warrant procedures that allow courts sufficient time to thoroughly review each inmate's warrant- and execution-related claims. By way of background, Part II provides an overview of the lengthy capital appellate process defendants go through before execution.¹⁸ Part III then canvasses the difficulty capital defendants face in raising warrant- and execution-related claims, as illustrated by the Supreme Court's recent decisions in *Bucklew* and *Price*. Part IV analyzes the advantages and disadvantages of three intuitive and seemingly simple solutions to this issue. After exploring each of these potential solutions, Part V contends that the optimal solution is likely for state legislatures to enact and courts to enforce uniform warrant and execution procedures, whether by statute or rule. Part V also proposes an example of legislation that could be used to effectuate this solution.

I. OVERVIEW OF THE CAPITAL APPELLATE PROCESS

After being sentenced to death, capital defendants embark on the long capital appellate process. This Part provides a general, chronological overview of this process, from the first appeal after sentencing to execution: direct appeal, postconviction and federal habeas claims, executive clemency, and final, warrant-related claims.¹⁹

IN 1976, at 8 (2011), <https://files.deathpenaltyinfo.org/legacy/documents/StruckByLightning.pdf> [<https://perma.cc/ZP8V-GNEU>]; see also BRANDON L. GARRETT, END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE 44 (2017) ("40% of death sentences never result in executions because cases are reversed on appeal or postconviction for a host of reasons.").

¹⁷ See *infra* note 44 (discussing existing scholarship).

¹⁸ This discussion generally assumes that the defendant has not waived the right to any appeal. This Article also focuses on the state appellate process. Federal courts also play a role—albeit less significant—in this process. See, e.g., Michael A. Millemann, *Collateral Remedies in Criminal Cases in Maryland: An Assessment*, 64 MD. L. REV. 968, 969 (2005) ("At the direction of Congress and the United States Supreme Court, the federal judiciary now plays an extremely limited role in protecting the federal constitutional rights of state prisoners."); Wermiel, *supra* note 3 ("Death penalty litigation today is primarily about state death penalty laws . . ."). Those processes are not discussed in this Article. However, as the federal government seeks to resume executions after a 16-year moratorium, discussing the federal side of this issue will likely be necessary soon. Gurman & Bravin, *supra* note 12.

¹⁹ See, e.g., *Beck v. State*, 396 So. 2d 645, 656 (Ala. 1980) ("Appellate review of death cases is required to make sure that the death penalty will not be wantonly or freakishly imposed." (citing *Gregg v. Georgia*, 428 U.S. 153 (1976))). The exact way in which these processes proceed likely varies from state to state. This Article provides a general overview and discusses the process generally.

First, the defendant gets a direct appeal—the appeal from the trial court’s decision convicting the defendant of a capital offense and imposing a sentence of death.²⁰ In the direct appeal, defendants are limited to challenging aspects of their trial²¹—for example, jury selection issues or the trial court’s evidentiary determinations.²² In addition to errors alleged by the defendant, some courts also review whether the evidence was sufficient to support the defendant’s conviction²³ and whether the sentence of death is proportionate.²⁴ Courts often review these issues—sufficiency of the evidence and proportionality—even if the defendant does not raise a related claim.²⁵

²⁰ See, e.g., *Death Penalty Appeals Process*, CAP. PUNISHMENT IN CONTEXT, <https://capitalpunishmentincontext.org/resources/dpappealsprocess> [<https://perma.cc/YPK5-4VKP>] (last visited Apr. 26, 2019) (describing the appellate process following the death sentence). This Part provides a general overview. Because state statutes control this process, it may differ from state to state. For another overview of this process, see, e.g., Joan M. Fisher, *Expedited Review of Capital Post-Conviction Claims: Idaho’s Flawed Process*, 2 J. APP. PRAC. & PROCESS 85, 88–90 (2000).

²¹ See *Death Penalty Appeals Process*, *supra* note 20.

²² See, e.g., *Asay v. State*, 580 So. 2d 610 (Fla. 1991) (direct appeal challenging finding of premeditation); *Lambrix v. State*, 494 So. 2d 1143 (Fla. 1986) (direct appeal challenging the exclusion of jurors opposed to death penalty and the admission of certain evidence); *Rousseau v. State*, 291 S.W.3d 426 (Tex. Crim. App. 2009) (direct appeal challenging admission of evidence).

²³ In a sufficiency analysis, “the question is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt.” *Pham v. State*, 70 So. 3d 485, 501 (Fla. 2011) (quoting *Caraballo v. State*, 39 So. 3d 1234, 1243–44 (Fla. 2011) (internal quotation marks omitted)); see also *Jackson v. Virginia*, 443 U.S. 307, 316 (1979) (defining “sufficient proof” as “evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense”).

²⁴ The purpose of proportionality review, in which courts review “the totality of the circumstances to determine if death is warranted in comparison to other cases where the sentence of death has been upheld,” is to ensure the crime is among the most aggravated and least mitigated and, therefore, deserving of death. *Pham*, 70 So. 3d at 500 (quoting *England v. State*, 940 So. 2d 389, 408 (Fla. 2006)); see also *Pulley v. Harris*, 465 U.S. 37, 45 (1984) (explaining that proportionality review is not constitutionally required under Supreme Court case law). Not all states conduct proportionality review. See, e.g., Brooks Emanuel, *North Carolina’s Failure to Perform Comparative Proportionality Review: Violating the Eighth and Fourteenth Amendments by Allowing the Arbitrary and Discriminatory Application of the Death Penalty*, 39 N.Y.U. REV. L. & SOC. CHANGE 419, 422–31 (2015) (“North Carolina’s imposition of the death penalty violates the Eighth and Fourteenth Amendments to the United States Constitution.”). For more on proportionality, see generally William W. Berry III, *Practicing Proportionality*, 64 FLA. L. REV. 687 (2012); William W. Berry III, *Promulgating Proportionality*, 46 GA. L. REV. 69 (2011); Timothy V. Kaufman-Osborn, *Proportionality Review and the Death Penalty*, 29 JUSTICE SYS. J. 257 (2008).

²⁵ See, e.g., *Pham*, 70 So. 3d at 501.

When the state's highest court denies the direct appeal, the defendant usually files a petition for writ of certiorari to the Supreme Court.²⁶ The Supreme Court rarely grants petitions for writs of certiorari, much less in capital cases.²⁷ When the Supreme Court denies the petition for writ of certiorari arising from the direct appeal, that is the end of the litigation resulting from the original trial.²⁸

Once the defendant's sentence of death is final, the defendant may raise postconviction (or "collateral") claims as well as a state habeas corpus petition.²⁹ Postconviction review is available in every state.³⁰ In this phase, defendants raise claims "surrounding the conviction and sentence that are outside of the record"³¹—for example, ineffective assistance of trial counsel or newly discovered evidence.³² If the trial court denies the defendant's postconviction motion, the defendant may appeal to the state's appellate court.³³ Likewise, if the trial court grants relief, the state may appeal. When the appellate court denies the postconviction appeal, defendants, again, usually file a petition for writ of certiorari to the Supreme Court.

Outside of the first, guaranteed postconviction claim, defendants may also and often do file successive postconviction appeals—again depending on each state's statutes and rules. The literature and jurists widely recognize

²⁶ E.g., *Death Penalty Appeals Process*, *supra* note 20; *Supreme Court Procedure*, SCOTUSBLOG, <https://www.scotusblog.com/reference/educational-resources/supreme-court-procedure/> [<https://perma.cc/E67E-GTWX>] (last visited Apr. 23, 2020). For more on certiorari generally, see generally, e.g., Stewart A. Baker, *A Practical Guide to Certiorari*, 33 CATHOLIC U. L. REV. 611 (1984).

²⁷ E.g., *The Supreme Court—The Statistics*, 133 HARV. L. REV. 412, 427 tbl.III (2019); *The Supreme Court—The Statistics*, 131 HARV. L. REV. 403, 410, 413 tbl.III (2017); see also *Success Rate of a Petition for Writ of Certiorari to the Supreme Court*, SUP. CT. PRESS, https://supremecourtpress.com/chance_of_success.html [<https://perma.cc/NT2X-CPHY>] (last visited May 27, 2019) (listing the success rate of writs of certiorari by year); Wermiel, *supra* note 3 ("It is extremely rare for the Supreme Court to agree to hear a direct appeal, however That direct appeal may go all the way to the U.S. Supreme Court but will rarely be granted."); *Supreme Court Procedures*, U.S. COURTS, <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> [<https://perma.cc/9QTQ-PESC>] (last visited Apr. 23, 2020) ("[T]he Court accepts 100-150 of the more than 7,000 cases that it is asked to review each year."); *Supreme Court Procedure*, *supra* note 26 ("Of the 7,000 to 8,000 cert petitions filed each term, the court grants certiorari and hears oral argument in only about 80.").

²⁸ *Death Penalty Appeals Process*, *supra* note 20.

²⁹ E.g., Nancy J. King, *Judicial Review: Appeals and Postconviction Proceedings*, in EXAMINING WRONGFUL CONVICTIONS: STEPPING BACK, MOVING FORWARD 4 (A. Redlich et al., eds., 2014); Wermiel, *supra* note 3.

³⁰ KING, *supra* note 29, at 4; see *Death Penalty Appeals Process*, *supra* note 20.

³¹ *Id.*

³² See generally, e.g., *Lambrix v. State*, 534 So. 2d 1151 (Fla. 1988) (initial postconviction appeal challenging effectiveness of trial counsel).

³³ See *Death Penalty Appeals Process*, *supra* note 20.

the length of time defendants spend litigating postconviction claims, or the delay postconviction causes in the capital process.³⁴ In fact, some, including the late Justice Stevens and Justice Breyer, have argued that this delay amounts to a violation of the Eighth Amendment's protection against cruel and unusual punishment.³⁵

For example, Florida defendant Cary Michael Lambrix was convicted in 1984 of a murder that occurred in 1983.³⁶ Before his execution in 2017, Lambrix had “filed numerous successive petitions for postconviction relief and successive habeas petitions” in state court, as well as “numerous . . . pleadings in federal court.”³⁷ Even after the Supreme Court of Florida “determin[ed] in 2013 that Lambrix had ‘exhausted all permissible legal remedies in his case,’ Lambrix . . . continued to raise repetitive state and federal claims” all the way through to his execution.³⁸

³⁴ See, e.g., *Individual Justices and the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/united-states-supreme-court/individual-justices> [<https://perma.cc/FLU7-ZXP9>] (last visited Apr. 23, 2020) (documenting the Justice's public statements regarding the death penalty, including statements recognizing the length of time defendants spend on death row while their cases are pending). See generally, e.g., Nancy Levit, *Expediting Death: Repressive Tolerance and Post-Conviction Due Process Jurisprudence in Capital Cases*, 59 U.M.K.C. L. REV. 55 (1990) (discussing due process defects within the capital punishment system).

³⁵ E.g., *Glossip v. Gross*, 135 S. Ct. 2726, 2764–72 (2015) (Breyer, J., dissenting) (explaining that the death penalty may violate the Eighth Amendment because of “lack of reliability, the arbitrary application of a serious and irreversible punishment, individual suffering caused by long delays, and lack of penological purpose”); see also Christopher E. Smith, *Justice John Paul Stevens and Capital Punishment*, 15 BERKELEY J. CRIM. L. 205, 246 (2010) (tracing the evolution of Justice Stevens's death penalty jurisprudence, including his eventual belief that a “penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment” (quoting *Baze v. Rees*, 553 U.S. 35, 78 (2008) (Stevens, J., concurring) (alteration in original))); David Cole, *Justice Breyer v. the Death Penalty*, NEW YORKER (June 30, 2015), <https://www.newyorker.com/news/news-desk/justice-breyer-against-the-death-penalty> [<https://perma.cc/RXQ8-GLZZ>] (highlighting Justice Breyer's jurisprudence discussing whether the death penalty violates the Eighth Amendment); *Justice John Paul Stevens's Death Penalty Jurisprudence*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/justice-john-paul-stevens-death-penalty-jurisprudence> [<https://perma.cc/DX29-QMNV>] (last visited Apr. 24, 2020) (listing excerpts from Justice Stevens' opinions regarding the death penalty). But see, e.g., *Glossip*, 135 S. Ct. at 2748 (Scalia, J., dissenting) (arguing that Breyer's point about the time defendant spend on death row is “nonsense”).

³⁶ See, e.g., Emily Mavrikis, *Michael Lambrix Executed After 33 Years on Florida's Death Row*, WUFT (Oct. 6, 2017), <https://www.wuft.org/news/2017/10/06/michael-lambrix-executed-after-33-years-on-floridas-death-row/> [<https://perma.cc/Z7XC-JGQ4>].

³⁷ *Lambrix v. State*, 217 So. 3d 977, 981–82 (Fla. 2017); accord *Lambrix v. Jones*, 227 So. 3d 550, 552 (Fla. 2017) (“Lambrix's ‘death case . . . has been in the judicial system for a substantial period of time.’” (quoting *Lambrix v. State*, 39 So. 3d 260, 262 (Fla. 2010))).

³⁸ *Lambrix*, 227 So. 3d at 552 (quoting *Lambrix v. State*, 124 So. 3d 890, 900 (Fla. 2013)).

Outside of the appellate process, defendants may also petition for executive clemency.³⁹ In this process, the governor (or a board of advisors, or a combination of the two) has full discretion to commute a defendant's sentence—implementing, instead, a sentence of life imprisonment without parole.⁴⁰ Thus, the clemency process is essentially without standards or rules. Since the death penalty was reinstituted in 1976, the frequency of executive clemency in capital cases has declined.⁴¹

Once a defendant exhausts his or her guaranteed appeals, a death warrant may be issued scheduling the defendant's execution.⁴² In fact, some states *require* the issuance of a death warrant once certain appeals have been denied.⁴³ While scholars often discuss capital punishment—more specifically, capital sentencing processes and the constitutional or moral

³⁹ See *Clemency*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/clemency> [<https://perma.cc/3BZ8-QRNY>] (last visited Apr. 24, 2020) (describing the clemency process). As with the other processes discussed in this Article, each state has its own laws regarding executive clemency. Hugo Adam Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255, 256 (1990). Generally, “[c]lemency decisions . . . are standardless in procedure, discretionary in exercise, and unreviewable in result.” *Id.* at 257; accord Winthrop Rockefeller, *Executive Clemency and the Death Penalty*, 21 CATH. U. L. REV. 94, 95 (1971) (“The power to pardon is absolute.”).

⁴⁰ See Bedau, *supra* note 39 (highlighting that clemency can result in commutation of a death sentence “to a less severe punishment,” like a “lengthy prison term[.]”); Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. RICH. L. REV. 289, 289–290 (1993) (noting that the authority to pardon, grant reprieve, or commute a sentence varies by state); *Clemency*, *supra* note 39 (discussing courts’ reluctance to impose upon executive discretion to grant clemency); see also, e.g., *Carroll v. State*, 114 So. 3d 883, 887–88 (Fla. 2013) (“[I]t is not this Court’s prerogative to second-guess the executive branch on matters of clemency in capital cases”).

⁴¹ Radelet & Zsembik, *supra* note 40, at 290 (citing Bedau, *supra* note 39, at 257); see Rockefeller, *supra* note 39, at 97 (“[E]xecutive clemency in the United States has been reserved for the rare exception.”). See generally *Clemency*, *supra* note 39 (showing the low number of clemencies granted by states since 1976).

⁴² See, e.g., FLA. STAT. § 922.052 (2020); TEX. CODE CRIM. PROC. ANN. art. 43.141 (West 2020); WASH. REV. CODE § 10.95.160 (2020); see also Wermiel, *supra* note 3 (“Typically, an inmate who is still pursuing a direct appeal or who has a first habeas petition pending in federal court is entitled to a stay, which is a court order freezing the status quo to prevent execution while the appeals are pending.”). Like the appellate process, the warrant process differs from state to state.

⁴³ See, e.g., Susanna Bagdasarova, *Florida Accelerates Death Penalty Process with “Timely Justice Act,”* AM. B. ASS’N (June 1, 2013), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2013/summer/florida-accelerates-death-penalty-process-with-timely-justice-ac/ [<https://perma.cc/J8FS-PQMW>] (discussing Florida’s Timely Justice Act of 2013). See generally OFFICE OF VICTIM’S SERVS., CAL. ATT’Y GEN.’S OFFICE., A VICTIM’S GUIDE TO THE CAPITAL CASE PROCESS 16, <https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/deathpen.pdf> [<https://perma.cc/PF4S-4P68>] (discussing the process of capital cases in California).

viability of the death penalty altogether—the death warrant process has not been addressed nearly as often or as thoroughly.⁴⁴

The time between the warrant being issued and the scheduled execution is referred to as “the warrant period.”⁴⁵ Generally, once a warrant is issued, the defendant is moved from his or her cell on death row to another area—or, in some instances, another facility—called “death watch.”⁴⁶ There, the defendant prepares for execution.

⁴⁴ For scholarship on capital sentencing process at trial, see generally, e.g., Carissa Byrne Hessick & William W. Berry III, *Sixth Amendment Sentencing After Hurst*, 66 U.C.L.A. L. REV. 448 (2019) (arguing that Sixth Amendment sentencing after *Hurst* “invalidates several state capital sentencing systems and several noncapital systems”); Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today’s Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345 (1998) (discussing whether the addition of aggravating and mitigating factors has actually eliminated arbitrariness in capital sentencing after *Furman*); Jeffrey L. Kirchmeier, *Casting a Wider Net: Another Decade of Legislative Expansion of the Death Penalty in the United States*, 34 PEPP. L. REV. 1 (2006) (discussing how legislatures have recently expanded the death penalty by adding aggravating factors to capital sentencing schemes). Specifically, for scholarship regarding capital juries, see generally, e.g., Scott E. Sundby, *Moral Accuracy & “Wobble” in Capital Sentencing*, 80 IND. L.J. 56 (2005) (arguing that any “any system where a jury is asked to make the moral judgment of whether someone should die” will contain inconsistency); Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557 (1998) (analyzing the “role of remorse and its interaction with trial strategy”); Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109 (1997) (examining how, in capital trials, jurors “react differently to expert and non-expert testimony and determine how they perceive so-called ‘abuse excuse’ defenses”).

For scholarship on capital postconviction processes, see generally, e.g., Fisher, *supra* note 20 (focusing “on the operation of expedited capital postconviction review procedure in Idaho”); Levit, *supra* note 34 (arguing for procedural due process challenges to capital cases).

For scholarship on the viability of the death penalty altogether, see generally, e.g., William W. Berry III, *Unusual State Capital Punishments*, 72 FLA. L. REV. 315 (2020).

⁴⁵ E.g., *Jimenez v. State*, 265 So. 3d 462, 493 n.23 (Fla. 2018) (Pariente, J., dissenting); *Coronavirus Pandemic Halts Executions, Perhaps for the Foreseeable Future*, DEATH PENALTY INFO. CTR. (Mar. 27, 2020), <https://deathpenaltyinfo.org/news/coronavirus-pandemic-halts-executions-perhaps-for-the-foreseeable-future> [<https://perma.cc/83NN-PBKN>].

⁴⁶ See, e.g., Sydney P. Freedberg, ‘Yes, I’m Angry. . . . Yes, I’m Bitter. I’m Frustrated,’ ST. PETERSBURG TIMES (July 4, 1999), <https://deathpenaltyinfo.org/node/1914> [<https://perma.cc/69VQ-X8AR>] (detailing the days preceding one individual’s near execution); Adam Tamburin, *Death Row Inmate Billy Ray Irick Moved to Death Watch Ahead of Thursday Execution Date*, TENNESSEAN (Aug. 7, 2018), <https://www.tennessean.com/story/news/crime/2018/08/07/tennessee-death-row-billy-ray-irick-moved-death-watch-before-execution-date/923464002/> [<https://perma.cc/4AKF-VULW>] (“Death watch is the three-day period before an execution when strict guidelines are implemented to maintain the security and control of the offender and to maintain safe and orderly operations of the prison . . .”); see also *Death Row*, FLA. DEP’T OF CORRS., <http://www.dc.state.fl.us/ci/deathrow.html> [<https://perma.cc/274L-SHA3>] (last visited Apr. 17, 2020) (providing an overview of death row in Florida prisons).

After a warrant issues, most defendants file a final claim raising warrant- or execution-related claims, which ultimately leads to a final appeal. While some defendants may raise these claims before a death warrant is issued,⁴⁷ courts generally consider these claims premature and, as explained below, deny the claims when brought before a warrant. Claims defendants raise after a warrant is issued (referenced collectively herein as “warrant- or execution-related claims”) include—but are not limited to—arguments that (a) the warrant process is arbitrary and, therefore, violates the Eighth Amendment; (b) the execution will violate the Eighth Amendment due to the time the defendant has spent on death row; (c) the method of execution violates the Eighth Amendment because it causes a substantial risk of pain and, therefore, amounts to cruel and unusual punishment; and (d) the defendant is otherwise ineligible for execution under the Eighth Amendment—due to intellectual disability or for some other reason.⁴⁸

Oftentimes, courts are rushed to review these warrant- or execution-related claims because defendants face short warrant periods,⁴⁹ which force them to raise, litigate, obtain a ruling on, and exhaust appeals on these claims within a matter of weeks—sometimes days.⁵⁰ As one author explained,

⁴⁷ See *infra* Part III (discussing procedural setbacks defendants may face in their death penalty claims, including issues with ripeness).

⁴⁸ See, e.g., *Long v. State*, 271 So. 3d 938, 941 (Fla. 2019) (court denying defendant’s many constitutional claims, including that the death penalty violated his rights due to the length of time he had spent on death row, his mental illness, and the lethal injection method); *Asay v. State*, 224 So. 3d 695, 702–03 (Fla. 2017) (defendant challenging the lethal injection method and the death penalty, generally, by alleging that the court’s prior actions were arbitrary and violated his due process rights); *Lambrix v. State*, 227 So. 3d 550, 552 (Fla. 2017) (court denying defendant’s evidentiary and procedural claims for relief). In addition, defendants may raise claims of innocence or other guilt-related claims.

⁴⁹ For example, in Florida, recent executions followed warrant periods of around thirty days. See *Jimenez v. State*, 265 So. 3d 462, 493 (Fla. 2018) (Pariente, J., dissenting) (“Since executions resumed in Florida [in 2017], the judicial system—the circuit courts, this Court, and the United States Supreme Court—has been faced with increasingly short warrant periods, the shortest being the one in this case—a mere 27 days.”). Recent warrant periods in Alabama have been just as short. See, e.g., Ivana Hrynkiw, *Execution Date Set for Man Convicted in 1997 Pelham Quadruple Slaying*, AL.COM, <https://www.al.com/news/birmingham/2019/04/execution-date-set-for-man-convicted-in-1997-pelham-quadruple-slaying.html> [<https://perma.cc/2E37-DYBA>] (last updated May 14, 2019) (detailing an Alabama death row inmate’s short warrant period of only a few weeks); see also Melanie Kalmanson, *Steps Toward Abolishing Capital Punishment: Incrementalism in the American Death Penalty*, 28 WM. & MARY BILL RTS. J. 587, 630–34 (2020) (discussing the effect of delay in the warrant and execution process).

⁵⁰ See, e.g., *Dunn v. Price*, 139 S. Ct. 1312, 1315 (2019) (Breyer, J., dissenting) (“[I]t is possible that Price was given no more than 72 hours to decide how he wanted to die, notwithstanding the 30-day period prescribed by state law.”); Levit, *supra* note 34, at 83

Collapsing the time for adjudication of capital habeas cases has a powerful substantive impact. Death row inmates, who have no right to counsel, who are generally uneducated, and who must psychologically prepare to die, are forced to comprehend several supremely complex areas of law, all within an accelerated time frame.⁵¹

As this Article explains, this concern is exacerbated with respect to warrant- and execution-related claims.

As with the other appeals discussed above, after the state court denies warrant- and execution-related claims, defendants generally file petitions for writs of certiorari and/or applications for a stay of execution with the Supreme Court.⁵² The Supreme Court's denial of certiorari or stay of execution at this point is generally the final step before the defendant proceeds to execution. The rush of short warrant periods often causes the Supreme Court to review last-minute petitions for writ of certiorari.⁵³ The last-minuteness often causes the Supreme Court to delay execution while it reviews the last-minute requests for relief.⁵⁴

Despite the extent of the capital appellate process, a gaping hole exists somewhere between death row and death watch. In that hole is the time at which defendants may properly raise warrant- and execution-related claims and have a fair opportunity to fully litigate those claims.

II. GAPING HOLE IN THE CAPITAL APPELLATE PROCESS, AS ILLUSTRATED BY U.S. SUPREME COURT'S RECENT DECISIONS

The Supreme Court's landmark decision in *Furman v. Georgia* in 1972 and then *Gregg v. Georgia* in 1976 instituted contemporary capital punishment.⁵⁵ Since then, most of the Supreme Court's decisions instituting

("[C]apital habeas litigants may be required, on extremely short notice, to argue . . . that a pending execution should be stayed *and* to fully litigate the range of substantive legal issues and habeas procedures on the merits."); *Executions Scheduled for 2020*, *supra* note 7.

⁵¹ Levit, *supra* note 34, at 56.

⁵² For more explanation on the process the Supreme Court uses in reviewing these requests, see, e.g., Wermiel, *supra* note 3.

⁵³ See, e.g., *Glossip v. Gross*, 135 S. Ct. 2726, 2763 (Breyer, J., dissenting) ("The studies [highlighting the arbitrary application of the death penalty] bear out my own view, reached after considering thousands of death penalty cases and last-minute petitions over the course of more than 20 years."); Wermiel, *supra* note 3 ("Today, a stay application may still come in at night and close to the time of execution.").

⁵⁴ See *supra* note 6 and accompanying text; see also Kalmanson, *supra* note 49, at 630–34 (discussing delays in the warrant and execution process).

⁵⁵ *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972); see Wermiel, *supra* note 3 (explaining the background information).

changes to capital punishment—other than decisions holding certain classes of defendants ineligible for execution under the Eighth Amendment⁵⁶—have addressed the judicial processes that must occur between the crime and execution.⁵⁷ The Supreme Court has issued prophylactic decisions clarifying how constitutional principles apply to certain aspects of the capital punishment process⁵⁸ but has avoided squarely confronting the constitutionality of capital punishment,⁵⁹ despite some Justices urging the Court to do so.⁶⁰

Justice Kennedy's 2018 retirement undoubtedly ushered in a new era for the Court—in more contexts than just capital punishment.⁶¹ Although the

⁵⁶ See generally, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that juvenile defendants are not eligible for capital punishment); *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that intellectually disabled defendants are not eligible for capital punishment); *Ford v. Wainwright*, 477 U.S. 399 (1986) (holding that insane defendants are not eligible for capital punishment). For more on how the pool of eligibility has been narrowed and how this may continue in the future, see generally Kalmanson, *supra* note 49.

⁵⁷ E.g., *McKinney v. Arizona*, 140 S. Ct. 702, 709 (2020) (holding that “state appellate courts may . . . [independently] reweigh[] aggravating and mitigating circumstances, and may do so in collateral proceedings as appropriate and provided under state law”); see also, e.g., Adam M. Gershowitz, *Imposing a Cap on Capital Punishment*, 72 MO. L. REV. 73, 73 (2007) (“[T]he Supreme Court . . . has laid down dozens of procedural rules for the death penalty over the last thirty years.”); *id.* at 76 (“[T]oday’s death-penalty trials are marked by considerably more rules and procedural hurdles than three decades ago.” (emphasis removed)); Renee Knake, *Abolishing Death*, 13 DUKE J. CONST. L. & PUB. POL’Y 1, 7 (2018) (explaining the procedure-based issues the Court generally hears in death penalty cases). See generally STEIKER & STEIKER, *supra* note 9 (addressing the Supreme Court’s constitutional regulation of the death penalty).

⁵⁸ See, e.g., *Flowers v. Mississippi*, 139 S. Ct. 2228, 2235 (2019) (“We simply enforce and reinforce *Batson* by applying it to the extraordinary facts of this case.”).

⁵⁹ See, e.g., Knake, *supra* note 57, at 10 (“[A] majority of the Supreme Court appears unlikely to conclude that the death penalty is per se unconstitutional under the Eighth Amendment.”); James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963–2006*, 107 COLUM. L. REV. 103, 119 (2007) (discussing the need for the Supreme Court to further regulate capital punishment); see also Kirchmeier, *Aggravating and Mitigating Factors*, *supra* note 44, at 350–51 (explaining how, before *Furman*, the Court addressed the constitutionality of capital punishment). See generally James E. Coleman, *One Way or Another the Death Penalty Will Be Abolished, but Only After the Public No Longer Has Confidence in Its Use*, 13 DUKE J. CONST. L. & PUB. POL’Y 15, 15–16 (2018) (arguing that a prerequisite for any successful abolitionist movement must be the erosion of public confidence in the death penalty).

⁶⁰ *Glossip v. Gross*, 135 S. Ct. 2726, 2764–72 (2015) (Breyer, J., dissenting) (Ginsburg, J., joining).

⁶¹ See, e.g., Brendan Beery, *Rational Basis Loses its Bite: Justice Kennedy’s Retirement Removes the Most Lethal Quill from LGBT Advocates’ Equal Protection Quiver*, 69 SYRACUSE L. REV. 69, 71 (2019) (discussing Justice Kennedy’s influence on LGBT rights); Zachary S. Price, *Symmetric Constitutionalism: An Essay on Masterpiece Cakeshop and the Post-Kennedy Supreme Court*, 70 HASTINGS L.J. 1273, 1314 (2019) (discussing the fate of substantive due

full effect of Justice Kennedy's departure remains unclear, the "new" Court has already proven more outspoken on capital punishment than the "old" Court. The new Court seems to have a renewed interest in the death penalty, as demonstrated most clearly by the Court's recent decision in *Bucklew v. Precythe*.⁶² The Court's decision in *Bucklew* will undoubtedly spur discussion about the principles surrounding capital sentencing and what the future may hold for capital punishment under the new Court. Contributing to that discussion, this Article explains how *Bucklew* and another recent Supreme Court decision, *Dunn v. Price*,⁶³ illustrate a widespread and longstanding problem defendants face in raising warrant- and execution-related claims.⁶⁴

Oftentimes, courts deny capital defendants' warrant- and execution-related claims as unripe when raised before the defendant is under an active death warrant.⁶⁵ In doing so, courts reason that these

process under the post-Kennedy Court); *Impact of Justice Kennedy's Retirement Examined*, HARV. GAZETTE (June 28, 2018), <https://news.harvard.edu/gazette/story/2018/06/the-impact-of-justice-kennedys-retirement-is-examined/> [<https://perma.cc/QVG2-ED6Z>] (explaining the impact of Justice Kennedy's retirement on the future of the Court); Stewart M. Patrick, *The Global Implications of Justice Kennedy's Retirement*, COUNCIL ON FOREIGN REL. (June 28, 2018), <https://www.cfr.org/blog/global-implications-justice-kennedys-retirement> [<https://perma.cc/G4P5-86CS>] (discussing the effect Kennedy's retirement will likely have on international law). Some argue that Trump's presidency coinciding with Kennedy's retirement further contributes to this change. See generally J. Richard Broughton, *The Federal Death Penalty, Trumpism, and Civil Rights Enforcement*, 67 AM. U. L. REV. 1611 (2018) (observing "the underappreciated place of the federal death penalty in American law and politics").

⁶² *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019); see, e.g., Linda Greenhouse, Opinion, *A Supreme Court Do-Over*, N.Y. TIMES (Apr. 11, 2019), <https://www.nytimes.com/2019/04/11/opinion/supreme-court-death-penalty.html> [<https://perma.cc/X874-YRP8>] (discussing the Supreme Court's "glaringly disparate treatment of two death-row inmates"); Lawrence Hurley, *Death Penalty Tensions Flare Again on Divided U.S. Supreme Court*, REUTERS (May 13, 2019), <https://www.reuters.com/article/us-usa-court-deathpenalty/death-penalty-tensions-flare-again-on-divided-u-s-supreme-court-idUSKCN1SJ1RI> [<https://perma.cc/APL6-SJFG>] (noting "internal divisions" between Supreme Court Justices on the issue of capital punishment); Adam Liptak, *Rancor and Raw Emotion Surface in Supreme Court Death Penalty Ruling*, N.Y. TIMES (Apr. 1, 2019), <https://www.nytimes.com/2019/04/01/us/politics/supreme-court-death-penalty.html> [<https://perma.cc/PS3Z-XY4L>] (noting the close 5–4 decision in a capital punishment case).

⁶³ *Dunn v. Price*, 139 S. Ct. 1312 (2019).

⁶⁴ Some scholars have discussed this issue in the past. See generally Fisher, *supra* note 20 (discussing procedural delays between conviction and execution); Levit, *supra* note 34 (discussing due process concerns in capital cases).

⁶⁵ See, e.g., *Barnes v. State*, 124 So. 3d 904, 918 (Fla. 2013) ("We have repeatedly held that this claim may not be asserted until a death warrant has been issued." (citing *Johnson v. State*, 104 So. 3d 1010, 1029 (Fla. 2012))); *Butler v. State*, 100 So. 3d 638, 672 (Fla. 2012) ("As this Court has explained, 'a claim of incompetency to be executed cannot be asserted until a death warrant has been issued.' " (citing *Green v. State*, 975 So. 2d 1090, 1115–16

claims are not ripe until the inmate has an active death warrant.⁶⁶ But, when the inmate *is* under an active death warrant and raises these claims, courts oftentimes deny the claims for being raised too late⁶⁷—as *Bucklew* and *Price* illustrate. In fact, as Justice Gorsuch’s majority opinion in *Bucklew* illustrates, some courts accuse defendants of raising these claims merely as an attempt to delay execution.⁶⁸ Indeed, the media perpetuates this narrative.⁶⁹

This Part uses the Court’s decisions in *Bucklew* and *Price* to illustrate how the system’s gaping procedural hole effectively deprives defendants of an opportunity to meaningfully raise warrant- and execution-related claims. While illustrative of this problem, *Bucklew* and *Price*’s cases are not anomalies. Rather, this issue pervades the capital appellate process across the country, causing last-minute delays in the hours before execution. The idea that defendants engage in last-minute gamesmanship to delay executions is prevalent in decades of precedent from both the Supreme Court and state courts.⁷⁰ In fact, the Supreme Court has explicitly allowed courts to “consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.”⁷¹

(Fla. 2008)); *Israel v. State*, 985 So. 2d 510, 521–22 (Fla. 2008) (holding that defendant’s claim that he was insane and, therefore, ineligible for execution was not ripe for review because “a death warrant ha[d] not yet been signed”); *Phillips v. State*, 894 So. 2d 28, 36 (Fla. 2004) (“However, this claim cannot be raised until an execution is imminent.”); *Jones v. State*, 845 So. 2d 55, 74 (Fla. 2003) (“[C]laim is not ripe for review because Jones has not yet been found incompetent and a death warrant has not yet been signed.”); *State v. Washington*, 330 P.3d 596, 626 (Or. 2014) (“We agree with the state that the specific method of defendant’s execution—as opposed to the death sentence itself—is not ripe for consideration by this court, nor will it be until all direct and collateral review proceedings have concluded and a death warrant has issued.”). *Contra*, e.g., *Gregory v. Pa. State Police*, 160 A.3d 274, 277 (Pa. Commw. Ct. 2017) (finding that “[w]ith regard to ripeness, the issues here are fully developed” despite the defendant having no active death warrant because “the harm is not speculative” and eventually “will be imposed by operation of law”).

⁶⁶ E.g., *supra* note 65.

⁶⁷ See Adam Liptak, *Over 3 A.M. Dissent, Supreme Court Says Alabama Execution May Proceed*, N.Y. TIMES (Apr. 12, 2019), <https://www.nytimes.com/2019/04/12/us/politics/supreme-court-alabama-execution.html> [<https://perma.cc/K3XU-3BK8>] (describing the Supreme Court’s majority opinion permitting the execution of Christopher L. Price); see also, e.g., *Nelson v. Campbell*, 541 U.S. 637, 650 (2004) (rejecting defendant’s claim because it was raised at the last minute).

⁶⁸ See *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019) (implying that defendant used claim as a tactic to forestall execution).

⁶⁹ See, e.g., Gurman & Bravin, *supra* note 12 (providing an example of the media’s participation in this “delay” narrative).

⁷⁰ See, e.g., *Nelson*, 541 U.S. at 649 (quoting *Gomez v. U.S. Dist. Court for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992)) (noting that defendants employ legal tactics to delay capital punishment).

⁷¹ *Id.* (quoting *Gomez*, 503 U.S. at 654).

A. Supreme Court's Decision in Bucklew v. Precythe

In 2014, Russell Bucklew raised an as-applied Eighth Amendment challenge to the State of Missouri's lethal injection protocol, alleging it would cause him substantial pain due to an "unusual medical condition" that would result in significant complications during execution.⁷² After extensive litigation about appropriate alternatives to lethal injection for Bucklew's execution, in 2018, the Supreme Court—before Justice Kennedy's retirement—granted a second stay of execution on the day Bucklew was scheduled to be executed.⁷³

Then, on April 1, 2019, after Justice Kennedy's retirement, the new Court issued its decision in *Bucklew*. Despite the long history of litigation on Bucklew's claim, the majority opinion continuously accused Bucklew of raising the claim as a delay tactic. In the first paragraph of the majority opinion, Justice Gorsuch wrote: "Mr. Bucklew raised this claim for the first time less than two weeks before his scheduled execution."⁷⁴ Then, concluding Bucklew was not entitled to relief under the Eighth Amendment, Justice Gorsuch again questioned whether Bucklew's motive for filing the claim was merely gamesmanship to delay execution.⁷⁵ Justice Gorsuch suggested Bucklew may have been more interested in delaying his execution than avoiding unnecessary pain due to his inability to identify an available alternative to the lethal injection protocol he challenged.⁷⁶ At the end of the majority opinion, Gorsuch even stated that Bucklew was successful in "secur[ing] delay through lawsuit after lawsuit,"⁷⁷ and opined that "[t]he people of Missouri, the surviving victims of Mr. Bucklew's crimes, and others like them deserve better."⁷⁸ The word "delay" appears in the Court's majority opinion six times.⁷⁹

Consistent with how state courts often treat last-minute warrant-and execution-related claims, the majority seemed to use the delay theory as a reason for denying Bucklew's claim. For example, the majority commented that it is not for the courts to "reward those who interpose delay with a decree ending capital punishment by judicial fiat."⁸⁰ Rather, "[t]he proper role of courts is to ensure that method-of-execution

⁷² *Bucklew*, 139 S. Ct. at 1118.

⁷³ *Id.* at 1122.

⁷⁴ *Id.* at 1118.

⁷⁵ *Id.* at 1128–29.

⁷⁶ *Id.* at 1129.

⁷⁷ *Id.* at 1133–34 (emphasis added).

⁷⁸ *Id.* at 1134.

⁷⁹ *Id.* at 1128–34.

⁸⁰ *Id.*

challenges to lawfully issued sentences are resolved fairly and expeditiously. Courts should police carefully against attempts to use such challenges as tools to interpose unjustified delay.”⁸¹

In their separate dissenting opinions, both Justice Breyer—joined by Justices Ginsburg and Kagan⁸²—and Justice Sotomayor responded to the majority’s theme of delay. While acknowledging the state’s and victims’ interests in expediting executions, Justice Breyer explained that delays pervade the capital process, from the time defendants spend waiting on death row for execution—a topic on which Justice Breyer has written extensively⁸³—to the execution process itself.⁸⁴ Related to the issue discussed here, Justice Breyer explained that, contrary to the majority’s suggestion, these delays actually affect defendants’ substantive rights, as opposed to merely causing an inconvenience to the courts.⁸⁵

Rather, Justice Breyer noted, the majority has created “unwarranted obstacles in the path of prisoners” seeking relief from unconstitutional executions.⁸⁶ Justice Breyer also distinguished between the delay caused by the appellate process, over which defendants have no control, and the delay caused by what the majority characterizes as defendants raising frivolous claims just before execution, commenting that the “majority’s new rules are not even likely to improve the problems of delay at which they are directed.”⁸⁷ Similarly, Justice Sotomayor clarified that the issue of delay was not before the Court and emphasized that delay should not be a reason to foreclose otherwise meritorious constitutional claims.⁸⁸ Justice Sotomayor argued that the majority’s discussion on delay should not be read to endorse a standard under which courts “treat[] late-arising claims as presumptively suspect.”⁸⁹

As Justices Breyer and Sotomayor explain, the majority’s decision in *Bucklew* unnecessarily condoned lower courts denying defendants’ warrant- and execution-related claims for being brought too close to execution. Yet, the majority failed to address the fact that oftentimes defendants have no choice but to raise these claims close to execution due

⁸¹ *Id.*

⁸² Justice Sotomayor also joined the dissent, but not as to the discussion on delay. *Id.* at 1146 (Breyer, J., dissenting).

⁸³ See, e.g., *Glossip v. Gross*, 135 S. Ct. 2726, 2764–72 (2015) (Breyer, J., dissenting) (discussing the cruelty of excessive delay in death penalty cases); *id.* at 2748 (Scalia, J., concurring) (responding to Justice Breyer’s discussion on delay).

⁸⁴ *Bucklew*, 139 S. Ct. at 1144–45 (Breyer, J., dissenting).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 1445.

⁸⁸ *Id.* at 1146 (Sotomayor, J., dissenting).

⁸⁹ *Id.* at 1147.

to short warrant periods and precedent directing that these claims are ripe only after a warrant has been issued.⁹⁰

B. Eleven Days After Bucklew: Supreme Court Issues 3 A.M. Decision in Dunn v. Price

Eleven days after the Court decided *Bucklew*, Alabama was scheduled to execute Christopher Lee Price at 6:00 P.M.⁹¹ Price had requested that he be executed using nitrogen hypoxia instead of lethal injection so he would not endure “severe pain and needless suffering” during his execution.⁹² When the State denied his request, Price brought an Eighth Amendment claim similar to *Bucklew*’s.⁹³

Determining Price was “likely to prevail on the issue of whether execution by nitrogen . . . would provide a significant reduction in the substantial risk of severe pain Price would incur if he were executed by lethal injection,” the U.S. District Court granted a stay of execution.⁹⁴ The U.S. Court of Appeals for the Eleventh Circuit “refused to vacate the District Court’s stay.”⁹⁵

Around 9:00 P.M. the night of Price’s scheduled execution, the State of Alabama filed an application to the Supreme Court to lift the stay of execution, which was “referred to the Conference.”⁹⁶ When the application was still pending at 11:34 P.M., the state called off the execution because the death warrant expired at midnight and there was no longer enough time before the warrant expired to complete the execution.⁹⁷ It would be a few more hours before the Supreme Court issued its decision.⁹⁸

Finally, around 3:00 A.M. the morning after Christopher Price’s execution was scheduled, the Supreme Court issued a one-paragraph

⁹⁰ See *supra* note 65 (illustrating circumstances in which defendants were unable to raise Eighth Amendment claims until shortly prior to their execution dates).

⁹¹ *Price v. Comm’r, Dep’t of Corr.*, 920 F.3d 1317, 1320 (11th Cir. 2019); *Price v. Dunn*, 385 F. Supp. 3d 1215, 1222 (S.D. Ala. 2019).

⁹² *Dunn v. Price*, 139 S. Ct. 1312, 1313 (2019) (Breyer, J., dissenting).

⁹³ *Price v. Comm’r, Dep’t of Corr.*, 920 F.3d at 1321.

⁹⁴ *Price*, 139 S. Ct. at 1313–14 (Breyer, J., dissenting) (quoting *Price v. Dunn*, 385 F. Supp. 3d at 1233).

⁹⁵ *Id.* at 1314.

⁹⁶ *Id.*

⁹⁷ Brendan O’Brien & Alex Dobuzinskis, *U.S. Supreme Court Will Allow Execution, Alabama Still Delayed as Death Warrant Expired at Midnight*, REUTERS (April 11, 2019), <https://www.reuters.com/article/us-alabama-execution/u-s-supreme-court-will-allow-execution-alabama-still-delayed-as-death-warrant-expired-at-midnight-idUSKCN1RN14E> [<https://perma.cc/9D4E-5F2Q>]; *Alabama, Running Out of Time, Halts Execution of Sword and Dagger Killer of Pastor*, *supra* note 6.

⁹⁸ O’Brien & Dobuzinskis, *supra* note 97.

decision granting the State of Alabama's application to vacate the stay of execution.⁹⁹ Again, the majority suggested that Price's claim was merely a delay tactic.¹⁰⁰

Once more, Justice Breyer dissented—joined by Justices Ginsburg, Sotomayor, and Kagan. He explained that the Court had denied his “request[] that the Court take no action” until the next morning, “when the matter could be discussed at Conference.”¹⁰¹ Although he “recognized that [his] request would delay resolution of the application and that the State would have to obtain a new execution warrant, thus delaying the execution by 30 days,” Justice Breyer felt the “delay was warranted.”¹⁰²

Explaining the irony in the Court's suggestion that Price's claim only served to delay execution, Justice Breyer wrote: “The Court suggests that the reason is delay. But that suggestion is untenable in light of the District Court's express finding that Price has been ‘proceeding *as quickly as possible* on this issue since *before the execution date was set*.’”¹⁰³

As a result of the Court's decision, Price's execution was rescheduled for May 30, 2019.¹⁰⁴ Again, Price filed an application for stay of execution to the Supreme Court. Over an hour after the rescheduled execution, in another 5–4 decision, the Supreme Court denied Price's application for stay.¹⁰⁵ Justice Breyer's dissenting opinion (joined by Justices Ginsburg, Sotomayor, and Kagan) revealed that the district court had scheduled a trial on Price's claims for June 10.¹⁰⁶

As the Supreme Court's decisions in *Bucklew* and *Price* illustrate, defendants are caught between the proverbial rock and hard place when it comes to raising warrant- and execution-related claims. *The rock*: Courts deny defendants' warrant- and execution-related claims as premature when raised before the defendant is under an active warrant. *The hard place*: Once a warrant is issued—generally with an extremely short warrant period—

⁹⁹ *Price*, 139 S. Ct. at 1312; Liptak, *supra* note 67.

¹⁰⁰ *Price*, 139 S. Ct. at 1312.

¹⁰¹ *Id.* at 1314 (Breyer, J., dissenting).

¹⁰² *Id.*

¹⁰³ *Id.* (citation omitted).

¹⁰⁴ *Outcomes of Death Warrants in 2019*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/outcomes-of-death-warrants-in-2019> [<https://perma.cc/73ZB-FXKY>] (last updated Dec. 11, 2019).

¹⁰⁵ *Alabama Executes Man Convicted of Killing Pastor with Sword and Knife Just Before Christmas*, CBS NEWS (May 31, 2019), <https://www.cbsnews.com/news/christopher-lee-price-execution-alabama-executes-man-for-killing-pastor-with-sword-and-knife-just-before-christmas/> [<https://perma.cc/GR86-A2B8>].

¹⁰⁶ *Id.*

courts deny warrant- and execution-related claims as being brought too late, or merely as a tactic to delay execution.¹⁰⁷

III. SEEMINGLY SIMPLE SOLUTIONS

Two seemingly simple solutions to this procedural difficulty arise: (A) allow defendants to raise execution-related claims sooner, or (B) disallow courts from using delay as a reason for denying warrant- or execution-related claims. While these potential solutions may seem intuitive, courts have not adopted either. This Part canvasses the advantages and disadvantages of each of these solutions and explains why courts may have steered away from them.

A. Allow Defendants to Raise Execution-Related Claims Sooner

When thinking of this issue, the first logical solution seems to be to allow defendants to raise execution- and warrant-related claims sooner. The rationale: *Death row defendants are, by definition, subject to execution. Thus, we should allow them to raise warrant- and execution-related claims so long as they are under a sentence of death.*

The advantages of this approach include allowing defendants the opportunity to fully litigate their claims and the courts to fully review these claims without the time-pressure that often accompanies active warrants. In addition to allowing for more thorough investigation of these claims—for example, into new execution protocols—this solution seems to provide a sounder resolution of defendants’ claims, at least from a due process perspective.¹⁰⁸

However, adopting this logic would require courts to abandon the longstanding theory that warrant- and execution-related claims are not ripe until the defendant is under an active warrant that provides a scheduled date and time for the defendant’s execution. Also, this approach could overwhelm courts with speculative claims. For instance, if a defendant challenges the state’s execution protocol as it stands in June 2019, the defendant assumes that protocol is the one that will exist (and be used) when the defendant is ultimately executed. Rather, the state could amend the protocol before the defendant’s execution, rendering any decision regarding the June 2019 execution an exercise in futility—at least as applied to that specific defendant.

¹⁰⁷ See also Levit, *supra* note 34, at 85–86 (explaining how courts play into the opportunity to truncate postconviction review).

¹⁰⁸ U.S. CONST. amends. V, XIV; see also *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) (discussing the due process requirement of a “hearing at a meaningful time and in a meaningful manner”); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965))).

Further, this approach may not completely resolve the chilling effect on some warrant- and execution-related claims. For example, suppose a rule was implemented requiring defendants to raise warrant- and execution-related claims in their first successive postconviction motions—the only guaranteed postconviction motion (and, therefore, appeal). What if a defendant does so, the appeal is denied, but the state proceeds to amend its execution protocol after that appeal is denied? Like the dilemma defendants currently face, as described above, the defendant would remain hard-pressed to find the appropriate opportunity for challenging the amended protocol since the first postconviction motion would have already been exhausted. Courts would likely say the defendant raised the claim too late—after the designated appeal. For these reasons, this approach is likely not the best solution to the procedural trap facing capital defendants in raising warrant- and execution-related claims.

B. Disallow Courts from Using Delay as a Reason for Denying Execution-Related Claims

The other seemingly obvious solution would be to disavow delay as a reason for denying warrant- or execution-related claims. Disallowing courts from denying warrant- or execution-related claims based on alleged delay in raising the claims would force courts to review the merits of these oftentimes significant claims.

However, this solution could result in unintended consequences that ultimately render this solution more detrimental to defendants than the problem it aims to resolve. For example, courts may be inclined to deny otherwise meritorious claims to avoid a stay of execution. Or, this solution could frustrate judges by causing the perception of too many unnecessary stays of execution, forced by the requirement that courts, faced with short warrant periods, review the merits of each claim.

Further, this solution would likely prove difficult to implement. A legislative mechanism would likely raise separation of powers issues because the legislative branch cannot tell the courts how to review, much less to rule on, cases or controversies.¹⁰⁹ Likewise, a judicial mechanism, such as a Supreme Court determination that delay is an invalid reason for denying these claims, would be unlikely to rectify the issue. Even after such a

¹⁰⁹ See, e.g., *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1950–51 (2015) (Roberts, J., dissenting) (warning of the danger of congressional violations of Article III judicial powers); see also *INS v. Chadha*, 462 U.S. 919, 951 (1983) (describing the separation of powers into three distinct branches in the United States constitutional scheme); *United States v. Nixon*, 418 U.S. 683, 703–04 (1974) (affirming that, despite “the deference each branch must accord the others,” the branches of government still retain separation of powers).

determination, the Supreme Court, in its final review of petitions for a writ certiorari or applications for a stay of execution, could still deny the claims and allow executions to proceed, as in Price's case. Likewise, unless implemented by the Supreme Court, the state courts would likely determine their own iterations of the appropriate standard, causing a great lack of uniformity and, in turn, creating separate Eighth Amendment concerns.¹¹⁰ For these reasons, this is likely not the ideal solution to the procedural trap facing capital defendants in raising warrant- and execution-related claims.

IV. ENACT AND ENFORCE UNIFORM WARRANT AND EXECUTION-RELATED PROCEDURES

Having established that the seemingly obvious solutions are likely not ideal, this Part outlines a third, not-so-clear solution that, this Part contends, is the best route to balancing all of the competing interests and providing uniformity and stability to the capital appellate process with respect to warrant- and execution-related claims. Specifically, this Part contends the solution lies in enacting and enforcing uniform warrant procedures, whether by statute or rule. At the outset, Section A explains how some states have attempted to implement these types of procedures. Then, using those examples to guide the rest of the discussion, this Part presents a two-step solution in which states enact and enforce uniform warrant- and execution-related procedures.

Section B explains the first step in implementing this solution: the enactment of such warrant procedures—either by way of the legislature enacting a statute, or courts enacting a procedural rule.¹¹¹ This Section defines the multiple aspects that a statute or rule should include and then provides proposed language. Once the necessary statutes or rules exist, the second step, which is discussed in Section C, would be for courts to be diligent in holding the other branches accountable by enforcing the statutes or rules. After explaining this two-step path to implementing this solution, Section D addresses potential counterarguments to this solution. Ultimately, this Part concludes that this solution is likely the best way to balance all of the competing interests involved here—judicial efficiency, defendants' rights, etc.

¹¹⁰ See generally *Furman v. Georgia*, 408 U.S. 238 (1972) (detailing the different standards states have applied with regard to the Eighth Amendment).

¹¹¹ Which of these would be appropriate would depend on each state's governing law regarding the court's jurisdiction to control procedure.

A. Prior Attempts to Institute Uniform Warrant Procedures

In response to the length of time the capital appellate process often takes—causing delays between sentencing and execution—some states have adopted procedures for expediting the post-trial process.¹¹² Many of these state statutes are modeled after the Uniform Post Conviction Procedure Act (UPCPA), which “replaces all common law remedies, and provides one procedure for asserting every constitutional, jurisdictional, or other ground for collateral relief that has not been previously litigated or waived.”¹¹³ The UPCPA allows claims “to be brought at any time during imprisonment,” with certain limitations.¹¹⁴

For example, since 1984, Idaho has used “an expedited and consolidated appeal process,”¹¹⁵ the purpose of which was to “eliminat[e] unnecessary delay in carrying out a valid death sentence.”¹¹⁶ The Idaho statute requires defendants to “file any legal or factual challenge” to their sentence of death within forty-two days of judgment.¹¹⁷ Otherwise, the claim is waived.¹¹⁸ In other words, defendants have only “one opportunity to raise all challenges to the[ir] conviction and sentence.”¹¹⁹ After the forty-two days passed or the one appeal was denied, a death warrant should be issued.¹²⁰ However, as a 2000 article explained, courts failed to consistently or regularly impose these restrictions.¹²¹

More drastic than Idaho, in 1989, the Arkansas Supreme Court “abolished its postconviction remedy altogether.”¹²² The court said it was concerned that postconviction was unnecessarily drawn out before cases were

¹¹² Fisher, *supra* note 20, at 87 (describing Idaho’s unitary system of reviewing appeals in capital cases). For other examples not discussed here, see generally John H. Blume, *An Introduction to Post-Conviction Remedies, Practice and Procedure in South Carolina*, 45 S.C. L. REV. 235 (1994) (reviewing South Carolina’s postconviction review process); Millemann, *supra* note 18 (reviewing Maryland’s postconviction review process); Jeffrey T. Renz, *Post-Conviction Relief in Montana*, 55 MONT. L. REV. 331 (1994) (reviewing Montana’s postconviction review process); Note, *State Post-Conviction Remedies*, 61 COLUM. L. REV. 681 (1961) (discussing several states’ approaches to postconviction review).

¹¹³ *State Post-Conviction Remedies*, *supra* note 112, at 698.

¹¹⁴ *Id.*

¹¹⁵ Fisher, *supra* note 20, at 87.

¹¹⁶ *Id.* at 91 (citation omitted).

¹¹⁷ IDAHO CODE § 19-2719(3) (2020); see Fisher, *supra* note 20, at 91.

¹¹⁸ IDAHO CODE § 19-2719(5); see Fisher, *supra* note 20, at 91.

¹¹⁹ *Id.* (quoting *Paz v. State*, 852 P.2d 1355, 1356 (Idaho 1993)).

¹²⁰ *Id.* at 102; see IDAHO CODE § 19-2719.

¹²¹ Fisher, *supra* note 20, at 91.

¹²² *Id.* at 108.

concluded.¹²³ However, a year later, the court “reestablished [the] postconviction process.”¹²⁴

In 2000, Florida Governor Jeb Bush called for the state “to adopt a ‘unitary review’ system of appeal in capital cases, which is designed to shorten the time between conviction and execution of sentences.”¹²⁵ Thirteen years later, the Florida legislature enacted the “Timely Justice Act of 2013” (“the Act”).¹²⁶ The purpose of the Act was to “ensure that cases are processed in a timely manner.”¹²⁷ Under the Act, the Governor of Florida is required to issue a warrant for execution within thirty days of the conclusion of the defendant’s guaranteed appeals, provided “the executive clemency process has concluded,”¹²⁸ and the warrant should schedule the execution within 180 days.¹²⁹ However, similar to Idaho, Florida courts have not enforced the Act, and the warrant process in Florida remains a matter of complete executive discretion.¹³⁰ In exercising this discretion, Florida’s governors have not upheld the statutory time periods. Most significantly, rather than heeding the 180-day warrant period provided for in the Act, Florida’s governors have recently

¹²³ *Id.* at 109–10.

¹²⁴ *Id.* at 109.

¹²⁵ *Id.* at 85. A “unitary review” system “essentially consolidates the direct appeal and state postconviction process to eliminate the additional time involved in” considering postconviction claims. *Id.* at 85–86.

¹²⁶ FLA. STAT. § 922.052 (2018).

¹²⁷ Bagdasarova, *supra* note 43; *see* *Abdool v. Bondi*, 141 So. 3d 529, 537 (Fla. 2014) (discussing the Act’s purpose to resolve capital cases as quickly as possible after the imposition of a death sentence).

¹²⁸ FLA. STAT. § 922.052(2)(b) (2018); *accord* *Abdool*, 141 So. 3d at 543 (upholding this provision of the Act because it does not “unconstitutionally infringe[] on the Governor’s . . . unfettered discretion to issue warrants by mandating that the Governor must sign a warrant once the Clerk issues a certification”).

¹²⁹ FLA. STAT. § 922.052(2)(b); *see* *Abdool*, 141 So. 3d at 543–44 (finding the 180-day requirement reasonable).

¹³⁰ In *Abdool*, the Supreme Court of Florida denied a constitutional challenge to the Timely Justice Act of 2013. 141 So. 3d at 538–47. In doing so, the court stated: “The State has a legitimate interest in ensuring that capital sentences are carried out in a timely manner.” *Id.* at 546. Florida defendants continue to unsuccessfully challenge this discretionary process. *See, e.g.,* *Hannon v. State*, 228 So. 3d 505, 509 (Fla. 2017) (“We have repeatedly and consistently denied these claims.” (citing *Bolin v. State*, 184 So. 3d 492, 502–03 (Fla. 2015))); *Mann v. State*, 112 So. 3d 1158, 1162–63 (Fla. 2013) (“Because Mann has not presented any reason for this Court to recede from its prior decisions, Mann’s claim is without merit and was properly denied.”); *Ferguson v. State*, 101 So. 3d 362, 366 (Fla. 2012) (“Because we have previously rejected similar claims, we find that the circuit court properly denied Ferguson’s present claim.”); *Gore v. State*, 91 So. 3d 769, 780 (Fla. 2012) (“As recently as last year, we rejected claims that because of the Governor’s absolute discretion to sign death warrants, and thereby decide who lives and who dies, the death penalty structure of Florida violates the United States Constitution.”); *Valle v. State*, 70 So. 3d 530, 551–52 (Fla. 2011) (declining to “‘second guess’ the application of the exclusive executive function of clemency”).

provided warrant periods of merely thirty days, give or take.¹³¹ And, Florida is not alone in the phenomena of short warrant periods; just recently, Georgia issued a warrant that provided a warrant period of a scant twelve days.¹³²

These former attempts by states to streamline the postconviction process focused on the goals of efficiency and reducing delay in the warrant litigation process. But they were insufficient in recognizing the vulnerability of defendants' rights during the process they addressed.¹³³

An Oregon statute seems to attempt to address defendants' ability to raise additional claims when execution is pending. The statute provides for an automatic stay of ninety days if certain events trigger the stay and a thirty-day stay after the Supreme Court denies a petition for certiorari to provide the defendant an opportunity to notice the lower court of a forthcoming claim for postconviction relief.¹³⁴ The statute also directs that an execution is stayed while a defendant's claim for postconviction relief is pending.¹³⁵ Certainly, the ninety-day stay provided in the Oregon statute is better than the thirty-day warrant periods recently provided in Florida, for example.

Drawing on these examples, the next Section discusses the first step in the two-step solution presented herein.

B. States to Enact Uniform Warrant and Execution-Related Procedures

First, in the interest of uniformity and transparency in the warrant and execution process, states should enact uniform warrant procedures that both the executive and judicial branches must follow ("the procedures"). The procedures should explain when the defendant is eligible for execution—i.e., what appeals must be concluded. The procedures should also outline when, after the point the defendant becomes eligible for execution, an inmate's warrant should be issued. As to the warrant, the procedures should enumerate what must be included in the death warrant—for example, the execution period and the scheduled date and time of the execution.

Then, the procedures should determine the warrant period—how long between the warrant being issued and the scheduled execution date. Likewise,

¹³¹ See *Jimenez v. State*, 265 So. 3d 462, 493 (Fla. 2018) (Pariente, J., dissenting) (explaining how warrant periods, since executions resumed in Florida after *Hurst v. Florida*, 136 S. Ct. 616 (2016), have been too short to allow the courts sufficient time to review defendants' claims); see also Kalmanson, *supra* note 49, 630-34 (discussing the effect of delay in the warrant and execution process).

¹³² See *Outcomes of Death Warrants in 2020*, *supra* note 7.

¹³³ See, e.g., Fisher, *supra* note 20, at 87; Levit, *supra* note 34, at 56 (expressing procedural due process concerns when postconviction review is expedited).

¹³⁴ OR. REV. STAT. § 138.686(3) (2020).

¹³⁵ *Id.* § 138.686(4).

the procedures should indicate that the defendant is entitled to one post-warrant, pre-execution postconviction motion (and appeal), which shall be final before the execution process begins. Thus, the time period defined in the procedures between the warrant and the scheduled execution should be long enough to allow the judiciary to thoroughly and adequately review the defendant's warrant- and execution-related claims without unnecessary rush.

As to the execution, the procedures should require the State to provide adequate notice to an inmate whose execution is pending if the State changes its lethal injection. Finally, the procedures should provide for what should occur if, for some reason (including delay caused by last-minute appeals), the execution does not occur at the date and time stated in the warrant.¹³⁶

The proposed language below includes all of these aspects:

Uniform Warrant- and Execution-Related Procedures.

(1) The clerk of the [state's highest court] shall inform the Governor in writing certifying when a person convicted and sentenced to death ("the Inmate") has:

(a) Completed direct appeal and initial postconviction proceedings in state court and habeas corpus proceedings and appeal therefrom in federal court, and the Inmate does not have any pending litigation related to his conviction or sentence; or

(b) Allowed the time permitted for filing a habeas corpus petition in federal court to expire.

(2) Within 30 days after receiving the letter of certification from the clerk of the [state's highest court], the [Governor or appropriate actor] shall issue a warrant for execution if the executive clemency process has concluded and no cases remain pending, directing the warden to execute the Inmate's sentence 180 days from the date of the warrant ("the Warrant Period"), at a time designated in the warrant.

(a) Within twenty-four hours of the Governor issuing the warrant, the [appropriate state department] shall provide the Inmate and/or the Inmate's attorney of record a copy of the execution protocol that the State intends to use for the execution.

(b) If the State's execution protocol changes during the Warrant Period, the updated protocol shall be provided to the Inmate and/or the Inmate's attorney

¹³⁶ See Kalmanson, *supra* note 49, 630-34 (explaining how these indefinite execution delays likely create an Eighth Amendment violation).

immediately. If the State adopts a new protocol within fifteen days of the execution, the execution shall be rescheduled to allow sufficient time for the Inmate to review and, if necessary, challenge the amended protocol.

(c) Within the Warrant Period provided in paragraph (2), the defendant shall be entitled to complete a final postconviction proceeding in state court and, if necessary, a habeas corpus proceeding in federal court regarding any warrant- or execution-related claims. The State shall not execute the Inmate until all pending cases related to the sentence for which the State intends to execute the Inmate are completed.

(3) The State shall not execute the Inmate's sentence until the Governor issues a warrant, attaches it to the copy of the record, and transmits it to the warden, directing the warden to execute the sentence at a date and time designated in the warrant.

(4) If, for any reason, the Inmate's sentence is not executed within thirty minutes of the time designated in the warrant, the execution shall be automatically and immediately stayed for a period of at least three (3) days.

(a) If the stay is a result of delay, the Governor shall issue a new warrant rescheduling the execution, providing the Inmate with at least twenty-four hours notice.

(b) Notwithstanding the three-day period provided in subparagraph (4), any court may provide for a longer stay period. If a court issues an indefinite stay, the warrant shall expire. When the stay is lifted, this process shall restart from the beginning.

(5) If, for any reason, a court determines that a stay is necessary, it shall enter a stay of reasonable time to resolve the problem causing the stay.

First, paragraph (1) explains *when* the State may execute an inmate's sentence—after the inmate's guaranteed appeals are complete. This paragraph also requires certification by the judiciary that the inmate has reached this point, providing a balance of power between the executive and judicial branches.

Further, paragraph (1)(a) requires that *all* litigation from the defendant's guaranteed appeals be complete before the warrant issues. This would significantly change and improve the backlog of pending petitions with which the Supreme Court is often faced on the night of execution. Oftentimes, a defendant goes into execution with a petition for writ of

certiorari pending at the Supreme Court from a prior appeal.¹³⁷ Thus, the Supreme Court is reviewing not just the warrant-related petition, but several pending petitions with an execution looming. Paragraph (1)(a) would curb this issue by requiring that *all* of the defendant's pending litigation related to the sentence and conviction be complete before the warrant is issued.

Paragraph (2) provides a concrete timeline for all actors involved in the warrant process—defining when the warrant will be issued, the time for litigating any post-warrant claims, and when the execution should be scheduled. Paragraphs (2)(a) and (2)(b) serve to streamline litigation regarding the execution protocol that will be used in the execution. By requiring the state to provide the defense with the protocol that will be used in the inmate's execution, these provisions eliminate the need for litigation regarding access to the protocol.

Further, paragraph (2)(c) guarantees each defendant the ability to raise any post-warrant and execution-related claims once the warrant is issued. Consistent with the way these claims are currently litigated, these claims would be brought via a postconviction motion in state court and, if necessary, a federal habeas proceeding.

Under the statute, the final warrant-related case would be litigated in the 180-day warrant period, which provides state courts (and, ultimately, the Supreme Court) more time than they are often provided to review these claims. This longer time period should provide sufficient time for the trial court to hold an evidentiary hearing and/or for the appellate court to hold an oral argument, if necessary. If not, the procedures provide that the defendant is entitled to “complete” litigation of the final warrant-related claim; this provision should be read to include the Supreme Court's denial of certiorari. Additionally, under paragraph (5), courts would have grounds to stay the execution to complete review of the case. Therefore, the guarantee provided in paragraph (2)(c) curbs the due process concerns that coincide with shortened warrant periods and accelerated postconviction litigation, as scholars have articulated.¹³⁸ Finally, the last sentence in paragraph (2)(c) makes clear that the execution shall not proceed if any litigation related to the sentence remains pending.

Paragraph (3) provides a procedural checklist to ensure the execution does not proceed unless specific procedures have been followed. Finally, paragraph (4) removes the unknown from delayed and rescheduled executions, which has become prevalent with short warrant periods.

¹³⁷ See, e.g., *Asay v. State*, 224 So. 3d 695, 704 (Fla. 2017) (Pariente, J., dissenting) (arguing for a stay of execution until a pending petition for a writ of certiorari is resolved).

¹³⁸ See generally *Fisher*, *supra* note 20; *Levit*, *supra* note 34 (expressing procedural due process concerns when postconviction review is expedited).

Paragraph (4) indicates that the time of execution set in the warrant is a concrete time and shall be honored, within thirty minutes. Similarly, paragraphs (4)(a) and (4)(b) explain what should occur if an execution is delayed past the time provided. This eliminates the current situation of defendants waiting—minute-by-minute, often for hours on end—to find out whether the scheduled execution will proceed, as in *Bucklew*'s case.¹³⁹ And, if an execution must be rescheduled, the procedures provide guidelines for doing so—rectifying the current lack of guidance, as *Bucklew* and *Price* illustrate.¹⁴⁰ In sum, these proposed procedures take the guesswork out of executions—for both the government and the inmate.

C. Courts to Enforce Such Procedures

Enacting procedures like those outlined above is just the first step. States enacting procedures like those proposed above is insignificant if the procedures are not enforced, as illustrated by Idaho and Florida. Thus, the crucial second step to the solution proposed herein is for courts to enforce the procedures, once enacted.

For example, if the State amends its execution protocol within fifteen days of the scheduled execution, the court has the power under paragraph (2)(b) to stay the execution to allow for proper review and litigation over the new protocol, if necessary. Also, paragraph (4) gives the court the power to automatically enter a stay if the State does not begin the execution within thirty minutes of the scheduled execution time. Finally, paragraph (5) provides courts with oversight of the warrant process to ensure the defendants' constitutional rights are protected, allowing courts to enter a stay for any reason the court deems proper. While courts technically have this ability now, the language in the proposed procedures expressly providing such power may incline courts to exercise it when feeling rushed in reviewing warrant- and execution-related claims.

D. Addressing Counterarguments

Some may argue that this approach is more defendant-adverse than the procedural problem it seeks to rectify—forcing executions, shortening the time between sentencing and execution, and, thereby, increasing the risk of executing innocent defendants. As with most issues related to capital sentencing, this issue presents a discord between interested actors that is

¹³⁹ See *supra* Part III.

¹⁴⁰ *Id.*

difficult to reconcile. Each of the potential counterarguments to the solution proposed above is addressed, in turn, below.

At the outset, it is important to reiterate that this Article does not address or otherwise consider abolition as a potential solution but, rather, addresses the current system, in which death is a viable punishment in numerous states. Without addressing the constitutionality of the death penalty itself, this Article aims to improve the protection of defendants' rights in a system that accepts capital punishment.

First, some may counter this solution because it forces executions.¹⁴¹ The short response is: yes, but that is what the current system demands, if it functions effectively. As stated at the outset, the purpose of this Article is not to abolish capital sentencing but, rather, to preserve capital defendants' constitutional rights so long as we have capital sentencing in the United States. Relatively speaking, executions are rare in our current system because of the extreme delays and discretion in issuing death warrants.¹⁴² Defendants spend an inordinate amount of time on death row awaiting execution; most times, defendants will suffer a natural death before reaching execution.¹⁴³ This solution would likely cause an increase in the number of executions, and it would likely cause those executions to happen faster, by requiring states to schedule an inmate's execution once the inmate completes the guaranteed appeals—as outlined in paragraph (1) of the statute.

As to the merits, by facilitating a thorough review of defendants' warrant- and execution-related claims, this solution, at the least, guarantees that each defendant's constitutional claims are properly reviewed before the execution. As a result, some defendants may properly avoid execution because the courts will find that their warrant- or execution-related claims, as guaranteed by the procedures, are meritorious.

As to timing, there are competing arguments. Some—most famously, Justice Breyer—would argue that shortening the time-frame between sentencing and execution serves to lessen the “cruel and unusual” nature of

¹⁴¹ See, e.g., *Florida's Timely Justice Act to Speed Up Executions Becomes Law*, INNOCENCE PROJECT (June 17, 2013), <https://www.innocenceproject.org/floridas-timely-justice-act-to-speed-up-executions-becomes-law/> [<https://perma.cc/7XUT-9LHM>] (highlighting that innocent death row inmates may now be executed too quickly to achieve exoneration).

¹⁴² See, e.g., GARRETT, *supra* note 16, at 13 (“Only a small fraction of the over 8000 death sentences imposed since the 1970s have resulted in executions . . .”); STEIKER & STEIKER, *supra* note 9, at 2 (finding only 16 percent of death row inmates have been executed nationwide); Coleman, *supra* note 59, at 20–21 (generally finding an annual decline in the number of executions carried out year-to-year).

¹⁴³ STEIKER & STEIKER, *supra* note 9, at 2.

the death penalty as it currently exists in the United States.¹⁴⁴ Indeed, defendants often challenge their sentences and/or executions under the Eighth Amendment, arguing that the time they have waited on death row between sentencing and execution amounts to cruel and unusual punishment.¹⁴⁵ Others may argue that it is better for a defendant to spend years awaiting execution and, instead, die naturally than to proceed sooner to execution.

As long as the death penalty exists and a defendant stands sentenced to death, case law directs that the state and victims have an interest in executions occurring.¹⁴⁶ To that extent, this solution serves those interests while maintaining defendants' right to due process in litigating their final claims. This shortened time period may incentivize courts to review defendants' guaranteed appeals even more closely by avoiding fatigue in reviewing the same defendants' numerous claims. Thus, shortening the delay between sentencing and execution actually serves the goal of ensuring constitutionality throughout the capital punishment process.

Notwithstanding, if a state found that the procedures unnecessarily forced warrants and therefore executions, it could enact an amended version of the procedures in which paragraph (2) provides:

After receiving the letter of certification from the clerk of the [state's highest court], the [Governor or appropriate actor] may issue a warrant for execution if the executive clemency process has concluded and no cases remain pending. When the warrant is issued, it shall direct the warden to execute the Inmate's sentence 180 days from the date of the warrant ("the Warrant Period"), at a time designated in the warrant.

This amended version would make the state's issuing the warrant permissive rather than mandatory but still provide the defendant the same protections once the warrant is issued.

Next, some may argue that shortening the time between sentencing and execution lessens the time for the appellate process to work—especially

¹⁴⁴ See *Glossip v. Gross*, 135 S. Ct. 2726, 2764–72 (2015) (Breyer, J., dissenting) (considering excessive delays to be "cruel"); *id.* at 2748–49 (Scalia, J., concurring) (discussing Breyer's dissent on delay and explaining the length of time defendants spend on death row awaiting execution).

¹⁴⁵ See, e.g., *Long v. State*, 271 So. 3d 938, 946 (Fla. 2019) (basing Eighth Amendment claim, in part, on the length of time—more than thirty years—the defendant had spent on death row); *Branch v. State*, 236 So. 3d 981, 988 (Fla. 2018) (basing Eighth Amendment claim, in part, on the length of time—twenty-four years—the defendant had spent on death row).

¹⁴⁶ See, e.g., *Bucklew v. Precythe*, 139 S. Ct. 1112, 1133 (2019) ("Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006))).

as it relates to claims of innocence.¹⁴⁷ It often takes years for a wrongly convicted defendant to prove his or her innocence as a result of technological advances.¹⁴⁸ The concern of executing wrongly convicted inmates is of utmost importance.¹⁴⁹ Despite even the staggering amount of exonerations that have occurred since 1973, it is likely that they are “only the tip of the iceberg,” as Michael L. Radelet explains.¹⁵⁰ However, the systemic issue of executing innocent persons and their innocence not being detected until years, if not decades, later is not fixed or eliminated by leaving defendants on death row for years awaiting execution, which could be scheduled at any time without warning.

In summary, this solution provides defendants with more notice and process in the post-warrant, pre-execution process, thereby reducing the overall risk of constitutional violations in each execution.

CONCLUSION

Ultimately, it is the courts’ responsibility to ensure the constitutionality of capital punishment, which includes safeguarding defendants’ rights throughout the appellate process.¹⁵¹ While the period of time between the state issuing a warrant for an inmate’s execution and the actual execution is one of the most significant in a capital defendant’s life, it is one of the most overlooked insofar as protecting defendants’ rights. During

¹⁴⁷ See, e.g., Coleman, *supra* note 59, at 21 (finding more individuals being removed from death row due to errors in their convictions); *Florida’s Timely Justice Act to Speed Up Executions Becomes Law*, *supra* note 141.

¹⁴⁸ See, e.g., GARRETT, *supra* note 16, at 35–36 (describing how exonerations based on new evidence do not occur quickly).

¹⁴⁹ See *id.* at 43 (“[T]here is about a 4 percent rate of exoneration in death penalty cases.”). The prevalence of wrongful convictions is a leading reason for abolition. Lyn Suzanne Entzeroth, *The End of the Beginning: The Politics of Death and the American Death Penalty Regime in the Twenty-First Century*, 90 OR. L. REV. 797, 833–34 (2012).

¹⁵⁰ Michael L. Radelet, *The Role of the Innocence Argument in Contemporary Death Penalty Debates*, 41 TEX. TECH L. REV. 199, 204 (2008); see also GARRETT, *supra* note 16, at 43 (“We know that there is a ‘uniquely high rate of exoneration’ in death penalty cases”); Levit, *supra* note 34, at 64 (“[T]he capital punishment system . . . survives despite overwhelming evidence that a significant number of people who were factually innocent have been . . . put to death.”).

¹⁵¹ As Justice Brennan stated in his *Gregg* dissent:

This Court inescapably has the duty . . . to say whether . . . “moral concepts” require us to hold that the law has progressed to the point where we should declare that the punishment of death, like punishments on the rack, the screw, and the wheel, is no longer morally tolerable in our civilized society.

Gregg v. Georgia, 428 U.S. 227, 229 (1976) (Brennan, J., dissenting); see also *Furman v. Georgia*, 408 U.S. 238, 269 (1972) (Brennan, J., concurring) (describing the meaning of the cruel and unusual punishment clause not as static, but as evolving with the “standards of decency that mark the progress of a maturing society”).

that time, defendants often raise claims that could significantly affect the constitutionality of their ultimate execution. For example, defendants raise claims challenging the constitutionality of the state's process for signing warrants, claims challenging the state's execution protocol, etc.

As this Article explained, the Supreme Court's recent decisions in *Bucklew v. Precythe* and *Price v. Dunn* illustrate the procedural hardship capital defendants face across the country in raising these warrant- and execution-related claims. Through decades of jurisprudence, courts have effectively precluded defendants from meaningfully raising these claims. The correct time for defendants to raise warrant- and execution-related claims is some mysterious point between death row and death watch. While raising a claim before the defendant is under an active death warrant is too early, raising a claim while under a death warrant just before execution is too late. These claims fall into a black hole of procedural technicalities, likely subjecting defendants to unconstitutional executions.

In addition, ever-shortening warrant periods force courts to review the claims defendants do raise in last-minute fire drills. This often forces the Supreme Court to review several last-minute petitions for certiorari, the denial of which is the last step before the defendant's execution. This last-minute rush has recently resulted in executions being delayed late into the night, which presents additional constitutional concerns.

Addressing this problem, this Article explained that the best way to manage all the competing interests involved in this discussion is for state legislatures to enact and courts to enforce uniform warrant procedures. In defining this solution, this Article proposed model language for states to adopt—whether as statute or rules—procedures that outline the warrant process and, without compromising the state's interest in the timely execution of death sentences, safeguard defendants' rights up until execution. For as long as the death penalty remains viable in the United States, states should act diligently to respect and protect each defendant's rights until the time of death.