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## Executing Equity: The Broad Judicial Discretion to Stay the Execution of Death Sentences

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## NOTE

### EXECUTING EQUITY: THE BROAD JUDICIAL DISCRETION TO STAY THE EXECUTION OF DEATH SENTENCES

#### I. INTRODUCTION

Stays of executions of sentences are equitable remedies<sup>1</sup> provided to defendants to allow them full and fair consideration of their sentences.<sup>2</sup> The courts' exercise of their power to stay executions is often crucial for the proper administration of justice.<sup>3</sup> However, courts do not employ bright-line rules when evaluating petitions to stay the execution of sentences.<sup>4</sup> Rather, the power to grant or deny stays lies in the exercise of each court's judgment.<sup>5</sup> As a result, decisions that can affect a person's life and liberty are left to the discretion of the courts.<sup>6</sup> This broad discretion granted to courts has resulted in unpredictable

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1. Hill v. McDonough, 547 U.S. 573, 584 (2006). When a stay is granted, "the state is enjoined from implementing" the imposed sentence and the claims of the petitioner are allowed to be heard. Nicole Veilleux, Note, *Staying Death Penalty Executions: An Empirical Analysis of Changing Judicial Attitudes*, 84 GEO. L.J. 2543, 2545 (1996).

2. Veilleux, *supra* note 1, at 2546 (explaining that stays function to provide the court with sufficient time to hear petitioner's claims); see *In re Murchison*, 349 U.S. 133, 136 (1955) (explaining that criminal defendants are constitutionally entitled to a "fair trial in a fair tribunal"); *White v. Wainwright*, 632 F. Supp. 1140, 1147 (S.D. Fla. 1986); see also *Chambers v. Bowersox*, 197 F.3d 308, 309 (8th Cir. 1999) (granting the motion for stay of execution, finding that defendants should not be executed without receiving "the full review process").

3. *Rosenberg v. United States*, 346 U.S. 273, 285 (1953); see also *Scripps-Howard Radio, Inc. v. Fed. Comm'n Comm'n*, 316 U.S. 4, 9-10 (1942) (explaining that stays of execution are part of the "traditional equipment for the administration of justice"); *Shaw v. Martin*, 613 F.2d 487, 492 n.2 (4th Cir. 1980) (finding that dates of execution are practically subject to deferral through judicial stay orders).

4. Julia E. Boaz, Note, *Summary Processes and the Rule of Law: Expediting Death Penalty Cases in the Federal Courts*, 95 YALE L.J. 349, 359 (1985) (discussing "the need for more stringent requirements for sentencing and review in capital punishment cases"); Veilleux, *supra* note 1, at 2550 (highlighting that "the rules governing stay decisions are not uniform").

5. *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936).

6. See, e.g., Aaron-Andrew P. Bruhl, *Deciding When to Decide: How Appellate Procedure Distributes the Costs of Legal Change*, 96 CORNELL L. REV. 203, 218-19 (2011) (discussing the discretion associated with appellate procedure regarding changes in legal regimes).



procedures and results<sup>7</sup> and has further resulted in seemingly unjust and inconsistent sentences.<sup>8</sup> Thus, the current system employed by courts in the United States to evaluate petitions to stay executions does not consistently provide defendants with the full and fair consideration to which they are entitled pursuant to the Due Process Clause of the U.S. Constitution.<sup>9</sup>

The injustice resulting from such broad discretion is apparent in many cases.<sup>10</sup> For example, in *Jacobs v. Scott*,<sup>11</sup> the petitioner was executed after the U.S. Supreme Court denied his application for a stay of execution, despite evidence implicating his innocence.<sup>12</sup> Similarly, in *Herrera v. Collins*,<sup>13</sup> although the Court agreed to hear the petitioner's claim that new evidence would establish his innocence, it denied the petition to stay his execution.<sup>14</sup> As a result, the petitioner's imminent execution preempted his ability to establish his innocence.<sup>15</sup>

The recent Supreme Court decision *Garcia v. Texas*<sup>16</sup> is a particularly good example of the injustice associated with courts' broad discretion in death penalty cases.<sup>17</sup> *Garcia* is one in a line of cases in

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7. Bruhl, *supra* note 6, at 231-32 (noting that even when courts reach the same substantive outcomes, they often apply different procedures to reach those results); see Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1080, 1094 (1988) (discussing the "inconsistency and incoherence" resulting from the U.S. Supreme Court Justices' views on the Court's rules of operation). Specifically, courts' choices regarding the implementation of new law "are often idiosyncratic or even haphazard." Bruhl, *supra* note 6, at 219.

8. See Boaz, *supra* note 4, at 354 (noting that the procedures used by courts in implementing the death penalty should strictly adhere to the "principle of fairness and reliability"); see also Cornelius F. Murphy, *The Supreme Court and Capital Punishment: A New Hands-Off Approach*, USA TODAY, Mar. 1993, at 51, 52 (discussing the U.S. Supreme Court's difficulty in properly and effectively enforcing its "unbridled discretion" associated with the death penalty).

9. The U.S. Constitution provides that, "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. Accordingly, procedural due process of law requires a fair and impartial trial. *In re Murchison*, 349 U.S. 133, 135-36 (1955).

10. See Veilleux, *supra* note 1, at 2562-63.

11. *Jacobs v. Scott*, 31 F.3d 1319 (5th Cir. 1994), *cert. denied sub nom. Jacobs v. Texas*, 513 U.S. 1070 (1995).

12. *Id.* at 1320.

13. 502 U.S. 1085 (1992).

14. See *id.*

15. A Texas state court judge subsequently granted petitioner a temporary stay. *Herrera v. Collins*, 506 U.S. 390, 397 (1993). The Court, however, denied him federal habeas corpus relief. *Id.* at 390. He was executed four months later, prior to having a chance to litigate his innocence claim. Veilleux, *supra* note 1, at 2544 n.17.

16. 131 S. Ct. 2866 (2011).

17. See *id.* at 2867.



which foreign nationals were arrested in the United States, denied access to their national consulates in violation of the Vienna Convention on Consular Relations (the “VCCR”),<sup>18</sup> and eventually convicted and sentenced to death.<sup>19</sup> In each of these cases, the Court denied the prisoners’ petitions to stay their executions.<sup>20</sup> However, *Garcia* is distinguishable because the Court denied the defendant’s petition to stay his execution, despite the fact that a bill, the Consular Notification Compliance Act of 2011 (the “CNCA”),<sup>21</sup> had been introduced into Congress.<sup>22</sup> If passed, the CNCA would have provided the defendant with a claim to challenge his or her capital sentence.<sup>23</sup>

This Note will demonstrate how the broad discretion given to courts to evaluate stays of execution has resulted in inconsistency and, therefore, injustice for defendants in capital cases, as specified above. Part II discusses the current methods applied by courts in evaluating petitions to stay the executions of death sentences, as well as courts’ practice of granting stays where there is a pending decision, the outcome of which will affect the petitioner’s sentence. Part III uses *Garcia* to demonstrate the injustice that occurs when a stay is denied despite relevant proposed legislation that has been introduced into Congress. Finally, Part IV discusses how guidelines surrounding stays have proven to be functional and beneficial in an area of law in which individuals’ lives are not at stake. It then analogizes proposed legislation with pending court decisions, and proposes that, since courts grant stays of executions where there is the potential for changes in substantive case law, courts should similarly consider granting stays where there is relevant legislation introduced into Congress to allow for greater consistency and justice. Part IV further addresses the state’s countervailing interests of federalism and finality and suggests that considering granting stays where the petitioner stands to potentially benefit from proposed legislation will not unduly interfere with these interests. Finally, Part V concludes that considering granting stays of execution will at least afford defendants the potential opportunity to

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18. Vienna Convention on Consular Relations, art. 36, Apr. 24, 1963, 596 U.N.T.S. 261.

19. *Garcia*, 131 S. Ct. at 2867; *see also, e.g.,* *Medellín v. Texas*, 554 U.S. 759, 759-60 (2008); *Breard v. Greene*, 523 U.S. 371, 372-73 (1998).

20. *See, e.g., Garcia*, 131 S. Ct. at 2868; *Medellín*, 554 U.S. at 760; *Breard*, 523 U.S. at 378-79.

21. Consular Notification Compliance Act of 2011, S. 1194, 112th Cong. (2011).

22. *Garcia*, 131 S. Ct. at 2867-68.

23. Consular Notification Compliance Act of 2011 § 4(a)(1).



present a claim that those with later execution dates will potentially have the ability to present.

## II. HOW COURTS EVALUATE PETITIONS FOR STAYS OF EXECUTION

Federal courts have jurisdiction to stay the execution of sentences pursuant to habeas corpus.<sup>24</sup> After an individual exhausts state court remedies,<sup>25</sup> the writ of habeas corpus allows that individual to challenge his or her conviction on constitutional grounds in federal court.<sup>26</sup> Accordingly, stay petitions often accompany these post-conviction appeals in attempts to gain time to litigate and decide the claims.<sup>27</sup> The Federal Rules of Criminal Procedure provide limited guidelines.<sup>28</sup> However, courts exercise their discretion when deciding to grant or deny petitions to stay executions.<sup>29</sup> Although the Supreme Court has held that, due to its nature, capital punishment is entitled to higher procedural safeguards than other sentences,<sup>30</sup> the discretion granted to courts continues to result in the application of inconsistent procedures and

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24. The jurisdictional grant is clear:

A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

28 U.S.C. § 2251(a)(1) (2006).

25. Post-conviction appeal in state court is termed “direct” review. Veilleux, *supra* note 1, at 2546.

26. Michael Macmanus, Comment, *Section 2262(C) of the Antiterrorism and Effective Death Penalty Act of 1996: Towards the Precipice of Unconstitutionality?*, 7 SETON HALL CONST. L.J. 879, 888-89 (1997); Veilleux, *supra* note 1, at 2546. Post-conviction appeals in federal court are referred to as “collateral” review. *Id.* The doctrine of habeas corpus represents the notion that the state must have justification to detain an individual. Macmanus, *supra*, at 886. The Constitution prohibits suspension of “[t]he Privilege of the Writ of Habeas Corpus.” U.S. CONST. art. I, § 9, cl. 2. Moreover, the Supreme Court has described writs of habeas corpus as the “highest safeguard of liberty.” *Lonchar v. Thomas*, 517 U.S. 314, 322 (1996) (quoting *Smith v. Bennett*, 365 U.S. 708, 712 (1961)).

27. Veilleux, *supra* note 1, at 2546. The need to stay executions is particularly crucial in capital cases, since executing the sentence renders moot any claim of the death-sentenced individual. Beverly Bryan Swallows, Comment, *Stays of Execution: Equal Justice for All*, 45 BAYLOR L. REV. 911, 929 (1993).

28. See FED. R. CRIM. P. 38. Specifically, this rule sets forth that courts must grant stays of a death sentence where “the defendant appeals the conviction or sentence.” *Id.*

29. *United States v. Bestway Disposal Corp.*, 724 F. Supp. 62, 70 (W.D.N.Y. 1988).

30. Boaz, *supra* note 4, at 353 n.19; see also Gailon W. McGowen, Jr., Note, *An Opportunity to Address the Merits: Barefoot v. Estelle*, 463 U.S. 880 (1983), 17 COLUM. HUM. RTS. L. REV. 83, 100 (1985).



results.<sup>31</sup> However, where there is potential for a change in relevant case law, courts tend to exercise their discretion in favor of the petitioner in order to give him or her a chance to benefit from the potential law.<sup>32</sup>

### A. The “Standards”

The Supreme Court did attempt to set forth general guidelines for courts to follow when evaluating petitions to stay the executions of death sentences in *Barefoot v. Estelle*.<sup>33</sup> There, the Court found it necessary to establish proper procedure in the interest of “the fair and efficient consideration” of defendants’ habeas corpus appeals.<sup>34</sup> The Court left it to the lower courts to develop the procedure<sup>35</sup> but established that where

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31. See, e.g., Veilleux, *supra* note 1, at 2550 (discussing the “informal procedures” and inconsistency regarding stay decisions); see also, e.g., Edward A. Hartmett, *Ties in the Supreme Court of the United States*, 44 WM. & MARY L. REV. 643, 676 (2002) (explaining how “a blanket rule requiring a stay in death penalty cases rather than . . . case-by-case equitable balancing” is appropriate due to the irreparable harm that can be caused by the sentence). However, this is not the only area of law in which broad judicial discretion is problematic. For example, the decision whether to impose the death penalty lies within the discretion of the sentencers. George Wesley Sherrell, IV, Note, *Successive Chances for Life: Kuhlmann v. Wilson, Federal Habeas Corpus, and the Capital Petitioner*, 64 N.Y.U. L. REV. 455, 478-79 (1989). Although it is important that such decisions be made “rationally and according to uniform standards,” the Court has struggled to find a system that guides the imposition of the death penalty. Jack Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 914 (1982); Sherrell, *supra*, at 478-79. In 1972, the Court struck down capital punishment statutes since “the penalty was being imposed without uniformity or reason,” but subsequently upheld statutes that limited the sentencer’s discretion and assisted appellate review of the sentencer’s decision. Sherrell, *supra*, at 478. However, later decisions allowed defendants to introduce any available mitigating evidence, making it difficult to determine why the jury found the death sentence to be appropriate on appellate review. *Id.* at 478-79. While this may have been meant to assist defendants facing potential death sentences, it interferes with the Court’s attempt to make the sentencing process more certain and uniform. *Id.* For instance, if the appellate court is uncertain whether an error that occurred during trial affected the jury’s decision, it similarly cannot be certain whether that decision should be upheld. *Id.* at 479. Judge Gerald W. Heaney has even held that “the imposition of the death penalty is arbitrary and capricious,” and further that “the decision of who shall live and who shall die for his crime turns less on the nature of the offense and the incorrigibility of the offender and more on inappropriate and indefensible considerations.” *Singleton v. Norris*, 108 F.3d 872, 875 (8th Cir. 1997) (Heaney, J., concurring); see also Stephen B. Bright, *Will the Death Penalty Remain Alive in the Twenty-First Century?: International Norms, Discrimination, Arbitrariness, and the Risk of Executing the Innocent*, 2001 WIS. L. REV. 1, 9 (expressing disapproval of the capital punishment system).

32. See, e.g., *Rosenberg v. United States*, 346 U.S. 273, 285 (1953) (convening a Special Term of the Court to discuss a grant of a stay of execution pending a lower court’s determination of whether law applied to a specific case); see also Bruhl, *supra* note 6, at 219 n.48 (2011).

33. 463 U.S. 880, 892-95 (1983).

34. *Id.* at 892.

35. *Id.*



a prisoner obtains a certificate of probable cause by “mak[ing] a ‘substantial showing of the denial of [a] federal right,’”<sup>36</sup> the Court should grant a stay of execution to allow for disposition of the appeal.<sup>37</sup> Further, stays may be considered simultaneously with the merits of the appeal, but *must* be granted if the time needed to rule on the merits conflicts with the defendant’s impending execution date.<sup>38</sup> With regards to stays related to successive habeas corpus petitions that present new issues, the petitioner must demonstrate “substantial grounds upon which relief might be granted.”<sup>39</sup> Lastly, stays should be granted if the petitioner sets forth a reasonable probability that four Justices would find the underlying issue sufficiently meritorious to grant certiorari, a significant possibility that the lower court’s decision will be reversed, and a “likelihood [of] irreparable harm” resulting from a denial of the stay.<sup>40</sup>

In response to *Barefoot*, some of the Federal Circuit Courts of Appeals promulgated rules that govern the procedure for applying for stays of execution of death sentences pending appeal.<sup>41</sup> However, the standard under which the courts will consider such petitions has yet to be codified.<sup>42</sup> Further, *Barefoot* has since been superseded by statute.<sup>43</sup> While it continues to be cited for various propositions,<sup>44</sup> application of this standard is inconsistent.<sup>45</sup> Further, both Congress and the Supreme Court have yet to establish guidelines regarding the evaluation of stay

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36. *Id.* at 893 (quoting *Stewart v. Beto*, 454 F.2d 268, 270 n.2 (5th Cir. 1971)). This portion of the *Barefoot* inquiry has since been superseded by 28 U.S.C. § 2253(c)(2), which provides that the defendant must substantially establish the denial of a constitutional, rather than a federal right. 28 U.S.C. § 2253(c)(2) (2008); *see also* *United States v. Monroe*, 974 F. Supp. 1472, 1475 n.4 (N.D. Ga. 1997) (evaluating motion for certificate of appealability). Nonetheless, the Court noted in *Barefoot* that it is proper to consider the nature of a capital sentence when evaluating probable cause. *Barefoot*, 463 U.S. at 893.

37. *Barefoot*, 463 U.S. at 893-94.

38. *Id.* at 894.

39. *Id.* at 895.

40. *Id.*

41. McGowen, *supra* note 30, at 90 (evaluating the effectiveness of the procedures).

42. *See, e.g.*, 4TH CIR. LOC. R. 22(b); 5TH CIR. R. 8(2).

43. *See* 28 U.S.C. § 2235(c)(2) (2008).

44. *Hill v. McDonough*, 547 U.S. 573, 584 (2006); *see also* *Netherland v. Tuggle*, 515 U.S. 951, 952 (1995) (denying the petitioner’s stay for failure to convince four Justices that certiorari would be granted on underlying claims).

45. *Compare Hill*, 547 U.S. at 584 (holding that defendants must satisfy the *Barefoot* requirements for a stay), *with Garcia v. Texas*, 131 S. Ct. 2866 (2011) (making no mention of *Barefoot* or stay requirements).



petitions where there is no petition for certiorari on the underlying appeal.<sup>46</sup>

Although *Barefoot* could have been a step toward consistent procedure, there continues to be no uniform method for evaluating petitions to stay executions of death sentences.<sup>47</sup> Sometimes courts require that a stay of execution be granted only where a substantial question exists, therefore compelling further proceedings.<sup>48</sup> Other times courts find that a consideration of whether the underlying issue has been fairly litigated trumps an inquiry into substance.<sup>49</sup> Still, many times courts do not consider whether a substantial question exists at all.<sup>50</sup> Rather, they analyze petitions to stay executions in accordance with the four-prong standard used to evaluate preliminary injunctions,<sup>51</sup> since stays and injunctions similarly provide relief in the form of enjoining current actions.<sup>52</sup> In such instances, these courts consider whether: (1) the petitioner “has a substantial likelihood of success on the merits;” (2) the petitioner would “suffer irreparable injury” without issuance of the stay; (3) issuing the stay would “substantially harm” the other party involved in the litigation; and (4) issuing the stay would “be adverse to the public interest.”<sup>53</sup>

Sometimes courts apply this four-prong standard in determining whether a substantial question exists.<sup>54</sup> Even still, other courts require petitioners to show good cause for the court to grant a stay of execution.<sup>55</sup> For example, in *Morales v. Cate*,<sup>56</sup> the court granted the

46. See, e.g., 28 U.S.C. § 2235; *Barefoot v. Estelle*, 463 U.S. 880, 892-96 (1983) (limiting guidelines to govern stays in which the petitioner has an underlying appeal pending).

47. See Bruhl, *supra* note 6, at 256-57; see also Boaz, *supra* note 4, at 358 (noting that the post-*Barefoot* procedures “provide no measured or sensible system”).

48. *Rosenberg v. United States*, 346 U.S. 273, 288-89 (1953) (finding no substantial question where the Court refuted defendants’ claim that the District Court had no jurisdiction to impose the death sentence); *Wheeler v. Reid*, 175 F.2d 829, 831 (D.C. Cir. 1948) (finding no substantial question where defendant did not seek underlying appeal in good faith).

49. *Shaw v. Martin*, 613 F.2d 487, 491 (4th Cir. 1980).

50. See, e.g., *infra* notes 51-62 and accompanying text.

51. *DeYoung v. Owens*, 646 F.3d 1319, 1324 (11th Cir. 2011).

52. *Mulligan v. Zant*, 531 F. Supp. 458, 459 (M.D. Ga. 1982) (“[T]he extraordinary remedy of a stay of execution is equivalent to the issuance of a preliminary injunction, and . . . similar considerations apply in the Court’s exercise of its discretion.”).

53. *DeYoung*, 646 F.3d at 1324; see also *Valle v. Singer*, 655 F.3d 1223, 1228 (11th Cir. 2011); *Workman v. Bell*, 484 F.3d 837, 839 (6th Cir. 2007); *Mulligan*, 531 F. Supp. at 459.

54. *O’Bryan v. Estelle*, 691 F.2d 706, 708, 710 (5th Cir. 1982) (setting forth guidelines later to be adopted in *Barefoot* and finding a substantial question where petitioner alleged that jury selection violated rules established in U.S. Supreme Court case law).

55. *Catlin v. Superior Court*, 245 P.3d 860, 866 (Cal. 2011); *Tokman v. Terrell*, No. 06-0150,



petitioner's stay since it found "good cause"<sup>57</sup> where the petitioner could potentially establish that California's method of execution "create[d] a demonstrated risk of severe pain."<sup>58</sup> Yet, in *Tokman v. Terrell*,<sup>59</sup> where the petitioner asserted that his execution should be stayed so that the Supreme Court could evaluate a separate, non-capital judgment, the court found that the petitioner failed to establish "good cause" to stay his execution.<sup>60</sup> Moreover, other times courts grant or deny stays without specifying any standard<sup>61</sup> or fail to explain the reasons for their decisions altogether.<sup>62</sup>

The evaluation procedure not only varies from court to court, but it is inconsistent within individual courts as well.<sup>63</sup> Further, there seems to be a trend toward expediting the execution process.<sup>64</sup> Thus, a petitioner seeking full and fair consideration of his or her sentence through a stay of execution cannot even be sure under which procedure, if any, his or her stay petition will be evaluated.<sup>65</sup>

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2006 WL 1750671, at \*5 (W.D. La. May 2, 2006).

56. No. 5-6-cv-219-JF-HRL, 2010 WL 3835655 (N.D. Cal. Sept. 28, 2010).

57. *Id.* at \*5.

58. *Id.* at \*4 (quoting *Baze v. Rees*, 553 U.S. 35, 61 (2008)) (internal quotation marks omitted).

59. No. 06-0150, 2006 WL 1750671 (W.D. La. May 2, 2006).

60. *Id.* at \*1, \*4-5.

61. See e.g., *Garcia v. Texas*, 131 S. Ct. 2866, 2868 (2011) (denying stay since claim was based on "hypothetical legislation"); *Medellín v. Texas*, 554 U.S. 759, 760 (2008) (denying stay where there was no evidence of an unlawfully obtained confession); *Wicker v. McCotter*, 798 F.2d 155, 156 (5th Cir. 1986) (denying stay where the petitioner failed to present an "issue that jurists of reason would consider debatable").

62. *Revesz & Karlan*, *supra* note 7, at 1074-75; *Swallows*, *supra* note 27, at 924 (highlighting that stay decisions are usually not accompanied by an opinion). For examples of the Court denying petition for stays of death sentences without providing explanation, see *Juniper v. Kelly*, 132 S. Ct. 572, 572 (2011), *Valle v. Singer*, 132 S. Ct. 73, 73 (2011), and *Darden v. Wainwright*, 473 U.S. 927, 927 (1985).

63. Compare *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004) (explaining that courts must consider "the likelihood of success on the merits [and the] relative harms to the parties, [but also] the extent to which the" petition was unnecessarily tardy), with *Autry v. Estelle*, 464 U.S. 1, 2 (1983) (denying stay for failure to convince four Justices that certiorari would be granted on underlying claims, "one of the basic requirements for the issuance of a stay," and failing to make mention of any consideration of the relative harm to the parties), and *Garcia*, 131 S. Ct. at 2866-68 (making no evaluation of relative harm to the parties or time of filing).

64. See *Boaz*, *supra* note 4, at 355-56, 358-59 (discussing expedited executions and the surrounding problems). See generally *Veilleux*, *supra* note 1 (discussing and analyzing data evidencing the overall increase in denied stays of execution).

65. See *Bruhl*, *supra* note 6, at 256-57; *Veilleux*, *supra* note 1, at 2550.



### B. Where There Are Potential Changes in Case Law

The procedure that governs potential changes in the law similarly lacks formal rules.<sup>66</sup> However, the Supreme Court has noted the importance of adapting to changes in accordance with justice.<sup>67</sup> Thus, although new law is sometimes applied prospectively,<sup>68</sup> changes in case law are generally applied retroactively to cases that are pending on appeal.<sup>69</sup> Further, criminal proceedings allow for collateral attack on final judgments<sup>70</sup> and changes in substantive law provide reason for relief in post-finality collateral proceedings.<sup>71</sup>

The Court has even made it a practice to remand cases for reconsideration where, in light of new precedent, it becomes unclear whether the case's disposition should remain the same.<sup>72</sup> An underlying assumption exists in the court system that when the Court makes such a remand—also referred to as a “GVR”<sup>73</sup>—it has decided that the judgment below is inconsistent, and thus cannot coexist, with the new precedent.<sup>74</sup> Therefore, under this assumption, when presented with these remands, the lower courts are expected to reverse their decisions,<sup>75</sup> effectively applying the new case law retroactively.<sup>76</sup>

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66. Bruhl, *supra* note 6, at 218-20.

67. *Landis v. N. Am. Co.*, 299 U.S. 248, 256 (1936).

68. U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”). Retroactive liability is prohibited in criminal law so that people are on notice of what constitutes criminal behavior. See Bruhl, *supra* note 6, at 210; R. Brian Tanner, Comment, *A Legislative Miracle: Revival Prosecutions and the Ex Post Facto Clauses*, 50 EMORY L.J. 397, 416 (2001).

69. Bruhl, *supra* note 6, at 211 (“Adjudicative retroactivity . . . is balanced against values like finality and repose.”). Constitutional principles of criminal procedure also apply retroactively to cases pending on direct review. *Teague v. Lane*, 489 U.S. 288, 304 (1989).

70. Collateral attack is a form of post-conviction relief that is not a direct appeal. *Wall v. Kholi*, 131 S. Ct. 1278, 1284 (2011) (citing WASH. REV. CODE § 10.73.090(2) (2008)). Collateral review provides defendants with a method to make legal challenges to their conviction. See *id.* at 1283-84, 1287.

71. Bruhl, *supra* note 6, at 212.

72. See, e.g., *Henry v. City of Rock Hill*, 376 U.S. 776, 776 (1964).

73. “GVR” is an acronym that represents the Court’s procedure of *granting* certiorari, *vacating* the lower court’s decision, and *remanding* the case to the lower court for further consideration. Bruhl, *supra* note 6, at 217.

74. Arthur D. Hellman, *The Supreme Court’s Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held for Plenary Decisions*, 11 HASTINGS CONST. L.Q. 5, 9-10 (1984).

75. *Id.* at 8.

76. *United States v. Schleis*, 582 F.2d 1166, 1173 n.6 (8th Cir. 1978) (noting that the Court would not have remanded the case to the Eighth Circuit had it not intended for retroactive application of the new case law); Hellman, *supra* note 74, at 20.



Accordingly, courts have used their discretion to grant petitions to stay the executions of death sentences where there are pending court decisions that might affect the outcome of the defendant's sentence.<sup>77</sup> For example, in *Rosenberg v. United States*,<sup>78</sup> the two defendants petitioned the Court to stay their executions, alleging that the Atomic Energy Act of 1946<sup>79</sup> superseded the Espionage Act<sup>80</sup> and thus rendered the District Court without jurisdiction to impose a death sentence.<sup>81</sup> The Court granted the stay until applicability of the Atomic Energy Act could be determined in the lower courts.<sup>82</sup>

Furthermore, the Court typically uses its discretion to grant stay petitions where the petitioner's underlying claim goes to the same question to which it has granted certiorari.<sup>83</sup> At times, lower courts follow the precedent of the Supreme Court in granting stays where certiorari has been granted on a relevant issue.<sup>84</sup> For example, in *Chambers v. Bowersox*,<sup>85</sup> the court granted a stay of execution since the decision of a pending Supreme Court case could be determinative as to whether the defendant was entitled to plenary review.<sup>86</sup> Similarly, in *Gardner v. Florida*,<sup>87</sup> the court stayed the execution of a capital prisoner sentenced in Florida pending the Supreme Court's decision regarding the

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77. Courts have discretion when there is a potential change in the law—they can stay the case or fail to act until the issue regarding the change in the law is resolved. Bruhl, *supra* note 6, at 218-19. At times, courts decline to wait for the outcome of the relevant decision, despite the irreparable harm involved. *Id.* at 206. However, "the unwillingness of . . . courts to manage the timing of their decisions with an eye toward the potential for a forthcoming change of law is incongruous in light of how courts handle other cases." *Id.* at 257.

78. 346 U.S. 273 (1953).

79. Pub. L. No. 79-585, 60 Stat. 755 (1946) (codified as amended at 42 U.S.C. §§ 2011-23. (2008)).

80. 18 U.S.C. § 794 (2006).

81. *Rosenberg*, 346 U.S. at 283.

82. *Id.* at 285. However, the Court subsequently vacated the stay, holding that the question to be decided during the stay was not substantial since the Atomic Energy Act did not render the District Court without jurisdiction to impose the death penalty under the Espionage Act. *Id.* at 288-89.

83. Bruhl, *supra* note 6, at 219 n.48 (citation omitted); see also Hartnett, *supra* note 31, at 677-78 (arguing that Congress should codify a law providing for the automatic stay of a death sentence any time the Supreme Court grants a petition for certiorari). But see Veilleux, *supra* note 1, at 2550-51.

84. See Bruhl, *supra* note 6, at 206.

85. 197 F.3d 308 (8th Cir. 1999).

86. *Id.* at 309 (finding an "appreciable chance" that the defendant had not received "the full review process").

87. 430 U.S. 349 (1977).



constitutionality of the capital-sentencing procedure in Florida.<sup>88</sup> Moreover, from 2006 to 2008, several courts granted petitions to stay the executions of prisoners sentenced to death by lethal injection, pending the Supreme Court's decision in *Baze v. Rees*.<sup>89</sup>

Therefore, the U.S. court system does not apply a uniform standard when determining whether to grant or deny petitions to stay the executions of death sentences.<sup>90</sup> This lack of structure often results in uncertainty and, at times, injustice.<sup>91</sup> However, courts have demonstrated a trend toward granting petitions to stay executions where there exists the potential for a change in case law from which the petitioner stands to benefit.<sup>92</sup> Courts should extend this practice to granting stays where there exists the potential for a change in statutory law.<sup>93</sup>

### III. PREJUDICE EXEMPLIFIED: DENIAL DESPITE PROPOSED LEGISLATION

Although the injustice resulting from courts' broad discretion to stay the executions of death sentences is demonstrated in numerous cases,<sup>94</sup> it is particularly apparent in *Garcia v. Texas*.<sup>95</sup> Due to the failure of many states to comply with Article 36 of the VCCR,<sup>96</sup> numerous foreign nationals<sup>97</sup> arrested in the United States have been prosecuted

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88. *Id.* at 354.

89. 553 U.S. 35, 41 (2008) (reviewing the constitutionality of lethal injection administration methods); *Stays and Executions*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/lethal-injection-stays-granted> (last visited July 27, 2012) (discussing stays based on challenges to the lethal injection process).

90. Veilleux, *supra* note 1, at 2550; *see also* Boaz, *supra* note 4, at 359.

91. *See, e.g.*, Boaz, *supra* note 4, at 354, 359; Veilleux, *supra* note 1, at 2546, 2557.

92. *See, e.g.*, *Rosenberg v. United States*, 346 U.S. 273, 285 (1953) (granting stay pending a lower court's determination of whether law applied to the petitioners' specific case); Bruhl, *supra* note 6, at 219 n.48.

93. *See infra* Part IV.B.

94. *See* Veilleux, *supra* note 1, at 2543 (highlighting various cases in which the Court denied petitions to stay the execution of death sentences despite evidence implicating the petitioners' innocence).

95. *See generally* 131 S. Ct. 2866 (2011).

96. Vienna Convention on Consular Relations, art. 36, Apr. 24, 1963, 596 U.N.T.S. 261. Under Article 36 of the VCCR, the United States is required to inform detained foreign nationals "without delay" of the right to communicate with their consulate and to freely allow such communications. *Id.*

97. It is difficult to quantify the number of foreign nationals arrested and sentenced to death since, due to the failure of the United States to provide arrested foreigners with their consular rights, the "foreign consulates in the United States are likely to remain unaware of the true number of their nationals who are imprisoned, let alone sentenced to death." Mark Warren, *Foreign Nationals and*



and sentenced to death without being provided access to the legal resources of their respective national consulates upon arrest.<sup>98</sup> Although this constitutes a violation of the VCCR,<sup>99</sup> the Supreme Court has held that such a violation does not constitute grounds to stay the executions of the sentences in order to afford these convicted individuals a new, unprejudiced trial.<sup>100</sup>

The petition for a stay of execution in *Garcia*, however, did not merely allege a VCCR violation.<sup>101</sup> Rather, it asserted that the execution should be stayed to allow Garcia the opportunity to benefit from a potential change in legislation.<sup>102</sup> The Court has previously stayed executions in light of potential changes in case law,<sup>103</sup> and Garcia set forth evidence of a strong likelihood of the potential legislative change.<sup>104</sup> However, the majority of the Court, in its discretion, denied Garcia an opportunity to potentially benefit from a law that similarly situated individuals may benefit from in the near future.<sup>105</sup>

#### A. Background

Pursuant to Article 36 of the VCCR, foreign nationals who are arrested abroad have a right to communicate with their national consulate.<sup>106</sup> This is beneficial to foreigners because the consulate has the power to ensure the arrestee has proper legal assistance.<sup>107</sup> Congress has recognized the crucial role played by competent counsel in capital

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*the Death Penalty in the US*, DEATH PENALTY INFO. CENTER (Feb. 28, 2012), <http://www.deathpenaltyinfo.org/foreign-nationals-and-death-penalty-us>. However, an estimated sixty-six foreigners who were arguably denied their consular rights are currently on death row. *Id.*

98. Nancy Alexander, Comment, *Saved by the States? The Vienna Convention on Consular Relations, Federal Government Shortcomings, and Oregon's Rescue*, 15 LEWIS & CLARK L. REV. 819, 822-23 (2011).

99. *Id.*

100. See, e.g., *Medellin v. Texas*, 554 U.S. 759, 759-60 (2008); *Germany v. United States*, 526 U.S. 111, 111-12 (1999); *Breard v. Greene*, 523 U.S. 371, 377-79 (1998).

101. *Garcia v. Texas*, 131 S. Ct. 2866, 2867 (2011).

102. *Id.*

103. Bruhl, *supra* note 6, at 219 n.48.

104. Supplemental Brief to the Petition for Writ of Certiorari at 1 *Garcia v. Texas*, 131 S. Ct. 2866 (2011) (No. 11-5001) [hereinafter Supplemental Brief to the Petition].

105. See generally *Garcia*, 131 S. Ct. 2866 (denying petition for stay of execution and writ of habeas corpus).

106. Vienna Convention on Consular Relations, art. 36, Apr. 24, 1963, 596 U.N.T.S. 261.

107. Alexander, *supra* note 98, at 823-24; see also Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 15-17 (1990) (discussing the importance of competent counsel in capital cases).



cases by providing for an automatic stay upon the appointment of adequate counsel in initial post-conviction proceedings.<sup>108</sup> Moreover, in 2001, Supreme Court Justice Ruth Bader Ginsburg noted that whether a capital defendant received competent counsel would be dispositive of his or her sentence.<sup>109</sup>

As a party to the VCCR,<sup>110</sup> the United States has an international obligation to comply with its provisions.<sup>111</sup> However, the United States has demonstrated a consistent disregard for Article 36 of the VCCR.<sup>112</sup> As a result, numerous foreign nationals arrested in the United States have been convicted and sentenced to death without being given access to the resources of their respective consulates.<sup>113</sup> Many of these sentenced foreigners have unsuccessfully attempted to preempt their capital punishment by alleging that their convictions were prejudiced due to lack of consular access.<sup>114</sup> One such attempt is apparent in *Medellin v. Texas*.<sup>115</sup> There, Texas officials arrested a Mexican national and failed to inform him of his right to communicate with the Mexican consulate pursuant to the VCCR.<sup>116</sup> Medellín was subsequently convicted and sentenced to death.<sup>117</sup>

Meanwhile, as a result of the deaths resulting from the consistent failure of the United States to comply with Article 36 of the VCCR,

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108. 28 U.S.C. §§ 2261(c), 2262(a) (2006); *see also* Hartnett, *supra* note 31, at 677 (discussing the Antiterrorism and Effective Death Penalty Act of 1996, as codified in 28 U.S.C. § 2262(a)).

109. "I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial? People who are well represented at trial do not get the death penalty." *Inadequate Representation*, AM. CIV. LIBERTIES UNION (Oct. 8, 2003), <http://www.aclu.org/capital-punishment/inadequate-representation>.

110. *Medellin v. Texas*, 552 U.S. 491, 499 (2008) (noting that the United States ratified the VCCR in 1969); MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL 32390, VIENNA CONVENTION ON CONSULAR RELATIONS: OVERVIEW OF U.S. IMPLEMENTATION AND INTERNATIONAL COURT OF JUSTICE (ICJ) INTERPRETATION OF CONSULAR NOTIFICATION REQUIREMENTS 4 (2004) [hereinafter ICJ INTERPRETATION OF CONSULAR NOTIFICATION], available at <http://www.fas.org/sgp/crs/row/RL32390.pdf>.

111. ICJ INTERPRETATION OF CONSULAR NOTIFICATION, *supra* note 110, at 1; Alexander, *supra* note 98, at 822.

112. ICJ INTERPRETATION OF CONSULAR NOTIFICATION, *supra* note 110, at 1; Alexander, *supra* note 98, at 822-23.

113. Warren, *supra* note 97.

114. *See, e.g.,* Germany v. United States, 526 U.S. 111, 111-12 (1999) (denying motion to enjoin execution of German national since pleas were tardy); *Breard v. Greene*, 523 U.S. 371, 377-79 (1998) (finding no private cause of action in the VCCR to set aside convictions).

115. 552 U.S. 491, 501-04 (2008).

116. *Id.* at 500-01.

117. *Id.* at 501.



Mexico brought a claim against the United States in the International Court of Justice ("ICJ")<sup>118</sup> regarding Medellín and the fifty-one other foreign nationals on death row who had been denied their consular rights under the VCCR.<sup>119</sup> The ICJ found that the United States was bound by its international obligations pursuant to the VCCR.<sup>120</sup> As such, it ordered the United States to reconsider the convictions and sentences of those foreign nationals awaiting execution.<sup>121</sup> Accordingly, Medellín applied in state court for a writ of habeas corpus.<sup>122</sup> On appeal, however, the Supreme Court found that the "the treaties requiring compliance with the *Avena* judgment"<sup>123</sup> were not self-executing,<sup>124</sup> and, therefore, that the ICJ decision was not binding in the United States absent congressional action.<sup>125</sup>

Medellín then petitioned the Court to stay the execution of his death sentence, arguing that, should Congress or the state legislature determine that the ICJ decision should be given controlling weight in U.S. domestic law, the Court would have jurisdiction over his claim that he

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118. The ICJ is an international tribunal that adjudicates disputes between members of the United Nations Charter. *Id.* at 497; U.N. Charter art. 92 ("The International Court of Justice shall be the principal judicial organ of the United Nations.").

119. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 15-16, 23 (Mar. 31); see also *Medellín v. Texas*, 522 U.S. 491, 497-98 (2008).

120. *Avena*, 2004 I.C.J. at 73.

121. *Id.* at 73.

122. *Medellín*, 552 U.S. at 498.

123. *Id.* at 504. Specifically, the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention, the United Nations Charter and the ICJ Statute. *Id.* at 499, 506 n.4.

124. Treaty obligations do not extend from international law into domestic law absent congressional action unless the treaty is self-executing. *Id.* at 504-05. A treaty is self-executing if it contains provisions that make it operative in the United States. *Id.* at 505-06.

125. *Id.* at 506. In 1969, the United States signed the Vienna Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes. Optional Protocol Concerning the Compulsory Settlement of Disputes, art. 1, Apr. 24, 1963, 496 U.N.T.S. 487, available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/9\\_2\\_1963\\_disputes.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963_disputes.pdf) [hereinafter Optional Protocol]; Alexander, *supra* note 98, at 823. As a party to the Optional Protocol, the United States agreed to be subject to the compulsory jurisdiction of ICJ opinions. Optional Protocol, *supra*; Alexander, *supra* note 98, at 823. In response to Medellín's petition to stay his execution, President George W. Bush issued a Presidential Memorandum declaring that the courts should comply with the *Avena* judgment. George W. Bush, President of the United States, Memorandum for the Att'y Gen. (Feb. 28, 2005), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2005/02/20050228-18.html>; see also *Medellín*, 552 U.S. at 498. In 2005, the United States withdrew from the Optional Protocol. Letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations (Mar. 7, 2005), available at <http://www.state.gov/documents/organization/87288.pdf>; Alexander, *supra* note 98, at 823. The Court similarly found the Presidential Memorandum to be unenforceable in U.S. domestic law. *Medellín*, 552 U.S. at 498-99.



received a prejudiced trial.<sup>126</sup> Nevertheless, the Court found that the possibility was “too remote” that either Congress or the Texas legislature would enact legislation that would make the VCCR violation illegal in domestic law.<sup>127</sup> The Court denied the stay,<sup>128</sup> and Medellín was executed that day.<sup>129</sup>

### B. *Garcia v. Texas*

*Garcia v. Texas*<sup>130</sup> similarly concerned a foreign national on death row who did not receive access to his national consulate pursuant to the VCCR.<sup>131</sup> In *Garcia*, the federal legislature had taken steps toward the congressional action necessary to make the *Avena* decision binding in U.S. domestic law.<sup>132</sup> Accordingly, Garcia’s stay petition alleged that his execution should be postponed pending Congress’s consideration of the CNCA,<sup>133</sup> which, if passed, could have the potential to change Garcia’s sentence.<sup>134</sup> Still, despite the introduction of the CNCA into Congress, the Court denied Garcia’s petition to stay his execution.<sup>135</sup>

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126. *Medellín v. Texas*, 554 U.S. 759, 759 (2008).

127. *Id.* The Court further noted that it had received no representation from the President or other officials regarding the likelihood of legislative action. *Id.* at 759-60.

128. *Id.* at 760. The Court also found the stay to be inappropriate since Medellín’s confession was not obtained unlawfully and the state court judgment was valid. *Id.*

129. *Id.* at 759 (rendering decision on August 5, 2008); David Carson, *Jose Medellin*, TEX. EXECUTION INFO. CENTER. (Aug. 6, 2008), <http://www.txexecutions.org/reports/410.asp> (noting that Jose Medellín was executed on August 5, 2008).

130. 131 S. Ct. 2866 (2011).

131. *Id.* at 2867. In fact, Garcia is one of the Mexican nationals listed in the *Avena* case. Brief *Amicus Curiae* of the Gov’t of the United Mexican States in Support of Petitioner Humberto Leal García at 1, 10, *García v. Texas*, 131 S. Ct. 2866 (2011) (No. 11-5001) [hereinafter Brief *Amicus Curiae* of the United Mexican States]; see also Zoe Tillman, *Supreme Court Denies Stay of Execution for Humberto Leal*, THE BLT: THE BLOG OF LEGAL TIMES (July 7, 2011, 7:45 PM), <http://legaltimes.typepad.com/blt/2011/07/supreme-court-denies-stay-of-execution-for-humberto-leal.html>.

132. *Garcia*, 131 S. Ct. at 2867 (explaining the introduction of legislation in the Senate with the support of the Executive Branch).

133. *Id.* at 2869.

134. See Consular Notification Compliance Act of 2011, S. 1194, 112th Cong. § 4(a)(1)–(2) (2011). The Court was aware that the CNCA would likely become enacted legislation prior to the end of the current congressional session, since the Supplemental Brief to the Petition for Writ of Certiorari set forth that the CNCA had the support of the Obama administration, the endorsement of Secretary of State Hillary Clinton and Attorney General Eric Holder, and the commitment of Senator Leahy to ensure it passed. Supplemental Brief to the Petition, *supra* note 104, at 1.

135. *Garcia*, 131 S. Ct. at 2867-68.



The enactment of the CNCA would provide a substantive change to the law that would go directly to the sentences of Garcia and other similarly situated foreign nationals.<sup>136</sup> Specifically, the CNCA would provide the federal courts with jurisdiction to hear claims regarding VCCR violations.<sup>137</sup> Thus, Garcia and other foreign death row prisoners would be entitled to hearings regarding their allegations that their trials were prejudiced due to the state's failure to comply with the VCCR.<sup>138</sup> The CNCA would also codify the international obligations of the United States pursuant to the VCCR,<sup>139</sup> therefore placing the claims of future foreign arrestees alleging failure to be provided with consular access within the protection of federal court review.<sup>140</sup>

### C. Garcia's Injustice

Although Garcia alleged that his constitutional due process rights<sup>141</sup> would be violated if the Court were to deny the stay given that Congress was currently reviewing the CNCA,<sup>142</sup> the Court, using its discretion, held that it was not its job to rule on what the law might be and denied

136. See *id.* at 2869 (Breyer, J., dissenting).

137. Consular Notification Compliance Act of 2011, S. 1194, 112th Cong. § 4(a)(1) (2011).

138. *Garcia*, 131 S. Ct. at 2869 (Breyer, J., dissenting). The Court is no stranger to defendants petitioning for stays of execution on the basis of prejudiced trials. See *Buck v. Thaler*, 132 S. Ct. 69, 69 (2011). In *Buck*, a case decided approximately two months after Garcia's death, the Court granted a stay of execution pending its decision to review whether the defendant received a prejudiced trial. *Id.*; David Carson, *Humberto Leal*, TEX. EXECUTION INFO. CENTER. (July 8, 2011) <http://www.txexecutions.org/reports/471.asp> (identifying Humberto Leal Garcia's execution as taking place on July 7, 2011); Ariane de Vogue, *After Stay of Execution in Texas, Ginsburg Discusses Death Penalty, Perry 'Respects' Court Decision*, ABC NEWS (Sept. 16, 2011, 1:59 PM), <http://abcnews.go.com/blogs/politics/2011/09/after-stay-of-execution-in-texas-ginsburg-discusses-death-penalty-perry-has-no-comment/> (discussing the Court's decision in *Buck*).

139. Consular Notification Compliance Act of 2011, S. 1194, 112th Cong. § 3(a) (2011) (providing that arresting officials are to immediately inform arrested foreign nationals of their right to communicate with their consulate and immediately make the consulate accessible upon the arrestee's request).

140. *Id.* at § 4(a)(1).

141. U.S. CONST. amend. XIV, § 1 (providing that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law"). It is established law that a defendant's sentencing process and trial must comply with the requirements of Due Process. *Gardner v. Florida*, 430 U.S. 349, 358 (1977). Accordingly, in *Gardner*, the Court vacated defendant's death sentence since defendant was denied access to information in a pre-sentence investigation report. *Id.* at 351, 362. The Court found that this constituted a violation of defendant's due process rights since the lower court denied defendant an opportunity to explain or deny the information that it relied on in sentencing defendant to death. *Id.* at 362.

142. *Garcia*, 131 S. Ct. at 2867.



the petition.<sup>143</sup> Garcia was executed that evening.<sup>144</sup> Evinced by the 5-4 split<sup>145</sup> and passionate dissent,<sup>146</sup> the denial of Garcia's petition for a stay demonstrates that whether he would have received one more chance to challenge his sentence depended more on the discretion of the Justices than on the law itself.<sup>147</sup>

Due to the risk of irreparable harm inherent in capital sentences,<sup>148</sup> it is important that each capital defendant's sentence is fully evaluated<sup>149</sup> and based on individualized reason.<sup>150</sup> Some states even have automatic appeal statutes in which either the clerk or trial judge, immediately after sentencing a defendant to death, is to enter an appeal of the sentence on behalf of the defendant.<sup>151</sup> Pursuant to these statutes, defendants are afforded stays of execution upon the automatic entering, and for the duration of, these initial appeals.<sup>152</sup> Further, in *Evans v. Bennett*,<sup>153</sup> the Supreme Court granted a stay of execution simply because the defendant

143. *Id.* at 2867-68.

144. *See id.* at 2868 (Breyer, J., dissenting) (noting that Garcia's execution would take place on the evening of July 7, 2011); Carson, *supra* note 138 (confirming that Garcia was executed on July 7, 2011).

145. *Garcia*, 131 S. Ct. at 2868.

146. *See id.* at 2868-71 (Breyer, J., dissenting).

147. In his dissent, Justice Breyer noted:

In reaching its . . . conclusion, the Court . . . substitutes its own views about the likelihood of congressional action for the views of Executive Branch officials who have consulted with Members of Congress, and it denies the request by four Members of the Court to delay the execution until the Court can discuss the matter.

*Id.* at 2871 (Breyer, J., dissenting); *see also* IRA MARK ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* 629 (5th ed. 2010) (explaining how broad judicial discretion often results in decisions that demonstrate the personal views of the judges rather than the law). In fact, in general, the law of legal change as a system is largely up to the discretion of the courts. Bruhl, *supra* note 6, at 218-19.

148. *See* Bruhl, *supra* note 6, at 256; *see also* LaGrand (Ger. v. U.S.), 2001 I.C.J. 466, 487 (June 27) (recognizing the irreparable and imminent prejudice inherent in capital cases); Hartnett, *supra* note 31, at 676 ("Everyone agrees that death constitutes irreparable harm . . .").

149. *O'Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir. 1982) (quoting *Shaw v. Martin*, 613 F.2d 487, 491 (4th Cir. 1980)) (explaining that courts must be especially certain in capital cases "that the legal issues 'have been sufficiently litigated,' and the criminal defendant accorded all the protections guaranteed him by the Constitution"); McGowen, *supra* note 30, at 101.

150. *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (explaining that death sentences should not be based on "caprice or emotion"); *see also* 18 U.S.C. § 3595 (2006) (noting that appeals of death sentence convictions should take precedence over all other cases).

151. *See, e.g.*, ALA. CODE § 12-22-150 (2006); ARIZ. REV. STAT. ANN. § 31.2 (2011); CAL. PENAL CODE § 1239 (West 2004); GA. CODE. ANN. § 17-10-35 (2008); NEV. REV. STAT. ANN. § 177.055 (West 2000).

152. *See, e.g., supra* note 151.

153. 440 U.S. 1301 (1979).



was facing the death penalty.<sup>154</sup> The Court acknowledged that the defendant had received full review of his conviction and sentence<sup>155</sup> and that the petitioner<sup>156</sup> filed for the stay of execution against the defendant's will.<sup>157</sup> Still, "because of the obviously irreversible nature of the death penalty," the Court "d[id] not feel justified in denying the stay on that assumption."<sup>158</sup>

The Court has even noted the importance of reviewing "capital-sentencing procedures against evolving standards of procedural fairness in a civilized society."<sup>159</sup> This proved to be important in *Gardner v. Florida*<sup>160</sup> where the Court, after staying the petitioner's death sentence and granting certiorari, found that the petitioner had been denied due process of law during sentencing.<sup>161</sup> Were the petitioner not afforded the chance to litigate his due process claim, the Court likely would not have vacated his death sentence.<sup>162</sup> Moreover, in *Shaw v. Martin*,<sup>163</sup> the court stayed the petitioner's death sentence to ensure that he was afforded his post-conviction procedural rights.<sup>164</sup> There, the court found that it was necessary to grant the stay in order to ensure that "the legal issues ha[d] been sufficiently litigated and relitigated,"<sup>165</sup> and that the petitioner had received all the protections to which he or she was constitutionally entitled.<sup>166</sup> Further, appellate review proved important in *Schlup v. Delo*<sup>167</sup> where the Supreme Court found a man facing the death penalty to be innocent.<sup>168</sup> Had the Court declined to hear the petitioner's claim on appeal, he would have been executed despite his potential

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154. *Id.* at 1306.

155. *Id.*

156. The petitioner in this case was the mother of the capital defendant. *Id.* at 1301.

157. The defendant plead guilty to robbery-murder, requested the death penalty, refused to participate in the appeals and petitions on his behalf, and "repeatedly expressed his desire to die." *Id.* at 1301-02.

158. The assumption being that "because the Alabama Court of Criminal Appeals and the Alabama Supreme Court have fully reviewed Evans' conviction and sentence" a denial of a stay of execution would be appropriate. *Id.* at 1306.

159. *Gardner v. Florida*, 430 U.S. 349, 357 (1977).

160. 430 U.S. 349.

161. *Id.* at 354, 362.

162. *See id.* at 362.

163. 613 F.2d 487 (4th Cir. 1980).

164. *Id.* at 492-93.

165. *Id.* at 491, 493 (quoting *Evans v. Bennett*, 440 U.S. 1301, 1303 (1979) (internal quotation marks omitted)).

166. *Id.* at 491 (citing *Evans*, 440 U.S. at 1303).

167. 513 U.S. 298 (1995).

168. *Id.* at 301, 332.



innocence.<sup>169</sup> Thus, it is of particular importance that courts grant stays of execution where a petitioner has a claim that can affect his or her conviction.<sup>170</sup>

Some courts are of the opinion that the carrying out of the death sentence alone does not constitute irreparable harm.<sup>171</sup> Nevertheless, timing is crucial to the ultimate outcome of these types of cases.<sup>172</sup> Capital defendants should be afforded the opportunity to litigate viable claims during their lifetime.<sup>173</sup> Denying stays of execution in capital cases effectively renders any viable claims moot and “undermines the very legitimacy of capital punishment as a system.”<sup>174</sup> Accordingly, in *O’Bryan v. Estelle*,<sup>175</sup> the court granted the petitioner’s stay of his death sentence to ensure that the petitioner’s claims<sup>176</sup> received adequate review.<sup>177</sup>

Further, in *Teague v. Lane*,<sup>178</sup> the Supreme Court emphasized the inequity that would result from the disparate treatment of defendants.<sup>179</sup> Specifically, “once a new rule is applied to the defendant in the case announcing the rule, *evenhanded justice* requires that it be applied retroactively to all who are similarly situated.”<sup>180</sup> Therefore, in *Garcia*,

169. See *Schlup*, 513 U.S. at 323-25 (holding that “[t]he quintessential miscarriage of justice is the execution of a person who is entirely innocent”); Macmanus, *supra* note 26, at 881-82, 892.

170. See Macmanus, *supra* note 26, at 889, 892; see also Bd. of Trs. of Keene State Coll. v. Sweeney, 439 U.S. 24, 26 (1978) (Stevens, J., dissenting) (discussing the importance of reconsideration of a decision where an “intervening decision has shed new light on the law which, if it had been available at the time of the [lower court’s] decision, might have led to a different result”).

171. *Mulligan v. Zant*, 531 F. Supp. 458, 460 (M.D. Ga. 1982). But see Swallows, *supra* note 27, at 926 (discussing the “irreparable harm” caused by failure to stay executions since death is “irrevocable”).

172. See Bruhl, *supra* note 6, at 213-14, 218.

173. Macmanus, *supra* note 26, at 898-99 (arguing that denying convicted individuals an opportunity for Supreme Court review and adjudication is unconstitutional on due process grounds); see also *Shaw v. Martin*, 613 F.2d 487, 492 (4th Cir. 1980) (granting stay so that related issues pending in various lower courts would not become moot due to the petitioner’s execution).

174. Swallows, *supra* note 27, at 929-30 (noting that rendering a case moot by failure to stay an execution constitutes irreparable harm).

175. 691 F.2d 706 (5th Cir. 1982).

176. The court found that the petitioner’s underlying claims deserved review since at least one of the claims presented a “substantial question.” *Id.* at 708.

177. *Id.*

178. 489 U.S. 288 (1989).

179. *Id.* at 302-03, 315 (1989) (rejecting a “standard [which] led to the disparate treatment of similarly situated defendants”).

180. *Id.* at 300 (emphasis added). “[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant’s conviction became final.” *Id.* at 301 (emphasis



the denial of the defendant's petition to stay his execution is comparatively unjust since it stripped him of an opportunity to be aided by the CNCA, which if enacted, will likely help other similarly situated individuals in the future.<sup>181</sup>

The Court has consistently declined to consider the states' failure to comply with the VCCR<sup>182</sup> as grounds to stay the execution of death sentences, since such actions are violations of international, but not domestic, law.<sup>183</sup> Even in the face of proposed legislation that would make such violations illegal in the United States, the Court, in its discretion, has declined to stay the execution of a death sentence.<sup>184</sup> Although courts have previously recognized the importance of full review of viable claims in the capital context,<sup>185</sup> the Court stripped Garcia of a potential opportunity to litigate a viable claim.<sup>186</sup> In addition to causing Garcia injustice, the Court's exercise of discretion to deny the petition for a stay of execution will likely pose serious diplomatic consequences for the United States.<sup>187</sup>

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omitted).

181. *Garcia v. Texas*, 131 S. Ct. 2866, 2870 (2011) (Breyer, J., dissenting); see also Hellman, *supra* note 74, at 31 (noting the importance of the retroactive application of case law to prevent the deprivation of "at least one litigant of the benefit of a new rule of law solely by reason of an accident of timing"); Macmanus, *supra* note 26, at 892 (discussing the importance of granting stays so that defendants are not deprived of claims that can potentially aid them); Swallows, *supra* note 27, at 926-27 (discussing how the execution of a petitioner with claims that may potentially be found in the petitioner's favor denies the court an opportunity to grant equitable relief).

182. Alexander, *supra* note 98, at 822-23.

183. See, e.g., *Medellin v. Texas*, 552 U.S. 491, 505-06 (2008).

184. *Garcia v. Texas*, 131 S. Ct. 2866, 2867-68 (2011).

185. See, e.g., *Gardner v. Florida*, 430 U.S. 349, 362 (1977); *O'Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir. 1982).

186. *Garcia*, 131 S. Ct. at 2870 (Breyer, J., dissenting).

187. See *id.* (Breyer, J., dissenting) (asserting that the execution would place the United States in breach of its international obligations and thus cause irreparable harm to international relations, as well as hinder American citizens that are arrested abroad from receiving their consular rights); see also Alexander, *supra* note 98, at 825-26 (discussing that "[t]he United States has a strong interest in complying with its Article 36 obligations in order to maintain international integrity and to protect its citizens abroad"). Mexico even filed an amicus curiae brief on behalf of Garcia, noting that the Court's failure to grant the stay "would seriously jeopardize the ability of the Government of Mexico to continue working collaboratively with the United States on a number of joint ventures." Brief *Amicus Curiae* of the United Mexican States, *supra* note 131, at 23, 51a (quoting Letter from Arturo Sarukhan, Ambassador of Mex., to Hillary Clinton, U.S. Sec'y of State (June 14, 2011) (appended at page 49a of Brief *Amicus Curiae* of the United Mexican States)).



#### IV. A STEP TOWARD A MORE UNIFORM SYSTEM OF EVALUATION

To preserve the equitable nature of stays of execution, a certain amount of discretion must, and should, be left to the courts.<sup>188</sup> However, some of the inconsistent and seemingly unjust consequences of such broad discretion will be minimized if courts are provided with at least some universal considerations to which they can apply their discretion.<sup>189</sup> Specifically, courts should extend their practice of granting stays where there is a pending court decision to include granting stays where there is a pending bill in Congress.<sup>190</sup> The concrete guidelines that govern stays in other areas of the law have proven to be functional and beneficial for both the court system and parties involved.<sup>191</sup> Moreover, given the final and irreparable nature of the death penalty,<sup>192</sup> including the existence of relevant proposed legislation in an equitable evaluation will not violate the judicial process or unduly interfere with the state's countervailing interests.<sup>193</sup>

##### *A. Reducing the Courts' Discretion:*

##### *An Example of Functional Guidelines Surrounding Stays in Federal Bankruptcy Law*

The codification of strict guidelines regarding stays has presented a fair and functional system in Federal Bankruptcy Law.<sup>194</sup> Pursuant to the Bankruptcy Code,<sup>195</sup> the debtor's estate is automatically stayed upon the

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188. See Eric Berger, *Lethal Injection and the Problem of Constitutional Remedies*, 27 YALE L. & POL'Y REV. 259, 293 (2009) (noting that "equitable concerns guide [courts'] decision[s] of whether or not to issue a stay delaying an execution"); Swallows, *supra* note 27, at 926-27 (discussing the flexibility and discretion necessary for equitable relief); see also Hill v. McDonough, 547 U.S. 573, 584 (2006).

189. Boaz, *supra* note 4, at 354 ("The Court's numerous and varied holdings established that the unique constitutional status of the death penalty requires strict adherence to the principle of fairness and reliability in the procedures that inform death sentencing."); Swallows, *supra* note 27, at 922-23 (discussing how consistency and predictability is "the key" to the fair imposition of sentences, which is particularly important for capital sentences).

190. Bruhl, *supra* note 6, at 258 (proposing a rule in which lower courts should automatically stay executions in light of potential changes in the law, particularly those exemplified by the Supreme Court's grant of certiorari, to promote equity).

191. See *infra* Part IV.A.

192. See *supra* note 148 and accompanying text.

193. See *infra* Part IV.C-D.

194. LYNN M. LOPUCKI ET AL., COMMERCIAL TRANSACTIONS: A SYSTEMS APPROACH 801, 805 (Vicki Been et al. eds., 4th ed. 2009).

195. 11 U.S.C. § 362 (2006).



filing of the bankruptcy proceedings.<sup>196</sup> Although there are exceptions,<sup>197</sup> the statute suspends all pending proceedings and prohibits the commencement of any new proceedings.<sup>198</sup> Accordingly, the stay prevents the debtor from incurring any additional debt and provides the trustee with sufficient time to evaluate the debtor's estate and assess the claims of the creditors.<sup>199</sup> While the purpose of the automatic stay is to protect the debtor,<sup>200</sup> the law also provides guidelines as to when the stay is terminated<sup>201</sup> and allows the creditors to move to vacate the stay so that they are not unjustly prevented from receiving money to which they are legally entitled.<sup>202</sup> These guidelines leave little discretion to the courts<sup>203</sup> and have resulted in a beneficial, "efficient[,] and orderly,"<sup>204</sup> system.<sup>205</sup>

Since the law strictly regulates stays in order to protect an individual's assets,<sup>206</sup> it would not be inconsistent to allow at least some regulation in proceedings where an individual's life—as opposed to his or her assets—is at risk.<sup>207</sup> While courts need not necessarily stay executions automatically upon a death row inmate's application,<sup>208</sup> the system will function more equitably if courts considered uniform factors, with a universal understanding as to how much weight should be applied to each.<sup>209</sup> Specifically, to ameliorate some of the current injustice and

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196. *Id.* at § 362(a). This is true regardless of whether the debtor or creditor initiates the proceedings. *Id.*

197. For example, various criminal and family proceedings will not be stayed. *Id.* at § 362(b).

198. *Id.* at § 362(a)(1).

199. See Van C. Durrer, II & Kimberly D. Jaimez, *Competing Bankruptcies: What Defenses Survive the Automatic Stay?*, AM. BANKR. INST. J., Oct. 2011, at 52, 53 (referring to § 362(a) of the Bankruptcy Code, noting that "its two-fold purpose is to afford the debtor a 'breathing spell' and to facilitate an orderly resolution of all claims") (quoting *In re Zinchiak*, 406 F.3d 214, 219 n.2 (3d Cir. 2005)).

200. *Id.*

201. 11 U.S.C. § 362(c).

202. *Id.* at § 362(d); LOPUCKI ET AL., *supra* note 194, at 807.

203. See generally LOPUCKI ET AL., *supra* note 194 (discussing the Bankruptcy Code's strict regulation of the automatic stay).

204. Susan Power Johnston, *2009 Developments in Chapter 15 Jurisdiction*, 2010 ANN. SURV. BANKR. L., 1192.

205. See Brian Rothschild, *The Illogic of No Limits on Bankruptcy*, 23 EMORY BANKR. DEV. J. 473, 486 (2007) (discussing the benefits of bankruptcy's automatic stay).

206. See *supra* notes 195-205 and accompanying text.

207. See *supra* note 147 and accompanying text.

208. See *Mulligan v. Zant*, 531 F. Supp. 458, 460 (M.D. Ga. 1982). The countervailing state interests in denying stays of execution are discussed *infra* Part IV.D.

209. See Bruhl, *supra* note 6, at 217-20 (discussing consistency problems resulting from the great degree of discretionary control courts have over stays of executions).



variance resulting from the courts' broad discretion,<sup>210</sup> courts should extend their practice of granting stays where there is a relevant court decision pending to further grant stays where there is a relevant bill pending in Congress.<sup>211</sup>

### *B. Pendency of Court Decisions and Proposed Legislation*

In the context of granting stays of execution in capital cases, proposed legislation is analogous to pending court decisions because both signal the potential for a change in the law.<sup>212</sup> Changes in the law can be either substantive<sup>213</sup> or procedural.<sup>214</sup> Accordingly, both the legislature and the judiciary have the authority to change what conduct is deemed criminal and what consequences may be imposed for such behavior.<sup>215</sup> Both can create and remove areas over which courts have jurisdiction,<sup>216</sup> provide parties with new causes of action,<sup>217</sup> and change the way courts evaluate claims.<sup>218</sup>

Legislative and judicial changes to the U.S. legal system are far from uncommon.<sup>219</sup> Such changes can be disruptive.<sup>220</sup> Therefore, it is important to "have a set of doctrines and institutional practices that govern the implementation of these changes."<sup>221</sup> Since both proposed legislation and pending court decisions have the potential to change the

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210. See *supra* notes 10-23 and accompanying text.

211. Bruhl, *supra* note 6, at 258 (proposing a rule in which lower courts should automatically stay executions in light of potential changes in the law, particularly those exemplified by the Supreme Court's grant of certiorari, to prevent clutter in the Court's docket, and to promote equity).

212. See *id.* at 207. "[E]vents . . . such as the mere filing of a petition for certiorari, the issuance of a concurring opinion in which a Justice deems a precedent ripe for reconsideration, or even the fact that a new Justice has been appointed" can also evince a potential change in the law. *Id.*

213. Substantive changes affect the rights, obligations, and private interests of the parties to which the law applies. See *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987).

214. Procedural changes affect the steps that must be taken in compliance with the law, as well as the rules that govern the law. See Barry Kamins, *2007 Criminal Law Legislation*, N.Y. ST. B.J., Feb. 2008, at 35, 36 (discussing procedural changes accompanying new criminal law).

215. Bruhl, *supra* note 6, at 208.

216. See, e.g., Kamins, *supra* note 214, at 37; see also Bruhl, *supra* note 6, at 218-20.

217. See Ian C. Ballon, *Internet Security Law and Litigation 2007: An Overview of FTC Enforcement Actions and Class Action Litigation*, 903 PRAC. L. INST. 207, 212 (2007) (discussing new claims created by statutes); *supra* notes 136-40 and accompanying text.

218. See *Barefoot v. Estelle*, 463 U.S. 880, 892-95 (1983) (setting forth a standard of review for stays of execution of death sentences); Kamins, *supra* note 214, at 36.

219. Bruhl, *supra* note 6, at 208-09.

220. *Id.*

221. *Id.* at 209.



law in crucial ways,<sup>222</sup> equity requires that courts not distinguish between them when the prospective change is relevant to a petition to stay the execution of a death sentence.<sup>223</sup>

Accordingly, when deciding whether to grant or deny stays of execution, courts should include in their equitable consideration the existence of proposed legislation that has the potential to affect the petitioner's death sentence, just as they do when a relevant decision is pending in the courts.<sup>224</sup> If such legislation exists, courts should further inquire as to how long the bill has been pending in Congress<sup>225</sup> and the likelihood of Congress passing the bill.<sup>226</sup> Factors such as express endorsements from members of the House of Representatives and/or the Senate<sup>227</sup> and the number of steps through which the bill has passed<sup>228</sup> will demonstrate the likelihood of the bill passing.<sup>229</sup> Furthermore, the more relevant the prospective law is to the petitioner's conviction, the more weight its potential enactment should be given in an equitable evaluation.<sup>230</sup>

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222. *Id.* at 208-09.

223. *See supra* note 148 and accompanying text. *But see* Bruhl, *supra* note 6, at 248 (explaining how the timing of legislative changes are less predictable than the new decisions). The state's interest in expediting the execution process is discussed *infra* Part IV.D.

224. *See supra* notes 212-18 and accompanying text.

225. Courts should consider how long a bill has been pending in Congress so as not to unduly interfere with the state's interest in an expeditious process, which is discussed in detail *infra* Part IV.D.2.

226. *See* Supplemental Brief to the Petition, *supra* note 104, at 1 (asserting that the Court should grant the petitioner's stay of execution since there is a strong likelihood that the bill will become law in the near future).

227. In the case of state law, the endorsements of local legislatures should be considered. *See id.* (emphasizing the express endorsements of Secretary of State Hillary Clinton and Attorney General Eric Holder, as well as the commitment of Senator Leahy). Support from members of both branches of Congress is stronger than a unitary endorsement. *See* Ashley N. Parker, Comment, *Problem Patents: Is Reexamination Truly a Viable Alternative to Litigation?*, 3 N.C. J. L. & TECH. 305, 326 n.105 (2002) (noting that "strong bi-partisan support" demonstrates a "good likelihood" of a bill becoming law).

228. *See generally* U.S. CONST. art. I, § 7 (describing the steps through which a bill must pass in order to become a law).

229. "The likelihood that a bill will become law [further] increases with the number of special procedures and practices employed [by Congress]." BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 223 (2d ed. 2000). Such special procedures and practices include, *inter alia*, consideration by multiple committees and subsequent adjustments. *Id.*

230. *See supra* Part II.B. and text accompanying notes 132-41.



*C. Considering Relevant Proposed Legislation Will Not Violate  
Courts' Authority*

Staying executions while Congress is considering relevant potential legislation is consistent with judicial authority.<sup>231</sup> For one, the Supreme Court has extended the application of judicial power to prospective law,<sup>232</sup> and in *Federal Trade Communication v. Dean Foods Co.*,<sup>233</sup> it held that the All Writs Act<sup>234</sup> applied to “the *potential jurisdiction* of the appellate court.”<sup>235</sup> Further, courts have found it appropriate to exercise their discretion in favor of granting stays where the petitioner can establish that he or she can offer evidence of claims not yet presented.<sup>236</sup> As in *Garcia*, the enactment of new legislation will at times provide petitioners with novel claims that they previously did not have the opportunity to bring.<sup>237</sup> It follows, therefore, that courts should preserve their recognized “potential jurisdiction”<sup>238</sup> by considering staying executions so that petitioners can be afforded a chance to receive the benefit of the prospective law and any new claims that it may provide before they die.<sup>239</sup>

Moreover, the law recognizes the importance in revising even final judgments when faced with a change in the law.<sup>240</sup> The judicial system greatly values the finality of judgments,<sup>241</sup> and still, the Federal Rules of Criminal Procedure expressly grant federal courts discretion to vacate a final judgment that was “based on an earlier judgment that has been

231. See *Garcia v. Texas*, 131 S. Ct. 2866, 2870 (2011) (Breyer, J., dissenting).

232. See *Fed. Trade Comm’n v. Dean Foods Co.*, 384 U.S. 597, 600-01 (1966); see also *Garcia*, 131 S. Ct. at 2870 (Breyer, J., dissenting) (arguing that the petitioner’s execution should be stayed in light of, *inter alia*, proposed legislation).

233. 384 U.S. 597 (1966).

234. 28 U.S.C. § 1651 (2006). This Act provides, in relevant part, that courts “may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” *Id.*

235. *Fed. Trade Comm’n*, 384 U.S. at 603 (emphasis added). The Court held that the Court of Appeals had jurisdiction to issue a preliminary injunction where it would preserve the status quo pending the determination of the legality of a merger. *Id.* at 599, 605.

236. See *Rosenberg v. U.S.*, 346 U.S. 273, 287 (1953) (granting stay where the defendants’ petition contained a claim not yet considered). Part IV.D.4, *infra*, discusses the statutory limitations imposed on petitioners that attempt to raise new claims in federal court via successive writs of habeas corpus.

237. See *supra* Part III.B.

238. See *supra* note 232-35 and accompanying text.

239. See *supra* note 173 and accompanying text.

240. See FED. R. CIV. PROC. 60(b)(5)–(6); Bruhl, *supra* note 6, at 212.

241. The interest in finality is discussed *infra* Part IV.D.2.



reversed or vacated; or applying it prospectively is no longer equitable; or . . . any other reason that justifies relief.”<sup>242</sup> Additionally, courts may reverse decisions that “affected the defendant’s substantial rights, and . . . the fairness, integrity, or public reputation of the proceedings,”<sup>243</sup> and opportunities for revising judgments are much more limited in the civil than the criminal context.<sup>244</sup>

Furthermore, due to the irreversible nature of the death sentence, capital cases require exceptionally high procedural safeguards.<sup>245</sup> “[T]he greater the interest at stake, the greater the procedural protection that must be afforded to the individual in order to insure that the government does not act in an *arbitrary* manner.”<sup>246</sup> Moreover, “[i]n capital cases, direct review is not an adequate safeguard against miscarriages of justice,”<sup>247</sup> and states are required to consider any factors offered by the defense that can mitigate the sentence.<sup>248</sup> Thus, courts’ decisions to expedite the execution of death sentences rather than take extra precautions to ensure that the individuals facing capital punishment are rightfully sentenced pose a great risk of irreversible error.<sup>249</sup>

Finally, in *Teague v. Lane*,<sup>250</sup> the Supreme Court found that it is crucial to retroactively apply new constitutional rules of criminal procedure.<sup>251</sup> Although the Court restricted its holding to cases on direct review,<sup>252</sup> it set forth exceptions to which new rules should apply retroactively, even to cases being reviewed collaterally.<sup>253</sup> Specifically,

242. FED. R. CIV. PROC. 60(b)(5)–(6).

243. Bruhl, *supra* note 6, at 213 (citing FED. R. CRIM. P. 52(b)).

244. *Id.* at 211–12.

245. “In a capital case, we must be particularly certain that the legal issues ‘have been sufficiently litigated,’ and the criminal defendant accorded all the protections guaranteed him by the Constitution of the United States.” *O’Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir. 1982) (quoting *Shaw v. Martin*, 613 F.2d 487, 491 (4th Cir. 1980)).

246. Macmanus, *supra* note 26, at 898 (emphasis added) (explaining the test for determining procedural due process rights due to an individual, as set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

247. Murphy, *supra* note 8 (arguing that federal courts “have weakened their independent authority” by giving great deference to the states in capital cases).

248. *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O’Connor, J., concurring) (citing *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)).

249. See *infra* notes 317–27 and accompanying text.

250. 489 U.S. 288 (1989).

251. *Id.* at 304–05. “[F]ailure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication.” *Id.* at 304 (quoting *Griffith v. Kentucky*, 470 U.S. 314, 322 (1987)).

252. *Id.* at 310–11.

253. *Id.* at 311.



the Court provided for the retroactive application of new rules that implicate “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,”<sup>254</sup> and that require “procedures that . . . are ‘implicit in the concept of ordered liberty.’”<sup>255</sup> Most importantly, however, the Court explicitly declined to express any views as to the restrictions on retroactivity in capital cases.<sup>256</sup>

#### *D. States and Sentencing: Balancing the Interests*

The state has various interests in the denial of petitions to stay the execution of the sentences that it imposes.<sup>257</sup> It is entirely within the courts’ discretion to decide how much weight to give these interests.<sup>258</sup> As a result, courts often rely on the state’s countervailing interests—particularly those of federalism and finality<sup>259</sup>—when deciding to deny petitions to stay the execution of death sentences.<sup>260</sup> While these legitimate state interests certainly deserve consideration in an equitable determination,<sup>261</sup> giving them disproportionate weight poses a risk of irreversible error<sup>262</sup> and at times prevents the viable claims of death-sentenced individuals from being heard.<sup>263</sup> Further, the Antiterrorism and Effective Death Penalty Act of 1996 (the “AEDPA”)<sup>264</sup> is in place to ensure that the state’s interests are maintained where the petitioner seeks

254. *Id.* (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971)).

255. *Id.* (omission in original) (quoting *Mackey v. United States* 401 U.S. 667, 693 (1971)).

256. *Id.* at 314 n.2 (“Because petitioner is not under sentence of death, we need not, and *do not*, express any views as to how the retroactivity approach we adopt today is to be applied in the capital sentencing context.”) (emphasis added).

257. For instance, renewed litigation imposes financial burdens on the courts. *Berger*, *supra* note 188, at 294. Relitigating claims is expensive, since it requires the expenditure of costs already concentrated at trial, as well as any additional expenses. Kathleen Callahan, Note, *In Limbo: In re Davis and the Future of Herrera Innocence Claims in Federal Habeas Proceedings*, 53 ARIZ. L. REV. 629, 649 (2011).

258. See *Berger*, *supra* note 188, at 294-95.

259. The state’s interests in federalism and finality are discussed *infra* Part IV.D.1-2.

260. See *Veilleux*, *supra* note 1, at 2556, 2560 (discussing a trend toward denying stays of execution).

261. See *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004); *Berger*, *supra* note 188, at 293-95; *Veilleux*, *supra* note 1, at 2568.

262. See *Boaz*, *supra* note 4, at 358-59.

263. *Veilleux*, *supra* note 1, at 2545 (“When a stay is denied, although the state’s interest may be vindicated, the constitutional claim of the petitioner is silenced.”).

264. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 28 U.S.C.).



collateral relief in federal court through a writ of habeas corpus.<sup>265</sup> Thus, considering relevant proposed legislation as a factor when deciding whether to grant or deny a stay of execution will not unduly interfere with the state's countervailing interests.<sup>266</sup>

### 1. The Interests of Federalism and Comity

The federal reexamination of state convictions raises legitimate concerns regarding federalism and comity.<sup>267</sup> The United States has a federalist form of government in which the states maintain authority over all areas of law that are not expressly granted to the federal government by the Constitution.<sup>268</sup> The Framers of the Constitution instituted such a system in order to create a strong central government while preserving state sovereignty.<sup>269</sup> Criminal law is among those areas of law that remains within the authority of the states.<sup>270</sup> Accordingly, "staying the hand of state justice is no small matter."<sup>271</sup> Further, the doctrine of comity provides for the respectful recognition of the judgments of other tribunals.<sup>272</sup> It therefore follows that respect for the

265. Callahan, *supra* note 257, at 646, 650; Macmanus, *supra* note 26, at 895; Veilleux, *supra* note 1, at 2567-68.

266. See Boaz, *supra* note 4, at 358 ("[T]he state does not suffer unduly if the rare frivolous appeal lasts several months instead of being disposed of in a matter of days or hours.").

267. McCleskey v. Zant, 499 U.S. 467, 491 (1991) ("Reexamination of state convictions on federal habeas frustrate[s] . . . both the States sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." (omission in original) (citations omitted) (internal quotation marks omitted)); Veilleux, *supra* note 1, at 2568.

268. See, e.g., LARRY K. GAINES & ROGER LEROY MILLER, CRIMINAL JUSTICE IN ACTION 11 (Michelle Julet ed., 6th ed. 2011), available at <http://books.google.com/books?id=Fsqkl2g4VIMC&printsec=frontcover&dq=editions:VKmJ1iOV4C&hl=en&sa=X&ei=JNQaT8ymNsbr0gGYkeGsCw&ved=0CDQQuwUwAA#v=onepage&q=editions%3A-VKmJ1-iOV4C&f=false>; *Federalism*, USLEGAL, <http://system.uslegal.com/federalism/> (last visited July 27, 2012).

269. GAINES & MILLER, *supra* note 268, at 11-12. The preservation of state sovereignty was very important since the states feared the strong central government would become too powerful, perhaps even tyrannical. *Id.*

270. *Id.* at 12.

271. Rodriguez v. Texas, 515 U.S. 1307, 1307-08 (1995) (denying stay since the execution date would not interfere with "the orderly processing of a petition on direct review"); see also Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 456 (2007) ("[A]n interest in comity arises when a criminal judgment of a state court of competent jurisdiction becomes final.").

272. Kovarsky, *supra* note 271, at 456. The Constitution provides that states give "Full Faith and Credit . . . [to the] judicial Proceedings of every other State." U.S. CONST. art. IV, § 1. Further, "every court within the United States" is required to give "the same full faith and credit," to the judicial proceedings of any state court. 28 U.S.C. § 1738 (2006); see also Kovarsky, *supra* note 271, at 456 (explaining comity and federalism).



dual system of government requires that state courts be afforded “the first opportunity to decide a petitioner’s claims,”<sup>273</sup> as well as “an opportunity to . . . correct a constitutional violation.”<sup>274</sup>

Furthermore, there exists a presumption that state courts are competent to impose criminal sentences.<sup>275</sup> It is true that the federal habeas statute grants the federal courts jurisdiction to stay state court proceedings.<sup>276</sup> However, “[f]ederal courts are not forums in which to relitigate state trials,”<sup>277</sup> and the state has a right to have the sentences that it imposes be promptly executed.<sup>278</sup> Accordingly, “equity must be sensitive to the State’s strong interest in enforcing its criminal judgments without undue interference from the federal courts.”<sup>279</sup> Therefore, an equitable consideration by the federal courts understandably includes concerns regarding the preservation of federalism and comity.<sup>280</sup>

## 2. The Interests of Finality and Avoiding Abusive Delay

Judgments typically become final upon either the exhaustion of remedies under direct review or the expiration of time allotted to bring an appeal.<sup>281</sup> Finality<sup>282</sup> is necessary for the proper functioning of a criminal justice system.<sup>283</sup> For instance, finality helps ensure that

273. *Rhines v. Weber*, 544 U.S. 269, 273 (2005) (citing *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982)).

274. *Rose*, 455 U.S. at 518 (quoting *Darr v. Burford*, 339 U.S. 200, 204 (1950)) (internal quotation marks omitted).

275. See *Berger*, *supra* note 188, at 294 (discussing the political costs imposed on the states as a result of delays of executions “resulting from the inability to execute a lawfully-imposed sentence”); see also *Callahan*, *supra* note 257, at 649 (noting that reviewing claims already litigated in state court “disregard[s] the time and expense already undertaken by the deciding state in rendering its verdict”); *Veilleux*, *supra* note 1, at 2568 (discussing the importance of respecting “the integrity of state court decisions”).

276. 28 U.S.C. § 2251 (2006); *Veilleux*, *supra* note 1, at 2568.

277. *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983); see also *Veilleux*, *supra* note 1, at 2568 (discussing the importance of preserving federalism).

278. *Boaz*, *supra* note 4, at 355.

279. *Hill v. McDonough*, 547 U.S. 573, 584 (2006).

280. See *Nelson v. Campbell*, 541 U.S. 637, 649 (2004) (citing *Gomez v. U.S. Dist. Court for N. Dist. of Cal.*, 503 U.S. 652, 654 (1992) (per curiam)); *Berger*, *supra* note 188, at 293-94; *Veilleux*, *supra* note 1, at 2568.

281. Erin Simmons, Comment, *Challenging an Execution After Prolonged Confinement on Death Row [Lackey Revisited]*, 59 CASE W. RES. L. REV. 1249, 1263 (2009).

282. Finality represents the notion that judgments are final, effectively concluding the direct litigation. *Kovarsky*, *supra* note 271, at 454.

283. *Callahan*, *supra* note 257, at 648; *Veilleux*, *supra* note 1, at 2560; see also *McCleskey v. Zant*, 499 U.S. 467, 491 (1991) (finding “[o]ne of the law’s very objects is the finality of its judgments”).



criminal punishment has a deterrent effect.<sup>284</sup> Further, the state has a legitimate interest in the efficient execution of the sentences that it imposes.<sup>285</sup> Litigation certainly cannot go on forever,<sup>286</sup> and “[b]oth the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation.”<sup>287</sup> Accordingly, in *Bible v. Schriro*,<sup>288</sup> the court held that granting a stay would cause hardship to the state since the case had already been going on for more than two decades.<sup>289</sup>

Additionally, many courts presume that death row inmates petition for stays solely to postpone the execution of their death sentences.<sup>290</sup> This is particularly true where inmates petition to have their executions stayed on a date close to that of their impending execution.<sup>291</sup> Such “last-minute” petitions are often viewed as attempts to abuse and manipulate the judicial process.<sup>292</sup> Accordingly, these courts consider any unnecessary delay in bringing the claim,<sup>293</sup> as well as the delay that the stay will cause<sup>294</sup> in their equitable determination.<sup>295</sup>

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284. *Teague v. Lane*, 489 U.S. 288, 309 (1989). The Court has established that the death penalty is constitutional and represents the notions of deterrence and retribution in *Gregg v. Georgia*, 428 U.S. 153, 183 (1976). See Callahan, *supra* note 257, at 652.

285. *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (citing *Calderon v. Thompson*, 523 U.S. 538, 556 (1998)); *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004); see also Berger, *supra* note 188, at 293 (discussing controversy with courts’ interference with states’ interest in the expeditious execution of death sentences).

286. Kovarsky, *supra* note 271, at 454.

287. Callahan, *supra* note 257, at 649 (quoting *Sanders v. United States*, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting)).

288. 651 F.3d 1060 (9th Cir. 2011).

289. *Id.* at 1066.

290. Berger, *supra* note 188, at 293-94; Boaz, *supra* note 4, at 352.

291. Berger, *supra* note 188, at 293-94.

292. *Nelson v. Campbell*, 541 U.S. 637, 649 (2004) (quoting *Gomez v. United States Dist. Court for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992) (per curiam)) (internal quotation marks omitted); Berger, *supra* note 188, at 293-94; Boaz, *supra* note 4, at 356.

293. *Nelson*, 541 U.S. at 649 (“A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.” (quoting *Gomez*, 503 U.S. at 654) (internal quotation marks omitted)).

294. It can take years to resolve the underlying claim. Ty Alper, *Blind Dates: When Should the Statute of Limitations Begin to Run on a Method-of-Execution Challenge?*, 60 DUKE L.J. 865, 887 (2011).

295. Berger, *supra* note 188, at 294.



### 3. Disproportionate Weight and Risk of Error

State interests often compete with those of justice.<sup>296</sup> Since there are no set guidelines as to how to balance these legitimate interests, courts, in their discretion, often give more weight to the state's interests and deny petitions to stay executions.<sup>297</sup> For instance, there seems to be a trend toward deferring to the state courts in order to preserve federalism, even where the petitioner has a viable constitutional claim.<sup>298</sup> State interests certainly deserve consideration. However, it would not unduly burden the courts to consider them more proportionately against interests that serve justice, such as the availability of relevant prospective legislation.<sup>299</sup> It has been noted that:

The irreversible nature of the death penalty must be weighed against the fact that "[t]here must come a time, even when so irreversible a penalty as that of death has been imposed upon a particular defendant, that the legal issues in the case have been sufficiently litigated and relitigated so that the law must be allowed to run its course . . . ."<sup>300</sup>

Still, it is particularly important in capital cases to ensure that "the legal issues 'have been sufficiently litigated,' and the criminal defendant accorded all the protections guaranteed him by the Constitution of the United States."<sup>301</sup> Not only do "American common law and the legislative history of habeas corpus reflect adherence to the notion that concerns for the constitutionality of convictions and detentions should supersede principles of finality,"<sup>302</sup> but finality is "an interest that is wholly inapplicable to the capital sentencing context."<sup>303</sup> Further, "finality is not affected by the fact that . . . [the petitioner] has . . . obtained a stay."<sup>304</sup> Therefore, in *O'Bryan v. Estelle*,<sup>305</sup> even though the

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296. Kovarsky, *supra* note 271, at 454; *see also* Bright, *supra* note 31, at 10 (noting that courts have chosen the goal of finality over those of "fairness and reliability" (quoting *People v. Bull*, 705 N.E.2d 824, 847 (Ill. 1998) (Harrison, J., dissenting)) (internal quotation marks omitted)); Murphy, *supra* note 8, at 52 (discussing the Court's difficulty in balancing the interests of "prompt enforcement of the death penalty" and "careful and judicious review of the sentence").

297. *See* Veilleux, *supra* note 1, at 2556.

298. *See id.* at 2556-58.

299. *See infra* notes 309-31 and accompanying text.

300. *O'Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir. 1982) (quoting *Evans v. Bennett*, 440 U.S. 1301, 1303 (1979)).

301. *Id.* (quoting *Shaw v. Martin*, 613 F.2d 487, 491 (4th Cir. 1980)).

302. Sherrell, *supra* note 31, at 456.

303. *Teague v. Lane*, 489 U.S. 288, 321 n.3 (1989) (Stevens, J., concurring in part and concurring in the judgment).

304. Edward D. Cavanagh, *Issue Preclusion in Complex Litigation*, 29 REV. LITIG. 859, 875



case had been “drawn out,”<sup>306</sup> the court used its discretion to stay the execution of the petitioner’s death sentence to allow for “adequate review”<sup>307</sup> of his claims.<sup>308</sup>

Denying stays in the interest of preventing potentially unwarranted delays can prohibit petitioners from bringing claims to which they are constitutionally entitled.<sup>309</sup> For example, since the method of execution for death-sentenced individuals is not made known far in advance,<sup>310</sup> inmates that petition for stays to challenge their method of execution<sup>311</sup> necessarily must bring their claim at a time close to the scheduled execution.<sup>312</sup> Thus, although hearing these claims would cause a delay, giving disproportionate weight to the delay and the “last-minute”<sup>313</sup> nature of the claim can preclude sentenced individuals from receiving their constitutional right to protection against dangerous methods of execution.<sup>314</sup> Furthermore, “instructing prisoners to file premature claims . . . does not conserve judicial resources, ‘reduc[e] piecemeal litigation,’ or ‘streamlin[e] federal habeas proceedings.’”<sup>315</sup> Therefore, it is questionable why some courts consider “delaying an execution . . . an exceptional evil . . . [, particularly] when the propriety of the judgment is in question.”<sup>316</sup>

Giving disproportionate weight to the state’s interests poses a great risk of error.<sup>317</sup> For example, since there are no existing guidelines as to how much weight courts should give to the delay factor,<sup>318</sup> courts often

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(2010).

305. 691 F.2d 706 (5th Cir. 1982).

306. *Id.* at 708.

307. *Id.*

308. *Id.* The court further noted that the petitioner’s claims particularly deserved review since “at least one . . . present[ed] a substantial question.” *Id.*

309. Berger, *supra* note 188, at 295; Veilleux, *supra* note 1, at 2558.

310. See Berger, *supra* note 188, at 294.

311. Petitioners have a constitutional right to challenge their method of execution pursuant to the Eighth Amendment, which prohibits the infliction of “cruel and unusual punishments.” U.S. CONST. amend. VIII; Berger, *supra* note 188, at 295.

312. See Berger, *supra* note 188, at 294.

313. Veilleux, *supra* note 1, at 2557.

314. Berger, *supra* note 188, at 294-95.

315. Panetti v. Quarterman, 551 U.S. 930, 946 (2007) (quoting Burton v. Stewart, 549 U.S. 147, 154 (2007) (per curiam)); see also Simmons, *supra* note 281, at 1265 (explaining how Eighth Amendment claims regarding prolonged confinement on death row necessarily become ripe only “when execution is imminent”).

316. Bruhl, *supra* note 6, at 257.

317. See Boaz, *supra* note 4, at 358-59.

318. See Berger, *supra* note 188, at 294-95 (discussing the disproportionate weight courts give



rely on the presumption that the underlying claims lack merit and deny the stay petitions without sufficiently considering relevant evidence.<sup>319</sup> At times, this happens even where the petitioner did not bring the claim at the last minute.<sup>320</sup> While collateral review must be limited to preserve finality,<sup>321</sup> the number of stays denied for fear of abuse of the judicial system too often encompasses stay petitions that are accompanied by meritorious claims<sup>322</sup> and results in the execution of undeserving prisoners who were not granted sufficient review.<sup>323</sup> The courts are justified in their concern.<sup>324</sup> However, most capital appeals are not “legally frivolous.”<sup>325</sup> Thus, the effect of denying stays to prevent “abuse of the writ”<sup>326</sup> goes beyond deterring actual abuse.<sup>327</sup>

Even supporters of the death penalty worry “about the danger of executing the innocent.”<sup>328</sup> The availability of DNA evidence has revealed the innocence of death-sentenced individuals years after their convictions.<sup>329</sup> For some, the court’s willingness to grant a stay of

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to the delay factor).

319. Berger, *supra* note 188, at 294-95; Boaz, *supra* note 4, at 369 (noting that the lack of order and certainty surrounding the courts’ jurisprudence in expediting death sentences distorts the deliberative process); Veilleux, *supra* note 1, at 2557 (discussing how judges often deny stays due to irritation with last-minute petitions). Fortunately, this is not always the case. *See, e.g.,* O’Bryan v. Estelle, 691 F.2d 706, 708 (5th Cir. 1982). In *O’Bryan*, the court granted the petition to stay the execution of the death sentence, even though the petition was presented to the court only days before the scheduled execution. *Id.* The court reasoned that it needed more than a “few days” to provide the adequate review of the petitioner’s claims to which he was constitutionally entitled. *Id.* Similarly, in *Morales v. Cate*, although the petitioner filed his stay petition about two weeks prior to his scheduled execution, the court granted the stay. No. 5-6-cv-219-JF-HRL, 2010 WL 3835655, at \*1, \*5 (N.D. Cal. Sept. 28, 2010) (“[T]here is no way that the Court can engage in a thorough analysis of the relevant factual and legal issues in the days remaining before [petitioner]’s execution date.”).

320. Berger, *supra* note 188, at 295 n.191.

321. Veilleux, *supra* note 1, at 2560.

322. *Id.* at 2562-64.

323. Boaz, *supra* note 4, at 358 (discussing how constitutional errors attached to executed individuals have gone undiscovered due to limited federal review); *see also* Bruhl, *supra* note 6, at 256 (arguing in favor of granting stays of execution in capital cases because “errors cannot be ‘fixed’ later”).

324. *See* Veilleux, *supra* note 1, at 2557-59, 2561 (noting that sometimes petitioners do abuse the writ of habeas corpus by unnecessarily reserving claims for successive petitions solely in hopes of postponing their executions).

325. Boaz, *supra* note 4, at 357-58 (defining “legally frivolous” as an issue that has no factual basis or is preempted by a Supreme Court decision).

326. *See* Veilleux, *supra* note 1, at 2562.

327. *See id.* at 2564.

328. Bright, *supra* note 31, at 2.

329. *See id.* at 5.



execution to consider the evidence has corrected the previous error and prevented injustice.<sup>330</sup> For others, the evidence was not discovered until it was too late.<sup>331</sup> For example, in *Jones v. Johnson*,<sup>332</sup> Claude Jones, who was convicted and sentenced to death based on a strand of hair, petitioned for a stay of execution to allow time for DNA tests to be conducted on the hair strand.<sup>333</sup> The petition was denied and Jones was executed.<sup>334</sup> About ten years later, DNA tests established that the hair in fact did not belong to Jones.<sup>335</sup>

Subsequent evidence of innocence is not limited to DNA discoveries.<sup>336</sup> Anthony Porter had the execution of his death sentence stayed pending the determination of his mental competency.<sup>337</sup> In the meantime, and fortunately for Porter, a private investigator and college journalism class were able to obtain a confession from the individual who actually committed the crime for which Porter had been sentenced to death.<sup>338</sup> Recognizing a potential flaw in Illinois's system, then-Governor George Ryan, a supporter of the death penalty,<sup>339</sup> called a moratorium on the execution of death sentences pending a system that would eliminate such error.<sup>340</sup>

Unfortunately, the individual sentenced to death in *Willingham v. Johnson*<sup>341</sup> was not as lucky as Porter.<sup>342</sup> There, the court sentenced the defendant to death for murder by arson, based largely on the testimony of arson experts.<sup>343</sup> Prior to his execution, emerging discoveries in fire science revealed the invalidity of the indicia of intentional arson relied

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330. See *Innocence Project Case Profiles*, INNOCENCE PROJECT, <http://www.innocenceproject.org/know/> (last visited July 27, 2012). Of the 289 total post-conviction exonerations based on subsequent DNA evidence, seventeen had been sentenced to death. *Id.*

331. See, e.g., Jonathan Cohn, *Executing an Innocent Man*, NEW REPUBLIC (Nov. 15, 2010, 3:56 PM), <http://www.tnr.com/blog/jonathan-cohn/79177/executing-innocent-man>.

332. 211 F.3d 124 (5th Cir. 2000).

333. *Id.* at 124; Cohn, *supra* note 331.

334. *Jones*, 211 F.3d at 124; Cohn, *supra* note 331.

335. Cohn, *supra* note 331.

336. See *infra* text accompanying notes 337-38.

337. Bright, *supra* note 31, at 6.

338. *Id.*

339. *Id.*

340. *Id.* at 7. The State of Illinois has since abolished the death penalty. *It's Official: On July 1st, SB3539 Became LAW!*, ILL. COAL. TO ABOLISH THE DEATH PENALTY, <http://www.icadp.org/content/its-official-july-1st-sb3539-became-law> (last visited July 27, 2012).

341. No. Civ.A. 3:98-CV-0409-L, 2001 WL 1677023 (N.D. Tex. Dec. 31, 2001).

342. Compare *Willingham*, 2001 WL 1677023, at \*25 (denying the petitioner's writ of habeas corpus), with Bright, *supra* note 31, at 6 (discussing Porter's situation).

343. See *Willingham v. State*, 897 S.W.2d 351, 354 (Tex. Crim. App. 1995) (en banc).



on by the experts who testified against Willingham.<sup>344</sup> Willingham filed a habeas petition, but he did not have time to have his innocence claims heard prior to his execution.<sup>345</sup> In the years following Willingham's execution, "the evidence of arson introduced at his trial ha[d] been largely disproven."<sup>346</sup> Thus, "[i]n certain cases such as that of Cameron Todd Willingham, . . . refusal to stay an execution may actually hinder society's quest for a feeling of finality and closure."<sup>347</sup>

It is true that it is hard for courts and convicting parties to ever be entirely certain that "the crime and requisite culpability for punishment . . . occurred."<sup>348</sup> However, it is particularly disconcerting that such a practice is used in death penalty cases due to the severe and permanent nature of the sentence.<sup>349</sup> In order for the state's interests to be consistent with justice, reliable procedure must be in place to not only reduce the risk of error and uncertainty, but also allow for an expeditious execution process.<sup>350</sup> Therefore, although post-conviction appeals may prolong the finality of the judgment,<sup>351</sup> they "are essential to ensure the reliability of the convictions and sentences,"<sup>352</sup> especially in the capital context.<sup>353</sup>

#### 4. Protecting the State's Interests: The AEDPA

To address the various state interests in the expeditious execution of the death sentences that it imposes, Congress enacted the AEDPA.<sup>354</sup> Specifically, the AEDPA imposes both substantive and procedural obstacles to a death-sentenced individual's ability to gain federal habeas

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344. Jonathan Aminoff, *Something Very Wrong is Taking Place Tonight: The Diminishing Impact of the Actual Innocence Exception on Eligibility for the Death Penalty*, CRIM. L. BULL. Jan.-Feb. 2010, at 86, 134; Callahan, *supra* note 257, at 630 n.6.

345. *Willingham*, 2001 WL 1677023, at \*2; Aminoff, *supra* note 344, at 134.

346. Callahan, *supra* note 257, at 630.

347. *Id.* at 661 (citation omitted).

348. Kovarsky, *supra* note 271, at 454.

349. *See* Sherrell, *supra* note 31, at 475.

350. *See* Kovarsky, *supra* note 271, at 454.

351. *See id.*

352. Sherrell, *supra* note 31, at 455.

353. *Id.* at 455-56 ("Post-conviction appeals are an essential ingredient of the capital defendant's efforts to ensure that his conviction and sentence are constitutional.").

354. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 28 U.S.C.); *see* *Williams v. Taylor*, 529 U.S. 420, 436 (2000) (explaining that "there is no doubt" that Congress enacted the AEDPA to advance "the principles of comity, finality, and federalism"); Callahan, *supra* note 257, at 646, 650; Macmanus, *supra* note 26, at 895.



relief.<sup>355</sup> These obstacles further the state's interests by, *inter alia*, limiting successive petitions, requiring that state remedies be exhausted, and imposing a statute of limitations.<sup>356</sup>

While the AEDPA preserves federal jurisdiction over original habeas petitions, it imposes limitations on a convicted individual's ability to file successive petitions.<sup>357</sup> Accordingly, "no Federal court . . . shall have the authority to enter a stay of execution . . . unless the court of appeals approves the filing of a second or successive application."<sup>358</sup> Petitioners cannot bring claims litigated in previous habeas corpus petitions in a successive petition,<sup>359</sup> and any new claims must present new rules of constitutional law<sup>360</sup> or facts "sufficient to establish by clear and convincing evidence that" a constitutional error resulted in the petitioner's guilty verdict.<sup>361</sup> These restrictions protect the state's interests of preventing abuse of the writ and finality since they severely limit the claims available to the petitioner on successive petitions.<sup>362</sup> This effectively lowers the chances that the court will be presented with frivolous or manipulatively postponed claims and makes final the judgments rendered on the original petition.<sup>363</sup>

The AEDPA further imposes a one-year statute of limitations on the time the petitioner has to file his or her habeas petition.<sup>364</sup> The commencement of the statute of limitations varies depending on the claim,<sup>365</sup> but in all circumstances "plac[es] a temporal constraint on the ability of prisoners to challenge convictions."<sup>366</sup> This effectively restricts

355. Kovarsky, *supra* note 271, at 448-49.

356. *Id.* at 450-53. The AEDPA also limits state prisoners' ability to challenge claims that were decided "on the merits in State court proceedings," 28 U.S.C. § 2254(d) (2006) and generally bars claims that were not raised properly in state court. *Id.* § 2254(e)(2); *see also* Kovarsky, *supra* note 271, at 449-52 (discussing the AEDPA).

357. Macmanus, *supra* note 26, at 890. Individuals sentenced to death, in particular, are likely to file successive petitions. Veilleux, *supra* note 1, at 2549.

358. 28 U.S.C. § 2262(c).

359. *Id.* § 2244(b)(1).

360. *Id.* § 2244(b)(2)(A). This provision is essentially a codification of *Teague*. Kovarsky, *supra* note 271, at 448-49. Accordingly, these new rules of constitutional law must be "made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. § 2244(b)(2)(A).

361. 28 U.S.C. § 2244(b)(2)(B); *see also* Kovarsky, *supra* note 271, at 451-52 n.44 (explaining the AEDPA).

362. *See* Kovarsky, *supra* note 271, at 450-52, 454.

363. *See id.* at 450-52.

364. 28 U.S.C. § 2244(d)(1); Kovarsky, *supra* note 271, at 453.

365. 28 U.S.C. § 2244(d)(1)(A)-(D); Kovarsky, *supra* note 271, at 453.

366. Kovarsky, *supra* note 271, at 453.



the petitioners' ability to be heard, but caters to the state's interest of finality.<sup>367</sup>

Moreover, the AEDPA protects federalism since it provides that writs of habeas corpus generally cannot be granted unless state remedies are exhausted.<sup>368</sup> Accordingly, any claims regarding a state court conviction will not reach the federal courts unless the petitioner previously sought relief from every appellate tribunal in the convicting state.<sup>369</sup> The AEDPA allows the state to waive the exhaustion requirement only through an express statement made with the aid of counsel.<sup>370</sup> This surely "give[s] the state courts an opportunity to act on [the] claims."<sup>371</sup>

The AEDPA is not without critics. For instance, the American Bar Association "has urged Congress and the courts to preserve full habeas corpus review."<sup>372</sup> Others are of the view that "the basic premise behind habeas relief . . . [is] that finality must take a back seat to justice,"<sup>373</sup> and further that, "Congress can not and should not be allowed to destroy the Court's role through the passage of legislation designed to promote an efficient, as opposed to a just, result."<sup>374</sup> However, despite the additional hurdles that the AEDPA arguably imposes on the ability of death-sentenced individuals to obtain relief, it remains in effect and protects the various interests of the state.<sup>375</sup>

Courts should consider any relevant prospective legislation when evaluating petitions to stay the executions of death sentences.<sup>376</sup> Providing guidelines that remove some of the courts' discretion surrounding stays have proven to be both functional and beneficial in other areas of law.<sup>377</sup> Therefore, doing so in the capital context—where individuals' lives are at risk—will not violate the legal system.<sup>378</sup> While

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367. *Id.*; see also *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (quoting *Williams v. Taylor*, 529 U.S. 420, 436 (2000)).

368. 28 U.S.C. § 2254(b)(1)(A); *Rhines v. Weber*, 544 U.S. 269, 276 (2005); Kovarsky, *supra* note 271, at 452.

369. Kovarsky, *supra* note 271, at 452.

370. 28 U.S.C. § 2254(b)(3); Kovarsky, *supra* note 271, at 452.

371. *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999).

372. Bright, *supra* note 31, at 4.

373. Swallows, *supra* note 27, at 930.

374. Macmanus, *supra* note 26, at 912.

375. See *supra* text accompanying notes 354-56.

376. See *supra* text accompanying notes 188-93.

377. See *supra* Part IV.A.

378. See *supra* Part III.C.



denying petitions for stays of executions supports the state's interests of finality and federalism,<sup>379</sup> it can prohibit the capital prisoner from having his or her constitutional claims heard and result in the inadvertent execution of innocent individuals.<sup>380</sup> Although the interests of the state are certainly legitimate, the more courts continue to give such disproportionate weight to the state's interests, the less available stays will become and the more likely a deserving petitioner's stay will be denied.<sup>381</sup> "Even if one were to argue that the state's interest in capital cases includes extraneous externalities such as cost or efficiency, there is no basis to argue that these interests outweigh the life of a human being."<sup>382</sup> Moreover, although the AEDPA arguably "curtails the ability of federal courts to enter a stay of execution for capital defendants,"<sup>383</sup> its enactment preserves the various state interests.<sup>384</sup> Thus, postponing an execution in the face of relevant proposed legislation that may afford prisoners a chance at life will not unduly interfere with the state's countervailing interests.<sup>385</sup>

## V. CONCLUSION

The broad discretion given to courts to grant or deny stays of execution has resulted in inconsistency and injustice for capital defendants.<sup>386</sup> Providing courts with more stringent guidelines to follow when evaluating petitions to stay executions could ameliorate this problem.<sup>387</sup> Particularly, courts should uniformly consider granting stays of execution where a bill that could affect the defendant's sentence has been introduced into Congress.<sup>388</sup> Although there is no definitive way to know whether the bill will pass, granting stays in the meantime will at least afford defendants the opportunity to present a claim that others—who were fortunate enough to have later execution dates—will

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379. *See supra* Part IV.D.1–2.

380. *See Veilleux, supra* note 1, at 2545, 2558, 2562–64.

381. *Id.* at 2557.

382. Macmanus, *supra* note 26, at 901.

383. *Id.* at 882 (arguing that the AEDPA is unconstitutional because it interferes with courts' abilities to stay the executions of death sentences).

384. *See supra* Part IV.D.4.

385. *See Garcia v. Texas*, 131 S. Ct. 2866, 2870–71 (2011) (Breyer, J., dissenting) (noting that "it is difficult to see how the State's interest in the immediate execution of an individual convicted of capital murder 16 years ago can outweigh the considerations that support additional delay").

386. *See supra* text accompanying notes 10–23.

387. *See supra* Part IV.A–B.

388. *See supra* Part IV.B.



potentially have the ability to present.<sup>389</sup> Therefore, courts should balance the existence of any relevant proposed legislation against the state's interests in an expeditious execution when deciding whether to grant or deny petitions to stay the execution of death sentences.<sup>390</sup>

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389. *See supra* Part IV.B.

390. *See supra* text accompanying notes 224-30.

\* J.D. candidate, 2013; Hofstra University School of Law. I would like to extend my gratitude to the editors of Volume 40 and everyone who contributed to the process of editing all 390 of my footnotes—Professor Barbara Stark, Katherine Porter, Lindsey Zullo, Stephen Piraino, and Dave Gerardi. To my friends at Hofstra: I am so glad to have met you all. Thank you for sharing in this experience with me and making it fun. A special thanks to my whole family, especially Billy for being the best brother I could ask for. This Note is dedicated to my parents, Ted and Maddy. I would not be where I am today without your endless love, support, and trips to the grocery store. Thank you for believing in me and providing me with a sense of stability during the past two crazy years.



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