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McKenzie v. Day: Is Twenty Years on Death Row Cruel and Unusual Punishment?

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NOTE

**MCKENZIE v. DAY: IS TWENTY YEARS ON DEATH ROW CRUEL AND UNUSUAL PUNISHMENT?**

I. INTRODUCTION

In *McKenzie v. Day*, Duncan Peder McKenzie filed a writ of habeas corpus, claiming that extended incarceration on death row is so cruel and unusual that it invokes Eighth Amendment protections. The Ninth Circuit held that McKenzie was not entitled to a stay of execution pending the resolution of his claim. The Ninth Circuit relied on his failure to raise this claim earlier. Further, after only preliminary consideration, the Ninth Circuit concluded that McKenzie's claim would not likely succeed if it was litigated further.

In 1976, the United States Supreme Court decided that capital punishment does not violate the Eighth Amendment's protection against cruel and unusual punishment. This note raises the question whether extended incarceration on death row invokes the protections of the Eighth Amendment. This note examines four aspects of this issue. First, it traces the facts and procedural history of *McKenzie*. Second, the history of

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2. *Id.* at 1463.
3. *Id.* at 1462.
4. *Id.* at 1464-66.
5. *McKenzie*, 57 F.3d at 1462.
cruel and unusual punishment jurisprudence is discussed. Third, it details and analyzes the majority and dissenting opinions. Finally, it demonstrates that McKenzie is a poorly reasoned opinion.

II. FACTS AND PROCEDURAL HISTORY

A. INTRODUCTION

In January of 1975, a jury convicted McKenzie of deliberate homicide and aggravated kidnapping. On March 3, 1975, the district court of Montana sentenced McKenzie to death.

During his incarceration on death row for over two decades, McKenzie filed three petitions for habeas relief. In his third petition, McKenzie claimed that an inordinate delay in carrying out his death sentence violated the Eighth Amendment’s prohibition against cruel and unusual punishment. McKenzie attributed the delay to actions and errors committed by the State of Montana. He specifically focused on two actions taken by the trial judge that raised questions about whether Montana convicted and sentenced McKenzie in


8. McKenzie, 57 F.3d at 1489. The sentencing judge stated that a primary motive in handing down the death penalty was that Montana law did not provide for life imprisonment without the possibility of parole. Therefore, he feared that if McKenzie was not sentenced to death, McKenzie would serve only seven or eight years. Id. at 1471.

9. Id. at 1463.

10. Id.

11. Id. at 1471.
violation of the U.S. Constitution. First, the judge gave jury instructions that shifted to McKenzie the burden of proving he lacked the requisite intent to commit the crime charged. Second, the judge and the prosecutor conferred alone just prior to McKenzie's capital punishment sentence.

B. JURY INSTRUCTIONS - FIRST PETITION FOR WRIT OF HABEAS CORPUS

McKenzie appealed his conviction to the Montana Supreme Court, claiming that the jury instructions given at trial violated the United States Constitution. He argued that the jury instructions relieved the state of proving all the elements of the crime alleged, and unlawfully shifted to McKenzie the burden of proving he lacked the requisite intent. The Montana Supreme Court rejected McKenzie's arguments and affirmed his conviction.

The United States Supreme Court granted certiorari and subsequently remanded the case to the Montana Supreme Court for consideration of the jury instructions. A year later, the Montana Supreme Court upheld the constitutionality of the jury instructions and affirmed McKenzie's conviction. The following year, the United States Supreme Court again granted certiorari, vacated the judgment, and remanded the case to the Montana Supreme Court to reconsider the constitutionality of the jury instructions. The Montana Supreme

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12. McKenzie, 57 F.3d at 1471.
13. Id.
14. Id. at 1471 (citing McKenzie v. McCormick, 27 F.3d 1415, 1417 (9th Cir. 1994)).
15. See id. at 1490 (citing State v. McKenzie, 557 P.2d 1023, 1029 (Mont. 1976)).
16. Id. at 1490. The instructions informed the jury that, if they found the defendant committed the illegal act on the victim, "the law directs you to reason from such unlawful act that the defendant acted with an unlawful intent." McKenzie, 57 F.3d at 1490 n.1 (quoting McKenzie v. Montana, 449 U.S. 1050, 1051-52 n.1 (1980)). At trial, the prosecutor also requested that the jury receive alternative instructions. Id.
17. Id. at 1490.
19. McKenzie, 57 F.3d at 1490 (citing McKenzie, 581 P.2d at 1205).
20. Id. (citing McKenzie v. Montana, 443 U.S. at 903). In its decision, the U.S. Supreme Court referred to Sandstrom v. Montana, 442 U.S. 510 (1979), in which
Court held that the jury instructions were unconstitutional.\textsuperscript{21} However, the Court again affirmed McKenzie's conviction, finding that any violation of McKenzie's Fourteenth Amendment rights constituted harmless error.\textsuperscript{22} In 1980, the United States Supreme Court denied McKenzie's third petition for certiorari.\textsuperscript{23}

In 1981, due primarily to Montana's admission that the jury instructions violated the Fourteenth Amendment, McKenzie filed a petition in federal court for writ of habeas corpus.\textsuperscript{24} Almost four years later, the district court dismissed the petition in an unpublished opinion.\textsuperscript{25} One year later, the Ninth Circuit affirmed the district court's decision to dismiss the petition.\textsuperscript{26}

C. EX PARTE MEETING - SECOND PETITION FOR WRIT OF HABEAS CORPUS

In 1985, while the first habeas petition was still pending, McKenzie's attorney discovered that the prosecutor and the sentencing judge had conferred alone for over forty-five minutes just prior to the judge handing down McKenzie's capital punishment sentence.\textsuperscript{27} Based on this new information,
McKenzie filed a second petition for writ of habeas corpus with the Montana Supreme Court, arguing that this ex parte meeting violated his due process rights. On March 3, 1987, the United States District Court for the District of Montana dismissed McKenzie’s second petition in an unpublished opinion.

McKenzie appealed the district court’s dismissal to the Ninth Circuit which remanded the petition to the federal district court for an evidentiary hearing. In 1992, the district court denied the petition in another unpublished order. On June 24, 1994, a three-member panel of the Ninth Circuit affirmed the district court’s dismissal by a 2-1 vote, holding that McKenzie had the burden of proving what took place at the ex parte meeting between the judge and prosecutor.

D. CRUEL AND UNUSUAL PUNISHMENT - THIRD PETITION FOR WRIT OF HABEAS CORPUS

On March 27, 1995, after the denial of McKenzie’s second habeas petition, a Montana state district court scheduled McKenzie’s execution for May 10, 1995. McKenzie appealed to the Montana Supreme Court, claiming for the first time that Montana’s twenty-one year delay in carrying out his execution violated the Eighth Amendment. On April 11, 1995, the

However, he admitted that they may have talked about the victim, the community’s feeling about the case, and McKenzie’s defenses. See McKenzie v. Risley, 915 F.2d 1396, 1397-98 (9th Cir. 1990).

28. McKenzie, 57 F.3d at 1492. McKenzie based his argument on a Supreme Court case, “which held that ‘it is a denial of due process for a trial judge to impose the death penalty on the basis of information which was not disclosed and which the defendant had no opportunity to deny or explain.’” Id. (quoting Gardner v. Florida, 430 U.S. 349 (1977)).

29. Id.

30. Id. (citing McKenzie v. Risley, 915 F.2d 1396, 1398 (9th Cir. 1990)). The Ninth Circuit instructed the district court to decide whether the prosecutor and sentencing judge had discussed any matters that may have influenced the judge in his sentencing. However, before any evidentiary hearing took place, the prosecutor died and the record of his testimony regarding the ex parte meeting could not be found. See id.

31. McKenzie, 57 F.3d at 1492.

32. Id. The majority admitted that the outcome of this appeal “turned on who would bear the burden of proving what happened at the ex parte meeting.” Id.

33. McKenzie v. Day, 57 F.3d 1461, 1492 (9th Cir. 1995).

34. Id. at 1493. McKenzie based this claim on the Eighth Amendment’s protec-
Montana Supreme Court dismissed the appeal without addressing the merits of the Eighth Amendment claim.\textsuperscript{35}

On April 18, 1995, McKenzie filed his third petition for writ of habeas corpus in the federal district court of Montana, claiming that carrying out his execution at that late date would violate the Eighth Amendment.\textsuperscript{36} Two days later, the district court dismissed this third habeas petition as being "meritless as a successive and repetitive petition."\textsuperscript{37}

On April 24, 1995, McKenzie appealed the federal district court’s dismissal to the Ninth Circuit.\textsuperscript{38} One week later, he filed a motion with the Ninth Circuit to stay his execution.\textsuperscript{39} The Ninth Circuit issued a certificate of probable cause and ordered expedited briefing and argument.\textsuperscript{40}

\textsuperscript{35} Id. at 1492-93.

\textsuperscript{36} See McKenzie, 57 F.3d at 1493. In addition to claiming a violation of his rights under the Eighth Amendment, McKenzie raised seven other claims, including: (1) changes made to Montana’s capital punishment scheme since his conviction violated the \textit{ex post facto} clause; (2) changes in the method of execution violated the \textit{ex post facto} clause; (3) he was denied due process because he was not given an opportunity to consult with counsel before choosing his method of execution; (4) he was denied due process by the state’s refusal to consider new evidence in mitigation of his sentence; (5) he was denied due process by the state’s refusal to reweigh the proportionality of his sentence in light of the reversal of convictions to which his crime had been compared; (6) his execution would violate the Eighth Amendment because he would be the first person executed in Montana since 1943 and the only person executed under the pre-1977 death penalty statute; and (7) his death sentence was based on inaccurate facts because changes in the law would now allow him to be sentenced to life imprisonment without the possibility of parole. \textit{Id.} at 1463-84.

\textsuperscript{37} Id. The court failed to discuss the merits of McKenzie's Eighth Amendment claim. \textit{Id.} at 1473.

\textsuperscript{38} Id. at 1473.

\textsuperscript{39} McKenzie, 57 F.3d at 1472.

\textsuperscript{40} Id. at 1464.
III. BACKGROUND

A. INTERPRETING THE PUNISHMENT CLAUSE

Ratified in 1791, the Eighth Amendment states, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."41 Prior to 1958, only a handful of cases addressed whether a punishment would be considered cruel and unusual.42 The Supreme Court first interpreted the "cruel and unusual" language of the punishment clause43 in Wilkerson v. Utah.44 The Court refused to "define with exactness the extent of the constitutional provision," but found it safe to affirm that the amendment forbids unnecessary cruelty and torture.45

Eleven years later, the Court affirmed Wilkerson.46 The Court held that punishments involving burning at the stake, crucifixion, or breaking on the wheel violated the Eighth Amendment.47 However, the Court upheld death by electrocution as permissible, stating, "punishments are cruel when they involve torture or lingering death[,] . . . something inhumane and barbarous, something more than the mere extinguishment of life."48

41. U.S. CONST. amend. VIII.
42. See e.g., In re Medley, 134 U.S. 160 (1890); In re Kemmler, 136 U.S. 436 (1890), overruled by Trimble v. State, 478 A.2d 1143 (Md. 1984); McElvaine v. Brush, 142 U.S. 155 (1891); Weems v. United States, 217 U.S. 349 (1910).
43. The language, "nor cruel and unusual punishments inflicted" is commonly referred to as the punishment clause. See generally Jonathan A. Vold, Note: The Eighth Amendment "Punishment" Clause After Helling v. McKinney: Four Terms, Two Standards, and a Search For Definition, 44 DEPAUL L. REV. 215 (1994).
44. 99 U.S. 130 (1878), overruled by Trimble v. State, 478 A.2d 1143 (Md. 1984). The issue in Wilkerson was whether the sentence of public execution by shooting violated the Eighth Amendment. See id. at 132-33.
45. Id. at 135-36. The Court listed several forms of prohibited punishments which involved different types of torture. The Court held that being dragged to a hanging site, beheading, and public dissecting violated the punishment clause, while death by shooting did not. See id. at 135-37.
46. See In re Kemmler, 136 U.S. 436 (1890) (Petitioner claimed that death by electrocution violated the Eighth Amendment.).
47. Id. at 446.
48. Id. at 447. The Court noted that execution generally is not cruel within the meaning of the words of the Constitution. Id.
In 1910, in *Weems v. United States*, the Supreme Court again refused to define with exactness the punishment clause, but stated that the clause "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." Attempting to further define the clause, the Court listed a number of factors courts should consider when resolving an Eighth Amendment claim. The Court focused on the nature of the crime, the purpose of the law, the length of the sentence, and the proportion of the penalty as applied in similar cases, considering the crime and the defendant. Additionally, the Court noted that "there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation."

In 1958, the Supreme Court emphasized the inherent flexibility in the words "cruel and unusual." The Court explained that the Amendment must draw its meaning from the "evolving standards of decency that mark the progress of a maturing society." Chief Justice Warren stated that the fundamental doctrine of the Eighth Amendment "is nothing less than the dignity of man."

While the objective "evolving standards of decency" retains its vitality as a principle governing Eighth Amendment analysis, the Court has continued to further define the Eighth Amendment. In *Gregg v. Georgia*, the Court stated that

49. 217 U.S. 349 (1910). Weems' sentence consisted of fifteen years of hard labor in ankle chains, perpetual surveillance, and loss of his civil rights. The Court found that this punishment violated the "cruel and unusual punishment" clause. See *id.* at 351.
50. *Id.* at 378.
52. *Id.*
53. *Id.* at 372.
54. See *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958). In *Trop*, the Court reviewed revoking the citizenship of a native-born American who had escaped from an Army stockade and deserted for a day. The Court concluded that loss of citizenship violated the Eighth Amendment. *Id.* at 86-87.
55. *Id.* at 101.
56. *Id.* at 100.
although an analysis of contemporary values concerning a challenged sanction is relevant to the application of the Eighth Amendment, it is not conclusive.\(^{59}\) The Supreme Court decided that courts must also “look to objective indicia that reflect the public attitude toward a given sanction” by considering whether the punishment is subjectively excessive.\(^{60}\) For a punishment to be excessive it must either involve unnecessary and wanton infliction of pain or be grossly out of proportion to the severity of the crime.\(^{61}\)

Recent Supreme Court decisions use both subjective and objective standards to review allegations of Eighth Amendment violations.\(^{62}\) The Eighth Amendment prohibits not only eighteenth century concepts of cruelty, but also those practices deemed cruel and unusual by contemporary standards.\(^{63}\)

B. INORDINATE DELAYS IN CARRYING OUT EXECUTIONS

The Supreme Court ruled that capital punishment, itself, does not violate the prohibition against cruel and unusual punishment.\(^{64}\) The Court has also stated that the penalty of death differs from all other forms of criminal punishment.\(^{65}\) Lengthy incarceration on death row is a punishment apart from the death penalty itself.

Many prisoners on death row currently argue that extended incarceration on death row violates the Eighth Amendment’s prohibition against cruel and unusual punish-

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59. Id. at 173.
60. Id.
61. Id. The Court also noted that the judiciary still owed a certain amount of deference to legislators who assigned the punishments for crimes. See Gregg, 428 U.S. at 174-76.
62. See, e.g., Helling v. McKinney, 113 S. Ct. 2475, 2482 (1993). The Court held that the Eighth Amendment applies to conditions of confinement but violations require proof of a subjective component and this component does not vitiate the objective component in Eighth Amendment analysis. See also Furman v. Georgia, 408 U.S. 238 (1972), reh'g denied, 409 U.S. 902 (1972) (listing four different theories under which a punishment may be considered cruel and unusual).
ment. 66 This claim is not novel; various forms of this issue have previously been considered by the courts. 67

In 1960, the Ninth Circuit considered Caryl Chessman’s claim that he should not be executed because he has been on death row for eleven and one-half years, thus he has been subjected to cruel and unusual punishment. 68 Chief Judge Richard H. Chambers, rejecting Chessman’s claim, stated, “I do not see how we can offer life as a prize for one who can stall the processes for a given number of years, especially when in the end it appears the prisoner never really had any good points.” 69

In 1984, the U.S. District Court for the District of Utah rejected a similar Eighth Amendment claim. 70 The petitioner raised a cruel and unusual punishment claim based on the repeated setting and staying of execution dates. 71 In rejecting this claim, the court held that to accept petitioner’s argument would create an irreconcilable conflict between constitutional guarantees and would create a mockery out of the justice system. 72

In 1986, the Ninth Circuit considered a comparable Eighth Amendment claim. 73 The claimant argued that fulfilling his sentence after sixteen years on death row would constitute


67. See Stafford, 899 P.2d at 657, and McKenzie v. Day, 57 F.3d 1461, 1463 (9th Cir. 1995) (referring to this claim as a Lackey claim). See also infra notes 68-85 and accompanying text.

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

69. Id.


71. Id.

72. Id. at 431.

73. Richmond v. Lewis, 948 F.2d 1473 (9th Cir. 1990), rev’d on other grounds, 506 U.S. 40 (1992). Although this case was reversed on other grounds in 1992, the law of the circuit was that no Eighth Amendment claim existed. See McKenzie v. Day, 57 F.3d 1461, 1465 (9th Cir. 1995).
cruel and unusual punishment. The Ninth Circuit rejected the claim, stating "[a] defendant must not be penalized for pursuing his constitutional rights, but he also should not be able to benefit from the ultimately unsuccessful pursuit of those rights.")

In evaluating Eighth Amendment violations, the Supreme Court also has considered objective evidence of international community values. Since 1986, foreign courts have developed a line of precedent which could support a conclusion different from that reached by United States courts; a conclusion that evolving standards of decency call for a closer examination of this issue. In 1989, the European Commission on Human Rights concluded "lengthy delays in executing death sentences in the United States make the death penalty inhuman or degrading treatment...." Other foreign courts have considered whether lengthy delays in executing a prisoner constitutes cruel and unusual punishment. In 1993, a British court held that to execute two inmates who had spent fourteen years on death row and who had been read execution warrants three times would constitute torture or inhumane or degrading punishment. The Supreme Court of Zimbabwe prohibited the execution of two inmates who had been on death row for

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74. Richmond, 948 F.2d at 1491.
75. Id. at 1491-92.
77. See generally McKenzie, 57 F.3d at 1487 and Justice Norris' dissent discussing Soering v. United Kingdom, 11 Eur. H.R. Rep. 489 (1989), Pratt & Morgan v. Attorney General for Jamaica, 3 SLR 995 (Privy Council 1993), and Catholic Comm'n for Justice & Peace in Zimbabwe v. Attorney General, No. SC 73, reported in 14 HUM. RTS. L.J. (1993). Our humanity gives rise to "an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years." Id. (quoting Pratt & Morgan, 3 SLR at 16).
79. See supra note 77 and accompanying text.
80. McKenzie, 57 F.3d at 1488 (quoting Pratt & Morgan, 3 SLR at 995). "This decision did not involve an interpretation of the cruel and unusual punishment clause of the English Bill of Rights of 1689 - the source of the Eighth Amendment. . . ." but the Privy Council did survey English common law and conclude that these "practices were condoned historically at common law." Id.
four to six years, claiming that prolonged death row incarceration constituted inhuman or degrading punishment.\(^{81}\)

In 1995, the United States Supreme Court, in *Lackey v. Texas*, addressed whether an inordinate delay in carrying out an execution violated the Eighth Amendment.\(^{82}\) Lackey questioned whether executing a prisoner who had already spent seventeen years on death row violated the Eighth Amendment's prohibition against cruel and unusual punishment.\(^{83}\) Although the Supreme Court denied certiorari, Justice Stevens issued a memorandum stating the Court would postpone its consideration until other courts had addressed the issue.\(^{84}\) Justice Stevens' memorandum stated:

\[\text{T}he \text{ death penalty serves 'two principal social purposes: retribution and deterrence'.}\] \(^{85}\) It is arguable that neither ground retains any force for prisoners who have spent some seventeen years under a sentence of death. \[\text{W}hen \text{ the death penalty 'ceases realistically to further these purposes, its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.}\] \(^{86}\)

The Court remanded *Lackey* to the district court for further consideration of the Eighth Amendment claim.\(^{87}\)

81. *Id.* at 1488 (quoting Catholic Comm'n for Justice & Peace in Zimbabwe v. Attorney General, No. SC. 73, reported in 14 HUM. RTS. L.J. 323 (1993)). In reaching this decision, the court considered the “physical conditions” and the “mental anguish” endured by prisoners on death row. *Id.*


83. *Id.*

84. *Id.* at 1422.

85. *Id.* at 1421 (quoting Gregg v. Georgia, 428 U.S. 153, 183 (1976)).

86. *Id.* at 1421-22 (quoting Furman v. Georgia, 408 U.S. 238, 312 (1972)).

C. CONDITIONS ON DEATH ROW

Habeas petitions assert that to execute a petitioner after he or she has spent years on death row under torturous conditions would violate the Eighth Amendment's prohibition against cruel and unusual punishment. Petitioners argue that death row conditions invoke the protection of the Eighth Amendment because they violate evolving standards of decency.

One study of death row inmates documented the conditions on death rows and the effects of these conditions on death row inmates. This study revealed that the majority of death row inmates are unable to work at prison jobs, attend education classes or religious services, participate in clubs, and have much less opportunity for exercise and recreation. Moreover, most have little human contact and are confined to their cells over 22 hours a day. They eat in their cells and are separated from visitors by barriers. An inmate described his experience on death row. He described other inmates throwing feces from their cells; prisoners chained to their beds and lying in their own waste, and the availability of a single shower for 26 inmates which is "filthy, covered with human waste, frequently stopped up and shared by those with communicable diseases". Richard Strafer, an appellate law fellow, noted: "Apparently abandoned by the living, the condemned

88. See, e.g., Lackey v. Texas, 115 S. Ct. 1421, 1421-22 (1995); Free v. Peters, 50 F.3d 1362 (7th Cir. 1995); Williams v. Chrans, 50 F.3d 1363 (7th Cir. 1995).
91. Id.
92. Id.
93. Id.
94. Laura LaFay, 15 Years on Death Row Willie Lloyd Turner Has Been on Death Row Longer Than Anyone Else In Modern-Day Virginia History. In An Appeal Filed This Week, His Lawyer Says That Turner Has Been Punished Enough, THE VIRGINIAN-PILOT, April 28, 1995 at A1.
95. Id.
are subjected to massive deprivations of personal autonomy on death row.96

For many years, courts and medical experts have acknowledged the dehumanizing effect of death row conditions on prisoners.97 In 1972, the California Supreme Court, concluding that capital punishment violated the Eighth Amendment's punishment clause98, stated:

The cruelty of capital punishment lies not only in the execution . . . but also in the dehumanizing effects of the lengthy imprisonment prior to execution . . . Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture . . . 99

The Supreme Court of Massachusetts elaborated on such notions: “Punishment is cruel when it involves ‘a lingering death’”.100 Since death sentences will . . . be carried out only after agonizing months and years of uncertainty, the punishment is cruel and unusual.”101

Justice Frankfurter once recognized that prisoners who experience insanity while awaiting execution of a death sentence are not rare.102 In another case,103 Justice Brennan acknowledged “that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of the sentence and the actu-

96. Strafer, supra note 90 at 74.
101. Id.
Psychiatrists and psychologists, legal commentators and authors, and prison wardens, have all shared in the opinion that prisoners on death row live in torturous conditions. In sum, the Supreme Court has held that the Eighth Amendment’s punishment clause “may acquire meaning as public opinion becomes enlightened by a humane justice.” Further, the Court stated that the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. Considering the results of death row studies, as well as court decisions, Justice Stevens and Justice Breyer agreed that whether an inordinate delay in carrying out an execution constitutes cruel and unusual punishment is an important question and is sufficient to warrant review by courts.

IV. THE COURT’S ANALYSIS

A. THE MAJORITY OPINION

In McKenzie v. Day, the majority addressed two separate issues posed by McKenzie. First, the Ninth Circuit analyzed McKenzie’s appeal from the district court’s dismissal of the petition for habeas corpus. Second, it addressed

104. Id. at 288-89 (Brennan, J., concurring).
105. See, e.g., Strafer, supra note 90, at 74; Note, Mental Suffering Under the Sentence of Death: A Cruel and Unusual Punishment, 57 IOWA L. REV. 814, 826-31 (1972); Schabas, Execution Deferred, Execution Denied, 5 CRIM. L. FORUM 180 (1994); Mello, Facing Death Alone, 37 AMER. L. REV. 513, 552 (1989); Stafer, Symposium on Death Penalty Issue: Volunteering For Execution, 74 J. CRIM. L. 860, 861 (1983); Johnson, Under Sentence of Death: The Psychology of Death Row Confinement, 5 LAW & PSYCHOLOGY REVIEW 141, 157-61 (1979); Gallemore & Parton, Inmate Response to Lengthy Death Row Confinement, 129 AM. J. PSYCHIATRY 167 (1972); C. DUFFY & A. HIRSHBERG, 88 MEN AND 2 WOMEN (1962). A former warden at San Quentin stated: “One night on death row is too long, and the length of time spent there constitutes cruelty that defies the imagination. It has always been a source of wonder to me that they didn’t all go stark raving mad.” Id. at 254.
108. Lackey, 115 S. Ct. at 1421.
110. Id. at 1464.
111. Id. McKenzie sought a stay and a remand to the district court for consid-
McKenzie's alternative request for the court to issue a writ of habeas corpus based on the merits of his Lackey claim.\textsuperscript{112}

1. The Stay

The Ninth Circuit restated the Supreme Court's holding that a "court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief."\textsuperscript{113} The majority concluded that McKenzie, like the petitioner in \textit{Gomez v. United States District Court for the Northern District of California},\textsuperscript{114} raised claims that should have been brought much earlier in the legal proceedings.\textsuperscript{115} The majority reasoned that there was a strong presumption against granting a stay created by McKenzie's delay in raising his claim.\textsuperscript{116} According to the court, raising the claim six weeks prior to his execution was abusive.\textsuperscript{117}

\textbf{a. Timing the Stay Request}

The Ninth Circuit recognized that McKenzie's stay request rested on his claim that the 20 year delay in carrying out his execution constituted cruel and unusual punishment.\textsuperscript{118} The court noted that a 1960 Ninth Circuit case\textsuperscript{119} resolved a similar claim and another holding\textsuperscript{120} 30 years later addressed McKenzie's argument exactly.\textsuperscript{121} Since the Ninth Circuit had already addressed this claim, McKenzie could have raised the
issue as early as his first or second federal habeas petitions. 122

The majority acknowledged that the Ninth Circuit had rejected precisely this claim in 1990, 123 McKenzie would arguably have been frivolous in raising it. 124 However, the court determined that McKenzie could have raised the claim prior to the Ninth Circuit's rejection in 1990, or after the court vacated its decision in 1993. 125 The majority noted that had McKenzie raised the issue at either of these times, the court could have considered his claim without having to vacate a death warrant. 126 Further, the Ninth Circuit concluded that McKenzie offered no reasonable excuse for failing to raise this issue earlier except for his claim that his counsel believed it would be unsuccessful. 127 However, the majority pointed out that this fact did not stop a petitioner from raising it in 1984, 128 or another from asserting this claim in 1995. 129 Therefore, the majority concluded that McKenzie should have raised his Eighth Amendment claim earlier. 130

122. See id. The majority points out that McKenzie could have moved to amend his first petition prior to it being resolved in the district court. Id. at 1464 n.6.
123. Richmond, 948 F.2d at 1473. This decision was vacated in 1993. Richmond v. Lewis, 986 F.2d 1583 (9th Cir. 1993).
124. McKenzie, 57 F.3d at 1465. The court said "arguably" because "so long as the claim was not finally addressed by the Supreme Court, a death row inmate would have been well within his rights in raising the issue to preserve it for Supreme Court review." Id. at n.8.
125. Id. The majority noted that in 1990 McKenzie had been on death row for fifteen years, almost the same amount of time that Lackey had been on death row when he first raised the same argument. Id. at 1465.
126. Id. When a court vacates a death warrant, the existing death warrant becomes void. Then if the petitioner is unsuccessful in his habeas petition the court has to re-issue a new death warrant setting a new date and time. See generally, Maynard v. Cartwright, 486 U.S. 356 (1988).
127. McKenzie, 57 F.3d at 1465. Counsel for McKenzie explained that he refused to raise "frivolous claims, not only because such conduct is sanctionable, but also because he considers respect for the court to be paramount." Id. at 1475.
128. Id. at 1465. See Richmond, 948 F.2d at 1491-92. Richmond claimed that fulfillment of his sentence after so many years on death row would constitute cruel and unusual punishment. Id. at 1480.
130. McKenzie, 57 F.3d at 1464.
b. Preliminary Consideration on the Merits

Next, the Ninth Circuit gave McKenzie’s claim preliminary consideration. The court reasoned that a strong showing of success on the merits might, on rare occasions, outweigh abusive delay in raising the claim.

The court began its consideration of the merits by referring to Richmond v. Lewis, in which the Ninth Circuit stated that a petitioner must not be penalized for asserting his constitutional rights, but he should not benefit from the ultimately unsuccessful pursuit of those rights. Applying this reasoning, the Ninth Circuit claimed that the delay has been caused by McKenzie availing himself of the procedures provided to ensure that executions are carried out only in appropriate cases. The court concluded that delays due to procedures created to prevent cruel and unusual punishment could not alone violate the Eighth Amendment.

c. Policy Behind Not Sustaining the Eighth Amendment Claim

The court recognized that sustaining McKenzie’s Eighth Amendment claim would greatly affect procedures regarding capital punishment. The court explained that stays are frequently granted because a state is not permanently deprived of carrying out the punishment. The majority held that sustaining McKenzie’s unconstitutional delay claim would put states at the risk of not being able to enforce their sentenc-
The Ninth Circuit feared that death row inmates could avoid their sentences by drawing out the appeals process and thereby prevent the state from carrying out its sentence. Following this reasoning, the court feared that the administration of death penalty cases under pressure to avoid delays would emphasize speed instead of accuracy.

Finally, the majority stated that even if the court decided that McKenzie's claim constituted cruel and unusual punishment, commutation of the death penalty was an improper remedy. The court reasoned that McKenzie's years of suffering could not be undone, nor would commutation of the death penalty relieve the pain of others in similar situations.

In deciding whether to grant equitable relief, the majority, after weighing the State's strong interest in proceeding with its sentence and considering the last-minute nature of an application to stay the execution, concluded that McKenzie's Eighth Amendment claim should have been raised earlier. Further, the majority concluded that it was highly unlikely that McKenzie's claim would be successful if litigated on its merits. Therefore, the Ninth Circuit denied McKenzie's request for the court to remand the case to the district court and issue a stay.

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139. Id.
140. Id.
141. Id. The court noted that almost 1700 out of 5000 people have received some kind of relief from capital punishment, and implied that this figure would be severely affected if the court emphasized speed as compared to accuracy. McKenzie, 57 F.3d at 1467 n.13 (quoting BUREAU OF JUSTICE STATISTICS, Capital Punishment 1993, at 12).
142. Id. at 1467.
143. Id. The Ninth Circuit noted that when other prisoners complain of prison conditions, they correct the conditions; they do not reduce their sentences. Id.
144. Id. at 1468 (quoting Gomez, 503 U.S. at 653).
145. McKenzie, 57 F.3d at 1467.
146. Id. at 1469. The majority further stated that the court was unable to grant McKenzie's request for a stay based on any of his other claims. Again, the majority expressed that the claims should have been raised at an earlier time or were completely without merit. Id.
2. Stay Motion Made Directly To the Court

The Ninth Circuit also denied McKenzie's request to directly issue the writ based on the merits of his Eighth Amendment claim. The opinion reiterated that the merits of McKenzie's Eighth Amendment claim were highly questionable. The majority stated that delays due to procedures created to prevent cruel and unusual punishment could not violate the Eighth Amendment. The court expressed fear that sustaining the Eighth Amendment claim would emphasize speed instead of accuracy in death penalty cases. The court ultimately held that even if the delay did constitute cruel and unusual punishment, commutation of the death penalty was not the proper remedy. Therefore, the court explained its reluctance to grant the equivalent of summary judgment. The court refused to further examine the merits of McKenzie's claim and declined to order the writ.

B. THE DISSENT

1. The District Court's Failure to Follow Proper Procedures

In his dissent, Judge Norris addressed the majority's failure to properly address McKenzie's appeal of the district court's dismissal of the writ. He asserted that the district court erred in finding that McKenzie's claims were "successive." The dissent explained that the district court should have applied abuse of writ doctrine procedures as mandated by

147. McKenzie, 57 F.3d at 1470. McKenzie claimed that the long delay in carrying out his sentence, independent of any other claims, proved that he was subjected to cruel and unusual punishment. Id.
148. Id.
149. Id. at 1467.
150. Id.
151. McKenzie, 57 F.3d at 1467. See also supra note 143.
152. Id. at 1470.
153. Id.
155. Id. (citing Campbell v. Blodgett, 997 F.2d 512, 515-16 (9th Cir. 1992)). Norris stated that a claim is considered "successive" only if it has been raised in a previous petition. Id. at 1472. Judge Norris pointed out that this was McKenzie's first time raising the Eighth Amendment violation claim. Id. at 1470.
the Supreme Court. Further, the dissent argued that the Ninth Circuit should have reversed the dismissal, remanded the case to the district court, and ordered the court to follow the proper procedures. Instead of following the proper procedures, the majority took no action on the appeal of the dismissal. "Nonetheless, the majority has paradoxically decided that because McKenzie did not bring his claim earlier, his potentially meritorious petition will be mooted by his potentially unconstitutional execution."

2. The Majority's Misinterpretation of Gomez

The dissent criticized the majority's gross misinterpretation and misapplication of the holding from Gomez. Judge Norris argued that Gomez provided a rule of very narrow application which extended the abuse of writ doctrine. Judge Norris contended that the majority interpreted Gomez as turning on the single fact of inexcusable delay; however, he insisted that courts may properly refuse to grant a stay only to petitioners who at the last-minute, attempt to manipulate the judicial process. Judge Norris explained that the punitive

156. Id. at 1472 (citing McCleskey v. Zant, 499 U.S. 467, 470 (1991), reh'g denied, 501 U.S. 1224 (1991)). The abuse of writ doctrine should be applied to a claim raised for the first time in a subsequent petition:

When a prisoner files a second or subsequent application, the government bears the burden of pleading abuse of the writ. . . . To excuse his failure to raise the claim earlier, petitioner must show cause for failing to raise it. . . . If petitioner cannot show cause, the failure to raise the claim may nonetheless be excused if he can show that a fundamental miscarriage of justice would result from a failure to entertain the claim.

McCleskey, 499 U.S. at 494-95.

157. McKenzie, 57 F.3d at 1470. Judge Norris reasoned "at that point the district court would still have had time to call a scheduling conference to arrange an expedited hearing on the petition's motion for a stay, permitting the State to raise abuse of the writ and allowing the petitioner to demonstrate cause and prejudice or miscarriage of justice in a manner mandated by McCleskey." Id. at 1474. Norris also emphasized that counsel for Mr. McKenzie was first confronted by Gomez at oral argument and was required to respond without preparation nor briefing. Id. at 1471.

158. Id. at 1474.

159. Id. at 1475.

160. See McKenzie, 57 F.3d at 1474-80 (citing Gomez v. United States Dist. Ct. for the N. Dist. of Cal., 503 U.S. 653 (1992)).

161. See id. at 1476-77.

162. Id. at 1477. See Gomez, 503 U.S. at 653. Norris claimed that the "lan-
holding of Gomez, refusal to consider a proper claim that may save a petitioner's life, has never been considered appropriate except when the petitioner has completely failed to present even a "semblance of a reasonable excuse for the inordinate delay."163

Judge Norris noted that two facts led the Gomez court to find that defendant's petition was a last minute effort to manipulate the judicial process.164 First, the petitioner in Gomez sought a stay a mere three days before his scheduled execution.165 Second, the petitioner in Gomez sought a stay of execution through a class action under § 1983, rather than through a habeas petition in a blatant attempt to avoid application of the abuse of the writ doctrine.166

3. Petitioner Did Not Attempt to Manipulate the Judicial Process

Judge Norris found that once the court properly applied the Gomez holding to rest on petitioners who try to manipulate the judicial process, it would find that the Gomez rule is inapplicable to McKenzie.167 First, he argued that McKenzie's petition was not a last minute effort to stay his execution.168 McKenzie brought this claim more than six and a half weeks prior to his scheduled execution, as compared to the Gomez petitioner who raised his claim only three days before he was scheduled to die.169 Second, Montana neither accused

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163. Id. at 1476 (citing Herrera v. Collins, 113 S. Ct. at 874 (O'Connor, J., concurring)). In Herrera, the petitioner presented new evidence eight years after his conviction without offering any excuse for this delay. Herrera, 113 S. Ct. at 874.
164. McKenzie, 57 F.3d at 1477.
165. Id.
167. McKenzie, 57 F.3d at 1477.
168. Id.
169. Id.
McKenzie of attempting to manipulate the judicial process nor brought forward any proof to support this allegation. Arguing that the majority should not have classified McKenzie's petition as a last-minute application, Judge Norris found that McKenzie had good cause for not raising his claim earlier, and therefore did not file his petition in an attempt to manipulate the judicial process.

Judge Norris noted that through the early 1990s, every Ninth Circuit case involving a claim similar to McKenzie's had been flatly rejected by the Ninth Circuit. The dissent conceded that other cases raised this claim, but noted that these other cases still lacked any positive precedent to rely upon. Norris insisted that McKenzie's failure to assert this previously rejected claim did not demonstrate that McKenzie was trying to manipulate the judicial process.

Judge Norris further explained that, until March of 1995, McKenzie had no basis to believe that his Eighth Amendment claim might be successful. Judge Norris pointed out that McKenzie raised his Eighth Amendment claim following the Supreme Court's decision to grant a stay of execution in Lackey v. Texas. Additionally, Judge Norris noted that McKenzie's first positive authority supporting his unconstitutional delay claim did not come until March 27, 1995, when Justice Stevens published a memorandum on the viability of this claim.

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170. Id. See supra note 163 and accompanying text.
171. Id. at 1479.
172. See, e.g., Richmond v. Lewis, 948 F.2d at 1491-92 (9th Cir. 1990); Chessman v. Dickson, 275 F.2d 604, 607 (9th Cir. 1960).
173. McKenzie, 57 F.3d at 1480.
174. Id. at 1480-81. Norris insisted that McKenzie raising his Lackey claim for the first time six weeks before his execution, cannot by itself justify finding McKenzie guilty of engaging in a last minute attempt to manipulate the judicial process. Id. at 1480. In addition, "[t]he fact that the claim was not completely unheard of, and had been raised in three or four cases . . . at the state or district court level, is not sufficient to show that counsel engaged in manipulative behavior. . . ." Id. at 1481.
175. Id. at 1480-81.
176. McKenzie, 57 F.3d at 1480-81 (citing Lackey, 115 S. Ct. 1274 (1995)). The Supreme Court issued the stay while deciding whether to grant certiorari on Lackey's Eighth Amendment violation claim. The dissent claimed that this indicated to McKenzie that this claim was "advancing." Id. at 1480.
177. Id. at 1481 (citing Lackey, 115 S. Ct. at 1421).
Judge Norris pointed out that this was the exact day McKenzie first asserted his unconstitutional delay claim. 178

Finally, Judge Norris argued that, unlike the petitioner in Gomez, McKenzie’s claim could possibly depict him as being innocent of the death penalty. 179 McKenzie argued that the substantial delay and harsh conditions on death row have made him ineligible for execution pursuant to the Eighth Amendment. 180 If he prevailed on this claim, McKenzie could have shown that he should not be executed. 181

In conclusion, the dissent explained that the proper interpretation of Gomez does not support the majority’s holding that McKenzie’s Eighth Amendment claim was a last minute attempt to manipulate the judicial process. 182 Gomez should not deny McKenzie the chance to have his petition properly considered on remand to the district court. 183

4. The Stay

The dissent next addressed the issue of whether the Ninth Circuit should have issued a stay pending consideration of the petition by the district court on remand. 184 The dissent referred to the proper standard for granting a stay set forth by the Supreme Court: a court should grant a stay only if the claim presents substantial grounds upon which relief might be granted. 185 Further, the dissent noted that there is a strong equitable presumption for granting stays of execution to permit

178. Id.
179. Id. at 1478.
180. McKenzie, 57 F.3d at 1478.
181. Id. See Teague v. Lane, 489 U.S. 288 (1989), reh’g denied, 490 U.S. 1031 (1989). “[T]he term ‘innocence of the death penalty’ is equally appropriate to describe a defendant who has been declared ineligible for such punishment based on facts arising after trial.” Id. at 1479.
182. Id. at 1479-80.
183. Id. at 1482.
184. McKenzie, 57 F.3d at 1482.
185. Id. (citing Barefoot v. Estelle, 463 U.S. 880 (1983)). The dissent in Barefoot elaborated that “substantial grounds” includes claims that are “debatable among jurists of reason or are adequate to deserve encouragement to proceed further.” Barefoot, 463 U.S. at 893.
full consideration of habeas petitions. The dissent argued that McKenzie's Eighth Amendment unconstitutional delay claim meets the standard expressed by the Supreme Court and a stay should have been granted pending the remanded decision.

5. The Eighth Amendment Claim

The dissent noted that Justice Stevens addressed McKenzie's Eighth Amendment claim in his memorandum respecting the denial of certiorari in *Lackey v. Texas*. Justice Stevens' memorandum stated that neither retribution nor deterrence serves any purpose for prisoners who have spent over 17 years on death row. The dissent argued that executing a prisoner after such a long delay would be pointless and that it would have "only marginal contributions to any discernible social or public purposes." The dissent summed up Justice Stevens' memorandum by stating a penalty with such insignificant returns to the State would be excessively cruel and unusual and would violative the Eighth Amendment.

The dissent argued that McKenzie presented a strong case that his execution would not further the two principal social purposes - retribution and deterrence - that justify capital punishment. The dissent asserted that his delay, coupled with confinement under the harsh and punitive conditions on death row, satisfied the retribution interest. Further, the dissent insisted that the additional deterrent effect of executing McKenzie was nil due to the time that has passed since he was sentenced; because no one in Montana has been executed

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186. *McKenzie*, 57 F.3d at 1476.
187. Id. at 1482. The dissent also claims that McKenzie's *ex post facto* claim would also meet this standard. Id. at 1482.
188. *McKenzie*, 57 F.3d at 1484 (citing *Lackey*, 115 S. Ct. at 1421).
189. Id. at 1484-85 (quoting *In re Medley*, 134 U.S. 160, 172 (1890)).
190. Id. (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972)).
191. Id. at 1485 (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972)).
192. Id. at 1486.
193. *McKenzie*, 57 F.3d at 1486.
since 1943, and no one has been sentenced to death under McKenzie's sentencing statute.194

The dissent further maintained that McKenzie's argument has gained additional strength from recent decisions in foreign courts.195 First, the dissent pointed to a recent decision by the Privy Council of the British House of Lords.196 The Privy Council held that to execute a prisoner who had been on death row for fourteen years would constitute torture or inhuman or degrading punishment.197 The dissent also mentioned a case decided by the Supreme Court of Zimbabwe198 where the court prohibited the execution of a prisoner who had been sentenced six years before, claiming that it was inhuman or degrading punishment.199

The dissent concluded its discussion of whether to grant a stay by arguing that McKenzie's unconstitutional delay claim is "substantial, important, and deserving of careful and thoughtful adjudication."200 Ultimately, the dissent urged that the only proper remedy in this case would be to vacate the district court's order, remand the case to the district court, and stay the execution.201

194. Id. at 1486-87.
195. Id. at 1487. The dissent recognized that the foreign decisions do not directly address the Eighth Amendment's cruel and unusual punishment clause. However, the dissent noted that the Privy Council surveyed common law and "concluded that extended imprisonment on death row and the repeated setting of execution dates were not practices condoned historically at common law." Id.
196. Id. (citing Pratt & Morgan v. Attorney Gen. for Jamaica, 3 SLR 995, 2 AC 1, 4 All ER 769 (Privy Council 1993)).
197. McKenzie, 57 F.3d at 1487.
199. Id. (citing Catholic Comm'n for Justice and Peace in Zimbabwe, No. S.C. at 4-5). In reaching its conclusion, the court also considered the physical conditions and mental anguish. Id.
200. Id. (Norris, J., dissenting).
201. McKenzie, 57 F.3d at 1489. The dissent finally argued that to allow McKenzie to die while Lackey is allowed to argue the exact same claim would be the "antithesis of justice." Id.
V. CRITIQUE

The Ninth Circuit misapplied *Gomez* to McKenzie's third petition for habeas corpus; as a result, the Ninth Circuit did not address McKenzie's appeal from the district court's dismissal of his petition. Further, the Ninth Circuit ignored prior Supreme Courts holdings offering guidance for evaluating Eighth Amendment claims.

A. THE MISAPPLICATION OF *GOMEZ*

The majority denied McKenzie's motion for a stay by finding *Gomez* applicable to McKenzie's third habeas petition. The *Gomez* Court held that when a petitioner "resorts to last-minute attempts to manipulate the judicial process," a court may refuse to grant equitable relief.

The Ninth Circuit noted that the Supreme Court's suggestion that a court may consider the last-minute nature of a stay was not elaborated in the Court's brief opinion, nor was it developed in subsequent cases. Further, the punitive *Gomez* rule, refusal to consider an otherwise valid claim, has never been applied except in cases where the petitioner failed to show "even a semblance of a reasonable excuse for the inordinate delay." Therefore, the holding in *Gomez* should not
have been expanded to apply to McKenzie's petition because of the fundamental differences between the cases. 209

The first such difference is that McKenzie's application was not a last minute attempt. 210 The Gomez Court held that filing a petition a mere three days before a scheduled execution constituted a last minute attempt. 211 McKenzie, however, filed his application over six weeks prior to his scheduled execution. 212

Second, in Gomez, the Supreme Court denied the petition for a stay of execution by holding that it was an attempt to manipulate the judicial process. 213 The Court explained that the petitioner in Gomez obviously attempted to avoid application of the abuse of the writ of habeas corpus jurisprudence by seeking a stay of execution through a § 1983 suit, rather than through a habeas petition. 214

McKenzie did not attempt to manipulate the judicial system by filing his petition. 215 He raised his Eighth Amendment claim as soon as he had a plausible basis for bringing the claim. 216 The majority argued that, even in the absence of positive authority for the claim, McKenzie should have raised it because it had been raised in other cases. 217 However, the Supreme Court has stated that petitioners aren't required to

209. See McKenzie, 57 F.3d at 1476-78.
210. Id. at 1477.
211. See generally Gomez, 503 U.S. at 653.
212. McKenzie, 57 F.3d at 1477.
213. Gomez, 503 U.S. at 653-54.
214. McKenzie, 57 F.3d at 1477. Three days before the petitioner in Gomez was scheduled to be executed, a class action was filed under § 1983 claiming that California's method of execution was unconstitutional and requested a temporary restraining order to prevent further executions. Id.
215. See id. at 1474-79.
216. Id. at 1481. McKenzie's counsel argued that he raised the Eighth Amendment claim as soon as he learned that the Supreme Court issued a stay for Clarence Lackey. Counsel asserted that this suggested that several justices thought the issue was one on which certiorari might be appropriate. Counsel cited to Barefoot v. Estelle, 463 U.S. 880, 896 (1983), which held that "a stay issues only if there is reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari - - [and] a significant possibility of reversal of the lower court's decision." See Brief for Appellant at 29.
217. McKenzie, 57 F.3d at 1465.
bring all remotely plausible constitutional claims that could, some day, gain recognition. \(^{218}\) Finally, McKenzie used the proper habeas procedures to raise his claim; he did not file a § 1983 suit. \(^{219}\) Considering these factors, the majority misapplied the holding in *Gomez* to deny McKenzie his appeal of the district court’s dismissal of his petition. \(^{220}\)

**B. THE MAJORITY’S FAILURE TO APPLY THE PROPER EIGHTH AMENDMENT ANALYSIS**

The majority deemed it prudent to give McKenzie’s Eighth Amendment claim preliminary consideration because a showing of success may outweigh any delay in raising the claim. \(^{221}\) Regarding Eighth Amendment violations, the Supreme Court has stated that the clause “is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.” \(^{222}\) The Supreme Court further stated that the Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” \(^{223}\)

The majority clearly ignored the precedent set forth by the Supreme Court and did not discuss public opinion or evolving standards of decency. \(^{224}\) The majority did acknowledge that foreign courts have held it to be cruel and unusual punishment to execute a prisoner after an inordinate delay. \(^{225}\) Nevertheless, instead of interpreting these cases as an indication that evolving standards of decency may have changed, or that pub-

\(^{218}\) *Id.* at 1481 (quoting Reed v. Ross, 468 U.S. 1, 16 (1984)).

\(^{219}\) *McKenze*, 57 F.3d at 1479.

\(^{220}\) See *id.* at 1477.

\(^{221}\) *McKenzie* v. Day, 57 F.3d 1461, 1466 (9th Cir 1995).


\(^{224}\) See *McKenzie*, 57 F.3d at 1461-70. See also *supra* notes 44-62 and accompanying text.

\(^{225}\) *Id.* at 1466. The majority refers to Pratt & Morgan v. Attorney General for Jamaica, 3 S.L.R. 995, 2 AC 1, 4 All ER 769 (Privy Council 1993), and Catholic Comm’n for Justice and Peace in Zimbabwe v. Attorney General, No. S.C. 73 (Zimb. June 24, 1993). *Id.*
lic opinion has become enlightened by a humane justice, the
majority did not believe that view would prevail in the United
States. However, the Court has traditionally examined
views of challenged punishment as expressed by objective evi­
dence of community values, including international practic­
es. Thus, the majority did not engage in any meaningful
Eighth Amendment legal analysis.

The majority also blatantly ignored Justice Stevens’ memo­
randum that directly addressed this Eighth Amendment
claim. In his memorandum, Stevens stated that capital
punishment is justified because it “might serve two principal
social purposes: retribution and deterrence. It is arguable that
neither retains any force for prisoners who have spent some 17
years under a sentence of death.” By failing to address this
assertion, the majority chose to ignore the guidance of the
Supreme Court. McKenzie argued that his twenty-one
years on death row under harsh conditions satisfied the retri­
bution interest. In addition, McKenzie argued that since
twenty years had passed since his sentencing, and that no one
in Montana had been executed since 1943, the deterrent value
of executing him was nullified. McKenzie's execution argu­
ably would not further state interests; the majority should
have at least addressed this argument.

In addition to struggling with his pending execution for 21
years, McKenzie alleged that he waited under the most diffi­
cult prison conditions. McKenzie has a pending federal civil
rights lawsuit alleging his long term denial of medical care.

226. Id.
(referring to international opinion and practices expressed in statutes and treaties
of Western European and Anglo-American nations in holding that the death penalty
for juveniles constitutes cruel and unusual punishment).
228. See McKenzie, 57 F.3d at 1466-68.
230. Lackey, 115 S. Ct. at 1421. Stevens also noted that the Eighth Amendment
does not prohibit capital punishment partly because the death penalty was consid­
ered permissible by the Framers. Id.
231. See McKenzie, 57 F.3d at 1466-68.
232. Id. at 1486.
233. Id. at 1486-87.
234. Id.
235. See Brief for Appellant at 33.
236. Id. at n.14. McKenzie is the named plaintiff in McKenzie v. Chisolm, (D.
Further, McKenzie and other maximum security inmates have a pending action regarding beatings and deprivation of property following a prison riot, caused by systemic mismanagement and neglect. These conditions alone may have violated McKenzie's Eighth Amendment rights.

The majority should have conducted a more comprehensive analysis for it is undisputable that McKenzie's Eighth Amendment claim is important and deserves a careful and thoughtful adjudication. The majority should not have applied the limited meaning of Gomez to McKenzie's third petition for habeas corpus. Rather, the majority should have followed the proper procedures and remanded the case to the district court, where the state could have raised an abuse of writ doctrine for McKenzie's failure to raise the claim in a previous petition. Further, by remanding the case and issuing a stay pending the district court's consideration of McKenzie's Eighth Amendment claim, the majority would have followed Justice Stevens's statement that the importance and novelty of this issue is sufficient to warrant review by the Supreme Court after it has been considered by other courts.

VI. CONCLUSION

In McKenzie v. Day, the Ninth Circuit first erred by not properly addressing McKenzie's appeal. The majority then greatly expanded the holding of Gomez v. United States District Court for the Northern District of California to dismiss McKenzie's petition as a last minute attempt to manipu-
late the judicial process.\textsuperscript{246} Finally, the majority concluded that McKenzie's claim that a 20-year delay in carrying out his death sentence amounted to cruel and unusual punishment was not likely to succeed if litigated to its conclusion.\textsuperscript{247} In reaching this conclusion, the court failed to engage in any meaningful Eighth Amendment analysis and ignored Justice Stevens' memorandum that this issue needs to be further addressed by lower courts.\textsuperscript{248}

Although the State executed Mr. McKenzie, other death row inmates live to pursue virtually indistinguishable Eighth Amendment claims.\textsuperscript{249}

\textit{Amber A. Bell}\textsuperscript{*}

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\textsuperscript{246} See McKenzie, 57 F.3d at 1479.
\textsuperscript{247} Id. at 1467.
\textsuperscript{248} See id. at 1466-68.
\textsuperscript{249} Id. at 1489. McKenzie was executed by the State of Montana on May 10, 1995. McKenzie v. Day, 57 F.3d 1495 (9th Cir. 1995).
\textsuperscript{*} Golden Gate University School of Law, Class of 1997.
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