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Recommended Citation

Schirra, Jeremy J. "Killing Them with Procedure: A New Cruel and Unusual Punishment?" American University Criminal Law Brief 6, no. 2 (2010): 4-8.

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Killing Them with Procedure: A New Cruel and Unusual Punishment?

BY: JEREMY J. SCHIRRA

“I am unaware of any support in the American constitutional tradition . . . for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed.”¹

INTRODUCTION

As recently as March 2009, the Supreme Court has expressed a divergence of opinion as to whether the long delays endured by a death row prisoner awaiting execution violate the Eighth Amendment of the Constitution.² Not only does a death row inmate ultimately suffer the punishment of execution, he or she also endures a lengthy prison sentence in an isolated, restrictive environment possibly best characterized as “austere.”³ Indeed, at the time of the Eighth Amendment’s enactment in 1789, it is unlikely that the Framers considered the period between sentencing and execution as a punishment itself,⁴ as this generally lasted only days or weeks.⁵ However, it seems prudent to re-evaluate the notion that the confinement period before execution does not constitute cruel and unusual punishment when we consider that the waiting period in 2000 approached twelve years.⁶

Rather than viewing the entire capital punishment system as flawed in light of this conclusion — which it is not — we must be willing to investigate the concept of “delay as punishment” on a case-by-case basis in light of the Eighth Amendment.⁷ The purpose of this article is to explore a hybrid stance that reconciles Justice Stevens’ and Thomas’ conflicting opinions in *Thompson v. McNeil*.⁸ Part I provides the basis for each Justice’s opinion concerning *Thompson*⁹ in greater detail and examines related Supreme Court cases. Part II explores the issues related to prolonged delays on death row including conditions affect-

ing death row prisoners, penological goal implications, and international trends regarding the delays between sentencing and death. Part III amalgamates the opinions of Justices Thomas and Stevens in light of this analysis and presents a new, practicable solution to the issue of delay on death row.

BACKGROUND

The Eighth Amendment of the Constitution provides protections to ensure that no “cruel and unusual punishment” will be inflicted upon citizens of the United States.¹⁰ Since the Eighth Amendment’s inception, capital punishment has been a permissible penalty for the most heinous of crimes.¹¹ As early as 1890, in *In re Medley*, the Supreme Court recognized that “one of the most horrible feelings . . . is the uncertainty” felt

by the prisoner between sentencing and execution.¹² Remarkably, this statement refers to a case in which a prisoner spent only four weeks awaiting execution,¹³ a timeframe unheard of in today’s legal system.

Now, over one century later, prisoners serving terms in excess of fifteen, twenty, and thirty years have petitioned the Supreme Court to challenge their sentences based on the Eighth Amendment.¹⁴ However, the response of the Supreme Court is to deny these petitions for writ of certiorari.¹⁵ Each case has conveyed a clear divergence of opinion regarding the applicability of such claims to the Eighth Amendment, thus indicating that this issue deserves further debate and deliberation. Further, it is persuasive that recent trends in international jurisprudence signify an aversion to lengthy terms on death row.¹⁶ In fact, some international cases have gone so far as to call delays of as few as five years prior to execution “lengthy sentences” constituting “cruel, inhumane and degrading treatment.”¹⁷



I. A BRIEF SUMMARY OF SUPREME COURT JURISPRUDENCE CONCERNING THE DELAY BETWEEN SENTENCING AND EXECUTION

In *Lackey v. Texas*, Justice Stevens expressed that despite the importance and novelty of the petitioner's Eighth Amendment challenge considering the seventeen years he had already served on death row, the issue was not yet ripe for a Supreme Court opinion.¹⁸ One explanation for Justice Stevens' opinion in *Lackey* may be that the Court often uses denial as a tactic to enable lower courts to act as laboratories before addressing an issue itself.¹⁹ Interestingly, nearly two decades prior to *Lackey* the Court supported capital punishment in light of the Eighth Amendment largely because it believed the death penalty served the social purposes of retribution and deterrence.²⁰

However, one of Justice Stevens' main aversions to carrying out the death penalty after such great delays was that the prisoner had already received a severe punishment, thus satisfying the penological goal of retribution.²¹ Merely sitting on death row for such lengths of time is in itself a mentally taxing punishment. In addition to the arguable satisfaction of retribution, the added deterrent effect of execution after a lengthy incarceration period "seems minimal."²² Hence, by Stevens' logic, the minor returns of actually carrying out the execution after such delay would be cruel and unusual punishment and violative of the Eighth Amendment.²³

In the fourteen years that passed between *Lackey* and *Thompson*, the Supreme Court never granted certiorari on the issue of whether long delays on death row violate the Eighth Amendment.²⁴ Despite this, Justice Stevens' opinion in *Thompson* was that the issue deserved the attention of the Supreme Court.²⁵ He asserted that the combination of delayed execution with the extreme conditions of death row and the psychological tolls inflicted on a prisoner as his death sentences are removed, then reimposed while he makes his way through the legal system is arguably cruel and unusual.²⁶ Stevens went so far as to suggest that given the delays in carrying out executions, the death penalty system in the United States was currently "unworkabl[e]."²⁷

Conversely, Justice Thomas staunchly supported the notion that prisoners would not suffer overly lengthy sentences on death row but for their purposeful availment to procedure.²⁸ Hence, these delays, which are the unavoidable result of procedure, should not provide justification for a new Eighth Amendment right,²⁹ as this would give death row inmates grounds to nullify execution simply by creating further procedural delays. Therefore, despite the lack of constitutional tradition regarding lengthy death row sentences,³⁰ Thomas contended that because the prisoner had control over his or her own fate, allowing an Eighth Amendment challenge to prevail would make a mockery of our current justice system.³¹ "Consistency," Justice Thomas

suggested, "would seem to demand that those who accept our death penalty jurisprudence as a given also accept the length of delay between sentencing and execution as a necessary consequence."³²

II. CONDITIONS ON DEATH ROW AND INTERNATIONAL IMPLICATIONS

The situation of death row prisoners is bleak. According to studies, many such prisoners find themselves in cramped cells with little opportunity to exercise or interact with others.³³ Moreover, most prisons only permit this class of inmate to be outside their cells for less than three hours per day.³⁴

While at first glance this may seem like the only practical method for confining our arguably most dangerous prisoners, this is not always the case. Some prisons have experimented with allowing death row inmates to participate in work programs and/or desegregating them from the general population.³⁵ Desegregation has proven to provide positive results benefitting both the prisoner and the overall prison system.³⁶ Further, the expectation that death row inmates will assault other prisoners because they have "nothing to lose" appears to be unfounded.³⁷

However, the conditions on death row often create a sense of despair in prisoners. There is clear evidence that most of these prisoners lack the requisite educational skills to defend themselves in the appeals process without assistance.³⁸ This disparity may lead to a sense of hopelessness, which has evolved in recent years into a new "condition" known as "death row syndrome."³⁹ This phenomenon is a relatively novel legal concept that traces back to the European Court of Human Rights.⁴⁰ Indeed, international jurists have used death row syndrome as a basis for several decisions in human rights and capital punishment cases. Although these jurists have used varying definitions of the condition, all seem to oppose lengthy prison sentences prior to execution.⁴¹ Probably the most notable example occurred in *Soering v. United Kingdom*, where the United Kingdom denied the extradition of a potential capital punishment prisoner due to the conditions of Virginia's legal and penitentiary system.⁴² While international opinion should certainly not be binding upon United States courts, such opinion should be considered as persuasive evidence as to what the global community believes is a fair policy.

Credit for inception of the term "death row syndrome" as it applies to American legal consciousness stems from the Michael Ross case, in which the prisoner "volunteered" for execution.⁴³ Ross' willingness to volunteer for death perplexed some people and they claimed that he suffered from death row syndrome,⁴⁴ an issue that had never reached a court prior to Ross' execution. However, presently this phenomenon has yet to be truly studied and thus remains unsubstantiated.⁴⁵ Yet the significance of the death row syndrome and its creation as it pertains to the Eighth

Amendment is an indication of a clear and developing social aversion to long delays prior to execution.

III. A KINDER AND MORE “USUAL” PUNISHMENT

Justices Stevens and Thomas differ in their opinions as to whether a lengthy delay from sentencing to execution is worthy of consideration in light of the Eighth Amendment.⁴⁶ Considering this divergence within the Supreme Court and the changes in the past century affecting the landscape of capital punishment, the time has arrived to address this matter.⁴⁷ There are many issues to take into account when evaluating the death penalty. One such issue is the great weight of mental anguish suffered by the inmate with regards to the uncertainty of his or her execution.⁴⁸ Undeniably, the conditions endured by most death row prisoners during their wait for execution are the most severe and isolating our prison system has to offer.⁴⁹ Thus, as stated above, prison administrators should explore other options to improve confinement conditions and decrease costs. While the Supreme Court may not have the expertise to commandeer death row programs effectively,⁵⁰ the pure possibility that a death sentence may convert into a life sentence may exert the needed pressure for altering the conditions on death row.

Justice Thomas makes the logical point that prisoners should not complain or attempt to have their sentence mitigated to life imprisonment through the Eighth Amendment when the delay is of their own design.⁵¹ This assertion, however, is perhaps far too ambiguous to apply to all prisoners. Instead, as suggested by Justice Stevens, “[i]t may be appropriate to distinguish . . . among delays resulting from (a) a petitioner’s abuse of the judicial system by escape or repetitive, frivolous filings; (b) a petitioner’s legitimate exercise of his right to review; and (c) negligence or deliberate action by the State.”⁵²

In cases where (a) applies, the prisoner is at fault and therefore should not be able to access any remedy under the protections of the Eighth Amendment. However, in cases where (b) and/or (c) apply, the Court should selectively grant certiorari on a case-by-case basis. The circumstances considered by the Court should include the fault of the state, the speed at which the prisoner exhausted all his judiciary avenues, the length of the prisoner’s sentence term, prison conditions, and fault of the defendant’s legal representation.

Both Justice Stevens and Thomas agree that some amount of delay between sentencing and execution is inevitable.⁵³ Because this inevitable delay is a necessary precursor to carrying

out an execution, this delay should be excluded from judicial consideration. However, the court should construe the Eighth Amendment to impose a duty upon the government to mitigate undue delays in the procedural process, as failure to do so is a failure of the system and not the prisoner.⁵⁴

CONCLUSION

When the delay between sentencing and execution transforms from days and weeks to more than a decade, this surely changes the landscape of capital punishment jurisprudence in light of the Eighth Amendment. If the Supreme Court does not consider cases in which this occurs, it tacitly approves of two punishments being served for one crime. The first punishment, time on death row, is arguably more severe than the execution that awaits the prisoner. When the length of that sentence is significantly longer than necessary to allow for appeals and other procedure, the court should make a determination as to whether the state failed to carry out the execution in a humane manner and, if so, accordingly commute a prisoner’s sentence to life in prison. Failure to impose an affirmative duty upon the government to alleviate undue delays in the judicial process as it pertains to carrying out executions has equivalence to placing death row prisoners under an invisible cloak under which the Eighth Amendment does not reach.

Because this inevitable delay is a necessary precursor to carrying out an execution, this delay should be excluded from judicial consideration.

¹ Knight v. Florida, 528 U.S. 990, 990 (1999) (Thomas, J., concurring in denial of certiorari).

² Compare Thompson v. McNeil, 129 S. Ct. 1299, 1299 (2009) (Stevens, J., respecting the denial of certiorari) (“[S]ubstantially delayed executions arguably violate the Eighth Amendment’s prohibition against cruel and unusual punishment.”) with *id.* at 1301 (Thomas, J., concurring in denial of certiorari) (“[T]he issue . . . is whether the death-row inmate’s litigation strategy, which delays his execution, provides a justification for the Court to invent a new Eighth Amendment right. It does not.”).

³ Mark D. Cunningham & Mark P. Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 BEHAV. SCI. & L. 191, 204 (2002) (summarizing research studies on death row inmates’ living conditions) (quoting George Lombardi et al., *Mainstreaming Death-Sentenced Inmates: The Missouri Experience and its Legal Significance*, 61 FED. PROBATION 3, 3 (1997)).

⁴ See Lackey v. Texas, 514 U.S. 1045, 1045 (1994) (discussing the Framers’ practice in the year of the Eighth Amendment’s enactment, 1789).

⁵ See Amy Smith, *Not “Waiving” But Drowning: The Anatomy of Death Row Syndrome and Volunteering for Execution*, 17 B.U. PUB. INT. L.J. 237, 248 (2008) (explaining that in the United States, the expected wait time between conviction and execution a century ago was typically only a matter of days or weeks, whereas in the year 2000 it stood at 11.42 years).

⁶ See Cunningham & Vigen, *supra* note 3, at 195 (summarizing research studies on death row living conditions).

⁷ See U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

⁸ *Supra* note 2.

⁹ *Id.*

¹⁰ U.S. CONST. amend. VIII.

¹¹ *Lackey*, 514 U.S. at 1045 (Stevens, J., respecting the denial of petition for writ of certiorari).

¹² 134 U.S. 160, 172 (1890); *accord. Lackey*, 514 U.S. at 1045.

¹³ See *Lackey*, 514 U.S. at 1045-46 (stating that uncertainty in a delay period of four weeks logically applies with greater force to a delay period of many years).

¹⁴ See *Thompson*, 129 S. Ct. at 1301 (reviewing a case where there was a delay of thirty-three years); see also *Foster v. Florida*, 537 U.S. 990, 991 (2002) (dismissing a request for certiorari where the defendant waited for twenty-seven years, although the national average between sentence and death was eleven years); *Knight v. Florida*, 528 U.S. 990, 992 (1999); *Lackey*, 514 U.S. at 1045 (1995).

¹⁵ See *Thompson*, 129 S. Ct. at 1299; *Foster*, 537 U.S. at 990; *Knight*, 528 U.S. at 990; *Lackey*, 514 U.S. at 1045.

¹⁶ See, e.g., *Soering v. U.K.*, 11 Eur. Ct. H.R. (ser. A) 439, 475-76 (1989) (acknowledging that some delay in the American justice system was necessary, but further expressing its abhorrence of the long amount of time the prisoner served in conjunction with a death penalty sentence still hanging over his head); see also Smith, *supra* note 5, at 239 (citing authority and cases from the Judicial Committee of the Privy Council, the United Nations Human Rights Committee, and the Supreme Court of Canada).

¹⁷ *Pratt v. Att’y Gen. for Jam.*, [1994] 2 A.C. 1 (Jam. 1933) (appeal taken from Jam.).

¹⁸ See *Lackey* 514 U.S. at 1045 (discussing that due to the novelty and importance of the question presented, the Supreme Court deferred from review until the issue has been addressed by other courts); cf. *Foster v. Florida*, 537 U.S. 990, 990 (2002) (emphasizing that the denial of a petition for a writ of certiorari does not constitute a ruling on the merits).

¹⁹ See *Lackey*, 514 U.S. at 1047 (noting the Supreme Court’s practice of declining to immediately rule on a novel issue and choosing instead to observe lower courts for further study on the matter).

²⁰ See *id.* at 1045 (discussing how the Framers considered the death penalty a permissible punishment) (citing *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)).

²¹ See *id.* at 1045, 1046-47 (noting the prisoner’s seventeen years already spent on death row).

²² See *id.* at 1046 (comparing the deterrent value of an actual, immediate execution to the deterrent value of seventeen years on death row).

²³ See *id.* (citation omitted); see also *Lackey*, 514 U.S. at 1046-47 (1995) (citing *Riley v. Att’y Gen of Jam.*, [1983] 1 A.C. 719, 734 (Jan. 1983)). Justice Stevens’ opinion that lengthy sentences on death row arguably constitute cruel and unusual punishment also finds support from English jurists’ opinions over Section 10 of the English Bill of Rights 1689. This bill of rights is the precursor of the United States Eighth Amendment and should be considered when interpreting its original intent.

²⁴ *Thompson*, 129 S. Ct. at 1299.

²⁵ See *id.* (reiterating Justice Stevens’ opinion in *Baze v. Rees*, 553 U.S. 35, 81 (2008), that the “‘time for a dispassionate, impartial comparison of the enormous costs that death penalty litigation imposes on society with the benefits that it produces has surely arrived.’”).

²⁶ See *id.* at 1299-1300 (pointing out a plethora of issues facing this specific case, including the severe conditions of death row in a six-by-nine foot cell combined with twenty-three hours of daily isolation, a multitude of errors made throughout the trial process including bad advice from counsel, and the stay of his death penalty warrant on two occasions only shortly before his scheduled execution).

²⁷ *Id.* at 1300.

²⁸ See *id.* at 1301 (2009) (reiterating his concurring opinion in *Knight*, 528 U.S. at 990, where “[he is] unaware of any support in the American constitutional tradition or . . . precedent for the proposition that a defendant can avail himself to a panoply of . . . procedures and then complain when his execution is delayed.”); see also *Foster*, 537 U.S. at 991 (implying that prisoners could end their anxieties and uncertainties simply by “submitting to what people . . . have deemed [them] to deserve: execution.”); *Knight*, 528 U.S. at 992 (“It is incongruous to arm capital defendants with an arsenal of ‘constitutional’ claims with which they may delay their executions, and simultaneously to complain when executions are inevitably delayed.”).

²⁹ *Thompson*, 129 S. Ct. at 1301 (2009) (quoting *Turner v. Jabe*, 58 F.3d 924, 933 (4th Cir. 1995)) (Luttig, J., concurring in judgment).

³⁰ See *Knight*, 528 U.S. at 991-92 (agreeing in part with Justice Breyer’s opinion that there is nothing in our constitutional tradition that justifies the lengthy delays between conviction and sentence).

³¹ *Thompson*, 129 S. Ct. at 1301 (2009) (quoting *Turner v. Jabe*, 58 F.3d 924, 933 (4th Cir. 1995)) (Luttig, J., concurring in judgment).

³² *Knight*, 528 U.S. at 992.

³³ See Cunningham & Vigen, *supra* note 3, at 204-05 (2002) (detailing the death row policies regarding accommodations).

³⁴ See *id.* at 204 (stating that eighteen jurisdictions allow death row prisoners less than an hour outside each day).

³⁵ *Id.* at 205.

³⁶ See *id.* (other benefits included cost savings, more efficient staff utilization, improved prisoner access to legal materials and assistance, and increased recreational activities).

³⁷ See *id.* at 203 (suggesting that many death row inmates do not exhibit serious violence within institutional confinement; many of these prisoners have incentives for good behavior).

³⁸ See *id.*, at 199-200, 206 (discussing that a significant minority of death row inmates qualify as mentally retarded while typical intelligence rates range in the average to low average IQ range; further, two studies covering death row inmates showed the average school attendance fell into the ninth grade level and educational achievement ability was at the fifth grade level).

³⁹ See Harold I. Schwartz, *Death Row Syndrome and Demoralization: Psychiatric Means to Social Policy Ends*, 33 J. AM. ACAD. PSYCHIATRY & L. 153, 154-55 (2005) (analyzing how the severe conditions of death row can alter inmates’ mental status to the point where actual execution seems preferable).

⁴⁰ See Avi Salzman, *Killer’s Fate May Rest on New Legal Concept*, N.Y. TIMES, Feb. 1, 2005, at B6 (describing briefly the case of Jens Soering, a man accused of murder in Virginia who fled to the United Kingdom, then challenged extradition based upon the length of time and deplorable living conditions of Virginia’s death row).

⁴¹ See *Pratt*, 2 A.C. at 2 (stating that capital punishment sentences in excess of five years provide strong grounds for arguing inhuman or degrading punishment); see also Smith, *supra* note 5, at 239-40 (summarizing the opinions of various international bodies that have determined that long delays between sentencing and execution constitute inhuman or

degrading punishment; the article further defines the death row phenomenon as follows: “[M]ost definitions of ‘death row phenomenon’ have included at least two components . . . [those being] a temporal requirement (length of time) and a physical one (harsh conditions).” Neither component by itself is sufficient to constitute the phenomenon. Instead, a third and integral requirement included in many definitions addresses the experiential component or psychological effects of living under a death sentence).

⁴² See *Soering*, 11 Eur. Ct. H.R. at 460, 478 (discussing the Privy Council’s decision, which primarily focused on the length of delay and the conditions the prisoner might face while awaiting execution if he received a death sentence in the United States. The court concluded that the conditions constituted inhuman and degrading punishment).

⁴³ See *Smith*, *supra* note 5, at 242 (explaining that Ross, who had purportedly attempted suicide on three separate occasions while on death row, repeatedly tried to waive his mandated appeals to volunteer for execution).

⁴⁴ See *Schwartz*, *supra* note 39, at 153-55 (discussing the Ross case, where an experienced psychiatrist examined Michael Ross, a convicted killer, and deemed him to be without an active major psychiatric illness (besides sexual sadism) at the time that he volunteered to waive any further procedure. Ross, in spite of personal opposition to the death penalty, indicated that he wished to waive his state and federally mandated appeals to “volunteer” for execution).

⁴⁵ See *id.* at 154 (noting that the death row phenomenon is quite possibly a social policy claiming its foundation in psychiatry, as it remains an invalidated diagnosis).

⁴⁶ *Supra* note 2.

⁴⁷ See *Smith*, *supra* note 5, at 241-43 (discussing developments such as California’s abolition of the death penalty and the emergence of death row phenomenon in the United States).

⁴⁸ *Lackey*, 514 U.S. at 1045 (citing *In re Medley*, 134 U.S. at 172).

⁴⁹ See *Cunningham & Vigen*, *supra* note 3, at 204 (detailing death row prisoners’ living conditions. In many jurisdictions, inmates are housed in individual cells, allowed less than an hour activity outside, and social visitation is no-contact).

⁵⁰ See *Thompson*, 129 S. Ct. at 1301-02 (discussing the disastrous consequences of the Supreme Court’s recent foray into prison management).

⁵¹ *Knight*, 528 U.S. at 990-92.

⁵² *Lackey*, 514 U.S. at 1047.

⁵³ Compare *id.* (creating a formula for determining when a delay should not count against a prisoner and when his Eighth Amendment rights have been violated) with *Knight*, 528 U.S. at 460 (stating that consistency demands those “who accept our death penalty jurisprudence . . . as a given also accept the lengthy delay between sentencing and execution as a necessary consequence.”).

⁵⁴ See *Pratt*, 2 A.C. at 18-19 (analyzing a section of the Jamaican constitution analogous to the Eighth Amendment and implying that the government’s responsibility is to ensure that executions occur expeditiously).

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Jeremy Schirra, C.P.A., will receive his J.D. from Case Western Reserve University School of Law in May, 2011, and currently serves as the Editor-in-Chief of *Health Matrix: Journal of Law-Medicine*. He holds a B.B.A. with honors from Ohio University, and previously served as an auditor and consultant for a Fortune 500 company. He is grateful for the contributions to this article provided by the editors of the law reviews at Case Western Reserve University.