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**DEAD MAN WAITING:  
DEATH ROW DELAYS, THE EIGHTH AMENDMENT,  
AND WHAT COURTS AND LEGISLATURES CAN DO**

KATE McMAHON\*

**INTRODUCTION: *SOERING V. UNITED KINGDOM* AND THE MODERN  
LANDSCAPE OF THE AMERICAN DEATH PENALTY**

Around dinnertime in the early spring of 1985, the parents of Elizabeth Haysom were stabbed to death in their Virginia home. Elizabeth was, by all accounts, a deeply troubled young woman who had recently entered into a symbiotic relationship with Jens Soering, an 18-year old German national also studying at the University of Virginia. Subsequent investigation into the stabbings revealed that Soering had likely committed the brutal acts at the behest of Elizabeth. Over one year later, Soering was indicted by a grand jury in the Commonwealth of Virginia and charged with the murders.

At the time of Soering's indictment, he and Elizabeth, having earlier fled to Europe, were being detained in England on charges of check fraud. Soon after, the United States invoked the relevant extradition treaty to request that Soering be released back to Virginia so that he could face his murder charges there. The United Kingdom, cognizant of the fact that Soering would likely face the death penalty in Virginia whereas capital punishment had since been abolished in Great Britain, paused to consider the implications of extradition. The Embassy issued a request to the United States asking for assurance that in the case of Soering's extradition to the U.S., appropriate authorities of the Commonwealth of Virginia would be alerted not to pursue Soering's execution. Indeed, no such assurances were made, and despite the issuance of a similar extradition application from Germany, the U.K. continued to consider the United States' request.

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When at last the United Kingdom's Secretary of State reluctantly agreed to sign a warrant ordering Soering's surrender, Soering appealed to the European Court of Human Rights (ECHR). As it happened, while the extradition requests were pending the British proceedings had generated a substantial amount of psychiatric evidence calling into question Soering's maturity and mental state. More significantly, Soering had fashioned a novel new claim that in the event the U.K. extradited him to Virginia and it resulted in his incarceration on death row there, it would be the functional equivalent of the U.K. exposing Soering to psychological torture and would thus violate Article 3 of the European Convention of Human Rights providing that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Interestingly, the tenor of Soering's argument rested in an emerging legal concept he identified as "death row phenomenon." The claim was that a "syndrome" manifests itself when persons are forced to endure the extreme conditions of death row and the lengthy delays which accompany it—usually six to eight years at that time in Virginia according to the ECHR, depending on the number of appeals a defendant decided to pursue. Soering maintained that "during [this] time he would be subject to increasing tension and psychological trauma... his future detention on 'death row'... where he expects to be the victim of violence and sexual abuse because of his age, colour and nationality; and the constant spectre of execution itself, including the ritual of execution."<sup>1</sup>

The ECHR considered this and other claims, and in a landmark decision on July 7, 1989, it concluded that implementation of Soering's extradition under these circumstances would indeed violate Article 3 of the Convention.<sup>2</sup> While explaining that the American institution of the death penalty could still be squared with democratic ideals, the Court was nevertheless persuaded by the notion that "the condemned prisoner has to endure *for many years* the conditions on death row and the anguish and mounting

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<sup>1</sup> *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989), reprinted in 11 Eur. H.R. Rep. 439 (1989).

<sup>2</sup> *Id.* at ¶ 111.

tension of living in the ever-present shadow of death.”<sup>3</sup> Taking account of the length of time someone in Virginia must remain on death row as well as more immediate concerns regarding Soering’s age and mental condition, the ECHR determined that extradition with possible exposure to death row would implicate evolving mores of torture, inhuman and degrading treatment.<sup>4</sup>

Is there a point at which a person’s tenure on death row has lasted so long or has become so stressful that his sentence begins to violate the Constitution? The language of our own Eighth Amendment very much reflects those same values embodied in Article 3 of the European Convention. That said, the *Soering* decision has several times proven important in the American context, and will likely take on new significance as average tenures on death row grow exponentially and Eighth Amendment jurisprudence continues to evolve.

Since the practice of capital punishment in the United States was reinstated in 1976,<sup>5</sup> the claim that prolonged incarceration on death row could violate Eighth Amendment notions of “cruel and unusual punishment” has only appeared a handful of times in state supreme courts. In the 1999 case *Knight v. Florida*, the United States Supreme Court consolidated two of these cases on appeal from Florida and Nebraska.<sup>6</sup> The majority opinion denied certiorari on the issue, which had by now gained notoriety as the *Lackey* claim,<sup>7</sup> with Justice Thomas concurring that delays are an inevitable function of our procedures for safeguarding the death penalty.<sup>8</sup> Although the two petitioners in *Knight* had been on

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<sup>3</sup> *Id.* at ¶ 106 (emphasis added)

<sup>4</sup> *Id.*

<sup>5</sup> *Gregg v. Georgia*, 428 U.S. 153, 169 (1976) (holding that the practice of capital punishment does not invariably violate the U.S. Constitution).

<sup>6</sup> *Knight v. Florida*, 528 U.S. 990 (1999) (consolidated with *Moore v. Nebraska*).

<sup>7</sup> *Id.* I will use the term “*Lackey*” claim interchangeably with claims of death row syndrome and death row phenomenon, although *Lackey* claim refers more specifically to the Eighth Amendment argument made out in American jurisdictions. Death row syndrome and death row phenomenon are more universally applicable legal concepts, discussed in more depth in Section II.

<sup>8</sup> *Id.* (Thomas, J., concurring).

death row for nearly 20 and 25 years respectively, he reasoned that a lengthy amount of time alone could not render a prisoner's punishments cruel and unusual.<sup>9</sup> Thomas intimated that most delays in execution are the result of an inmate's own decisions to exhaust appeals, and therefore granting certiorari here would only provide incentives for offenders to manipulate the appeals process. Where in *Lackey v. Texas* Justice Stevens had invited state courts to serve as "laboratories" to test the viability of such a constitutional argument,<sup>10</sup> Justice Thomas now submitted that "the Court should consider the experiment concluded."<sup>11</sup>

In a vigorous dissent, Justice Breyer questioned the retributive and deterrent justifications for imposition of the death penalty in cases where defendants had already been detained on death row for several decades.<sup>12</sup> Breyer proceeded to catalogue the way in which various foreign courts had interpreted legal standards comparable to those embodied in our own constitution—including the ECHR in the *Soering* case—and had found lengthy delays in otherwise lawful executions to have the potential for being impermissibly inhumane.<sup>13</sup> He also took issue with the characterization that this constitutional question had been definitively resolved in the state-level laboratory, instead asserting that very few courts had directly addressed the Eighth Amendment implications in cases where the state could be said to bear some of the responsibility for an offender's prolonged incarceration. Therefore, Breyer argued that "although the experiment may have begun, it is hardly evident that we 'should consider the experiment concluded.'"<sup>14</sup>

Since *Knight*, the Supreme Court has handed down two momentous decisions vindicating abolitionist principles in the area of the death penalty. In 2003, Justice Stevens, writing for a majority in *Atkins v. Virginia*, held that executing a mentally retarded person violates the "cruel and unusual" clause of the

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<sup>9</sup> *Id.* at 992.

<sup>10</sup> *Lackey v. Texas*, 514 U.S. 1045 (1995).

<sup>11</sup> *Knight*, 528 U.S. at 993.

<sup>12</sup> *Id.* at 995 (Breyer, J., dissenting).

<sup>13</sup> *Id.* at 995-996.

<sup>14</sup> *Id.*

Eighth Amendment.<sup>15</sup> In 2005, Stevens announced that the Eighth Amendment also prohibits imposing the death penalty on juvenile offenders in *Roper v. Simmons*.<sup>16</sup> Both opinions refer to “evolving standards of decency”<sup>17</sup> considerations necessitating prohibition of death sentences in certain circumstances, with an eye towards international ideals.

Whereas over the last five years the Eighth Amendment has substantially chipped away at the constitutionally permissible parameters of capital punishment, the current legal landscape surrounding the death penalty may be poised for more upheaval. Because so few courts have squarely addressed the validity of such a claim, and because there is strong indication that unusually long exposure on death row could implicate evolving standards of decency, our courts should re-explore the merits of a *Lackey* challenge. The first step is convincing courts to recognize the “cruel and unusual” implications of the “death row phenomenon,” explained in Part I by a closer examination of death row conditions, death penalty justifications, and foreign opinion surrounding the issue of delay. If the courts do decide to acknowledge the potential of such a claim, the next step is to then identify the line at which a constitutional confinement on death row becomes unconstitutionally lengthy. Part II discusses the many considerations which must factor into this sort of delicate balancing act, so that state legislatures and courts alike can guard against future Eighth Amendment violations in a system where efficiency may be at odds with decency.

## **I. CRUEL AND UNUSUAL PUNISHMENT: THE CASE FOR DEATH ROW PHENOMENON**

The Eighth Amendment does not support the execution of persons in instances where certain social principles will not be vindicated by imposition of the death penalty. Moreover, questions

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<sup>15</sup> *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

<sup>16</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>17</sup> *Atkins*, 536 U.S. at 312; *Roper*, 543 U.S. at 561.

regarding cruelty and unusual treatment are raised when punishments become so heinous or barbarous that they fall outside the bounds of constitutionality. As outlined below, conditions of death row confinement can be so psychologically taxing that prolonged exposure often proves torturous on the prisoner, provoking legitimate Eighth Amendment concerns. Such concerns have become increasingly commonplace in the international community, and lend credibility to the notion of a death row phenomenon and the legal legitimacy of an Eighth Amendment claim where inmates are languishing for several decades awaiting execution.

**A. Death Penalty Justifications, Eighth Amendment Limits, and J.B. Hubbard**

Any interpretation of the scope of the Eighth Amendment's "cruel and unusual punishment" provision will turn on "its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design."<sup>18</sup> The Supreme Court realizes that the reach of the Eighth Amendment is not fixed or precise; rather, "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man ... The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."<sup>19</sup>

In 2004, J.B. Hubbard became the oldest person to be executed in over six decades in the United States.<sup>20</sup> At the time of the Alabama execution, the twice-convicted murderer was 74 years-old and had spent 27 years on death row. The Washington Post reported that prior to his execution, Hubbard suffered from colon and prostate cancer, hypertension, and "spasms of dementia," and that his health was so deteriorated that his fellow death row inmates often had to help bathe him and wash his hair.<sup>21</sup>

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<sup>18</sup> *Roper*, 543 U.S. at 560.

<sup>19</sup> *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958).

<sup>20</sup> Manuel Roig-Franzia, *Alabama Executes 74-Year Old Man: Infirm Convict's Death Spurs Debate on Age, Appeals Process*, WASH. POST, Aug. 6, 2004.

<sup>21</sup> *Id.*

Hubbard's execution highlighted mounting tensions surrounding a nationwide system in which lengthy appeals often result in inordinately long delays on death row. Hours before Hubbard's death, the Supreme Court denied certiorari on his last petition for a stay of execution by just a five-to-four margin, indicating that there was at least a palpable argument that executing a man in these circumstances had the potential for being constitutionally problematic.<sup>22</sup> After the execution, even the district attorney prosecuting Hubbard's case exclaimed to a reporter "[i]t's ridiculous—unconscionable—for any process to take this long."<sup>23</sup>

At the time the Constitution was drafted, the Framers were familiar with a system where the interim between conviction and execution would be a matter of days or weeks, not years or decades.<sup>24</sup> Our contemporary system of capital punishment has since undergone a variety of reforms, most of which have been targeted at restricting a practice many characterize as being arbitrary in its administration. Undoubtedly, increasingly long appeals and prolonged detentions on death row are the inevitable consequences of providing additional procedures to safeguard the area of the death penalty. Justice Thomas noted as much when he denied the Eighth Amendment claim in *Knight v. Florida*, announcing that it would be "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 invariably delayed."<sup>25</sup>

However, while the Supreme Court has several times denied certiorari on this issue, Justices Breyer and Stevens have often dissented, parsing the terms "cruel" and "unusual" to conclude that this question fairly deserves to be addressed in instances where delays on death row reach an abnormal magnitude.<sup>26</sup>

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<sup>22</sup> *Hubbard v. Campbell*, 542 U.S. 958 (2004).

<sup>23</sup> Roig-Franzia, *supra* note 20.

<sup>24</sup> Death Penalty Information Center: Time on Death Row [hereinafter DPIC], available at <http://www.deathpenaltyinfo.org/article.php?&did=1397>.

<sup>25</sup> *Knight*, 528 U.S. at 992.

<sup>26</sup> *Elledge v. Florida*, 525 U.S. 944 (1998); *Foster v. Florida*, 537 U.S. 990, 992 (2002) (Breyer, J., dissenting).



Hubbard's execution in particular illustrates that in certain cases it might not be reasonable to assume that such long death row delays always comport with the constitution or with the social purposes underwriting the death penalty.

When the Supreme Court in 1976 announced the death penalty did not uniformly violate the Eighth Amendment in *Gregg v. Georgia*, thus ending a 10 year moratorium on the practice, it emphasized that capital punishment is constitutionally justified by two principles: deterrence and retribution.<sup>27</sup> In the situation where an ailing 74-year old man has already spent twenty-seven years on death row, however, it is difficult for any observer to discern how his execution definitively serves either social purpose. The state can arguably be said to have already furthered its retributive goals by subjecting the offender to endure almost three decades in near-solitary confinement, perhaps constituting a separate punishment distinct from execution, which begins to implicate notions of double-jeopardy. The state will also need to establish that deterrence principles are vindicated by imposition of the death penalty. Once again, this burden will be hard to make in instances where the state has determined to kill a man so feeble at the time of his execution that he is unable even to wash his own hair.

### **B. Conditions of Confinement: Death Row Syndrome and the *Ross* Case**

*Soering's* portrait of a so-called "death row phenomenon" has achieved new relevance in light of extreme fact-patterns like Hubbard's and relatively sympathetic opinions by Justices Stevens and Breyer in similar cases.<sup>28</sup> The Department of Justice reported that capital offenders in the United States between 1977 and 2004 had spent an average of ten years and two months on death row anticipating execution, up seven months from the average calcu-

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<sup>27</sup> *Gregg*, 428 U.S. at 183

<sup>28</sup> See *Elledge v. Florida*, 525 U.S. 944 (1998); *Foster v. Florida*, 537 U.S. 990 (2002)

lated from 1977-2003.<sup>29</sup> That same document also reported that the number of actual executions had marginally decreased in 2004, those figures illustrating a system that is only getting more clogged and unworkable as time progresses. As more and more prisoners languish for unprecedented lengths of time on death row, more situations like Hubbard's will inevitably emerge and spark debate.

The Death Penalty Information Center reports that those inmates stuck in limbo may spend up to 23 hours a day alone in their cell.<sup>30</sup> The Supreme Court has said that this time spent awaiting death is generally characterized by unnerving uncertainty about when or how the an execution will take place, constituting "one of the most horrible feelings to which [a person] can be subjected . . . ."<sup>31</sup> Justice Breyer has directly called attention to the viability of this assertion, stating that "it is difficult to deny the suffering inherent in a prolonged wait for execution—a matter which courts and judges have long recognized."<sup>32</sup> The dissent to denial of certiorari in *Knight* cites other judicial opinion calling attention to the "dehumanizing effects" of long periods spent on death row which take "a frightful toll" on inmates, often resulting in an "onset of insanity."<sup>33</sup> A study of Florida prisoners cited by Breyer, found that 42% of persons on death row had seriously considered suicide and 35% had actually attempted it, demonstrating

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<sup>29</sup> Thomas B. Bonczar & Tracy L. Snell, *Bureau of Justice Statistics: Capital Punishment, 2004*, Nov. 2005, NCJ 211349, at 11, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp04.pdf>. This figure is misleading for many reasons, explained also in Section II below. Most significantly, this figure looks at the average time spent on death row each year since 1976, then averages those figures. Inmates on death row in 2004 had been on death row an average of 132 months, or just over 11 years at the time of the report. This figure also assumes that length of death row confinement begins at the last sentencing date. In actuality, many death row inmates have been sentenced several times, so this figure would not reflect that.

<sup>30</sup> DPIC, *supra* note 24.

<sup>31</sup> *In Re Medley*, 134 U.S. 160, 172 (1890) (court evaluated the constitutionality of a four week delay from sentencing to execution).

<sup>32</sup> *Knight*, 528 U.S. at 994 (Breyer, J., dissenting).

<sup>33</sup> *Id.*

that psychological instability wrought by extended periods awaiting execution is a serious issue.<sup>34</sup>

No recent case more compellingly demonstrates the legal import of this phenomenon than the Connecticut case *State v. Ross*.<sup>35</sup> In January of 2005, just one hour before Michael Ross was set to die for murders he committed in 1984, Connecticut decided to stay his execution pursuant to last-minute motions filed by Ross' lawyer alleging that his client was suffering from death row syndrome.<sup>36</sup> Ross, having spent much of death row in solitary confinement, had long-insisted he was competent to volunteer for execution and had thus waived all further appeals of his sentence. In a series of dramatic events at the eleventh hour, his lawyer issued a statement saying that "new and significant evidence has come to light that I simply cannot ignore" regarding Ross' competency to waive his appeals, suggesting instead that prison conditions had coerced Ross into a suicidal state.<sup>37</sup> This evidence came in the form of a letter from another inmate who had spoken to Ross through vents and had heard him describe certain prison workers as "sociopaths in disguise," "engineering" Ross' will to die, in addition to other affidavits from individuals suggesting that Ross was suffering from death row syndrome and that his acute levels of despair and depression were inciting him to commit suicide through execution.<sup>38</sup> A former warden corroborated that it wasn't abnormal for prison staff to comment that it would be easier on everybody if death row inmates just killed themselves.<sup>39</sup> He further testified that the atmosphere in the Connecticut prison's death row resembled "living in a submarine or cave."<sup>40</sup> In fact, Michael Ross had already attempted to kill himself on three different occasions.<sup>41</sup>

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<sup>34</sup> *Id.* at 995 (citing Strafer, *Volunteering for Execution*, 74 J. Crim. L. & C. 860, 872, n. 44 (1983)).

<sup>35</sup> *State v. Ross*, 873 A.2d 131, 145 n.19 (Conn. 2005).

<sup>36</sup> William Yardley & Stacey Stowe, *Connecticut Delays Death of Serial Killer Indefinitely*, N.Y. TIMES, Feb. 1, 2005.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> DPIC, *supra* note 24.

<sup>41</sup> *Id.*

While Ross's lawyer was able to successfully secure another competency hearing to determine whether his client retained the proper mental state to elect to die, the court ultimately found that Ross was fit to volunteer for execution. In the course of its determination, however, the court specified that the only "colorable claim" advanced by Ross's lawyers was that Ross might be suffering from death row syndrome, a seeming re-invitation to explore the weight of the *Soering* decision as applied in the American context.<sup>42</sup> Characterizing death row syndrome as a legal concept that may or may not exist, the court nonetheless entertained court papers prepared by psychiatrist and former Harvard Medical Professor Dr. Stuart Grassian stating:

The conditions of confinement are so oppressive, the helplessness endured in the roller coaster of hope and despair so wrenching and exhausting, that ultimately the inmate can no longer bear it, and then it is only in dropping his appeals that he has any sense of control over his fate..."<sup>43</sup>

The Connecticut Supreme Court, deciding that Michael Ross was competent to waive his appeals, ruled to reinstate his execution, and on May 13, 2005, he became the first person executed by a state in New England in 45 years.<sup>44</sup> At the time of his execution, Michael Ross had spent upwards of 17 years on death row.<sup>45</sup>

*State v. Ross* is an interesting study in several respects. First, *Ross* illustrates potential judicial discomfort concerning competency when condemned prisoners volunteer to die. There is a fine line between the constitutional scenario where an inmate competently waives his appeals, and the unconstitutional scenario in which an inmate, having been exposed to intensely long periods of near-solitary confinement, is no longer able to stand his condi-

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<sup>42</sup> *Ross*, 873 A.2d at 145 n.19.

<sup>43</sup> DPIC, *supra* note 24.

<sup>44</sup> *Id.*

<sup>45</sup> Avi Salzman, *Killer's Fate May Rest on New Legal Concept*, N.Y. TIMES, Feb. 1, 2005.

tions and desperately waives his appeals in order to put an end to his own anguish. Tellingly, the chain of events resulting in Ross's final litigation was actually sparked by Robert N. Chatigny, a U.S. District Court judge who was so concerned that Michael Ross's mental state might fall in this latter, unconstitutional category that he threatened to disbar Ross's lawyer if he didn't adequately investigate new evidence regarding his client's psychological soundness.<sup>46</sup> Such unease on the part of judges has broad implications for opening the way for new discussion of death row syndrome.

Second, *Ross* is compelling in the sense that it was not Ross himself promulgating the *Soering* argument. Ross was willing to die and had said as much on several occasions. Unlike the scenario Justice Thomas had envisioned in *Knight*, Ross's 17-year incarceration on death row and subsequent death row syndrome claim was not the product of a prisoner's attempt to exploit his appeals and then complain about the delay. Here, it was the government intervening to assess the impact of death row conditions on Ross's mental state. Ross, in contrast, was trying to put an end to the delay and speed up the execution. Perhaps Connecticut's demonstrated reluctance to impose the capital punishment here was atypical of states, given that Connecticut had not executed anyone since the death penalty was reinstated. However, this case at least lends credence to Breyer's contention that Eighth Amendment inquiries could become relevant where prolonged delays are not directly attributable to the prisoner.

For the foregoing reasons, the death row phenomenon presents at least a workable Eighth Amendment challenge to enforcement of the death penalty in certain cases. This will turn on a combination of factors, including but not limited to the length of time someone has spent awaiting execution, the particular reasons for the delay, and a mental state examination of the prisoner. In any event, the Court has long recognized that the miserable nature and conditions on death row often inflict a significant degree of psychological harm on inmates. This has implicit Eighth Amend-

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<sup>46</sup> Yardley, *supra* note 36.

ment importance that deserves thoughtful consideration in fact-patterns where long delays have rendered punishments barbarous.

### C. International Support for the “Cruel and Unusual Punishment” Challenge

Guidance from foreign courts lends considerable support for the notion that death row syndrome can provide the foundation for a viable Eighth Amendment “cruel and unusual punishment” challenge at home. It seems that the Supreme Court, in the wake of *Atkins* and *Roper*, would be amenable to considering the opinion of international courts if it was to grant certiorari on this claim. The reasons are twofold: 1) because several foreign courts with constitutions like ours have directly and carefully addressed this issue in considerably more detail than our courts have, and 2) because an increasing number of countries are refusing to extradite offenders to the United States precisely because they have held our notoriously long death row delays violate perceived international standards of human rights.

The Eighth Amendment was molded out of a corresponding provision of the English Declaration of Rights of 1689.<sup>47</sup> When deciding that the Constitution now forbids execution of juvenile offenders, Justice Kennedy drew the Court’s attention to the fact the England had long ago abolished this practice, noting that “The United Kingdom’s experience bears particular relevance here in light of the historic ties between our countries and in light of the Eight Amendment’s own origins.”<sup>48</sup> That said, British Jurists have found that inordinate delays awaiting execution invariably violates the prohibition against cruel and unusual punishments contained in Section 10 of that document.<sup>49</sup> Historically speaking, those conclusions should be highly instructive to our immediate inquiry.

While Justice Breyer recognized that foreign law does not bind the U.S. Supreme Court, he nonetheless conceded that

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<sup>47</sup> *Gregg*, 428 U.S. at 169.

<sup>48</sup> *Roper*, 543 U.S. at 577.

<sup>49</sup> *Lackey*, 514 U.S. 1045 (quoting *Riley v. Attorney General of Jamaica* [1983] 1 A. C. 719, 734 (P. C. 1983)).

reviewing corresponding foreign decisions can be very probative in assisting our own evaluation of novel constitutional claims. His *Knight* dissent of denial of certiorari cited various instances in which the Court had in fact consulted the opinions of other countries—“courts that accept or assume the lawfulness of the death penalty”—to aid in its own interpretation of the Eighth Amendment’s limitations.<sup>50</sup> In ruling on the constitutionality of practices such as the execution of juvenile offenders, the doctrine of felony murder, death penalty for rape, and the death penalty for mentally retarded, United States courts have often consulted the opinions of other former Commonwealth countries “insofar as those opinions reflect a legal tradition that also underlies our own Eighth Amendment.”<sup>51</sup> In view of that, international opinion counsels that the United States should take evolving international standards of decency into consideration to find that the Eighth Amendment bans lengthy detentions on death row.

This concept is no doubt controversial. *Amicus curia* by the European Union in *Atkins* no doubt impressed Justice Stevens that the world community “overwhelmingly” disapproved of the use of capital punishment against mentally retarded by 2001.<sup>52</sup> In perhaps one of the lengthiest expositions on international consensus, Justice Kennedy’s 2005 opinion in *Roper* painted a stark portrait of America standing “alone in a world that has turned its face against the juvenile death penalty.”<sup>53</sup> Of course both of these recent opinions were met with biting dissents by Justice Scalia, joined by Justices Thomas and the now-deceased Justice Rehnquist.<sup>54</sup> Justice

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<sup>50</sup> *Knight*, 528 U.S. at 994 (Breyer, J., dissenting). Breyer discusses the decisions of Jamaica, the European Court of Human Rights, the Supreme Court of India, and the Supreme Court of Zimbabwe. He then cites various United States opinions.

<sup>51</sup> *Id.* at 997.

<sup>52</sup> *Atkins*, 536 U.S. at 316, n.21.

<sup>53</sup> *Roper*, 543 U.S. at 577.

<sup>54</sup> *Atkins*, 536 U.S. at 347-48 (Scalia, J., dissenting) (“the Prize for the Court’s Most Feeble Effort to fabricate “national consensus” must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, member of the so-called ‘world community’ . . . irrelevant are the practices of the “world community,” whose notions of justice

O'Connor, also dissenting in *Roper*, nevertheless qualified her dissent to agree with the majority that foreign and international law are appropriate resources in our Eighth Amendment jurisprudence because of that Amendment's unique character meant for measuring "the maturing values of civilized society."<sup>55</sup> In any event, with Rehnquist and O'Connor now gone and two new Justices on the Court, the majorities in both *Atkins* and *Roper* are still preserved—Justices Breyer, Stevens, Kennedy, Souter, and Ginsberg agreeing that the Eighth Amendment puts specific prohibitions on the death penalty. Because there is supporting evidence of consensus in the world community favoring a *Lackey*-type claim, there is a substantial and distinct possibility that a Roberts-led Court would be similarly persuaded to accept this argument in a grant of certiorari.

As mentioned previously, the Court also has functional reasons for reconsidering a *Lackey* argument, more directly invoking the legacy of *Soering*. Extradition concerns related to the European Court of Human Rights decision helped prompt Breyer's 1998 dissent of certiorari denial in *Elledge v. Florida*.<sup>56</sup> Likewise, he again dissented to a similar certiorari denial in 2002, noting that the Supreme Court of Canada had just ruled that possible prolonged incarceration on death row was "a relevant consideration" in deciding whether or not extradition to the United States would violate "principles of 'fundamental justice.'"<sup>57</sup> The prospect of Canada taking inordinate delays into account in extradition decisions has significant implications for the United States, given that we are Canada's major extradition partner. Data suggested that

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are (thankfully) not always those of our people . . . ."); *Roper*, 543 U.S. at 622 (Scalia, J. dissenting) ("Though the views of our own citizens are essentially irrelevant to the Court's decision today, the view of other countries and the so-called international community take center stage.").

<sup>55</sup> *Roper*, 543 U.S. at 605.

<sup>56</sup> *Elledge*, 525 U.S. at 944 (Breyer, J., dissenting) ("a reasoned answer to the 'delay' question could help to ease the practical anomaly created when foreign courts refuse to extradite capital defendants to America for fear of undue delay in execution" (referring to *Soering v. United Kingdom*)).

<sup>57</sup> *Foster*, 537 U.S. at 992-93 (quoting *United States v. Burns*, [2001] 1 S. C. R. 283, 353, P123).



the U.S. accounted for 83% of the extradition requests received by Canada between 1985 and 1991.<sup>58</sup> The import of the *Soering* decision is particularly salient here, as Canada is separated from the United States by only a land border, making it an accessible destination for fleeing felons. Our criminal justice system would be severely frustrated were it not able to try its worst offenders in our own court systems simply because those offenders had absconded north.

Hence, there are practical as well as ideological reasons why the Court should find a constitutional abuse if it were to grant certiorari on this issue. The changing composition of the Court does not seem to have shifted the balance of Justices willing to look towards consensus in the world community—particularly towards those countries that reflect our constitutional design—in order to evaluate the unique parameters of the Eighth Amendment. That said, foreign opinion favors identifying a human rights violation at some point in a prisoner's stay on death row, especially where lengthy delays inhibit the United State's ability to prosecute some of its worst offenders.

## II. PUTTING THE CHALLENGE INTO ACTION: CONSIDERATIONS FOR COURTS AND LEGISLATURES

Having already concluded that extremely long tenures on death row implicate notions of cruel and unusual punishment in violation of the Eighth Amendment, we are now tasked with the challenge of figuring out how to legally prevail with such an argument. State courts and legislatures have offered us little guidance in this arena, their silence serving only to highlight potential anxieties that must be addressed in any attempt to govern this claim. Assuming that courts should approach this as a matter of first impression, and assuming that the death penalty itself is constitutional pursuant to *Gregg v. Georgia*, then particularly thorny is the job of identifying the specific point at which a permissible

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<sup>58</sup> Paul Mitchell, *Domestic Rights and International Responsibilities: Extradition Under the Canadian Charter*, 29 *Yale J. Int'l L.* 141 (Winter 1998).

incarceration on death row becomes cruel and unusual. This article submits that there is no such bright line, only relevant factors with which prudent courts and legislatures can reasonably assess when an Eighth Amendment violation has occurred.

### A. Why Courts Should Evaluate this Claim as a Matter of First Impression

Eighth Amendment determinations normally rest on gauging where evolving standards of decency lie; in this vein, *Atkins* and *Roper* both sought to examine evidence of national consensus across states to aid their inquiry. This is not so easily accomplished in our investigation. As discussed earlier, *Knight* only briefly addressed the feasibility of a “cruel and unusual punishment” claim in instances where a prisoner had been awaiting execution on death row for an unusually long period of time. In many respects, this is an issue of first impression and courts should reexamine it with a clean slate.

It remains true that death row syndrome alone has not yet convinced any American court to overturn a death sentence.<sup>59</sup> Justice Thomas insinuated that this argument was effectively dead, citing eight cases between the 1995 *Lackey* opinion and his 1999 *Knight* concurrence that had rejected similar claims.<sup>60</sup> However, the eight cases he cited only handled *Lackey* claims involving six states.<sup>61</sup> In fact, in at least one of these cases Thomas referred to, the state and federal courts decided not to accept the *Lackey* claim simply because there was a lack of precedent directing them to grant relief.<sup>62</sup>

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<sup>59</sup> Salzman, *supra* note 45.

<sup>60</sup> *Knight*, 528 U.S. at 992-93.

<sup>61</sup> California, Alabama, Texas, Arizona, Montana and Oklahoma. These are in addition to Florida and Nebraska, the two states at issue in *Knight*.

<sup>62</sup> The Oklahoma Criminal Appeals Court fell in this category, refusing to even review the *Lackey* argument rejected by the district court because there was no precedent otherwise and because the prisoner had failed to raise the Eighth Amendment issue in prior proceedings. See *Stafford v. Ward*, 59 F.3d. 1025,

Data about the practice of the death penalty across the country does not help us predict with any certainty where states stand on this issue. At the time of this writing, the District of Columbia and twelve states have expressly abolished the death penalty.<sup>63</sup> Five others have not executed anyone since 1976.<sup>64</sup> Of this second group, New Hampshire currently has no one on death row, and New York and Kansas declared their death penalty statutes unconstitutional in 2004.<sup>65</sup> An additional thirteen states have each executed less than five persons in the last 29 years,<sup>66</sup> and thirteen states with capital punishment still on the books have death row populations of 10 persons or fewer.<sup>67</sup> These figures indicate that at least fourteen states—the twelve without the death penalty and the two which just held their death penalty statutes unconstitutional—would probably be amenable to an Eighth Amendment claim that prolonged incarceration on death row could constitute cruel and unusual punishment, if such a claim were to reach them. Aside from this projection however, there are very few indications that state courts have seriously considered these Eighth Amendment claims to render this a settled issue.

This may be due in part to the fact that tenures on death row are just now reaching unprecedented levels as we get further away from 1976's reinstatement of capital punishment and the length of death row residencies continues to inflate. An accurate portrait of the national consensus is also probably obscured by the fact that there are eighteen states that have not outright abolished

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1028 (10th Cir. 1995); *Stafford v. State*, 899 P.2d 657, 659-60 (Okla. Crim. App. 1995).

<sup>63</sup> Death Penalty Information Center Fact Sheet, *available at* <http://www.deathpenaltyinfo.org>. These states are Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin.

<sup>64</sup> *Id.* This group includes Kansas, New Hampshire, New Jersey, New York, and South Dakota.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* Colorado, Connecticut, Idaho, Kentucky, Maryland, Montana, Nebraska, New Mexico, Oregon, Pennsylvania, Tennessee, Washington, and Wyoming.

<sup>67</sup> *Id.* Washington, Utah, Illinois, Nebraska, Maryland, Connecticut, Kansas, Montana, South Dakota, Colorado, New York and New Mexico.

the death penalty but have nevertheless invoked it with relative infrequency (if at all); similarly, there several other states with relatively small death row populations that have simply not encountered this issue. All of these factors have resulted in alarmingly few opportunities for state courts to reach the merits of this kind of argument, and have instead largely relegated the *Lackey* claim to courts in states like California, Florida, and Texas with larger death row populations and therefore more languishing prisoners. As such, gauging the national consensus in this arena has become a challenging—if impossible—task.

As Justice Breyer pointed out, there were no cases between 1995 and 1999 that dealt substantially with the significance of an Eighth Amendment claim where the state bore some responsibility for the unusual delay.<sup>68</sup> Consequently, there was very little evidence of state consensus on that issue when the court denied certiorari without much elaboration in *Knight*. Since then, many lower-level decisions have again neglected to reach the merits of that sort of claim because of reliance on the Supreme Court, assuming the issue is well-settled because certiorari was denied. Subsequent cases raising this brand of “cruel and unusual punishment” argument in Idaho, Mississippi, Illinois, Indiana and Utah have had no success because courts have refused to entertain the claim due to strict adherence to *Knight*,<sup>69</sup> which wasn’t even a ruling on the merits.<sup>70</sup>

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<sup>68</sup> *Knight*, 528 U.S. at 998-99.

<sup>69</sup> *McKinney v. State*, 992 P.2d 144 (Idaho 1999) (unsuccessful claim where man had spent 17 years on death row, noting *Knight v. Florida*); *Jordan v. State*, 786 So. 2d. 987 (Miss. 2001) (unsuccessful claim where man had spent 22 years on death row over the course of 25 years of imprisonment, with a life sentence from 1991-1998; prisoner said he suffered psychological trauma not knowing his fate and that the state has gained nothing from the infliction of his pain; state says there is no precedent and thus no grounds for reversal after *Knight v. Florida*); *Russell v. State*, 849 So. 2d. 95 (Miss. 2003) (unsuccessful claims where man had spent 14 years on death row; no precedent in light *Jordan v. State* and *Knight v. Florida*); *People v. Simms*, 736 N.E.2d 1032 (Ill. 2000) (unsuccessful claim where man had been incarcerated for 15 years and his death sentence had been vacated three times; not cruel and unusual, citing *McKinney v. State*); *Moore v. State*, 771 N.E.2d 46 (Ind. 2002) (unsuccessful claim in light of *Knight v. Florida* where man had spent 20 years on death row); *State v. Lafferty*, 20

Thus, this issue is really one of first impression. Only a handful of states actually heard this kind of claim before *Knight* virtually precluded it, and of those states which have considered it, very few have actually written extensively on its merits. There is even less precedent in the case of a state bearing some responsibility for an inmate's unconstitutionally long stay on death row. The simple reality is that more states than not haven't encountered this issue and are now barred from seriously considering it. This will continue to pose problems as we get further away from the *Gregg* decision and stays on death row continue to reach unprecedented levels. This will be particularly problematic in those states which have declined to carry out many executions but have retained substantial death row populations.

### **B. Courts, the Bright-Line Problem and the Speedy Trials Analog**

Again, assuming the death penalty itself is not unconstitutional and that a thorough appeals process assures that capital punishment is administered less arbitrarily, then courts and legislatures must be able to identify the point at which a justifiable tenancy on death row crosses over into the cruel and unusual if they are to regard this kind of claim. In *Atkins* and *Roper*, the

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P.3d 342 (Utah 2001) (unsuccessful claim where man had spent 14 years incarcerated, mostly on death row; questions of retributive and deterrent effect were unpersuasive because "the Supreme Court [in *Knight*] has recently denied petitions for writs of certiorari.").

<sup>70</sup> I only found two other states that had dealt with this issue after 1999, though this list is not exhaustive. In *People v. Ochoa*, 981 P.2d 79 (Cal. 2001), the Supreme Court of California addressed the *Lackey* claim and the lack of penological effect a long delay would have upon a prisoner who has been detained over 10 years; the Court held that retribution and deterrence are maintained in these circumstances. In *Ross v. State*, 787 So. 2d. 786 (Fla. 2001), the Supreme Court of Florida stated without elaboration that an inmate's claim was meritless where he had been on death row for 24 years. The Florida court used this case to deny a similar claim in *King v. State*, 808 So. 2d 1237 (Fla. 2001) to quickly dismiss a claim where an inmate had been incarcerated for a little over ten years.

Court could measure the “direction and consistency” of evolving standards of decency by looking at which states had enacted or abolished statutes governing the use of the death penalty on mentally retarded and juvenile offenders. The *Lackey* claim has no comparable legislative or common law starting-point. Because there are no statutes to look towards, and because there is no clear higher court precedent on this issue, courts must look elsewhere to determine when they may step in and say enough is enough. The Speedy Trials cases provide some relevant insights into how the courts can approach this sort of nuanced balancing.

In the 1972 case *Barker v. Wingo*, the Supreme Court examined the “speedy trials” clause of the Sixth Amendment<sup>71</sup> to address the issue of whether it was unconstitutional to bring a man to trial five years after his initial arrest. In granting certiorari, the Court noted that “the right to speedy trial is a more vague concept than other procedural rights. It is . . . impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate.”<sup>72</sup> Similar to the dilemma posed by the vague parameters of the Eighth Amendment *Lackey* claim, speedy trial challenges ask courts to consider public justice as well as the individual rights of the defendant. The Court declined to set a fixed length of time at which delays awaiting trial would be automatically considered unconstitutional, opting instead for a “functional analysis of the right in the particular context of the case.”<sup>73</sup>

*Barker* announced the Court was to adopt a flexible approach on an *ad hoc* basis: “a balancing test in which the

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<sup>71</sup> The Sixth Amendment of the United States Constitution reads as follows: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. U.S. CONST. amend. VI.

<sup>72</sup> *Barker v. Wingo*, 431 U.S. 514, 521 (1972).

<sup>73</sup> *Id.* at 522.

conduct of both the prosecution and the defendant are weighed.”<sup>74</sup> These factors to be considered included the length of the delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.<sup>75</sup> These last two factors are probably not as relevant to our immediate inquiry, as the defendant’s assertion of his right to the challenge does not extend as readily to our situation and given the fact that his *Lackey* claim would be litigated in post-conviction proceedings. It is, however, helpful to examine the other two Speedy Trials factors to inform our Eighth Amendment determinations.

### *1. Length of Delay*

Looking at the “speedy trials” clause of the Sixth Amendment, the Supreme Court pronounced that the length of delay awaiting trial would serve as a “triggering mechanism” for this brand of constitutional challenge.<sup>76</sup> The Justices noted that the particular circumstances of the case must be evaluated in order for the length of delay to trigger scrutiny here, as longer delays might be more justifiable in certain circumstances. Likewise, they explained that the Court is not required to investigate the merits of such a claim “until there is some delay that is presumptively prejudicial.”<sup>77</sup> The Court has never been clear about what amount of time renders a delay presumptively prejudicial in the Sixth Amendment context, although the Court found that an 8 ½ year holdup between the indictment and arrest of the defendant in *Doggett v. United States* was “extraordinary,” noting more generally that delays are presumptively prejudicial at least when they near a year.<sup>78</sup>

Concededly, the criteria for a deciding how long is too long in the death row scenario is different than in the speedy trials situations, although the process of attempting to gauge the impre-

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<sup>74</sup> *Id.* at 530.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 530.

<sup>77</sup> *Id.*

<sup>78</sup> *Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992).

cise requires a similar approach. Certainly a year on death row will not prompt the Courts to examine this sort of Eighth Amendment challenge, for accuracy of death penalty administration requires appellate safeguards that ensure executions will rarely occur that soon after initial sentencing. While courts will want to look at the particular procedural history of each death penalty case raising this claim, the need to evaluate the length of delay on an *ad hoc* basis is probably not as pressing since each individual raising this claim remains under the same sentence of death. Again, prejudice is also not so much the determinative factor in a *Lackey* type claim because in our case the petitioner's trial has already occurred. The *Barker* considerations are still highly instructive here however, insofar as this claim must attach to a presumptively long delay in order to trigger judicial attention. We then must figure out what constitutes a presumptively long delay in the death row context.

The European Union refused to extradite Jans Soering because of a presumption that Virginia's average of six to eight years on death row was too long; that court did not, however, qualify its holding to suggest what length of detention before execution would have been permissible. While American abolitionists would likely perceive any amount of time on death row to be a violation of the Eighth Amendment, death penalty proponents of the Justice Thomas ilk would reject the notion that any fixed amount of time could be presumptively inordinate. That said, a workable standard will have to fall somewhere between those extremes if it is to achieve any real credibility within the courts. In that sense, it is probably least objectionable to proceed with a determination that seeks to discover where the *outer* limits of acceptability lie—that is, we must identify that point at which it becomes patently obvious that a delay has become exceptionally long, based on averages across the country.

Dwight Aarons, an American scholar who has closely examined this area, has suggested that we can classify a length of confinement on death row as “inordinate” *at least* once the delay reaches twice the national average for persons executed in the



United States.<sup>79</sup> Aarons' proposal is particularly compelling in light of the fact that the *Lackey* challenge turns on an examination of the cruel and "unusual," since twice the national average would seem fairly unusual by most accounts. This is not to say that periods of less than that average are not unconstitutional under this framework; some would argue that any delay in excess of the national average would be inordinate. However flawed, Aarons' model nevertheless provides us with a practicable starting point because it allows us to assume what is patently inordinate and work backwards. Applying the current statistics gathered by the Death Penalty Information Center then, this approach would provide courts with the power to hear an Eighth Amendment claim at least when a prisoner has spent twenty years and four months on death row.

Even proceeding from this relatively conservative outer-limit, it becomes quickly evident that the demand for an avenue of relief in this area is staggering. The United States Department of Justice statistics reveal that of the 7,187 people sentenced to death since 1977, over 50% of them are still lagging on death rows nationwide.<sup>80</sup> This figure breaks down in a drastic way at the individual state-level, particularly as we observe states like California which retain death row populations at rates inconsistent with their actual executions. With 648 persons awaiting execution there, the largest death row population of any state in the country,<sup>81</sup> California has executed a dozen people since it resumed the practice of capital punishment in 1978.<sup>82</sup> The Death Row Tracking records of The California Department of Corrections reveal of those 648 people, 106 of them have been on death row since 1985

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<sup>79</sup> Dwight Aarons, *Criminal Law: Getting Out of This Mess: Steps Toward Addressing and Avoiding Inordinate Delay in Capital Cases*, 89 J. Crim. L. & Criminology 1 (Fall 1998).

<sup>80</sup> Bonczar, *supra* note 29. 13% have been executed, 4% died in some other manner, and 37% received some other disposition.

<sup>81</sup> Death Penalty Information Center, *supra* note 63. Second is Texas, with 414, and Third is Florida, with 388.

<sup>82</sup> *Id.*

or before.<sup>83</sup> That means there are currently 106 people in California *alone* whose time spent on death row would presumptively trigger an Eighth Amendment investigation under the conservative length-of-delay standard propagated here.

The argument for establishing a presumptive triggering device is more compelling in light of these kinds of trends, as sheer utility counsels that emerging crises like the one in California must allow courts to step in at some point and decide when the imposition of life in prison might be constitutionally warranted in place of a death sentence. Beginning with the presumption that delays are at least unreasonably long when they reach twice the national average, Courts may proceed to examine in more detail the particulars of the case. Without such a mechanism in place, death row residencies will continue to reach unimaginable levels, overloaded state systems will see their resources drained, and further Eighth Amendment concerns will be implicated.

## 2. Reason for Delay

Returning to the Speedy Trials analog, *Barker* instructed that after a certain delay is held to be presumptively excessive, courts may begin to examine the government's reasons for the holdup in order to make their ruling on constitutionality. "Here, too, different weights should be assigned to different reasons."<sup>84</sup> The Court clarified: "A deliberate attempt to delay ... should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government and not with the defendant."<sup>85</sup> It also states that reasons for delay which pertain to ensuring the accuracy of the proceedings,

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<sup>83</sup> California Department of Corrections and Rehabilitation, Division of Adult Operations, Death Row Tracking Records, Condemned Inmate Summary List. Dec. 2, 2005, available at <http://www.corr.ca.gov/CommunicationsOffice/CapitalPunishment/PDF/Summary.pdf>.

<sup>84</sup> *Barker*, 431 U.S. at 531.

<sup>85</sup> *Id.*

such as attempting to find a missing witness, would be valid and legitimate for the government to justify putting off trial.<sup>86</sup>

This Eighth Amendment challenge will also need to survey the interests of both sides in its consideration. Justice Stevens suggested as much in *Lackey*, when he first proposed that this kind of claim might be able to hold water in courts: “It may be appropriate to distinguish, for example, 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.”<sup>87</sup>

As noted elsewhere in this paper, a prisoner’s own attempt to manipulate the system will not serve as the proper foundation for a *Lackey* claim of inordinate delay. However, it is worth noting that this sort of defendant would rarely experience delays reaching the extraordinary levels discussed at length here. As Aarons indicates, a long delay often implies that the capital case was a very difficult one to prosecute against a particular defendant, and that the decision to seek the death penalty in that case was probably debatable from the beginning.<sup>88</sup> Likewise, “the delay in carrying out the death penalty also may reflect a consensus by several actors in the capital litigation process—such as subsequent prosecutors, juries, state and federal judges, and governors—that the defendant is not truly deserving of death” due to possibilities of subsequent rehabilitation or new emerging facts.<sup>89</sup> Indeed, it seems logical that the so-called “slam-dunk” capital cases are not the ones which defendants could effectively stretch out across decades, no matter how many frivolous appeals are filed. That said, as long as capital defendants are acting legitimately in pursuing and exhausting review of their own life or death determinations, they should not be excluded from the protections of the Eighth Amendment.

Citing to a report made by the American Bar Association, Aarons concluded that “when there has been an inordinate delay

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<sup>86</sup> *Id.*

<sup>87</sup> *Lackey*, 514 U.S. at 1045.

<sup>88</sup> Aarons, *supra* note 79, at 53.

<sup>89</sup> *Id.*

between the imposition of the sentence and the pending execution, the state is usually directly responsible for a great part of the delay.”<sup>90</sup> Most delays are procedural failings on the part of state court systems, and can be attributable to ineffectiveness of appointed counsel, slowness in processing of records, cumbersome state policies and procedures, and uncertainty regarding constitutional and habeas law, among other things.<sup>91</sup> None of these causes of the delay are directly attributable to the prisoner, whose psychological trauma has often only increased as his confinement drags on, the faint prospect of an overturned death sentence flickering unpromisingly with each new phase of litigation.

The Illinois Supreme Court decision *People v. Simms* underscores the need for courts to take the reasons for delay into account when deciding whether or not the Eighth Amendment supports granting relief. In 2000, that court rejected most of an inmate’s claims—including his *Lackey* argument—but reversed and remanded to hold an evidentiary hearing on a claim that perjury had affected his death penalty sentence.<sup>92</sup> Chief Justice Harrison forcefully dissented to draw direct attention to the *Lackey* issue lingering above this prisoner’s 15 years on and off of death row during “extraordinarily protracted” litigation. During this time period, the inmate’s death sentence had been vacated three times for procedural error and each time the state had sought to reinstate it. The Chief Justice was unmoved by the notion that death row inmates must suffer such long delays as a consequence of their own decision to avail themselves to the appeals process.<sup>93</sup> He conceded that such reasoning would have force if many claims reaching him were largely frivolous attempts made only with the intention of postponing execution, but this was rarely the reality in the Illinois court system; there, most capital cases dragging on longer than a decade were addressing prosecutorial errors or issues of ineffective representation, and not merit-less arguments brought

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<sup>90</sup> *Id.* at 48.

<sup>91</sup> *Id.*

<sup>92</sup> *People v. Simms*, 736 N.E.2d 1032 (Ill. 2000).

<sup>93</sup> *Id.* at 1143.

by defendants. Of course the state must have the opportunity to retry defective cases; however:

[t]here must be a point . . . at which the court steps in and says enough is enough. Beyond a certain number of years and a certain number of failed attempts by the State to secure a constitutionally valid sentence of death, the litigation becomes a form of torture in and of itself. It is as if the State were holding a defective pistol to the defendant's head day and night for years on end and the weapon kept misfiring. It may eventually go off, but then again, it may not, and the defendant has no way to be sure.<sup>94</sup>

Here, where there was at least some evidence that the state had deliberately sought to procure the prisoner's death sentence by knowingly using perjured testimony, the absence of authority allowing the court to grant relief posed significant problems. Courts must be able to take the reasons for the delay into consideration when determining if an Eighth Amendment violation has occurred. Courts would be remiss not to recognize the unconstitutionality of extraordinary periods on death rows which are largely attributable to the state.

### **C. How to Legislate Around Death Row Syndrome and Competing Concerns**

Whereas the speedy trials problem was somewhat mitigated by statutes of limitations on the prosecution of certain crimes, no state or federal legislation yet establishes a statute of limitations addressing the point at which a punishment becomes cruel and unusual once a prisoner has spent an abnormally long time awaiting execution. Silence in this area might be understood in light of Justice Thomas's assertion that "consistency would seem

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<sup>94</sup> *Id.* at 1144.

to demand that those who accept our death penalty jurisprudence as a given also accept the lengthy delay between sentencing and execution as a necessary consequence.”<sup>95</sup> The system changes each year, and this logic may help explain why states are hesitant to fix specific statutory limits for death row incarceration, lest prisoners continually appeal and then claim they’d been too long incarcerated. However, this line of reasoning is countervailed by the danger of extraordinary delays due in large part to state failings, discussed above. Again, the state has a very real stake in establishing such legislation where death row populations are swelling, delays are reaching unprecedented levels, and the system is growing increasingly clogged. Much like the balancing courts will have to do, legislatures attempting to provide statutory governance of cruel and unusual death row delays must address these competing interests.

Dwight Aarons has suggested that there are four common objections to death row syndrome/*Lackey*-type claims which explain why petitioners have had little success in the American context: 1) the inmate caused the delay; 2) it would be unfair to other death row inmates to recognize the claim; 3) recognition of the claim would disrupt the administration of capital punishment; and 4) the appropriate remedy for inordinate delay is to apply for executive clemency.<sup>96</sup> He asserts that these qualms are not rooted in a realistic understanding of the death penalty litigation process, where in actuality, lengthy delays are more typically the result of the state’s failure “to vigorously respect the rights of capital defendants,” and “to carry out the execution as aggressively as it sought and obtained the death sentence.”<sup>97</sup> Either way, Aarons’ premises are instructive in any attempt to fashion legislation that seeks to properly balance competing values. I propose the following guidelines for crafting legislation on the state level to ensure the Eighth Amendment is upheld.

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<sup>95</sup> *Knight*, 528 U.S. at 992.

<sup>96</sup> Aarons, *supra* note 79, at 44.

<sup>97</sup> *Id.* at 22.

*1. Legislation must guard against the possibility that an inmate could cause his own delay, but it also must provide for Eighth Amendment relief when a state is primarily responsible for that delay.*

We have already concluded that it seldom happens where a prisoner aggressively litigates frivolous claims and then charges that the delay in his execution violates the Eighth Amendment. In those few instances where an inmate could do that, however, then providing for a length of delay triggering mechanism in state statutes—such as the outer-limit one proposed above for courts—would help guard against this danger. Establishing a presumptively inordinate delay at twice the national average would weed out those litigants seeking to manipulate the system, because it would rarely if ever be the case that such claims would survive for such an extraordinary length of time. If a litigant sought to continually raise “frivolous” claims and was successful to the point that he had managed to last on death row for over two decades, then chances are that those claims were not really all that frivolous to begin with and there was probably some more serious defect in the proceedings.

That said, legislation must provide for relief when an inmate has spent at least this amount of time on death row due to failings on the part of the state. This will mostly be the case when this claim is raised. In such instances, legislation should provide for life in prison instead of prolonged exposure to death row. Legislating in this area will have the effect of making states more careful in seeking the death penalty in the first place, while providing incentive to conduct their capital proceedings more diligently.

*2. Legislation must apply equally to all prisoners.*

An Eighth Amendment challenge must apply with equal force to all inmates on death row. Objectors to the availability of this kind of relief allege that it is inherently unfair, given the possibility that if two prisoners were sentenced to death on the

same day, varying durations of appeals proceedings could mean that only one of them will have the opportunity to raise this claim. That argument is not very persuasive in light of the arguments in favor of this challenge, and unfortunately it only highlights the arbitrariness which inevitably characterizes the entire system of capital punishment, not this claim specifically. Aarons responded to this by reminding objectors that “throughout the law ... such demarcations exist. These lines mark the difference between, for instance, what facts state a cause of action or by when a party has to file his legal claim. The criminal law is not exempt from this line-drawing.”<sup>98</sup>

While legislation can attempt to make this claim equally accessible to all death row prisoners by establishing a universal length-of-delay presumption, collateral review procedures will still be exhausted at different rates from case to case. The only way around this is to reform capital processing systems and attempt to streamline the way different courts across the state approach these types of cases. Legislators might agree that this might entail an overhaul of the entire system.<sup>99</sup>

*3. Legislation must preserve the safeguards that seek to maximize efficiency within the administration of capital punishment.*

If we assume that delays are largely borne out the state’s desire to be painstakingly careful before determining to carry out an execution, and that long tenures on death row are just a function of the system’s many safeguards to ensure efficiency, then there is concern that this kind of claim would lead to shoddier litigation where the state would rush towards execution. Certainly this kind of scenario would be counterproductive to the underlying rationale for the Eighth Amendment claim.

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<sup>98</sup> *Id.* at 53.

<sup>99</sup> Aarons suggests these areas for reform will necessarily include: state court systems, Defense Services, Protecting Against Executing Factually or legally innocent persons, and reconsidering the roles of prosecutors, judges, defense attorneys, and the public.



Aarons proposes that the solution to this is to require that after such delay, the state must prove its need to now carry out the execution.<sup>100</sup> Placing this burden on the state would closely resemble the procedural requirements now in place for executing an individual who has recently declared himself insane while awaiting execution. “Similarly to insane capital defendants, inordinate delay claimants are challenging a legal classification into which they entered after the commission of the capital offense. The state should prove that the defendant is no longer within that class of defendants before it executes him.”<sup>101</sup> Along the same line, providing for such a claim should not mean that prisoners are armed with any fewer avenues for appeal. All of the safeguards currently operating to protect death row litigants should remain in place to ensure the integrity of the system where the stakes are so high.

#### *4. Legislation must maintain appropriate alternatives.*

Some opponents suggest that clemency is the remedy for those prisoners seeking review of their death sentence because of mitigating or intervening factors. They contend that there are other systems in place to address the problems wrought by inordinate delays. The problem with this reasoning is that clemency fails to adequately address many of the issues included herein and is not even granted very often anymore, meaning that clemency is not really a significant avenue of relief for capital defendants. Furthermore, “capital defendants who have been on death row for an inordinate length of time are not immune from the political aspects of the clemency decision” especially since length of delay has rarely had any impact on the decision to grant relief historically.<sup>102</sup> That said, legislation should nonetheless continue to provide a clemency appeal option for that very narrow set of cases that might be able to benefit from it, but it should not presume that clemency

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<sup>100</sup> *Id.* at 56.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 63.

adequate fulfills the function that an Eighth Amendment inordinate delay challenge does.

5. *Legislation must address the other causes of death row syndrome.*

While excessive time spent on death row awaiting execution is the hallmark of this claim, the actual conditions on death row markedly contribute to the psychological deterioration of inmates. Length of delay and conditions of confinement are inextricably linked in the death row phenomenon, a sentiment made particularly apparent in the *State v. Ross* case from Connecticut which is discussed in Section II. There, the former warden testified that the death row environment was much like being confined to a submarine or cave. The affidavits there also showed that the attitude of the guards contributed greatly to Ross's psychological infirmity, as they repeatedly made comments that could have been construed as encouragement to commit suicide.

Statistics figuring into the amount of time a death row inmate must spend in solitary confinement also implicates notions of cruel and unusual punishment, especially where solitary confinement methods were not initially designed to accommodate for prisoners now spending in excess of two decades on death row. Nick Yarris, a man who was exonerated by DNA evidence after spending 23 years on death row in Pennsylvania for a crime he did not commit, reported in the documentary "After Innocence" that for the first two years of his confinement he was not allowed to speak at all.<sup>103</sup> All of this testimony only begins to scratch the surface of what the actual conditions on death row entail, and the Eighth Amendment significance when these delays are unusually protracted. Since death row residencies are reaching unprecedented levels and will continue to, legislators must be proactive about addressing each of these elements specifically and providing for more humane conditions of confinement.

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<sup>103</sup> "After Innocence," 2005. See <http://www.afterinnocence.com> for more information about the project.

## CONCLUSION

Death row syndrome is a concept with a great deal of legal importance, especially since death row tenures in excess of decades are becoming increasingly commonplace across the United States. This phenomenon is particularly significant given that it is recognized elsewhere in the world and foreign governments are growing more reluctant to extradite criminals here because of the potential for extraordinary delays before execution. In the absence of outright abolition of the death penalty, courts and legislatures should evaluate this Eighth Amendment claim as one of first impression, and determine that the constitutional question is raised at least when a prisoner has spent more than twice the national average amount of time in death row confinement. Courts and legislatures must then carefully balance competing interests to provide for relief where it is necessary.