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## Omnes Vulnerant, Postuma Necat; All the Hours Wound, the Last One Kills: The Lengthy Stay on Death Row in America

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## LAW SUMMARY

# ***Omnes Vulnerant, Postuma Necat; All the Hours Wound, the Last One Kills: The Lengthy Stay on Death Row in America***

MEGAN ELIZABETH TONGUE\*

### I. INTRODUCTION

The Bureau of Justice Statistics has compiled statistical analyses showing that the average amount of time an inmate spends on death row has steadily increased over the past thirty years.<sup>1</sup> In fact, the shortest average amount of time an inmate spent on death row during that time period was seventy-one months in 1985, or roughly six years, with the longest amount of time being 198 months, or sixteen and one half years, in 2012.<sup>2</sup> This means that the amount of time an inmate spends on death row has almost tripled over the past few decades.<sup>3</sup>

Missouri has increased its rate of executions in recent years and tied with Texas for administering the most executions in 2014.<sup>4</sup> Between 1989 and 2014, the average stay on death row in Missouri was a little over twelve years, with the average stay for Missouri prisoners between 2013 and 2014 being roughly twenty years.<sup>5</sup> With the rapid rate of executions, a Missouri post-conviction attorney reports that her clients are now becoming “more stressed,” as inmates that her clients have been living with for ten to fifteen

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\* B.A. Stephens College, 2013; J.D. Candidate, University of Missouri School of Law, 2016; Note and Comment Editor, *Missouri Law Review*, 2015–2016. I would like to thank Dr. Paul Litton for reviewing this Note and mentoring me throughout the writing process. I would also like to thank Val Leftwich for allowing me to interview her about her inspiring work as a post-conviction attorney with the Missouri State Public Defender. A special thank you needs to be given to my undergraduate mentor, Alexandria Zylstra, for introducing me to this topic and encouraging me to pursue this career. I will be forever grateful to her.

1. Tracy L. Snell, *Capital Punishment 2012 – Statistical Tables*, BUREAU JUST. STATISTICS at table 10 (May 2014), <http://www.bjs.gov/content/pub/pdf/cp12st.pdf>. See Figure 1 *infra* p. 920.

2. *Id.*

3. *Id.*

4. *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976> (last visited June 22, 2015).

5. *Executions: 1989–2014*, MO. DEATH ROW, <http://missourideathrow.com/executions-1989-2009/> (last visited June 22, 2015).

years are just now being executed.<sup>6</sup> Arizona, Georgia, Florida, Missouri, Ohio, Oklahoma, and Texas are the only states to have executed any of their death row inmates in the past year.<sup>7</sup> Many states have only executed three or fewer inmates since the reinstatement of the death penalty in 1976; yet, they continue to retain the death penalty as a potential punishment for first-degree murder.<sup>8</sup>

Although many states rarely, if ever, execute their inmates, all states that currently have the death penalty have inmates on their death row.<sup>9</sup> How long is too long for these inmates to wait for a punishment they may never receive? If states are unwilling or unable to execute in a timely fashion, then are these inmates effectively experiencing life without parole with only the remote possibility of death at the hands of the state?

Why inmates spend so long on death row and the accompanying mental ramifications are discussed in Part II. Part III discusses the response of American courts to the lengthy stays of inmates on death row. Next, Part IV discusses the international opinion on America's lengthy stay on death row, international tribunal holdings on the matter, the philosophical implications of a lengthy stay on death row, and possible solutions. Finally, Part V concludes this Note, finding that abolition of the death penalty is the best solution.

## II. BACKGROUND: THE CONSEQUENCES OF A LONG STAY ON DEATH ROW

This Part discusses the appeals process for death row inmates and additionally exposes some of the factors giving rise to the lengthy stay on death row. Following that, Part II.B. describes the mental suffering that an inmate endures while on death row, and Part II.C. defines "Death Row Phenomenon."

### A. *Why the Long Wait?*

The reason there is so much time between sentencing and execution is the appellate process. If a defendant is sentenced to death after the guilt and sentencing phases of trial, his sentence is automatically appealed to the state's

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6. Interview with Valerie Leftwich, Post-Conviction Attorney, Missouri State Public Defender, in Columbia, Mo. (Oct. 10, 2014).

7. *Execution List 2014*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/execution-list-2014> (last visited June 22, 2015).

8. *Number of Executions by State and Region*, *supra* note 4. These states include: Colorado, Connecticut, Idaho, Kansas, Kentucky, Montana, Nebraska, New Hampshire, New Mexico, Oregon, Pennsylvania, South Dakota, Wyoming, and the U.S. Government. *Id.*

9. *Death Row Inmates by State and Size of Death Row by Year*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year?scid=9&did=188> (last visited June 22, 2015).

highest court.<sup>10</sup> Then, if the conviction is not overturned, the defendant can petition the Supreme Court of the United States on federal constitutional grounds.<sup>11</sup> If the Supreme Court denies certiorari, the defendant can then make a state post-conviction appeal to the original trial court judge.<sup>12</sup>

It is on this post-conviction appeal to the original trial court judge that the defendant can raise issues outside of the record, such as incompetent counsel, new evidence, *Brady* violations, etc.<sup>13</sup> After appealing to the trial court judge, the defendant can subsequently appeal to the state's intermediate appellate court and then to the state's highest court.<sup>14</sup> If the state's highest court upholds the conviction, the defendant can petition the Supreme Court of the United States again on issues outside of the record.<sup>15</sup>

If the defendant appeals to the Supreme Court, and certiorari is denied, state appeals have been exhausted.<sup>16</sup> It is at this point that the defendant can move on to federal appeals, starting with a federal habeas corpus petition, which is limited to federal issues and is filed with the U.S. District Court.<sup>17</sup> If the U.S. District Court hears the case, the defendant can appeal to the U.S. Court of Appeals.<sup>18</sup> If the Court of Appeals overturns the conviction, the state may have the opportunity to re-try the defendant, which starts the appellate process all over again.<sup>19</sup> But, if the Court of Appeals upholds the defendant's conviction, a final appeal can be made to the Supreme Court of the United States.<sup>20</sup> After that appeal, the defendant has effectively exhausted all possible appeals, but can now file for executive clemency with the governor, who can grant the defendant more time before execution or a lesser sentence.<sup>21</sup> If these petitions fail, then an execution warrant is either issued by the governor, the state's highest court, or the trial court judge. Generally, the department of corrections only has so much time to fulfill that warrant and

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10. *Death Penalty Appeals Process*, CAPITAL PUNISHMENT IN CONTEXT, <http://www.capitalpunishmentincontext.org/resources/dpappealsprocess> (last visited June 22, 2015).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* See *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that prosecutorial misconduct via withholding evidence can lead to defendant's death sentence being overturned).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* When the conviction is overturned, "[T]he court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255(b) (2012).

20. *Death Penalty Appeals Process*, *supra* note 10.

21. *Id.*

execute the prisoner.<sup>22</sup> But, in many instances, courts or the governor's counsel take many years to issue these warrants, which is why states like Kansas have prisoners on death row but have not executed anyone since 1976.<sup>23</sup>

These appeals take several years, if not decades, to complete. In attempt to limit the number of years these appeals can take, Congress enacted the Antiterrorism Effective Death Penalty Act ("AEDPA") in 1996 to create a statute of limitations on federal appeals from state judgments in death penalty cases.<sup>24</sup> The state is still able to decide how many appeals the defendant may have within that state, but the AEDPA limits how many appeals the federal government can allow.<sup>25</sup> If the defendant wishes to file a second appeal in federal court, it will be dismissed, except under exceptional circumstances, and a second appeal will only be heard if the Court of Appeals allows the District Court to hear it.<sup>26</sup> Furthermore, the Court of Appeals has only thirty days to make this decision after the petition is filed.<sup>27</sup> This causes an abbreviated timeline for the federal appeals process.

Another outcome of the AEDPA is that federal courts are now required to give priority to death penalty cases "over all noncapital matters."<sup>28</sup> In theory, this would assist in shortening the length of stay on death row by encouraging judges to hear capital cases before other hearings on their docket. Part of the intent of the AEDPA is to keep defendants from abusing the habeas corpus process and to shorten the delay between sentencing and execution.<sup>29</sup>

However, Valerie Leftwich, a post-conviction capital defense attorney in Missouri, stated that the AEDPA actually hurts capital cases by streamlin-

22. For example, an execution in Kentucky should be carried out on the fifth Friday following the affirmation of the sentence by the Supreme Court of Kentucky. KY. REV. STAT. ANN. § 431.218 (1980). If the execution does not take place on the day appointed, the governor can appoint a different day of execution and keep doing so until the sentence is ultimately carried out. *Id.*

23. *Number of Executions by State and Region Since 1976*, *supra* note 4.

24. 28 U.S.C. § 2244(a) ("No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus . . ."); *id.* § 2244(d)(1) ("A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.")

25. *Id.* § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.")

26. *Id.* § 2244(b)(4) ("A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.")

27. *Id.* § 2244(b)(3)(D).

28. *Id.* § 2266(a).

29. James Robertson, *Quo Vadis, Habeas Corpus?*, 55 BUFF. L. REV. 1063, 1082 (2008).

ing the appellate process.<sup>30</sup> These shortened periods take away the necessary time to investigate issues on appeal, which prevents her from providing the quality of counsel she wants to provide.<sup>31</sup> Ultimately, the AEDPA makes her job more difficult, but she admits that Congress has met its goal because this statute speeds up executions.<sup>32</sup> But does abbreviating the federal appeals process make the death penalty any more effective if the appropriate amount of time required to build an adequate defense is unavailable?

As a result of the lengthy appeals process, an inmate can spend an inordinate amount of time on death row awaiting his sentence. But what effect does this have on him? What are the psychological consequences of telling someone he has been sentenced to death and then asking him to sit and wait years for his execution day to come?

### B. *Psychological Ramifications of the Lengthy Stay*

Dr. Johnnie L. Gallemore, Jr., completed a study on eight men who were sentenced to death and noted the effect their prison time had on them.<sup>33</sup> According to Dr. Gallemore, one of the “most stressful of all human experiences is the anticipation of death at a specific moment in time and in a known manner.”<sup>34</sup> Dr. Gallemore conducted numerous medical tests on these inmates over a two-year period to see how the health of the inmates changed while on death row.<sup>35</sup>

He found what was to be expected: severe depression.<sup>36</sup> During observation, one of the inmates seemed to reach a state of total psychosis from his experiences on death row, and upon further study, showed that he was suffering from extreme paranoia and delusions.<sup>37</sup> Another inmate showed signs of depression upon the initial interview and by the end of the two-year period had resorted to severe self-mutilation.<sup>38</sup> A third inmate appeared adequate after the first interview, but by the end of Dr. Gallemore’s study, the inmate had been psychiatrically evaluated twenty-five times, complaining of insomnia and anxiety, and requesting a multitude of medications.<sup>39</sup> He was hospitalized after only twenty months on death row because he hoarded the medi-

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30. Interview with Valerie Leftwich, *supra* note 6.

31. *Id.*

32. *Id.*

33. Johnnie L. Gallemore, Jr., M.D. & James H. Pantou, M.A., *Inmate Responses to Lengthy Death Row Confinement*, 129 AM. J. PSYCHIATRY 167, 167 (Aug. 1972).

34. *Id.*

35. *Id.*

36. *Id.* at 170.

37. *Id.* at 169.

38. *Id.* “[The inmate] stuck a staple and a broken ice cream spoon into his arm ‘just to see the blood.’” *Id.*

39. *Id.*

cation he had received and suffered a serious drug overdose.<sup>40</sup> It remains unclear whether suicide was his intention.<sup>41</sup>

This study came at a very interesting time in this country's history of imposing the death penalty. It was in 1972 that Dr. Gallemore's article was published, which was the same year that the Supreme Court of the United States struck down the states' death penalty statutes, as their implementation was considered unconstitutional.<sup>42</sup> Dr. Gallemore cautioned that if the death penalty were not reinstated, careful consideration would need to be given to those that had already spent so long on death row.<sup>43</sup> He warned that, in states where a commuted life sentence may offer an opportunity for parole, death row inmates may not be able to safely reenter society, and they may pose a danger to the public as a result of the psychological toll of death row.<sup>44</sup>

In the years since Dr. Gallemore's study, psychiatrists have been diagnosing the psychosis that accompanies time spent on death row as "Death Row Syndrome."<sup>45</sup> Death Row Syndrome is a compilation of the physical, experimental, and temporal aspects of death row.<sup>46</sup> The physical aspect of the syndrome is something that many prisoners face, whether on death row or not, which results from horrible prison conditions – such as, cramped cells, limited human contact, constant surveillance, etc.<sup>47</sup> The experimental aspect is the constant fear of knowing that you are going to die.<sup>48</sup> Finally, the temporal aspect is in reference to the decades a prisoner can spend on death row.<sup>49</sup> Taken together, these three elements constitutes Death Row Syndrome, which often leads to suicidal tendencies and frequent waivers of appeals to expedite the execution process and end the torture.<sup>50</sup>

Dr. Stuart Grassian coined the term "Death Row Syndrome" in 1986.<sup>51</sup> The conditions he described in his research of fourteen inmates on death row

40. *Id.*

41. *Id.*

42. *Id.* at 171. See *Furman v. Georgia*, 408 U.S. 238 (1972) (holding that current death penalty legislation is unconstitutional under the Eighth Amendment's Cruel and Unusual Punishment Clause).

43. Gallemore, *supra* note 33 at 171.

44. *Id.*

45. Patricia Cooper, *Competency of Death Row Inmates to Waive the Right to Appeal: A Proposal to Scrutinize the Motivations of Death Row Volunteers and to Consider the Impact of Death Row Syndrome in Determining Competency*, 28 DEV. IN MENTAL HEALTH L. 2, 106 (Jul. 2009).

46. *Id.* at 119.

47. *Id.* at 120.

48. *Id.*

49. *Id.*

50. *Id.*

51. Harold I. Schwartz, M.D., *Death Row Syndrome and Demoralization: Psychiatric Means to Social Policy Ends*, 33 J. OF THE AM. ACAD. OF PSYCHIATRY & L. 150, 153–55 (2005).

were much worse than death row conditions today.<sup>52</sup> Dr. Grassian described twenty-three hours a day of unbroken confinement in a six- by nine-foot windowless cell with only a steel bed, table, and stool; a situation that would leave any person in a state of psychosis, whether he was to be executed or not.<sup>53</sup> Psychiatrists argue that, even though the conditions are not as harsh today as they were twenty years ago, the combination of confinement and anxiety concerning an impending execution can still leave inmates in a state of psychosis.<sup>54</sup> A problem lies with whether to diagnose Death Row Syndrome as a mental illness that may leave an inmate incompetent and, therefore, insane and ineligible for execution, as laid out in *Ford v. Wainwright*.<sup>55</sup>

In 1986, in *Ford v. Wainwright*, the Supreme Court of the United States held that a state could not execute someone deemed to be insane (and therefore incompetent).<sup>56</sup> From the Supreme Court's perspective, an incompetent person cannot be executed because he will not know why he is being punished and will not understand the implications of this penalty.<sup>57</sup> Alvin Ford had spent a total of eleven years on death row and it was during that time that he became psychotic.<sup>58</sup> A psychiatrist was forced to make the distinction between competence and incompetence, knowing that his determination could be lethal to his patient.<sup>59</sup> This left the psychiatrist in a quagmire, forcing him to either spare a man's life or condemn him to death, which is a very difficult situation for a psychiatrist to be put in.<sup>60</sup>

Dr. Harold I. Schwartz, Psychiatrist-in-Chief at Hartford Hospital in Hartford, Connecticut, found that if Death Row Syndrome can be used to find an inmate incompetent, then this would lead to the abolition of the death penalty via psychiatry.<sup>61</sup> Dr. Schwartz worried that the law will try to ride on the coattails of psychiatry to end the death penalty, but he wanted policy makers to understand that Death Row Syndrome is not an easily diagnosable or widely recognized mental illness.<sup>62</sup> Therefore, should a diagnosis of Death Row Syndrome excuse an inmate from execution or would this lead to further complications between a court's judgment and a psychiatrist's diagnosis?

52. *Id.*

53. *Id.*

54. *Id.*

55. 477 U.S. 399 (1986).

56. *Id.* at 417–18.

57. *Id.* at 417.

58. Douglas A. Sargent, *Treating the Condemned to Death*, 16 HASTINGS CTR. REPORT, no. 6, Dec. 1986, at 5. Douglas A. Sargent is an M.D., J.D., and was director of the Neuroscience Consultation Group. *Id.*

59. *Id.*

61. *Id.*

61. Schwartz, *supra* note 51, at 154. Dr. Schwartz believes in the abolishment of the death penalty but fears that there is a confusion between Death Row Syndrome and “morbid existential distress” or “demoralization syndrome,” which is where terminally ill patients wish to cease treatment. *Id.*

62. *Id.* at 155.

### C. Application of Death Row Syndrome

Anticipation of death is an extremely stressful factor for death row inmates.<sup>63</sup> After clinical evaluations and psychological testing, researchers have concluded that there is a certain hardening of the “psychological defenses” of death row inmates.<sup>64</sup> Even though the findings determined that an inmate is able to adapt to death row, the adaptation leaves only the shell of a person, one who is socially undesirable.<sup>65</sup> A good example of one such “shell” is serial killer Michael Ross, who was involved in the first case that addressed Death Row Syndrome.

Michael Ross was forty-five years old when he was executed for murdering four women in Connecticut in the 1980s.<sup>66</sup> Ross admitted to killing eight women in a crime spree covering five states.<sup>67</sup> Ross, a criminal whom society had little to no sympathy for, waived each of his appeals and admitted he wanted to die.<sup>68</sup> It was his court-appointed attorneys and his father who attempted to halt the execution by claiming that Ross was incompetent to waive appeal.<sup>69</sup>

After Ross’s conviction and death sentence were affirmed on direct appeal, Ross attempted to waive further appeal and post-conviction review of his sentence, but his counsel argued that the mental disorders Ross developed while on death row made him incompetent to waive appeal.<sup>70</sup> The day before Ross’s execution was held, Judge Chatigny of the District Court for the District of Connecticut had a telephone conference with the attorneys handling the case and shared his concern about a letter he received from Ross’s cellmate, who claimed that the conditions of death row may have affected Ross’s competence.<sup>71</sup> Judge Chatigny further expressed concern that Dr. Michael Norko, the psychiatrist who found Ross competent for execution,<sup>72</sup> was not familiar with Death Row Syndrome.<sup>73</sup> Judge Chatigny even threatened one of Ross’s attorneys with the loss of his license if it turned out that Ross was executed even though he was incompetent because he suffered from Death Row Syndrome.<sup>74</sup> The Supreme Court of Connecticut ultimately concluded that, even though Ross had a mental disorder, it did not *substantially* affect

63. Marianne C. Kastrup, *Psychiatry and the Death Penalty*, J. MED. ETHICS 171, 182 (1988).

64. *Id.*

65. *Id.*

66. *Connecticut Serial Killer Put to Death*, CNN (May 13, 2005, 5:03 AM), <http://www.cnn.com/2005/LAW/05/13/ross.execution/>.

67. *Id.*

68. *Id.*

69. *Id.*

70. *State v. Ross*, 873 A.2d 131, 133 (Conn. 2005).

71. *Id.* at 137.

72. *Id.* at 135.

73. *Id.* at 137.

74. *Id.* at 138.

his ability to waive appeal.<sup>75</sup> This case was revolutionary because it was the first to address Death Row Syndrome and allowed the discussion to expand beyond “medical literature” and into “legal literature.”<sup>76</sup>

The overlap between “medical literature” and “legal literature” began with *Ross* in regards to the psychological effects of time spent on death row.<sup>77</sup> The argument presented was whether it was cruel and unusual to keep someone in a state of anxiety about his life for such a long time and *then* execute him. Several courts have addressed the issue, but the majority has dismissed this argument by shifting responsibility for resolution between legislatures, federal courts, and state courts, or by finding that the lengthy amount of time is inevitable or constitutionally acceptable.

### III. AMERICAN COURTS ON THE LENGTH OF STAY ON DEATH ROW

American courts acknowledge that inmates spend an inordinate amount of time on death row, and even admit that that time spent may be horrible to endure. It was not until recently that one court came forward and found that a substantial delay in execution can no longer be tolerated.<sup>78</sup> But, this court is in the minority. American courts continue, and have for many years, to allow an inmate to suffer through the dregs of endless appeals and the mental illness that potentially accompanies it.

#### A. *The History of Lengthy Stays on Death Row*

In 1890, in the case *In re Medley*, the state of Colorado allowed Medley, who was sentenced to death, to remain totally ignorant of the day or time he was to be executed.<sup>79</sup> The Supreme Court of the United States held that Medley, having been denied the knowledge of when his execution was to take place, was being subjected to an additional punishment.<sup>80</sup> The Court held that Medley could only receive punishments that were prescribed by sovereign authority, which did not include the authority of the prison warden where Medley was being held.<sup>81</sup> The Supreme Court determined that when a prisoner is confined and awaiting his impending execution, he is subjected to “one of the most horrible feelings,” which “is the uncertainty during the whole of it.”<sup>82</sup> It is the “immense mental anxiety” caused by the uncertainty

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75. *Id.* at 149 (emphasis added).

76. *Id.* at 137 n.6.

77. *Id.*

78. *See infra* Part III.D.

79. *In re Medley*, 134 U.S. 160, 172 (1890) (“[T]he prisoner is to be kept in utter ignorance of the day and hour when his mortal life shall be terminated by hanging, until the moment arrives when this act is to be done.”).

80. *Id.* at 172–73.

81. *Id.*

82. *Id.* at 172.

of the execution day that the Court considered to be an additional punishment and, therefore, improperly given by the warden.<sup>83</sup>

In 1959, the Supreme Court of California found that a stay of more than eleven years on death row was definitely unusual and that there was “no doubt that mental suffering attends such detention.”<sup>84</sup> The court made this observation in response to defendant Chessman’s Eighth Amendment cruel and unusual punishment claim about his lengthy stay on death row.<sup>85</sup> Ultimately, the California court held that there was no cruel and unusual punishment imposed on Chessman.<sup>86</sup> This was not the only state court to discuss the length of stay on death row, but like Chessman, all courts, whether federal or state, ultimately rejected this claim.<sup>87</sup> It was not until 1995 that the Supreme Court even considered reviewing the claim of the unconstitutionality of a lengthy stay on death row.

### B. The “Lackey” Claim

Clarence Lackey was convicted of capital murder in 1977 for the death of Diane Kumph.<sup>88</sup> A final conviction and schedule for execution was not granted to Lackey until seventeen years later due to two mandatory appeals in Texas state courts and federal habeas corpus proceedings.<sup>89</sup> In 1995, the Supreme Court denied certiorari to hear Lackey’s novel Eighth Amendment claim that an inordinate delay of execution was cruel and unusual punishment.<sup>90</sup>

Justice Stevens wrote a memorandum in dissent of the denial of certiorari.<sup>91</sup> In his memorandum, he stated that the Supreme Court permitted capital punishment because the Framers accepted the death penalty and because it served the necessary purposes of retribution and deterrence.<sup>92</sup> Justice Stevens argued that Lackey’s stay on death row for seventeen years would have been rare and unusual to the Framers and, “[A]fter such an extended time, the ac-

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83. *Id.*

84. *People v. Chessman*, 341 P.2d 679, 699 (Cal. 1959) (en banc) *overruled in part on other grounds by* *People v. Morse*, 388 P.2d 33 (Cal. 1964) (en banc).

85. *Id.*

86. *Id.*

87. *See* U.S. ex rel. *Townsend v. Twomey*, 452 F.2d 350 (7th Cir. 1974) (holding that *Townsend*’s sentence must be vacated due to improper voir dire and noting the unfairness of his fifteen year confinement on death row); *Richmond v. Ricketts*, 640 F.Supp. 767, 803 (D. Ariz. 1986) (holding that *Richmond*’s claim of long confinement on death row served no penal purpose and was therefore meritless).

88. *Lackey v. State*, 638 S.W.2d 439, 439 (Tex. Crim. Ct. App. 1982).

89. Brief for Petitioner, *Lackey v. Texas*, 514 U.S. 1045 (1995) (No. 94-8262), 1995 WL 17904041, at \*ii.

90. *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (Agreeing with Justice Stevens, Justice Breyer thinks this issue is “an important undecided one.”).

91. *Id.*

92. *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 186 (1976)).

ceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted.”<sup>93</sup> Justice Stevens also found that spending seventeen years on death row lowers the deterrent value of a death sentence since there is minimal difference (at the current rate of execution) between death and life without parole.<sup>94</sup> According to Justice Stevens, if these purposes are not served, then capital punishment should be considered cruel and unusual punishment under the Eighth Amendment.<sup>95</sup> Justice Stevens further noted that this case is one that would need to be examined further in the state courts and “seem[ed] an ideal example of one which would benefit from such further study.”<sup>96</sup> Since Justice Stevens’s memorandum in *Lackey*, there have been several additional cases where the Supreme Court denied certiorari on the supposed unconstitutionality of a lengthy stay on death row, and Justices continue to write memoranda either in concurrence or dissent of the denial.<sup>97</sup>

In 1999, the Supreme Court again denied certiorari to hear the cases of Thomas Knight and Carey Moore, both of whom sought relief under the Eighth Amendment’s Cruel and Unusual Punishment Clause for their lengthy stays on death row.<sup>98</sup> Justices Stevens, Thomas, and Breyer each wrote memoranda either in concurrence or dissent of the denial of certiorari.<sup>99</sup> Justice Stevens emphasized that when a petition is denied certiorari, it does not

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93. *Id.*

94. *Id.* See, e.g., *Coleman v. Balkcom*, 451 U.S. 949, 952 (1981) (Stevens, J., concurring) (“[T]he deterrent value of incarceration during that period of uncertainty may well be comparable to the consequences of the ultimate step itself.”).

95. *Id.* See *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring) (“[When the death penalty] ceases realistically to further these purposes, . . . its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.”).

96. *Id.* See, e.g., *McCray v. New York*, 461 U.S. 961, 963 (1983) (“[When certiorari is denied on an important topic, the state and federal courts will] serve as laboratories in which the issue receives further study before it is addressed by this Court.”).

97. See *Carpenter v. Gomez*, 516 U.S. 981 (1995) (cert. denied); *Gomez v. Fierro*, 519 U.S. 918 (1996) (cert. was granted, but the Court did not make a ruling and remanded the case to the Ninth Circuit); *Elledge v. Florida*, 525 U.S. 944 (1998) (cert. denied); *Knight v. Florida*, 120 S. Ct. 459 (1999) (cert. denied); *Foster v. Florida*, 537 U.S. 990 (2002) (cert. denied); *Allen v. Ornoski*, 546 U.S. 1136 (2006) (cert. denied) (raising the question as to whether a blind, diabetic, wheel-chair-bound, 76-year-old man’s death sentence would constitute cruel and unusual punishment.); *Smith v. Arizona*, 552 U.S. 985 (2007) (cert. denied); *Johnson v. Bredesen*, 130 S. Ct. 541 (2009) (cert. denied); *Valle v. Florida*, 132 S. Ct. 1 (2011) (cert. denied); *Muhammad v. Florida*, 134 S. Ct. 894 (2014) (cert. denied).

98. *Knight v. Florida*, 120 S. Ct. at 459.

99. *Id.*

make the claim meritless.<sup>100</sup> Justice Thomas, in concurrence of the denial of certiorari, found no American “tradition” or precedent to support this kind of claim.<sup>101</sup> He asked the Court to reflect on the “experiment” that Justice Stevens suggested in *Lackey v. Texas* and consider what that experiment concluded, implying that the states have formed their own conclusions on the topic – finding it meritless.<sup>102</sup>

Finally, Justice Breyer commented at length on not only the unconstitutionality of the lengthy stays on death row the defendants were enduring, but also how international courts have handled this question.<sup>103</sup> Justice Breyer disagreed with Justice Thomas that the *Lackey* experiment has come to a close because only four of the eight cases Justice Thomas mentioned supported his conclusion.<sup>104</sup> Justice Breyer believed the *Lackey* claim should be decided by the Court because, “Where a delay, measured in decades, reflects the State’s own failure to comply with the Constitution’s demands, the claim that time has rendered execution inhuman is a particularly strong one.”<sup>105</sup>

In 2009, the Supreme Court of the United States again denied certiorari to hear the case of Cecil Johnson, who waited nearly twenty-nine years on death row.<sup>106</sup> Justices Stevens and Breyer wrote a memorandum disagreeing with the denial of certiorari.<sup>107</sup> The Justices determined that executing Johnson after this length of time would be “inhumane” and stated they would have granted Johnson’s petition for certiorari.<sup>108</sup> They believed that “state-caused delay in state-sponsored killings can be unacceptably cruel.”<sup>109</sup> The Justices also considered this case to be worthy of certiorari because Johnson brought

100. *Id.* See, e.g., *Barber v. Tennessee*, 513 U.S. 1184 (1995) (opinion of Stevens, J., respecting denial of certiorari).

101. *Knight*, 120 S. Ct. at 459. Justice Thomas does not support reliance “on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council.” *Id.*

102. *Id.* at 461. See, e.g., *People v. Frye*, 959 P.2d 183, 262 (Cal. 1998); *People v. Massie*, 967 P.2d 29, 44–45 (Cal. 1998); *Ex parte Bush*, 695 So. 2d 138, 140 (Ala. 1997); *State v. Schackart*, 947 P.2d 315, 336 (Ariz. 1997), *cert. denied*, 525 U.S. 862 (1998); *Bell v. State*, 938 S.W.2d 35, 53 (Tex. Crim. App. 1996) (en banc), *cert. denied*, 522 U.S. 827 (1997); *State v. Smith*, 931 P.2d 1272, 1287–88 (Mont. 1996); *White v. Johnson*, 79 F.3d 432, 438–39 (5th Cir. 1996), *cert. denied*, 519 U.S. 911 (1996); *Stafford v. Ward*, 59 F.3d 1025, 1028 (10th Cir. 1995). “Each of these cases rejected the [Lackey] claim on the merits.” *Knight v. Florida*, 120 S. Ct. at 460–61.

103. *Knight*, 120 S. Ct. at 462–64. See *supra* Part II. International courts will be discussed in a subsequent section. See *infra* Part IV.

104. *Knight*, 120 S. Ct. at 464–65. See *Bell v. State*, 938 S.W.2d 35 (20 years; conviction overturned once); *Ex parte Bush*, 695 So. 2d 138 (16 years; conviction overturned twice); *State v. Smith*, 931 P.2d 1272 (13 years; sentence overturned once); *People v. Massie*, 967 P.2d 29 (16 years; sentence overturned once).

105. *Knight*, 120 S. Ct. at 461.

106. *Johnson v. Bredesen*, 130 S. Ct. 541 (2009).

107. *Id.* at 542.

108. *Id.*

109. *Id.*

his Eighth Amendment claim under 42 U.S.C. § 1983, whereas earlier claims had been brought under the doctrine of habeas corpus.<sup>110</sup> This was novel to the Justices, who felt it was important to address whether a *Lackey* claim is recognizable under this statute.<sup>111</sup> Justices Stevens and Breyer thought it regrettable that other Justices continued to find the *Lackey* claim without enough merit to warrant the Court's attention.<sup>112</sup>

Justice Thomas concurred with the denial of certiorari and determined that Johnson brought about his own lengthy stay on death row by continuing to unsuccessfully challenge his death sentence by appealing to state and federal courts and petitioning for executive clemency.<sup>113</sup> Justice Thomas found no support for the *Lackey* claim in the Constitution, legislation, or common law.<sup>114</sup> He concluded that as long as defendants have the "procedural safeguards" the Court has always supported, "[D]efendants who avail themselves of these procedures will face the delays Justice Stevens laments."<sup>115</sup>

### C. Recent Lackey Decisions: Supreme Court of the United States and Supreme Court of Missouri

The Supreme Court of the United States denied certiorari in the case of *Muhammad v. Florida* in 2014.<sup>116</sup> Muhammad was sentenced to death in 1983 for the first-degree murder of James Burke after his trial counsel failed to present mitigating evidence.<sup>117</sup> In his petition for certiorari to the Supreme Court for a stay of execution, after spending thirty years on death row,<sup>118</sup>

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110. *Id.* 42 U.S.C. § 1983 (2012).

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

*Id.*

111. *Johnson*, 130 S. Ct. at 543.

112. *Id.* at 544.

113. *Id.*

114. *Id.* See *Knight v. Florida*, 120 S. Ct. 459, 459 (1999) (Thomas, J., concurring).

115. *Johnson*, 130 S. Ct. at 546.

116. *Muhammad v. Florida*, 134 S. Ct. 894 (2014).

117. Initial Brief of Appellant at 2, *Muhammad v. State*, 22 So. 3d 538 (Fla. 2009) (No. SC09-170), 2009 WL 2001393 (June 22, 2009).

118. *Execution List 2014*, *supra* note 7.

Muhammad made a final appeal, relying on *Lackey*.<sup>119</sup> Justice Breyer disagreed with the denial of certiorari, stating that he would grant the stay of execution and hear the petition limited to the *Lackey* claim.<sup>120</sup>

The Supreme Court of Missouri heard the case of Walter Barton in early 2014.<sup>121</sup> Barton's conviction for first-degree murder and subsequent sentence of death were affirmed on direct appeal. Barton sought review by the Supreme Court of Missouri and brought several other claims, including the claim that it was unconstitutional to execute him after he had waited more than twenty years on death row.<sup>122</sup> Barton claimed that this delay violated the Eighth Amendment's prohibition of cruel and unusual punishment and the Fourteenth Amendment's Due Process Clause.<sup>123</sup> The court held that this claim lacked merit because the cases Barton cited discussed the importance of sentencing procedures but did not address the delay between sentencing and execution.<sup>124</sup> In a footnote, the court cited *Lackey v. Texas* and stated that *Lackey* did not support Barton's position because only one or two Justices of the Supreme Court of the United States found the claim to have merit, and that all subsequent cases rejected this claim on its merits.<sup>125</sup>

What does this calm rejection of the *Lackey* argument say about Missouri? As stated earlier, Missouri has been on an execution binge. Then-Chief Justice of the Supreme Court of Missouri, Mary Rhodes Russell, recently discussed the "backlog" of prisoners on death row.<sup>126</sup> She stated that it is "required by law that the Supreme Court . . . set execution dates," and now that the controversy that surrounded certain lethal injection protocols has been resolved, executions can continue at their unrelenting pace.<sup>127</sup> She claimed that she and the other judges on the court are just doing their job by

119. *Muhammad v. Florida*, 134 S. Ct. 894 (2014); see *Lackey v. Texas*, 514 U.S. 1045 (1995).

120. *Muhammad*, 134 S. Ct. at 894.

121. *Barton v. State*, 432 S.W.3d 741 (Mo. 2014).

122. *Id.* at 749, 763.

123. *Id.* at 763.

124. *Id.* at 764 (citing *Lankford v. Idaho*, 500 U.S. 110 (1991) and *Woodson v. North Carolina*, 428 U.S. 280 (1976)).

125. *Id.* at 763 n.9 (citing *Knight v. Florida*, 528 U.S. 990, 992–93 n.4 (1999) (Thomas, J., concurring in the denial of certiorari)). Even though the Supreme Court of Missouri continues to reject this claim, a Missouri case that rose to the Eighth Circuit discussed this claim in depth in 1998; and, though the Eighth Circuit found that the *Lackey* claim could not be raised by petitioner because procedurally barred, the court did find "that delay in capital cases is too long . . . [b]ut [that] delay . . . is a function of the desire of our courts . . . to get it right; . . . [to hear] any argument that might save someone's life."). *Chambers v. Bowersox*, 157 F.3d 560, 570 (8th Cir. 1998).

126. Mike Lear, *Chief Justice: Executions Don't Reflect On Her Term, Missouri High Court's Ideology*, MISSOURINET (June 30, 2015), <http://www.missourinet.com/2015/06/30/chief-justice-executions-dont-reflect-missouri-high-courts-ideology/>.

127. *Id.*

setting execution dates because they must follow legislative policy.<sup>128</sup> This argument is easily rejected by many other states that retain the death penalty yet choose to forgo imposing the sentence.<sup>129</sup>

Former inmate, David Zink, was executed in Missouri on July 14, 2015, after spending more than a decade on death row.<sup>130</sup> In David's final words, he not only expressed sorrow for his victim and her family, but also mentioned the "serious flaws that offend the basic concept of the American Justice System."<sup>131</sup> In his final message to other death row inmates, David encouraged them to understand that everyone is going to die and to embrace the death penalty before society "figures it out" and condemns them to a lingering death.<sup>132</sup> The discussion of a lingering death is worth more than a mere footnote in a Supreme Court of Missouri decision, and to become so detached as to inspire the use of the word "backlog" to describe the elimination of people should be a red flag in our society.

#### D. Jones v. Chappell: *California District Court Decides Enough is Enough*

In *Jones v. Chappell*, Judge Cormac J. Carney, of the District Court for the Central District of California, wrote that since the death penalty was reinstated in California in 1978, over 900 persons have been sentenced to death, but out of those 900, only thirteen have been executed.<sup>133</sup> Judge Carney found that a system that produces such results can only lead to a lengthy and inordinate delay.<sup>134</sup> He found the amount of time California's prisoners spend on death row to be so long that when, or if, execution comes, it will be arbitrarily inflicted and will have no retributive purpose.<sup>135</sup> Judge Carney

128. *Id.*

129. For example, California retains hundreds on death row, but no one has been executed in eight years. See *Number of Executions by State and Region Since 1976*, *supra* note 4; *Death Row Inmates by State and Size of Death Row by Year*, *supra* note 9. Also, Pennsylvania has over one hundred inmates on death row, but has not executed anyone in fifteen years. See *Number of Executions by State and Region Since 1976*, *supra* note 4; *Death Row Inmates by State and Size of Death Row by Year*, *supra* note 9.

130. Associated Press, 'Embrace Your Execution': Missouri Rapist Uses Last Words to Tell Fellow Inmates it's an Easier Form of Death than Serving Life Without Parole, DAILYMAIL, (July 14, 2015), <http://www.dailymail.co.uk/news/article-3160279/Missouri-death-row-inmate-presses-appeals-clemency-bid.html>.

131. *Id.*

132. *Id.*

133. *Jones v. Chappell*, 31 F.Supp.3d 1050, 1052 (C.D. Cal. 2014).

134. *Id.* at 1053.

135. *Id.* Retribution is when punishment is "inflicted on someone as vengeance for a wrong or criminal act." *Retribution*, OXFORD DICTIONARIES, [http://www.oxforddictionaries.com/us/definition/american\\_english/retribution](http://www.oxforddictionaries.com/us/definition/american_english/retribution) (last visited Sept. 26, 2015).

vacated Jones's death sentence and declared California's death penalty system unconstitutional.<sup>136</sup>

As one can imagine, this caused quite a stir for the California courts and left them in limbo about whether they should support or reject the death penalty in their own courts. This holding was met with considerable shock despite the fact that not a single execution had taken place in California since 2006.<sup>137</sup> A poll was taken after this decision was handed down asking Californians about their view on the death penalty.<sup>138</sup> Fifty-six percent of Californians surveyed still support the death penalty and wanted to keep it, which was the lowest support for the death penalty in California since 1965.<sup>139</sup>

The California Attorney General has appealed to the Ninth Circuit Court of Appeals to have the *Jones* decision overturned.<sup>140</sup> The Ninth Circuit denied the appeal, but after a re-filing by Ernest Jones, the Ninth Circuit will hear Jones's habeas petition on the same grounds.<sup>141</sup> One of the problems the Ninth Circuit will likely face when reviewing this case is how to rectify the delayed justice caused by California's ineffective death penalty system. Lengthy appeals are not just brought before state courts, but before federal courts as well.<sup>142</sup>

Judge Carney invalidated California's death penalty scheme because of its lengthy delays in executing prisoners, but what about the federal delays

136. *Jones*, 31 F.Supp.3d at 1053.

137. Erik Eckholm & John Schwartz, *California Death Penalty System Is Unconstitutional, Federal Judge Rules*, N.Y. TIMES (July 16, 2014), [http://www.nytimes.com/2014/07/17/us/california-death-penalty-unconstitutional-federal-judge-says.html?\\_r=0](http://www.nytimes.com/2014/07/17/us/california-death-penalty-unconstitutional-federal-judge-says.html?_r=0) (quoting *Jones*, 31 F.Supp.3d at 1053).

138. James Queally, *Support for Death Penalty in California at Lowest Point in 50 Years*, LOS ANGELES TIMES, (Sept. 13, 2014, 3:54 PM), <http://www.latimes.com/local/lanow/la-me-ln-california-death-penalty-support-20140913-story.html>.

139. *Id.* The study was conducted by the Field Poll. *Id.*

140. *What's the Likely Ninth Circuit Timeline for Deciding the Fate of California's Death Penalty in Jones v. Chappell?*, SENTENCING LAW AND POLICY: AN AFFILIATE OF THE LAW PROFESSOR BLOGS NETWORK (Aug. 25, 2014), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2014/08/whats-the-likely-ninth-circuit-timeline-for-deciding-the-fate-of-californias-death-penalty-in-jones.html](http://sentencing.typepad.com/sentencing_law_and_policy/2014/08/whats-the-likely-ninth-circuit-timeline-for-deciding-the-fate-of-californias-death-penalty-in-jones.html).

141. *Jones*, 31 F.Supp.3d 1050, *appeal dismissed* 14-56302 (9th Cir. Dec. 1, 2014). Ernest Jones v. Ron Davis, 14-56373, *hearing on* Aug. 31, 2015 at 9:00 A.M. at the U.S. Court of Appeals for the Ninth Circuit, <http://www.ca9.uscourts.gov/calendar/view.php?hearing=August%20-%20Richard%20H.%20Chambers%20US%20Court%20of%20Appeals,%20Pasadena&dates=31&year=2015>.

142. James Ching, *Ninth Circuit Preview: Jones v. Chappell Invalidates California Death Penalty*, LAW.COM (Jul. 18, 2014), <http://www.law.com/sites/jamesching/2014/07/18/ninth-circuit-preview-jones-v-chappell-invalidates-california-death-penalty/?slreturn=20140913142845>.

that makeup about fifty percent of time spent on death row?<sup>143</sup> Is he also calling federal capital punishment laws into question? This will be a difficult decision that the Ninth Circuit will inevitably have to face, but it will be most interesting to see if the Ninth Circuit chooses to side with the District Court and abolish the death penalty in California. If the Ninth Circuit determines California's death penalty is unconstitutional, the decision would be contrary to its own opinion in *McKenzie v. Day*, which stated that the *Lackey* Claim had too severe of policy implications,<sup>144</sup> and would also be contradictory to its opinion in *Smith v. Mahoney*, which held that a *Lackey* claim would be procedurally barred under *Teague v. Lane*, since the *Lackey* claim was not brought in a state appeal.<sup>145</sup>

Although the *Jones* decision is based on California's inadequate death penalty system,<sup>146</sup> there is nothing in the opinion to suggest that this situation could not be rectified by potentially reworking the system to be more productive. If California's death penalty system can be fixed, how should other states go about fixing their own systems? If California's death penalty system cannot be fixed, is this the catalyst needed for other states to review their own death penalty systems and also rule them unconstitutional?

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143. *Id.*

144. *McKenzie v. Day*, 57 F.3d 1461, 1489 (9th Cir. 1995) (Norris, J., dissenting). Here the dissenting judge was disgruntled by the prosecution's argument that a *Lackey* claim had severe policy implications – the argument that this would affect potentially thousands of inmates and cause large, statewide expense. *Id.* “Certainly the Supreme Court in *Brown v. Board of Ed.* . . . did not consider the inevitable – and clearly enormous – dislocation and administrative costs of desegregating the public schools when it decided that segregated schools violated the Equal Protection Clause of the Fourteenth Amendment.” *Id.* (citation omitted).

145. *Smith v. Mahoney*, 611 F.3d 978, 998–99 (9th Cir. 2010) (quoting *Teague v. Lane*, 489 U.S. 288, 301 (1989) (“In sum, a state court considering Smith's [*Lackey*] claim at the time his conviction became final would not have felt compelled by existing precedent to conclude that the rule sought was required by the Constitution. . . . Enforcing the rule proposed by Smith would therefore ‘break[] new ground or impose[] a new obligation on the States,’ . . . and we must therefore reject it.”).

146. *Jones*, 31 F.Supp.3d at 1053. The Connecticut Supreme Court recently abolished the state's death penalty, citing in part the *Jones* and *Lackey* decisions. *State v. Santiago*, No. 17413, 2015 WL 4771974, at \*38 (Conn. Aug. 25, 2015). The Court stated, “The . . . reason the death penalty has lost its retributive mooring in Connecticut is that the lengthy if not interminable delays in carrying out capital sentences ‘do not just undermine the death penalty's deterrent effect; they also spoil its capacity for satisfying retribution.’” *Id.* (quoting DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 45 (2010)) (citing *Jones*, 31 F.Supp.3d at 1064). Due to the important conversation occurring in *Santiago*, it is worthy of its own law summary.

## IV. DISCUSSION

How does the *Lackey* issue get resolved? One California District Court has decided to end the death penalty in California. The American consensus is that the death penalty is an acceptable punishment, one that an inmate justly deserves.<sup>147</sup> Is the appropriate response to retract all appeals, to let the conviction and sentence stand after just one or maybe two appeals? It is unlikely the Supreme Court would accept a reduction in appeals because, “[D]eath is different.”<sup>148</sup> Death is an irreversible punishment, so the courts need to make sure they get it right – that includes several rounds of appeals.<sup>149</sup> Then, it is possible that America accepts the lengthy stay on death row as an unfortunate, yet necessary, side effect to receiving a death sentence. But, how do other countries handle this *necessary* side effect?

Even though American courts and legislators have only dabbled in the idea of lengthy stays on death row being unjust, the European Court of Human Rights took a more in-depth look at the issue in the case of *Soering v. United Kingdom*.<sup>150</sup> In this case, the Commonwealth of Virginia wanted Soering, a native of Germany, for allegedly killing two people.<sup>151</sup> After the purported crime, Soering fled to the United Kingdom.<sup>152</sup> In an attempt to prevent Soering’s extradition to the United States to face his capital charges, several advocacy groups wrote petitions, including one to the European Commission on Human Rights (“ECHR”).<sup>153</sup> The ECHR halted the extradition until it could make a decision.<sup>154</sup> In its decision, the ECHR decided that Soering could not be extradited to the United States because he would be tortured by “inhuman or degrading” treatment under U.S. laws.<sup>155</sup>

Not only does the ECHR create strict guidelines for the death penalty,<sup>156</sup> it also does not permit the lengthy amount of time that a prisoner is forced to

147. Damla Ergun, *New Low in Preference for the Death Penalty*, ABC NEWS (Jun. 5, 2014, 7:00 AM), <http://abcnews.go.com/blogs/politics/2014/06/new-low-in-preference-for-the-death-penalty/> (citing a poll that found fifty-two percent of people pick life in prison as the “preferred punishment,” whereas forty-two percent favor the death penalty).

148. See *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

149. Teresa Lewis, *Death Sentence Appeals Take Time for a Reason*, LAWYERS.COM, <http://criminal.lawyers.com/criminal-law-basics/death-sentence-appeals-take-time-for-a-reason.html> (last visited June 22, 2015).

150. *Soering v. United Kingdom*, 161 Eur.Ct.H.R. (1989).

151. *Id.* at 4.

152. *Id.*

153. *Id.* at 6–8, 1.

154. *Id.* at 2.

155. *Id.* at 27.

156. European Convention on Human Rights, sec. 1, art. 2 (Council of Europe 1987) (“Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”).

wait on death row.<sup>157</sup> The ECHR found that due to the prisoner dwelling so long on death row, he would be forced to suffer “the anguish and mounting tension of living in the ever-present shadow of death.”<sup>158</sup> Further, the ECHR agreed with Mr. Soering’s concerns about “death row phenomenon” and found that Article 3 of the European Convention on Human Rights would not allow the “mounting anguish of awaiting execution.”<sup>159</sup> The ECHR concluded that the United Kingdom would not be able to extradite Soering to the United States without violating its obligations under Article 3.<sup>160</sup>

Besides the ECHR, other international tribunals have taken an interest in the inordinate delay between sentencing and execution. The highest court in Zimbabwe held that waiting just five or six years on death row amounted to torture and “inhuman or degrading punishment.”<sup>161</sup> In India, the highest court declared that an appellate court must take into account the delay of execution when deciding whether to implement a death sentence.<sup>162</sup> In Jamaica, the highest court held that any more than five years between sentencing and execution would be considered “inhuman punishment.”<sup>163</sup> The Supreme Court of Canada, like the ECHR, refused to extradite a prisoner to the state of Washington unless the death penalty was no longer an available punishment because the average amount of time an inmate spent on death row was 11.2 years (in 2001), which would cause “psychological trauma.”<sup>164</sup> Similarly, the

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157. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. at 33 (1989).

158. *Id.* at 35.

159. *Id.* at 38. See European Convention on Human Rights, sec. 1, art. 3 (Council of Europe, 1987) (“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”).

Death row phenomenon is used to describe the harmful effects of death row conditions, including exposure to extended periods of solitary confinement and the mental anxiety that prisoners experience whilst waiting for their death, whilst death row syndrome is used to describe the consequential psychological illness that can occur as a result of death row phenomenon.

Dr. Karen Harrison & Anouska Tamony, *Death Row Phenomenon, Death Row Syndrome, and Their Affect on Capital Cases in the US*, INTERNET J. OF CRIM. (Oct. 2010), at 1, [http://www.internetjournalofcriminology.com/Harrison\\_Tamony\\_%20Death\\_Row\\_Syndrome%20\\_IJC\\_Nov\\_2010.pdf](http://www.internetjournalofcriminology.com/Harrison_Tamony_%20Death_Row_Syndrome%20_IJC_Nov_2010.pdf).

160. *Soering v. United Kingdom*, 161 Eur.Ct.H.R. at 43 (1989).

161. *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General*, 1 Zimb. L.R. 239, 240, 269 (1993).

162. *Sher Singh v. State of Punjab*, A.I.R 1983 S.C. 465.

163. *Pratt and Morgan v. The Attorney General of Jamaica*, 3 SLR 995, 2 AC 1, 4 All ER 769 (Privy Council 1993) (en banc).

164. *Minister of Justice v. Burns and Rafay*, 2001 SCC 7 (S.C. Canada, 22 March 2001) (at para. 122).

Supreme Court of Uganda held that a delay in execution that lasted more than three years amounted to inhuman or degrading punishment.<sup>165</sup>

Even though American courts do not need to look to international tribunals, on several occasions the Supreme Court of the United States has considered their holdings on several occasions.<sup>166</sup> In *Roper v. Simmons*, when the Supreme Court struck down the death penalty for offenders under the age of eighteen, the Court stated that it references “the laws of other countries and . . . international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of ‘cruel and unusual punishments.’”<sup>167</sup> The Supreme Court has a long history of applying standards from international courts similar to its own constitutional standards in similar circumstances.<sup>168</sup> The Court should take into account more frequently the international tribunals’ holdings and consider how these foreign courts have dealt with the lengthy stay on death row. The international community has already openly condemned the United States for its continued use of the death penalty.<sup>169</sup> Instead of affirmatively responding to the United Nations’ request to abolish the death penalty,<sup>170</sup> the United States continues to be the only Westernized country that still supports capital punishment.<sup>171</sup>

The international community provides three solutions to end the lengthy stay on death row: (1) put a cap on the number of years an inmate can spend on death row; (2) consider the length of time spent on death row when carrying out an execution; and (3) abolish the death penalty.<sup>172</sup> American courts have inferred that if a cap is placed on the number of years an inmate can spend on death row, then an inmate and his counsel will file for every appeal imaginable to make it past that arbitrary number.<sup>173</sup> The same problem would occur with the second solution since the defendant would just look to the

165. *Kigula and Others v. Attorney Gen.*, 2006 S. Ct. Const. App. No. 03, at 56–57 (Uganda 2009).

166. *See, e.g.*, *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (observing that felony murder has been restricted or eliminated entirely in a number of countries with a similar common law system); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (noting that only three of sixty countries kept the death penalty as punishment for rape in 1965).

167. 543 U.S. 551, 575 (2005).

168. *Knight v. Florida*, 120 S. Ct. 459, 463 (1999) (Breyer, J., dissenting the denial of certiorari).

169. *See* Richard C. Dieter, *The Death Penalty and Human Rights: U.S. Death Penalty and International Law*, DEATH PENALTY INFO. CTR., at 4–6, <http://www.deathpenaltyinfo.org/Oxfordpaper.pdf> (last visited June 22, 2015).

170. *Id.*

171. *See* Figure 2 *infra* p. 920.

172. *See supra* text accompanying notes 150–54.

173. *See, e.g.*, *Thompson v. McNeil*, 129 S. Ct. 1299, 1301 (2009) (Thomas, J., concurring in the denial of certiorari) (“[There is nothing] in the American constitutional tradition or in this Court’s precedent 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.”).

amount of time his jurisdiction has found to be too much time spent on death row and then continue his appeals until that arbitrary line has been crossed.<sup>174</sup> Kent Scheidegger, the legal director of the Criminal Justice Legal Foundation does not find the *Lackey* claim to be a valid argument because a petitioner can continuously delay his own death with appeals and then use that delay as an excuse to vacate his death sentence.<sup>175</sup> The solution he suggests is to have these inmates drop their appeals to speed up the appellate process,<sup>176</sup> but it is unconscionable to ask someone not to fight for his life. To cap the number of years an inmate can spend on death row leaves just a shadow of a penalty that no one will actually receive because only the threat of death remains, without the actual execution that has been agreed upon by judge and jury.<sup>177</sup>

In Albert Camus's essay, *Reflections on the Guillotine*, Camus discusses the sentence of death as a punishment and ultimately terms it: "[R]evenge."<sup>178</sup> Camus did not believe that capital punishment is an appropriate response to murder.<sup>179</sup> He found that murdering is inherent in the nature of man, but that the law should not attempt to emulate man's nature.<sup>180</sup> But, what Camus found more torturous and cruel than the premeditated murder that is capital punishment is the time between sentencing and execution.<sup>181</sup> He wrote that a prisoner, who must wait an extended amount of time to receive his death sentence, gets "a punishment more terrible than death, and one that was not imposed on the victim."<sup>182</sup> In America's appellate system, the condemned have many avenues of appeals or stays via the state's highest court, District Court, Court of Appeals, Supreme Court of the United States, stay from the governor, and so on.<sup>183</sup> Camus would find these appeals appalling because each of these opportunities for relief would be a worse form of punishment, as it would cause "[t]orture through hope alternate[d] with the pangs of animal despair."<sup>184</sup> To Camus, knowing you are going to die is nothing compared to

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174. *Id.*

175. Adam Liptak, *Lifelong Death Sentences*, N.Y. TIMES (Oct. 31, 2011), [http://www.nytimes.com/2011/11/01/us/death-row-inmates-wait-years-before-execution.html?\\_r=1&](http://www.nytimes.com/2011/11/01/us/death-row-inmates-wait-years-before-execution.html?_r=1&).

176. *Id.*

177. *See supra* text accompanying notes 7–8.

178. Albert Camus, *Reflections on the Guillotine*, in RESISTANCE, REBELLION, AND DEATH 150 (Justin O'Brien, trans., The Modern Library 1963).

179. *Id.*

180. *Id.*

181. *Id.* at 152.

182. *Id.* In a footnote to this quote, Camus wrote about Roemen, a French prisoner, who waited 700 days between sentencing and execution: "Those condemned under common law, as a general rule, wait from three to six months for the morning of their death." *Id.*

183. *See* discussion *supra* Part II.A.

184. Camus, *supra* note 178, at 152.

not knowing whether you are going to live.<sup>185</sup> This is evident by Camus's belief that:

As a general rule, a man is undone by waiting for capital punishment well before he dies. Two deaths are inflicted on him, the first being worse than the second, whereas he killed but once. Compared to such torture, the penalty of retaliation seems like a civilized law. It never claimed that the man who gouged out one of his brother's eyes should be totally blinded.<sup>186</sup>

Camus makes a valid observation that still holds true to America's death penalty today. The United States not only allows an inmate to suffer from the knowledge of his impending doom, but, in a few states, also follows through with that threatened promise. If America is going to make changes to alleviate some of the unnecessary suffering that accompanies a protracted stay on death row, it needs to act now while so many currently toil there. A blind eye can no longer be turned to what is actually going on behind bars. The solution to ending a lengthy stay on death row is the abolishment of the death penalty.

## V. CONCLUSION

Americans have a deep-rooted belief in justice. They believe that when an inmate has been sentenced to death, justice has been served. But, are jurors made aware that the death sentence, a sentence they gave in the name of justice, does not occur for many years to come, if it occurs at all? Would American jurors still see justice in death knowing of its delay in delivery and the additional psychological trauma that accompanies that delay?

A lengthy stay on death row is not a notion that is going to melt the hearts of Americans for some of the worst criminals in our country. That being said, the lengthy stay is a thought-provoking idea that forces philosophers, doctors, policy makers, and victims' families, as part of a twelve-person jury, to ask themselves: What are we really doing to these inmates? What really happens between sentencing and execution? As the dissenting judge in *Ross v. State* commented,

After the execution, what will the state . . . have gained from all of this? The answer seems to be that, minimally, the state has secured the proverbial pound of flesh for the crimes of this one outrageously cruel man. But now, what is to be? Has our thirst for this ultimate

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185. *Id.* at 152–53. (“Knowing that you are going to die is nothing,” said a condemned man in Fresnes. “But not knowing whether or not you are going to live, that’s terror and anguish.”).

186. *Id.* at 156.

2015]

*OMNES VULNERANT, POSTUMA NECANT*

919

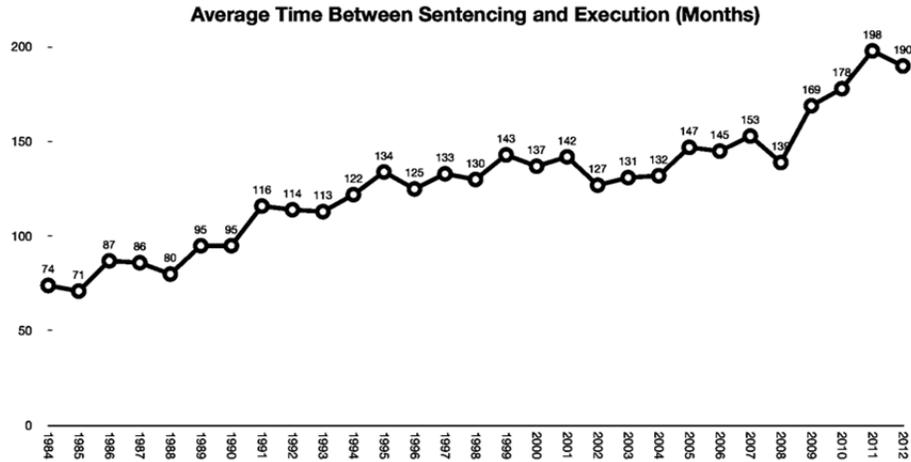
penalty now been slaked, or do we, the people . . . continue down this increasingly lonesome road?<sup>187</sup>

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187. *State v. Ross*, 873 A.2d 131, 154 (Conn. 2003) (Norcott, J., dissenting).

APPENDIX

Figure 1



*Time on Death Row*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/time-death-row> (last visited Aug. 23, 2015).

Figure 2



*Abolitionist and Retentionist Countries*, DEATH PENALTY INFO. CTR. (Dec. 31, 2013), <http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries>.