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I. Background

Thomas Knight ("Knight") and Carey Dean Moore ("Moore") each petitioned the United States Supreme Court for certiorari asking the Court to consider whether inordinately long delays in execution constituted cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.[1] Comparisons to other nations' death penalty laws and practices were made in support of petitioners' claims.[2] However, the Supreme Court declined to decide whether lengthy delays in execution constitute cruel and unusual punishment in violation of the Eighth Amendment and denied both petitions for writs of certiorari.[3] Although the denial did not constitute a ruling on the merits, it seems that the Court has clearly decided that delays, even in excess of twenty years, do not raise constitutional concerns.[4] This essay explores the extent to which international law and practices inform and influence death penalty jurisprudence in the United States ("U.S."). Despite a number of countries' support for the idea that excessive delays are cruel and contrary to their own constitutional principles, the United States Supreme Court has refused to adopt this position.[5]

II. The Cases' Procedural Histories

Moore was sentenced to death in Nebraska in June 1980. By 1988, he had exhausted all of his direct appeals and state collateral remedies. Moore next petitioned for a writ of habeas corpus in federal district court and was granted relief upon the court's finding that Nebraska's capital sentencing procedures were unconstitutionally vague and arbitrary. The United States Court of Appeals for the Eighth Circuit affirmed the district court's decision. Nebraska then petitioned the United States Supreme Court for

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1. Knight v. Florida, 120 S. Ct. 459 (1999) *(denial of certiorari)* (denying writs of certiorari for petitioners Thomas Knight and Carey Dean Moore).

2. *Id.* at 462-63.

3. *Id.* at 459.

4. *See id.* (citing Barber v. Tennessee, 513 U.S. 1184 (1995)).

5. *See infra* notes 18-24 and accompanying text.

certiorari, but was denied. Nebraska revised its death penalty sentencing scheme and once again sentenced Moore to death in another proceeding held in April 1995, fifteen years after Moore's first sentencing hearing. Once again, Moore was sentenced to death and by 1997, had lost all of his direct appeals and had invoked state collateral remedies without success.[6]

Knight, sentenced to death in Florida in April 1975, exhausted all of his state appeals by 1983 and filed for a writ of habeas corpus in the federal courts. In 1988, the United States Court of Appeals for the Eleventh Circuit concluded that Florida's death penalty sentencing procedure was constitutionally defective and ordered a new sentencing proceeding. Florida revised its sentencing procedure and held a new hearing for Knight where he was again sentenced to death. The Supreme Court of Florida affirmed the death sentence. Knight then petitioned the United States Supreme Court for writ of certiorari to review his claim of inordinate delay.[7]

III. Differing Opinions: Justice Thomas and Justice Breyer

Justice Thomas, concurring in the denial of the writs of certiorari, disparaged the notion that one could fully take advantage of all of the procedural remedies available to defendants sentenced to death and then go on to complain of excessive delay.[8] Justice Thomas disagreed with the idea that an Eighth Amendment speedy execution claim is in accord with U.S. jurisprudence and cited several state and lower federal court decisions that reached similar conclusions.[9] He opined that consistency would seem to require that those who take advantage of the death penalty appeals process also need to accept lengthy delays in execution as its consequence.[10] Because there is no U.S. legal authority supporting the notion that defendants may utilize their procedural remedies and then claim delay, petitioners were forced to rely upon foreign authorities to substantiate their claims.[11]

In contrast, Justice Breyer, dissenting from the Court's denial of certiorari, found that a state's failure to comply with constitutional demands which results in decades-long delays raises a "strong" Eighth Amendment claim of inhumane punishment.[12] He cited cases and statistics showing that many inmates on death row suffer extensively from depression, suicidal

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6. *Knight*, 120 S. Ct. at 461-62.

7. *Id.* The Eleventh Circuit held that Florida's sentencing procedure was defective because it failed to require the jury to consider evidence of an "unusually traumatic and abusive childhood" as a potential mitigating factor. *Id.* at 462.

8. *Id* at 459 (Thomas, J., concurring in denial of certiorari).

9. *Id.* at 460-61 (citations omitted).

10. *Id.* at 460.

11. *Id.*

12. *Id.* at 461 (Breyer, J., dissenting from denial of certiorari).

tendencies, and sometimes insanity.[13] Justice Breyer documented recognition by U.S. courts, dating as far back as the late 1800s, of the suffering caused by prolonged waits for execution.[14] He then noted that lengthy delays could not be justified on the basis of our constitutional tradition, as delays in execution of decades were unheard of at the time of the drafting of the Constitution.[15] Furthermore, he disagreed with Justice Thomas's assertion that lower courts have resoundingly rejected the type of speedy execution claim advanced in *Knight*.[16] After a closer examination of the lower court cases, Justice Breyer concluded that those courts had yet to address significantly a state's responsibility for delays.[17]

Justice Breyer also surveyed the death penalty jurisprudence of other nations to reinforce his view that state-caused extended delays in execution may indeed constitute cruel and unusual punishment under the Eighth Amendment.[18] Justice Breyer cited several examples of nations which have acknowledged that lengthy delays implicate constitutional concerns.[19] For instance, Jamaica's Privy Council held that any delay exceeding five years, unless the defendant was entirely at fault, was "inhuman or degrading punishment" in violation of the Jamaican Constitution.[20] Similarly, the Supreme Court of Zimbabwe found that delays of five and six years were "inordinate" and constituted "torture . . . or inhuman . . . degrading punishment."[21] Justice Breyer also referred to the Supreme Court of India's requirement that all appellate courts take delay into account when deciding whether to impose a death sentence.[22] Finally, in *Soering v. United Kingdom*,[23] the European Court of Human Rights prohibited the United King-

13. *Id.* at 462 (citations omitted).

14. *Id.* (citing Lackey v. Texas, 514 U.S. 1045, 1045-47 (1995); *In re* Medley, 134 U.S. 160, 172 (1890); People v. Anderson, 493 P.2d 880, 894 (Cal. 1972); Furman v. Georgia, 408 U.S. 238, 288-89 (1972) (per curiam) (Brennan, J., concurring); Solesbee v. Balkom, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting)).

15. *Id.*

16. *Id.* at 464-65.

17. *Id.*

18. *Id.* at 462-65.

19. *Id.*

20. *Id.* at 462-63; *see* Pratt v. Attorney General of Jamaica, [1994] 2 A.C.U.K. 1, 18, [1993] 4 All E.R. 769, 783, *available in* 1993 WL 963003 (PC 1993) (en banc) (holding that execution should take place as soon as reasonably practicable after imposition of sentence and that to carry out executions after a delay of fourteen years would constitute inhuman punishment contrary the Jamaican Constitution).

21. *Knight*, 120 S. Ct. at 463; *see* Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General [1993] 1 Zimb. L.R. 239, 240, 269(S), 271 (Aug. 4, 1999), <http://www.law.wits.ac.za/salr/catholic.html> (vacating four death sentences because the prolonged delays in execution were constitutionally impermissible).

22. *Knight*, 120 S. Ct. at 463 (citing Sher Singh v. State of Punjab, A.I.R. 1983 S.C. 465).

23. 11 Eur. Ct. H.R. (ser. A) (1989).

dom from extraditing a defendant to Virginia because the average six to eight year delay in execution constituted cruel, inhuman, or degrading punishment in contravention of the European Convention on Human Rights.[24]

IV. The Influence of International Law and Practice on U.S. Death Penalty Jurisprudence

To bolster his argument that international law should influence U.S. jurisprudence, Justice Breyer cited over a half dozen cases supporting his assertion that the Court has "long considered relevant and informative" foreign courts' application of comparable constitutional standards under similar conditions.[25] Justice Breyer acknowledged the utility of looking to opinions of the world's courts, notwithstanding the fact that these opinions are non-binding on the courts of the U.S.[26] However, there are a number of mechanisms that may indeed bind the United States under international law, such as international agreements/treaties, regional agreements/treaties, customary international law, and *jus cogens* norms.[27] There are at least four international instruments relevant to death penalty law which arguably bind the U.S.: the Universal Declaration of Human Rights ("Declaration"),[28] the International Covenant on Civil and Political Rights ("ICCPR"),[29] the Vienna Convention on Consular Relations ("Vienna Convention"),[30] and the United Nations Convention on the Rights of the Child ("Convention").[31]

Although not a treaty, the Declaration, adopted by the General Assembly of the United Nations in 1948, is often referred to as part of the "consti-

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24. *Id.* at 439, 478, & ¶ 111.

25. *Knight*, 120 S. Ct. at 463-64 (Breyer, J., dissenting from denial of certiorari) (citing Thompson v. Oklahoma, 487 U.S. 815, 830-31 (1988) (Stevens, J, plurality opinion); Enmund v. Florida, 458 U.S. 782, 796-97 n.22 (1982); Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977); Trop v. Dulles, 356 U.S. 86, 102-03 (1958); Washington v. Glucksberg, 521 U.S. 702, 710 n.8, 718-719 n.16 (1997); Culombe v. Connecticut, 367 U.S. 568, 583-84 n.25, 588 (1961); Kilbourn v. Thompson, 103 U.S. 168, 183-89 (1881)).

26. *Id.* at 464.

27. *See* Christy A. Short, Comment, *The Abolition of the Death Penalty: Does "Abolition" Really Mean What You Think it Means?*, 6 IND. J. GLOBAL LEGAL STUD. 721, 724-31, 740-54 (1999).

28. G.A. Res. 217, U.N. GAOR, 3rd Sess., at 71, U.N. Doc. A/810 (1948) [hereinafter Declaration].

29. G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter Covenant].

30. Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention].

31. G.A. Res. 44/25, annex, U.N. GAOR., 44th Sess., Supp. No. 49, at 167, U.N. Doc. A/44/49 (1989) [hereinafter Convention].

tutional structure of the world community."[32] The Declaration establishes a global commitment to forbid "cruel, inhuman or degrading treatment or punishment," and also asserts that all people have a right to life.[33] Though it is noteworthy because it forms the basis of many concepts in international human rights law, the Declaration has greater significance as a moral document than a legal one.[34]

As of 1997, 140 nations were parties to the ICCPR which was ratified by the U.S. in June 1992.[35] The ICCPR establishes standards on how the death penalty should be imposed by countries that have yet to abolish capital punishment.[36] However, the extent to which the U.S. is bound by the ICCPR is restricted by the reservations the U.S. attached to its acceptance,[37] such as the reservation attached to Article 6, paragraph 5, which prohibits the execution of persons who were below the age of eighteen at the time of their offense.[38] It is significant to note that the U.S. is greatly out of step with the rest of the world on the issue of putting juvenile offenders to death. Only five countries besides the U.S.–Nigeria, Pakistan, Saudi Arabia, Yemen, and Iran–have executed juvenile offenders in the last decade.[39]

The Convention on the Rights of the Child, signed but not ratified by the U.S., also prohibits the execution of individuals who were seventeen years old and younger at the time they committed the crime.[40] International law and the Vienna Convention on the Law of Treaties dictate that the U.S. "respect the object and purpose of the Convention on the Rights of the Child until such time as it ratifies the treaty."[41] However, as noted above, the U.S. has chosen not to follow this international precept.

The Vienna Convention, adopted in 1963 by 100 countries including the U.S., mandates that a foreign national arrested in another country be allowed to notify and receive assistance from the Consul of the country

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32. Short, *supra* note 27, at 725 (citation and internal quotation marks omitted).

33. Declaration, *supra* note 28, at art. 3, ¶ 5.

34. *See* Short, *supra* note 27, at 725.

35. *Id.* at 726.

36. Covenant, *supra* note 29, at art 6.

37. Short, *supra* note 27, at 741.

38. Colloquy, *Human Rights and Human Wrongs: Is the United States Death Penalty System Inconsistent with International Human Rights Law?*, 67 FORDHAM L. REV. 2793, 2811 (1999); *see* Covenant, *supra* note 29, at art 6.

39. National Coalition to Abolish the Death Penalty, *America's Shame– Killing Kids* (visited Feb. 10, 2000) <http://www.ncadp.org>.

40. Colloquy, *supra* note 38, at 2797.

41. *Id.* at 2812.

where he holds citizenship.[42] *Breard v. Greene*[43] illustrates the U.S. legal position pertaining to the Vienna Convention. Breard, a citizen of Paraguay, was convicted of capital murder in Virginia and sentenced to death.[44] Breard sought federal habeas relief, alleging that his conviction violated the Vienna Convention because he was not allowed to contact his consulate.[45] The Paraguayan government and certain of its officials filed a separate suit in federal district court claiming that their rights under the Vienna Convention were also violated.[46] The district court dismissed the suit for want of subject matter jurisdiction.[47] Five years later, the Republic of Paraguay began proceedings against the U.S. in the International Court of Justice ("ICJ").[48] The ICJ issued an order requesting that the U.S. stay Breard's execution until the ICJ concluded proceedings on the matter.[49] Accordingly, Breard filed a writ of habeas corpus and an application to stay the execution in the United States Supreme Court.[50] Despite the ICJ's order, the Supreme Court held that because Breard had not raised his Vienna Convention claim in state court, it had been procedurally defaulted.[51] The Court concluded that the "procedural rules of the forum State govern the implementation of [a] treaty in that State."[52] Consequently, U.S. procedural default rules applied. The Court noted that although treaties are considered "supreme law of the land," they are trumped where they conflict with the United States Constitution and congressional acts.[53]

The U.S.'s reservations to the ICCPR, ambivalence to the Convention on the Rights of the Child, and attitude towards the Vienna Convention as articulated in *Breard* reflect a reluctance to conform to or be influenced by international standards and practices as they relate to the death penalty. Furthermore, that the U.S. deviates from many of its allies and contempo-

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42. Mary K. Martin, Case Note, CAP. DEF. J., Spring 1998 at 17 (analyzing Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998)).

43. 523 U.S. 371 (1998) (per curiam).

44. Breard v. Greene, 523 U.S. 371, 372-73 (1998) (per curiam).

45. *Id.* at 373. Specifically, Breard argued that the arresting authorities' failure to inform him of his right to contact the Paraguayan Consulate resulted in a violation of the Vienna Convention. *Id.*

46. *Id.* at 374. The suit alleged that the Republic of Paraguay, the Paraguayan Ambassador to the U.S., and the Consul General to Paraguay had their rights violated under the Vienna Convention when the U.S. failed to inform Breard of his rights under the Convention or to inform Paraguay of Breard's conviction and sentence. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 375-76.

52. *Id.* at 375.

53. *Id.* at 376.

raries evidences its unwillingness to be affected by international trends. For instance, as of 1999, 106 countries had abolished the death penalty either in law or in practice.[54] The only nations carrying out more executions than the U.S.'s sixty-eight in 1998 were China and the Congo.[55] Cuba and Nigeria–often criticized by the U.S. for their human rights records–reportedly carried out five and six executions, respectively, in that same year.[56] Furthermore, in June 1999, Russia commuted the death sentences of all 716 of its death row convicts.[57] The U.S.'s death penalty jurisprudence has thus far largely ignored these global movements toward abolition and reform. The U.S. Supreme Court's denial of writ of certiorari in *Knight* is consistent with the U.S.'s tendency to resist looking to its international neighbors to inform U.S. death penalty law and policy.

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54. Death Penalty Information Center, *The Death Penalty: An International Perspective* (visited February 10, 2000) <http://www.essential.org/dpic/dpicintl.html>.

55. *Id.*

56. *Id.*

57. Angela Charlton, *Yelstin Commutes Death Sentences*, ASSOCIATED PRESS, June 3, 1999, *available in* 1999 WL 17810155.

Non-Capital Case of Import