

**WILLIAM LEE THOMPSON v. WALTER A. McNEIL, SECRETARY, FLORIDA
DEPARTMENT OF CORRECTIONS**

No. 08-7369.

SUPREME COURT OF THE UNITED STATES

**129 S. Ct. 1299; 129 S. Ct. 1580; 173 L. Ed. 2d 693; 2009 U.S. LEXIS 1970; 77
U.S.L.W. 3503**

March 9, 2009, Decided

NOTICE:

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: [***1]

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.

Thompson v. Sec'y for the Dep't of Corr., 517 F.3d 1279, 2008 U.S. App. LEXIS 4013 (11th Cir. Fla., 2008)

JUDGES: THOMAS, J., concurring. BREYER, J., dissenting. STEVENS, J., concurring in judgment.

OPINION

[**693] [*1299] Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

Statement of JUSTICE STEVENS respecting the denial of the petition for writ of certiorari.

Last Term, in my opinion in *Baze v. Rees*, 553 U.S. ___, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008), I suggested that the "time for a dispassionate, impartial comparison of the enormous costs that death penalty litigation imposes on society with the benefits that it produces has surely arrived." *Id.*, at ___, 128 S. Ct. at 1548-1549, 170 L. Ed. 2d 420 (opinion concurring in judgment). This petition for certiorari describes costs that merit consideration in any such study.

In June 1976, having been advised by counsel that he would not receive the death penalty if he accepted responsibility for his crime, petitioner pleaded guilty to a capital offense. The advice was erroneous, and he was sentenced to death. Since that time, two state-court judgments have set aside his death sentence. See *Thompson v. State*, 351 So. 2d 701 (Fla. 1977); *Thompson v. Dugger*, 515 So. 2d 173 (Fla. 1987). At a third penalty hearing -- after petitioner presented [***2] mitigation evidence about his limited mental capacity and dysfunc-

tional childhood that had previously been barred -- five members of the advisory jury voted against a death sentence, but the court again imposed a sentence of death.

Thirty-two years have passed since petitioner was first sentenced to death. In prior cases, both JUSTICE BREYER and I have noted that substantially delayed executions arguably violate the Eighth Amendment's prohibition against cruel and unusual punishment. See, e.g., *Smith v. Arizona*, 552 U.S. ___, ___, 128 S. Ct. 466, 169 L. Ed. 2d 326 (2007) (BREYER, J., dissenting from denial of certiorari); *Foster v. Florida*, 537 U.S. 990, 991, 123 S. Ct. 470, 154 L. Ed. 2d 359 (2002) (same); *Knight v. Florida*, 528 U.S. 990, 993, 120 S. Ct. 459, 145 L. Ed. 2d 370 (1999) (same); *Lackey v. Texas*, 514 U.S. 1045, 115 S. Ct. 1421, 131 L. Ed. 2d 304 (1995) (STEVENS, J., respecting denial of certiorari). Petitioner's case involves a longer delay than any of those earlier cases.

As he awaits execution, petitioner has endured especially severe conditions of confinement, spending up to 23 hours per day in isolation in a 6- by 9-foot cell. Two death warrants have been signed against him and stayed only shortly before he was scheduled to be put to death. The dehumanizing effects of such treatment are undeniable. See *People v. Anderson*, 6 Cal.3d 628, 649, 100 Cal. Rptr. 152, 493 P.2d 880, 894 (1972) [***3] ("[T]he process of carrying out a verdict of death is often so [*1300] degrading and brutalizing to the human spirit as to constitute psychological torture"); *Furman v. Georgia*, 408 U.S. 238, 288, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (Brennan, J., concurring) ("[T]he prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death"). Moreover, as I explained in [**694] *Lackey*, delaying an execution does not further public purposes of retribution and deterrence but only diminishes whatever possible benefit society might receive from petitioner's death. It would therefore be appropriate to conclude that a punishment of death after significant delay is "so totally without penological justification that it results in the gratuitous infliction of suffering." *Gregg v. Georgia*, 428 U.S. 153, 183, 96 S. Ct.

2909, 49 L. Ed. 2d 859 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.).

While the length of petitioner's confinement under sentence of death is extraordinary, the concerns his case raises are not unique. Clarence Allen Lackey had spent 17 years on death row when this Court reviewed his petition for certiorari. Today, condemned inmates await execution for an average [***4] of nearly 13 years. See Dept. of Justice, Bureau of Justice Statistics, Capital Punishment, 2007 (Table 11) (2008), online at <http://www.ojp.usdoj.gov/bjs/pub/html/cp/2007/tables/cp07st11.htm> (all Internet materials as visited Feb. 20, 2009, and available in Clerk of Court's case file). To my mind, this figure underscores the fundamental inhumanity and unworkability of the death penalty as it is administered in the United States.

Some respond that delays in carrying out executions are the result of this Court's insistence on excessive process. But delays have multiple causes, including "the States' failure to apply constitutionally sufficient procedures at the time of initial [conviction or] sentencing." *Knight*, 528 U.S., at 998, 120 S. Ct. 459, 145 L. Ed. 2d 370 (BREYER, J., dissenting from denial of certiorari). The reversible error rate in capital trials is staggering. More than 30 percent of death verdicts imposed between 1973 and 2000 have been overturned,¹ and 129 inmates sentenced to death during that time have been exonerated, often more than a decade after they were convicted.² Judicial process takes time, but the error rate in capital cases illustrates its necessity. We are duty bound to "insure that every [***5] safeguard is observed" when "a defendant's life is at stake." *Gregg*, 428 U.S., at 187, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (joint opinion of Stewart, Powell, and STEVENS, JJ.).

1 Dept. of Justice, Bureau of Justice Statistics Bulletin, Capital Punishment, 2005, p. 14 (Dec. 2006) (App. Table 12), <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp05.pdf>. This figure is underinclusive, as it does not account for the fact that many condemned inmates' convictions and sentences are still under review.

2 See Death Penalty Information Center, Innocence: List of Those Freed from Death Row (Sept. 18, 2008), <http://www.deathpenaltyinfo.org/innocence-list-t hose-freed-death-row> (showing that an average of nearly 10 years elapsed between an inmate's conviction and his exoneration).

In sum, our experience during the past three decades has demonstrated that delays in state-sponsored killings are inescapable and that executing defendants after such delays is unacceptably cruel. This inevitable cruelty, coupled with the diminished justification for carrying out

an execution after the lapse of so much time, reinforces my opinion that contemporary decisions "to retain the death penalty as a part of our law are the product of habit and inattention rather [***6] than an acceptable deliberative process." *Baze*, 553 U.S., at ___, ___, [*1301] 128 S. Ct. at 1546, 170 L. Ed. 2d 420 (STEVENS, J., concurring in judgment).

CONCUR BY: THOMAS

CONCUR

JUSTICE THOMAS, concurring in denial of certiorari.

I remain "unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the papyrus of appellate and collateral procedures and then complain when his execution is delayed." *Knight v. Florida*, 528 U.S. 990, 120 S. Ct. 459, 145 L. Ed. 2d 370 (1999) (THOMAS, J., concurring in denial of certiorari). Petitioner William Lee Thompson has pleaded guilty to this [***695] murder -- twice. *Thompson v. State*, 759 So. 2d 650, 654 (Fla. 2000) (*per curiam*). Having confessed, petitioner could have accepted "what the people of Florida have deemed him to deserve: execution." *Foster v. Florida*, 537 U.S. 990, 991, 123 S. Ct. 470, 154 L. Ed. 2d 359 (2002) (THOMAS, J., concurring in denial of certiorari). But because petitioner chose to challenge his death sentence, JUSTICE STEVENS and JUSTICE BREYER suggest that the subsequent delay caused by petitioner's 32 years of litigation creates an Eighth Amendment problem. *Ante*, at 2-4 (STEVENS, J., statement respecting denial of certiorari); *post*, at 1-3 (BREYER, J., [***7] dissenting from denial of certiorari). I disagree. It makes "a mockery of our system of justice . . . for a convicted murderer, who, through his own interminable efforts of delay . . . has secured the almost-indefinite postponement of his sentence, to then claim that the almost-indefinite postponement renders his sentence unconstitutional." *Turner v. Jabe*, 58 F.3d 924, 933 (CA4 1995) (Luttig, J., concurring in judgment).

JUSTICE BREYER replies that a death-row inmate's Eighth Amendment challenge to "a delay of more than 30 years" between sentencing and execution should not be "automatically waive[d]" because he chooses to exercise his appellate rights. See *post*, at 1. But framing the issue in this way obscures the central question. The issue is not whether a death-row inmate's appeals "waive" any Eighth Amendment right; the issue instead is whether the death-row inmate's litigation strategy, which delays his execution, provides a justification for the Court to invent a new Eighth Amendment right. It does not. See *Knight, supra*, at 992, 120 S. Ct. 459, 145 L. Ed. 2d 370 (opinion of THOMAS, J.) ("Consistency would seem to demand

that those who accept our death penalty jurisprudence as a given also accept the lengthy delay [***8] between sentencing and execution as a necessary consequence It is incongruous to arm capital defendants with an arsenal of 'constitutional' claims with which they may delay their executions, and simultaneously to complain when executions are inevitably delayed").

I also disagree with JUSTICE STEVENS that other aspects of the criminal justice system in this country require the fresh examination of the costs and benefits of retaining the death penalty that he seeks. *Ante*, at 2-3. For example, JUSTICE STEVENS criticizes the "dehumanizing effects" of the manner in which petitioner has been confined, *ante*, at 2, but he never pauses to consider whether there is a legitimate penological reason for keeping certain inmates in restrictive confinement. See, e.g., Kocieniewski, *Death Row Inmate Said to Beat and Kick Another to Death in New Jersey Prison*, *New York Times*, Sept. 8, 1999, p. B5. Indeed, the disastrous consequences of this Court's recent foray into prison management, *Johnson v. California*, 543 U.S. 499, 125 S. Ct. 1141, 160 L. Ed. 2d 949 (2005), should have suppressed any urge to second-guess these difficult institutional decisions, *Beard v. Banks*, 548 U.S. 521, 536-537, 126 S. Ct. [***1302] 2572, 165 L. Ed. 2d 697 (2006) (THOMAS, J., concurring in judgment) [***9] (noting that after the Court invalidated California's policy of racially segregating prisoners in its reception centers, the State "subsequently experienced several instances of severe race-based prison violence, including a riot that resulted in 2 fatalities and more than 100 injuries, and significant fighting along racial lines between newly arrived inmates, the very inmates that were subject to the policy invalidated by the Court in *Johnson*").

JUSTICE STEVENS also points to the 129 death row inmates that have been "exonerated" since 1973. *Ante*, at 3. These inmates may have been freed from prison, but that does not necessarily mean that they were declared innocent of the crime for which they were convicted. *Kansas v. Marsh*, 548 U.S. 163, 180, 126 S. Ct. 2516, 165 L. Ed. 2d 429, and n. 7 (2006). Many were merely the beneficiaries of "this Court's Byzantine death [***696] penalty jurisprudence." *Knight, supra*, at 991, 120 S. Ct. 459, 145 L. Ed. 2d 370 (opinion of THOMAS, J.). Moreover, by citing these statistics, JUSTICE STEVENS implies "that the death penalty can only be just in a system that does not permit error." *Marsh*, 548 U.S., at 181, 126 S. Ct. 2516, 165 L. Ed. 2d 429. But no criminal justice system operates without error. There is no constitutional basis for prohibiting Florida "from authorizing [***10] the death penalty, even in our imperfect system." *Ibid*.

Finally, JUSTICE STEVENS altogether refuses to take into consideration the gruesome nature of the crimes that legitimately lead States to authorize the death penalty

and juries to impose it. The facts of this case illustrate the point. On March 30, 1976, petitioner and his codefendant were in a motel room with the victim and another woman. They instructed the women to contact their families to obtain money. The victim made the mistake of promising that she could obtain \$ 200 to \$ 300; she was able to secure only \$ 25. Enraged, petitioner's codefendant ordered her into the bedroom, removed his chain belt, forced her to undress, and began hitting her in the face while petitioner beat her with the belt. They then rammed a chair leg into her vagina, tearing its inner wall and causing internal bleeding; they repeated the process with a nightstick. Petitioner and his codefendant then tortured her with lit cigarettes and lighters and forced her to eat her sanitary napkin and to lick spilt beer off the floor. All the while, they continued to beat her with the chain belt, the club, and the chair leg. They stopped the attack once to force [***11] the victim to again call her mother to ask for money. After the call, petitioner and his codefendant resumed the torture until the victim died. *Thompson*, 759 So. 2d, at 653-654. *

* JUSTICE BREYER suggests that petitioner "may be significantly less culpable than his codefendant, who did not receive the death penalty" principally because Barbara Garritz, the woman who witnessed the murder, averred at petitioner's third sentencing that he was dominated by his codefendant. *Post*, at 2. JUSTICE BREYER ignores, however, that petitioner "testified [at his codefendant's retrial] and took credit for the entire incident" and that Ms. Garritz had previously testified that petitioner "left the bedroom and told" her that he "was so angry he 'felt like killing Sally [the victim].'" *Thompson v. State*, 389 So. 2d 197, 199-200 (Fla. 1980) (*per curiam*). In any event, JUSTICE BREYER's factual recitation is entirely beside the point: He concedes that the jury's decision to sentence petitioner to death was "[r]easonable." *Post*, at 3.

Three juries recommended that petitioner receive the death penalty for this heinous murder, and petitioner has received judicial review of his sentence on at least 17 occasions. [***12] The decision to sentence petitioner to death is not "the product of habit and inattention rather than an acceptable [***1303] deliberative process." *Ante*, at 4 (quoting and citing *Baze v. Rees*, 553 U.S. ___, ___, 128 S. Ct. at 1546, 170 L. Ed. 2d 420 (2008) (STEVENS, J., concurring in judgment)). It represents the considered judgment of the people of Florida that a death sentence, which is expressly contemplated by the Constitution, see Amdts. 5, 14, is warranted in this case. It is the crime -- and not the punishment imposed by the jury or the delay in petitioner's execution -- that was "unacceptably cruel." *Ante*, at 4.

DISSENT BY: BREYER**DISSENT**

JUSTICE BREYER, dissenting from denial of certiorari.

This petition asks us to determine whether the Eighth Amendment's prohibition on "cruel and unusual punishments" precludes the execution of a prisoner who has spent over 30 years on death row. JUSTICE STEVENS and I have previously written that this is a question that merits the Court's attention, see, e.g., *Lackey v. Texas*, 514 U.S. 1045, 115 S. Ct. 1421, 131 L. Ed. 2d 304 (1995) (STEVENS, J., respecting denial of certiorari); *Foster v. Florida*, 537 U.S. 990, 123 S. Ct. 470, 154 L. Ed. 2d 359 (1999) (BREYER, J., dissenting from denial of certiorari); [**697] *Knight v. Florida*, 528 U.S. 990, 993, 120 S. Ct. 459, 145 L. Ed. 2d 370 (1999) (same), and [***13] the delay here is even longer than the delay in those prior cases. Here, petitioner has been on death row for 32 years, well over half his life. For the reasons we have set forth in the past and for many of those added in JUSTICE STEVENS' separate statement, I would grant this petition.

JUSTICE THOMAS suggests that petitioner cannot now challenge the constitutionality of the delay because much of that delay is his own fault -- he caused it by choosing to challenge the sentence that the people of Florida deemed appropriate. See *ante*, at 1 (opinion concurring in denial of certiorari). I do not believe that petitioner's decision to exercise his right to seek appellate review of his death sentence automatically waives a claim that the Eighth Amendment proscribes a delay of more than 30 years. See *Gregg v. Georgia*, 428 U.S. 153, 198, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) (automatic appeal of all death sentences is "an important additional safeguard against arbitrariness and caprice"). But in any event the delay here resulted in significant part from constitutionally defective death penalty procedures for which petitioner was not responsible. See *Knight, supra*, at 993, 120 S. Ct. 459, 145 L. Ed. 2d 370.

In [***14] particular, the delay was partly caused by the sentencing judge's failure to allow the presentation and jury consideration of nonstatutory mitigating circumstances, an approach which we have unanimously held constitutionally forbidden, see *Hitchcock v. Dugger*, 481 U.S. 393, 398-399, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987). As a result of this error, the Florida Supreme Court remanded for resentencing. See *Thompson v. Dugger*, 515 So. 2d 173 (1987).

At petitioner's resentencing, he presented substantial mitigating evidence, not previously presented, that suggested that he may be significantly less culpable than his

codefendant, who did not receive the death penalty. Petitioner, for example, introduced an affidavit of Barbara Garritz, who witnessed the crime for which petitioner was sentenced to death. She described petitioner's co-defendant Rocky Surace as "an evil man" and "the devil, himself" and explained that he "manipulate[d] people . . . [into] follow[ing] his orders." Tr. 2473 (May 31, 1989). By contrast, she described petitioner as "a big, easy-going child who would do just about anything to please" and who "never [*1304] seemed to have an idea of his own." *Id.*, at 2474; see also *ibid.* ("He would do just about anything [***15] he was told"). She described the relationship between petitioner and Rocky as follows: "Bill was completely under Rocky's spell. He hung on every word Rocky said and would do and say everything Rocky did and said. He was like Rocky's dog. Rocky would give an order and Bill would do it, no questions asked." *Id.*, at 2475. With respect to the night in question, she explained that, "Everything Bill did, he did at Rocky's direction, just like he always did when I was around the two. I saw what happened and I know that Rocky started and finished the whole thing." *Ibid.*

Garritz's testimony was consistent with the picture of petitioner painted by other witnesses. For example, one of petitioner's teachers testified that while in elementary school petitioner consistently scored in the mid-70's on IQ tests; those scores qualified him for classes for the educable mentally retarded. *Id.*, at 2178 (May 30, 1989). His teachers also described him as "slow," a "follower" who was "always . . . eager to please." *Id.*, at 2185, 2186, 2185; see also *id.*, at 2191-2192. A psychologist and a psychiatrist who examined him both described him as showing signs of brain damage. *id.*, at 2510, 2513, 2516, 2523 (June 1, 1989); [***16] see also *id.*, at 2570-2571, 2577, and a psychiatrist testified that "the kind of disorder [petitioner] has, he's easily led and felt very threatened by the co-defendant," *id.*, at 2564; see also *id.*, at 2602 ("There is no doubt in the world that this man basically appeared to be a rather -- rather dependent person [**698] who tends to follow the leader. He is not a leader himself. So, whatever Mr. Surace says, he probably goes along with it"). After hearing this evidence, the jury recommended a death sentence by a vote of 7 to 5.

I refer to the evidence only to point out that it is fair, not unfair, to take account of the delay the State caused when it initially refused to allow Thompson to present it at the punishment phase of his trial. I would add that it is the punishment, not the gruesome nature of the crime, which is at issue. Reasonable jurors might, and did, disagree about the appropriateness of executing Thompson for his role in that crime. The question here, however, is whether the Constitution permits that execution after a delay of 32 years -- a delay for which the State was in significant part responsible.

I believe we should grant the writ to consider that question.