

## Undue Delay as Torture in Death Penalty Cases

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on behalf of  
Death Penalty Focus

### i. The United States and International Law.

The Declaration of Independence reflects the Founding Fathers' appreciation of international opinion and law. The Eight Amendment of the United States Constitution prohibits "cruel and unusual punishment," which come directly from the English Declaration of Rights of 1688. The domestic law of the United States recognizes the law of nations. Unsurprisingly, the Supreme Court of the United States has considered international law for standards, persuasive opinions, and law interpretation in many cases but only selectively when it comes to the application of the Eight Amendment.

The illegality of cruel and unusual punishment is a principle accepted widely in the world. Consequently, many countries have determined that prolonged incarceration adds a significant degree of suffering, physical hardships, and mental anguish that goes beyond the death sentence itself constitutes torture resulting in cruel and unusual punishment.

Many treaties implicitly condemn prolonged detention on death row. Article 6(4) of the International Convention on Civil and Political Rights states that "anyone sentenced to death shall have the right to seek a pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases." *International Convention on Civil and Political Rights, G.A. Res. 2200A (XXXI)*, 999 U.N.T.S. 171 (16 December 1966). The United States is a ratified signatory of the ICCPR; thus, recognizes the importance of the rights contained therein, including the right to clemency and its implication that extended time on death row should result in a clemency of the death sentence.

International law and practice point out that a prolonged death row detention adds emotional, physical, and psychological torture to the conviction, thus constituting cruel and unusual punishment. As a result, the rejection of prolonged death row detention is becoming customary international law. Regional courts prohibit prolonged death row incarceration. In the Caribbean 200 death sentences were commuted to life following the Judicial Committee of the Privy Council's (JCPC) finding that a prolonged delay on death row amounts to cruel and unusual punishment. Following international laws grave concern about the length of time prisoners spend on death row prior to execution, many common law jurisdictions have prohibited such a practice finding it to violate cruel, inhumane and degrading treatment provisions.

Europe and Canada, both death free, address the prolonged death row detention issue in relation to extradition legislation. Both have made it clear that extradition where a defendant faces prolonged death row detention is unconstitutional.

Zimbabwe, India, Uganda, Kenya and the Caribbean have commuted a high number of death sentences to life imprisonment due to lengthy delays and the associated torture. Similarly, this United Nations Committee Against Torture found that prolonged death row detention amounts to cruel, inhumane or degrading treatment where conditions, such as overcrowding, compound the mental anguish associated with an “excessive length of time on death row.” Concluding observations of the Committee against Torture: Zambia, U.N. Doc. AT/C/ZMB/CO/2 (26 May 2008), ¶19. It also stated that, where such circumstances exist, “the State party should ensure that its legislation provides for the possibility of the commutation of a death sentence where there have been delays in its implementation.” *Id.*

The prohibition on torture under U.S. law is absolute. Every U.S. official is prohibited from engaging in torture or in cruel, inhuman, or degrading treatment or punishment and no exceptional circumstances may be invoked as a justification for torture. International courts, treaties, and practices establish that it is inhumane and degrading to detain prisoners for many years on death row and constitutes torture. A prolonged death row sentence adds mental anguish and physical hardships beyond the sentence of death and amounts to cruel and unusual punishment. The universality of this experience makes international law and opinions instructive in interpreting the Eighth Amendment.

#### ii. Death Penalty Delay in the State of California.

California’s death penalty system is grossly dysfunctional. The system is plagued with excessive delay in the appointments of counsel for direct appeals and habeas corpus petitions, and a severe backlog in the review of appeals and habeas petitions before the California Supreme Court. California’s death penalty system is so plagued by inordinate and unpredictable delay that the death sentence is actually carried out against only a trivial few of those sentenced to death. Of the more than 900 individuals that have been sentenced to death since 1978, only 13 have been executed. For every inmate executed by California, seven have died on Death Row, most from natural causes. The review process takes an average of 25 years, and the delay is only getting longer. Indeed, no inmate has been executed since 2006, and there is no evidence to suggest that executions will resume in the reasonably near future. Even when executions do resume, the current population of Death Row is so enormous that, realistically, California will still be unable to execute the substantial majority of Death Row inmates. In fact, just to carry out the sentences of the 748 inmates currently on Death Row, the State would have to conduct more than one execution a week for the next 14 years. Such an outcome is obviously impossible for many reasons, not the least of which is that as a result of extraordinary delay in California’s system, only 17 inmates currently on Death Row have even completed the post-conviction review process and are awaiting their execution.

As the size of California’s Death Row grows larger there are more delays. Of the 748 inmates currently on California’s Death Row, more than 40 percent have been there longer than 19 years. Nearly all of them are still litigating the merits of their death sentence, either before the California Supreme Court or the federal courts. *See* Cal. Dep’t of Corr. & Rehab., *Condemned Inmate List* (July 2014). For those whose challenge to the State’s death sentence is ultimately denied at each level of review, the process will likely take 25 years or more. *See* Gerald Uelmen,

*Death Penalty Appeals and Habeas Proceedings: The California Experience*, 93 Marq. L. Rev. 495, 496 (2009).

Accordingly, the vast majority of those sentenced to death in California will not actually be executed by the State. The most common way out of California's Death Row is not death by State execution, but death by other means. Of the 511 individuals sentenced to death between 1978 and 1997, 79 died of natural causes, suicide, or causes other than execution by the State of California. Another 15 sentenced after 1997—or two more than the total number of inmates that have been executed by California since the current death penalty system took form—have died of non-execution causes.

California is not unique in its lengthy delays regarding death row inmates. Manuel Valle was executed in Florida on Sept. 28, 2011 after spending 33 years on death row. On April 10, 2013 Florida executed Larry Eugene Mann after 32 years on death row. These were followed by John E. Ferguson in August 2013 after 35 years on death row and Askari Muhammad in January 2014 after 39 years on death row. Another Florida death row inmate recently died of natural causes after almost 40 years on death row. In Arizona, Viva Leroy Nash, died of natural causes at age 83 after 31 years on Arizona's death row. There are many additional cases of individuals on death row exceeding 20 years.

## Conclusion

To be constitutional a capital punishment system cannot be discriminatory or arbitrary. International law sustains an inmate's stay in death row should not be prolonged or it would constitute cruel and unusual punishment. Judicial opinions from common law courts and many international treaties and practices establish that it is inhumane and degrading to detain prisoners for many years on death row. The overwhelming evidence is that lengthy and undue delays are common in the United States resulting in conditions of torture for hundreds of individuals incarcerated under a sentence of death in the United States.