SUPREME COURT OF THE UNITED STATES

THOMAS KNIGHT, AKA ASKARI ABDULLAH MUHAMMAD

98–9741 *v.*

FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

CAREY DEAN MOORE

99–5291 *v.*

NEBRASKA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

Nos. 98–9741 and 99–5291. Decided November 8, 1999

The petitions for writs of certiorari are denied.

Opinion of JUSTICE STEVENS, respecting the denial of the petitions for writ of certiorari.

It seems appropriate to emphasize that the denial of these petitions for certiorari does not constitute a ruling on the merits. See, *e.g., Barber* v. *Tennessee*, 513 U. S. 1184 (1995).

JUSTICE THOMAS, concurring in denial of certiorari.

I write only to point out that I am 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 panoply of appellate and collateral procedures and then complain when his execution is delayed. Indeed, were there any such support in our own jurisprudence, it would be unnecessary for proponents of the claim to rely on the European Court of Human Rights,

the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council.[1]

It is worth noting, in addition, that, in most cases raising this novel claim, the delay in carrying out the prisoner's execution stems from this Court's Byzantine death penalty jurisprudence, *e.g.*, *Graham* v. *Collins*, 506 U. S. 461, 478 (1993) (THOMAS, J., concurring) (criticizing the Court's holding in *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), that Texas special issues violated the Eighth Amendment by preventing the jury from giving effect to mitigating evidence); *Ohio Adult Parole Authority* v. *Woodard*, 523 U. S. 272, 279 (1998) (opinion of REHNQUIST, C. J.) (disagreeing with the view of five Members of this Court[2] that procedural due process principles govern a clemency hearing in which the clemency decision is entrusted to executive discretion); *Simmons* v. *South Carolina*, 512 U. S. 154, 178 (1994) (SCALIA, J., dissenting) (disputing Court's holding that due process compels a State to inform a

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[1] In support of his claim, petitioner Knight cites Blackstone, who remarked that "a delayed execution 'affects the minds of the spectators rather as a terrible sight, than as the necessary consequence of transgression.' " Pet. for Cert. in No. 98–9741, p. 15 (quoting 4 W. Blackstone, Commentaries *397)). Blackstone was speaking of the effect speedy execution would have on deterring crime: "[P]unishment should follow the crime as early as possible; that the prospect of gratification or advantage, which tempts a man to commit the crime, should instantly awake the attendant idea of punishment." *Ibid*. In this regard, Blackstone observed that "throughout the kingdom, by statute 25 Geo. II. c. 37. it is enacted that, in case of murder, the judge shall in his sentence direct execution to be performed on the next day but one after sentence passed." *Ibid*. I have no doubt that such a system, if reenacted, would have the deterrent effect that JUSTICE BREYER finds lacking in the current system, but I am equally confident that such a procedure would find little support from this Court.

[2] See 523 U. S., at 288 (O'CONNOR, J., concurring in part and concurring in judgment); *id*., at 290 (STEVENS, J., concurring in part and dissenting in part).

sentencing jury of a capital defendant's ineligibility for parole); *Morgan* v. *Illinois*, 504 U. S. 719, 739 (1992) (SCALIA, J., dissenting) (disagreeing with the Court's holding that the Sixth Amendment requires exclusion of a sentencing juror who would always impose the death penalty upon proof of the defendant's guilt of a capital offense).[3] In that sense, JUSTICE BREYER is unmistakably correct when he notes that one cannot "justify lengthy delays [between conviction and sentence] by reference to [our] constitutional tradition." *Post*, at 3. Consistency would seem to demand that those who accept our death penalty jurisprudence as a given also accept the lengthy delay between sentencing and execution as a necessary consequence. See *Coleman* v. *Balkcom*, 451 U. S. 949, 952 (1981) (STEVENS, J., concurring in denial of certiorari) ("However critical one may be of . . . protracted post-trial procedures, it seems inevitable that there must be a significant period of incarceration on death row during the interval between sentencing and execution"). 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. See *Turner* v. *Jabe*, 58 F. 3d 924, 933 (CA4) (Luttig, J., concurring), cert. denied, 514 U. S. 1136 (1995); Kozinski & Gallagher, Death: The Ultimate Run-On Sentence, 46 Case W. Res. L. Rev. 1, 25 (1995).

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[3] Furthermore, I observed prior to Congress' adoption of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104–132, Tit. IV–B, §413(f), 110 Stat. 1269, that this Court has radically expanded federal habeas corpus review for state prisoners, which until AEDPA had been delineated in scope by an unchanged statutory formulation. See *Wright* v. *West*, 505 U. S. 277, 285–287 (1992) (opinion of THOMAS, J.) (tracing the expansion of federal habeas corpus relief from its original conception as a mechanism for prisoners to challenge the jurisdiction of the state court that had rendered judgment).

Ironically, the neoteric Eighth Amendment claim proposed by JUSTICE BREYER would further prolong collateral review by giving virtually every capital prisoner yet another ground on which to challenge and delay his execution. See U. S. Dept. of Justice, Bureau of Justice Statistics Bulletin, Capital Punishment 1997, p. 12 (Dec. 1998) (for prisoners executed between 1977 and 1997, the average elapsed time on death row was 111 months from the last sentencing date). The claim might, in addition, provide reviewing courts a perverse incentive to give short shrift to a capital defendant's legitimate claims so as to avoid violating the Eighth Amendment right suggested by JUSTICE BREYER. Cf. *United States* v. *Tateo,* 377 U. S. 463, 466 (1964) ("From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest").

Five years ago, JUSTICE STEVENS issued an invitation to state and lower courts to serve as "laboratories" in which the viability of this claim could receive further study. *Lackey* v. *Texas*, 514 U. S. 1045 (1995) (memorandum respecting denial of certiorari). These courts have resoundingly rejected the claim as meritless. See, *e.g.*, *People* v. *Frye*, 18 Cal. 4th 894, 1030–1031, 959 P. 2d 183, 262 (1998); *People* v. *Massie*, 19 Cal. 4th 550, 574, 967 P. 2d 29, 44–45 (1998); *Ex Parte Bush*, 695 So. 2d 138, 140 (Ala. 1997); *State* v. *Schackart*, 190 Ariz. 238, 259, 947 P. 2d 315, 336 (1997), cert. denied, 525 U. S. 862 (1998); *Bell* v. *State*, 938 S. W. 2d 35, 53 (Tex. Crim. App. 1996), cert. denied, 522 U. S. 827 (1997); *State* v. *Smith*, 280 Mont. 158, 183–184, 931 P. 2d 1272, 1287–1288 (1996); *White* v. *Johnson*, 79 F. 3d 432, 439–440 (CA5), cert. denied, 519

U. S. 911 (1996); *Stafford* v. *Ward*, 59 F. 3d 1025, 1028 (CA10 1995).[4] I submit that the Court should consider the experiment concluded.

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[4] Each of these cases rejected the claim on the merits. I am not aware of a single American court that has accepted such an Eighth Amendment claim. Some judges have dismissed the claim in the strongest of terms. See, *e.g.*, *Turner* v. *Jabe*, 58 F. 3d 924, 933 (CA4 1995) (Luttig, J., concurring) (describing a similar claim as a "mockery of our system of justice, and an affront to lawabiding citizens").