Chapter 7

Elderly Persons Facing the Death Penalty

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Introduction

I. Topic and Case Background

America’s death row population is aging. As of December 2009, 260 of those awaiting execution in the United States were aged sixty or older, comprising more than 8.2 percent of all inmates under a death sentence.1 This is a drastic increase from even ten years before, when only eighty such prisoners were awaiting execution, a mere 2.3 percent of the then total death row population.2 Since 2004, five convicts over age seventy have actually been executed in the U.S., while other elderly death-row inmates such as Viva Leroy Nash, who died in prison of natural causes at age ninety-four, do not even survive to be executed.3

The aging population of inmates awaiting execution does not reflect an increase in the number of crimes committed by the elderly in America, but is an unfortunate side effect of increased procedural protections and heightened review in capital cases. Prisoners executed in 2010 had spent an average of 14.8 years in prison between their initial sentence and execution,4 and it is not uncommon for this time period to stretch even longer, with some prisoners waiting decades before their appeals are exhausted and a final decision to execute is reached and implemented. Of course, these appeals are a necessary part of ensuring that only those actually guilty of the most serious offenses are executed, and many of these appeals are successful in reversing or reducing death sentences. In the period from 1977-2010, only 15.7 percent of those initially sentenced to death have been actually executed, with around thirty-nine percent having their sentence vacated or commuted after either successful challenges to the law or facts of their case.5 An additional forty percent still reside on death row awaiting their final disposition, and growing ever older.6

Even for ardent supporters of the death penalty, it may be uncomfortable to watch a feeble, elderly criminal be put to death. This discomfort is reflected in the intense media coverage that surrounds such executions and the controversy these cases inspire. From a legal perspective, however, is there any reason to treat elderly offenders differently from other offenders? Should a

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1 United States Department of Justice, Bureau of Justice Statistics, Capital Punishment 2009, Table 7.
2 United States Department of Justice, Bureau of Justice Statistics, Capital Punishment 1999, Table 5.
4 United States Department of Justice, Bureau of Justice Statistics, Capital Punishment 2010, Table 8. The length of this period has increased steadily since 1984, when the average duration was less than 6.2 years.
5 United States Department of Justice, Bureau of Justice Statistics, Capital Punishment 2010, Table 13, 14.
6 United States Department of Justice, Bureau of Justice Statistics, Capital Punishment 2010, Table 15. The remaining prisoners, slightly over 5% of the total, died in prison of other causes.
prisoner’s current advanced age have any bearing on his punishment for an offense that occurred many years before when he was a younger man? Is the question different for offenders who committed crimes when they were already seniors as opposed to those who aged while in prison pursuing appeals?

The U.S. Supreme Court has thus far declined to make a direct ruling on these questions or others relating to the age of capital offenders. In the case of *Allen v. Ornoski*, however, the influential Ninth Circuit Court of Appeals rejected the final appeal of a seventy-six year-old death row inmate who was put to death shortly after the Circuit Court’s decision. In denying his appeal, the circuit court considered whether his age should be a bar to execution.

II. Case and Analysis

*Allen v. Ornoski*, 435 F.3d 946 (9th Cir. 2006).

A. Case Facts

In 1974, Clarence Ray Allen, then forty-four, organized the robbery of a store owned by his long-time friends. When one of his co-conspirators, his son’s seventeen year-old girlfriend, later confessed to the store owners, Allen arranged her murder and the concealment of her body. Having gotten his revenge, he organized a new group of criminals to commit a series of additional robberies, but was ultimately caught when one of these went awry and police intervened. Allen was convicted of burglary, conspiracy and first-degree murder in 1977 as a result of these crimes, and was sentenced to life in prison with no possibility of parole.

Unfortunately, this was not the end of Allen’s criminal career. Now in prison, Allen harbored a grudge against those witnesses who had testified against him, including many of his former co-conspirators. From within prison, in preparation for an upcoming appeal of his sentence, he began to plot ways of eliminating these witnesses so as to prevent them from testifying against him again. Just as he had organized criminal gangs when free, Allen had secured the loyalty of other prison inmates who might help him achieve his goals. When one of these inmates was due to be released on parole in 1980, Allen employed him to kill some of the hostile witnesses against him and arranged for the killer’s access to weapons and transportation once outside of prison. What followed was a brutal triple murder at the same market Allen had first robbed, his revenge on the owners for their testimony against him.

The killer Allen had recruited was caught before other murders could follow, but when he was arrested, an address book listing all of the witnesses against Allen was found with him, indicating a larger plan to kill them all. This address book was critical in linking Allen to the case and overwhelming evidence was soon amassed against him showing him to be the instigator of these murders. He was tried and again found guilty in 1982, this time receiving a death sentence. Allen subsequently launched several procedural challenges to his trial, both in the state and federal court systems, which succeeded in delaying his execution, but ultimately failed to overturn his conviction and sentence. When his final petition for habeas corpus review and
motion to stay the execution were denied by the Federal District Court for the Eastern District of California, Allen requested review by the Ninth Circuit Court of Appeals.

At this time, as Allen’s seventy-sixth birthday was rapidly approaching, he already suffered from a number of physical limitations. His infirmities included blindness, hearing problems, advanced Type-2 diabetes, complications from a stroke, heart disease, and complications from a heart attack that left him confined to a wheelchair. His age and deteriorating condition were at the center of his appeal to the Ninth Circuit Court of Appeals.

B. Case Analysis

The Ninth Circuit Court of Appeals found that Allen’s final petition contained two related but independent contentions: first, that the Constitution’s prohibition of cruel and unusual punishment7 prevented outright the execution of someone as elderly and debilitated as he was. Secondly, Allen argued that execution, on top of his many years living in the demoralizing and dehumanizing conditions of death row, would together amount to cruel and unusual punishment. The procedural posture of the case required only that the Appellate Court decide whether these claims presented a debatable constitutional question, not whether they should actually succeed in this specific case.

1. Argument 1: Execution of the Elderly and Infirm is Cruel and Unusual Punishment Prohibited by the Constitution.

The court first considered the age and infirmity claim:

Allen argues that proceeding with the execution despite his old age and physical infirmities would deprive him of his constitutional right under the Eighth Amendment to be free from cruel and unusual punishment. Allen’s petition, however, displays a woeful lack of support for the proposition that the Eighth Amendment prohibits execution of the elderly and the infirm... Allen instead argues that the Supreme Court’s recently developing Eighth Amendment jurisprudence naturally extends to a constitutional prohibition against executing the elderly and infirm.8

Lacking legal authority that specifically related to the age question, Allen had instead attempted to generalize from the trend in Supreme Court decisions towards gradual reduction of the scope of the death penalty. He hoped to argue that the momentum and reasoning behind previous cases limiting the application of the death penalty against certain types of defendants should apply equally to restricting the death penalty for disabled seniors. The court recited the cases Allen had asserted to support this proposition:

7 U.S. Const., amend. VIII.
8 Allen v. Ornosski, 435 F.3d 946, 951 (9th Cir. 2006).
In support, Allen points to the Supreme Court’s capital case decisions of the post-
Furman era, in which the Court has gradually (1) enlarged the classes of persons
who are ineligible for the death penalty, see Ford v. Wainwright (executing
the mentally incompetent is unconstitutional); Thompson v. Oklahoma (executing
youths under sixteen at time of offense is unconstitutional); Atkins v. Virginia (executing
juveniles who committed the offense while under eighteen is unconstitutional), and (2) narrowed the range of offenses that are death-
eligible, see Coker v. Georgia, (execution for offenses short of murder is unconstitutio
nal); Enmund v. Florida (executing those who aided a felony but did not kill or intend to kill is unconstitutional).

a. The Relationship of Advanced Age and Culpability

The court rejected Allen’s contention that these cases created a debatable constitutional argument
on whether the elderly can be sentenced to death. It considered the rationales behind many of
these cases and determined that they did not apply equally to Allen’s situation. The cases he
cited that excluded certain classes of offenders from eligibility for the death penalty, for example,
did so because they found those groups to be less criminally culpable and thus undeserving of the
law’s most serious punishment. At the time of the crime, however, the Ninth Circuit found that
there was no reason to consider Allen any less culpable than other defendants:

The Supreme Court’s rulings in Roper, Atkins, Thompson and Enmund are
inextricably bound to the concept that the execution of certain classes of inherently
less culpable persons offends the Eighth Amendment’s proportionality
requirement. In Roper, the Supreme Court enumerated three traits of juveniles
which, as a class, render them less culpable and therefore unsuitable to be placed
in the worst category of offenders: (1) a “lack of maturity and an underdeveloped
sense of responsibility” resulting in “impetuous and ill-considered actions and decisions;” (2) a heightened vulnerability to “negative influences and outside

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13 Coker v. Georgia, 433 U.S. 584 (1977). For additional discussion of this case, see Chapter 4. In Coker v. Georgia,
the Court held that it would be disproportionate and therefore unconstitutional to impose a death sentence upon a
defendant convicted of rape of an adult woman, who does not take a human life. The Ninth Circuit in Allen
interpreted that decision as meaning that only crimes which end a human life may be constitutionally punished with
death. The precise meaning of the Coker case was not clarified until Kennedy v. Louisiana, 554 U.S. 407 (2008), in
which the Supreme Court held that the death penalty is indeed unconstitutional and prohibited for interpersonal
crimes (as opposed to crimes against the state) that do not take the life of a victim. The Kennedy case is also
discussed in further detail in Chapter 4.
14 Enmund v. Florida, 458 U.S. 782 (1982). See Chapter 4 for a more detailed account of the levels of intent and
participation in a felony-murder (felony resulting in a death not directly caused or intended by the defendant)
required by the Supreme Court before a capital sentence may be considered, in both Enmund and later in Tison v.
Arizona, 481 U.S. 137 (1987), which altered the Supreme Court’s rule in Enmund.
pressures;” and (3) personality that is “more transitory, less fixed.” The Court found that “[t]heir own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment,” and therefore concluded that the social purpose of “[r]etribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blame-worthiness is diminished, to a substantial degree, by reason of youth and immaturity.” The Court again focused on culpability in assessing whether executing juveniles fulfilled the social purpose of deterrence and found that “the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.”

In Atkins, the Court again linked “relative culpability” to the “penological purposes served by the death penalty.” With respect to retribution, the Court found that because “severity of the appropriate punishment necessarily depends on the culpability of the offender ... an exclusion for the mentally retarded is appropriate.” Culpability was again key to the Court’s finding that execution of the mentally retarded did not serve the penological purpose of deterrence, because “it is the same cognitive and behavioral impairments that make these defendants less morally culpable; for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses; that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.” The Court applied the same rationale of lessened culpability undermining the deterrence and retributive effects of capital punishment in holding that the Eighth Amendment prohibits the execution of persons who were under sixteen at the time of their offense. Similarly, in Enmund, the Court assessed proportionality based upon the personal culpability of the defendant, ruling that for an accomplice to a felony, “criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt.”

Nothing about Allen’s age or infirmity was found to have affected his culpability in the way that youth or mental defect might have. Or, in the court’s words, “[n]othing about his current ailments reduces his culpability and thus they do not lessen the retributive or deterrent purposes of the death penalty.” Quite the contrary, the Ninth Circuit held that his age and experience at the time of the offenses committed from within prison (fifty years old) “only sharpened his ability to coldly calculate the execution of the crime.”

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16 Allen v. Ornoski, at 952-54.
17 Id. at 953.
18 Id.
b. Relationship of Advanced Age and Competence to be Executed

The *Ford* case, which Allen also cited, differs from these other cases in that it required that a prisoner be able to understand his punishment at the *time of execution*, rather than consider his mental state at the *time of the crime*. Still, the Ninth Circuit found that Allen’s reliance on that case was also misplaced as this subjective mental health requirement is independent of age, and the test provided in the *Ford* case can be applied equally to any defendant, young or old on an individual basis. Further, nothing about Allen’s condition implied that the *Ford* standard would protect him from the death penalty:

Allen heavily relies upon *Ford*, arguing that given Allen’s age, failing health and length and conditions of confinement on death row the retributive purposes of capital punishment would not be served by his execution. In *Ford*, the Court held that the Eighth Amendment prohibits the execution of an insane defendant. In doing so, it relied in part on the rationale that the execution of a person who does not understand, or is not even aware of, the punishment that he is about to face does not serve the death penalty’s aims of deterrence and retribution. By contrast, here, there is no indication that Allen’s physical condition or his age has affected his mental acuity. To the contrary, Allen’s mental state was last evaluated on December 27, 2005, and he was found competent. Indeed, he does not claim that he is mentally incompetent in any way. *Ford*, then, is inapposite because nothing in the record suggests that Allen’s physical condition and age render him unable to comprehend the nature and purpose of the death penalty that he faces.19

2. Argument 2: Lackey Claim

A so-called “Lackey” Claim, named for the Supreme Court case that first suggested their possibility,20 asserts that years of living under threat of death in the spartan conditions of death row is already a severe form of punishment, and that after a sufficient amount of time spent in this fashion, execution would be excessive punishment without much punitive value and thus

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19 Allen v. Ornoski, at 953.
unconstitutional. The Supreme Court has yet to actually hear a single \textit{Lackey} claim, although more than one Justice has expressed his/her willingness to do so. In his concurring opinion to the \textit{Lackey} case, Justice Stevens questioned whether retribution and deterrence, the penological goals of capital punishment, would really be furthered by execution after a long delay. He felt that in such cases retribution is already achieved through the punishment of the unbearable wait and confinement the prisoner has already experienced, and that general deterrence value is likely to be only minimally decreased by rare failures to actually execute following such severe punishment. Put simply, it is unlikely that potential offenders will be less afraid of the death penalty because there exists an unlikely chance that if they live long enough on death row under constant threat of execution their life might ultimately be spared.

A defendant’s age is not explicitly a part of a \textit{Lackey} claim, and those who commit capital crimes while already elderly would not immediately benefit from it. Instead, the claim might provide a rationale for avoiding the death penalty in cases where convicts have grown old while exhausting their appeals on death row. As mentioned above, this accounts for the majority of elderly persons sentenced to death, and \textit{Lackey} claims may become increasingly important as the law and society struggle to address this problem. Occasionally allowing such claims where a prisoner is both elderly and has served a very long time on death row for his crimes would preserve the integrity of the death penalty while providing a means to avoid the spectacle of a seemingly helpless old person being escorted to the execution chamber. For now, however, most such claims are rejected as Allen’s ultimately was.

In rejecting Allen’s \textit{Lackey} claim, the Ninth Circuit noted that it would seem unreasonable to allow a prisoner who pursues unsuccessful challenges to his conviction or sentence, thereby delaying the time of his own execution, to then be able to successfully challenge the case on the grounds that he has been in prison too long. Or, as the court put it, “[w]e cannot conclude that delays caused by satisfying the Eighth Amendment themselves violate it.”\textsuperscript{21} Even those Supreme Court Justices who have previously expressed support for \textit{Lackey} challenges have usually focused on execution delays caused by a defect in the legal system itself rather than delays directly attributable to the prisoner’s own legal challenges, and they might well agree that this distinction is meaningful.

Although the procedural posture of Allen’s case required only that he demonstrate that \textit{Lackey} claims had become part of clearly established law, the Ninth Circuit did not so find. The court cited the large number of cases it had addressed that rejected such claims and also similar cases in sister circuits:

Allen’s \textit{Lackey} claim is devoid of support in federal or state law and therefore the denial of habeas relief by the California Supreme Court, even without a thorough discussion of the merits, could not possibly be construed to be “contrary to, [nor]  

\textsuperscript{21} \textit{Allen v. Ornoski}, at 959, quoting \textit{McKenzie v. Day}, 57 F.3d 1461, 1467 (9th Cir. 1995).
involve an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”

As such, this claim was also rejected and Allen was executed on January 17, 2006.

III. Discussion Questions

1. Age as Mitigation: This Chapter and the *Allen* case considered only whether old age and infirmity might present a *constitutional* barrier to imposing a death sentence or carrying out an execution, but did not consider whether it would be appropriate to consider old age as a mitigating circumstance at sentencing if the defendant was already elderly at the time of trial.

Elderly capital defendants have the opportunity to present evidence of their age in the sentencing phase of a capital trial, along with all other relevant mitigating factors, as part of constitutionally required “individualized sentencing.” The “age of the defendant at the time of the crime” (including youth or advanced age) is also a statutory mitigating circumstance in many states. Such statutes are all silent, however, as to what numerical age is appropriate to begin considering elderliness as a mitigating factor. Should there be a clear cut-off?

Even in those jurisdictions that consider advanced age as a mitigating circumstance, there seems to be a reluctance to give advanced age much weight in sentencing without showing some direct impact on the crime. Consider the following recent cases:

a. *Ballard v. State*, 66 So.3d 912 (Fla. 2011) (Polston, J., dissenting): “[T]he trial court assigned the statutory age [mitigator]25 ‘little to slight weight,’ because, although Ballard was 65 at the time of the murder, his aging ‘did not appear to slow him down’ as he worked at a full-time job that started before 7:00 a.m. and ‘required both physical stamina and mental acuity.’”

b. *State v. Frazier*, 115 Ohio St. 3d 139 (2007): “Frazier argues that any life sentence will keep him in prison for the rest of his life. However, Frazier’s age had no effect on his ability to brutally murder Stevenson. Thus, we give little weight to his age as a mitigating factor.”

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22 *Allen v. Ornoski*, at 960.
25 As the result of a presumed typographic error, Justice Polston actually mislabeled the defendant’s age as an aggravating factor; although his analysis clearly treats it as a mitigating factor throughout his dissent and identifies it correctly elsewhere.
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c. *State v. Glassel*, 211 Ariz. 33 (2005): In this case, the death penalty was imposed despite the recognition of three mitigating factors: the advanced age of the defendant (61), his lack of a criminal record, and his lack of a history of prior violent crimes. These were outweighed by the single aggravating factor of having killed multiple victims in a single incident.

How do the first two cases compare to the *Allen* court’s reflection on the generally undiminished culpability of elderly defendants? If, as these cases suggest, age alone is never or rarely enough, should it even be considered a factor alone, or considered only in light of its effects, such as physical infirmity or dementia? Can age be viewed as reducing future dangerousness and thus the need for the death penalty?

From the limited number of cases available, it is difficult to fully evaluate the impact of age as a mitigating factor. Despite the seeming reluctance to allow elderly offenders to avoid the death penalty based solely on their age, it is generally accepted that juries might be sympathetic to elderly defendants and it is said that prosecutors recognize this and often choose not to pursue the death penalty against such defendants. Prosecutors only pursuing the death penalty against the most heinous of elderly offenders might also explain why age is rarely an effective mitigating factor.

2. **Age as an Aggravating factor?** Is it possible that old age might be an aggravating factor? The court noted that at fifty years-old, Allen should have the experience and age to know how to control himself — is this not more true for even older felons, assuming they are mentally competent?

3. The Court considered both culpability at the time of the offense and mental competency at the time of execution in considering whether an elderly prisoner might be sentenced to death and found that there was no reason to consider elderly defendants as any different from other prisoners. If elderly defendants were unable to control their actions at the time of the crime, or to appreciate the nature of their impending execution, normal legal procedures would aid them without specific consideration of their age. Do these protections adequately address why some members of society are troubled by the execution of the elderly, or is there something unique about age that requires further protections?

   a. It has been said with regard to the mentally ill that “the execution of an insane person simply offends humanity” and that such executions are excessive because “madness is its own punishment.” Could it be said that the execution of the elderly and infirm “simply offends humanity” and that this alone should bar it? Is


27 *Ford v. Wainwright*, at 407.
old age its own punishment?

b. Is there a point at which so much time has passed since an offense was committed that while we still condemn the act, we no longer view the defendant as fully culpable for the actions of his younger self? The usual lack of a statute of limitations on murder and sometimes other major crimes implies that we are always willing to punish the most serious offenders, but perhaps the situation is different when the defendant has already been continuously confined and thus already punished for his actions. How does this relate to the Lackey claim?

4. In discussing Allen’s case, infirmity and old age are considered together, but perhaps this mistakes society’s concern in these cases. Dissenting from the Supreme Court’s denial of Allen’s application for a stay of execution of his sentence, Justice Breyer wrote, “Petitioner is 76 years old, is blind, suffers from diabetes, is confined to a wheelchair, and has been on death row for 23 years. I believe that in the circumstances he raises a significant question as to whether his execution would constitute ‘cruel and unusual punishment.’” Which of the circumstances Justice Breyer names is most problematic? Would executing a very healthy elderly person be less troubling? What if a younger condemned person were blind and confined to a wheelchair? Is it the overall image of a weak and vulnerable object of state violence that is so troubling – or is the problem something about old age per se?

5. Does existence of special protections for the elderly in civil rights law, under housing law, or as victims of crimes (where harming a victim who is elderly is often seen as an aggravating factor in criminal cases) seem inconsistent with the reluctance to consider a defendant’s advanced age as a mitigating factor in capital cases?