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THE DEATH PENALTY AND THE INTERSTATE AGREEMENT ON DETAINERS ACT: A PROPOSAL FOR CHANGE

[W]hat . . . will [it] be like to go through it, to die right there, strapped in the chair. . . . The body sears when the currents start going through the body; this makes a guy shiver to think of it. Does he feel it? What does he feel to start off with? When the current goes through, does he, is he unconscious right when it strikes him? Or what really happens?[1]

INTRODUCTION

Imagine that a person commits one murder in Oklahoma[2] and then commits another murder in New York.[3] The State of New York convicts the person first and sentences him to a prison term of twenty years to life,[4] but then Oklahoma obtains custody of the prisoner[5] under the Interstate Agreement on Detainers Act (IAD)[6] and imposes the death penalty.[7]

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1. Robert Johnson, *Under Sentence of Death: The Psychology of Death Row Confinement*, 5 LAW & PSYCHOL. REV. 141, 173 (1979).

2. Matt Siegel, *Defending a Death Wish*, AM. LAW., Apr. 1993, at 60. The late Thomas Grasso forms the basis for the above textual hypothetical. His odyssey began when he killed an elderly woman in the state of Oklahoma on Christmas Eve in 1990. *Id.*

3. *Id.* In 1991, Grasso strangled an elderly Staten Island man in New York. *Id.*

4. Mark Hansen, *An Unusual "Custody" Dispute: New York Wants Convict Sent to its Prison Instead of Oklahoma's Death Chamber*, 79 A.B.A. J. 32, 32 (1993). Grasso first faced trial in New York and received a 20-year-to-life sentence. *Id.*

5. Thomas A. Coughlin, *State Had No Choice In Returning Inmate*, BUFF. NEWS, Nov. 4, 1993, Editorial Page, at 2.

6. The text of the Interstate Agreement on Detainers Act appears in Council of State Governments, *Suggested State Legislation: Program for 1957* 74-78 (1957) [hereinafter IAD]. Art. IV of the IAD allows a prosecutor in one state to request the custody of an inmate imprisoned in another state for the purpose of resolving all outstanding charges against the prisoner. Thomas R. Clark, *The Effect of Violations of the Interstate Agreement on Detainers on Subject Matter Jurisdiction*, 54 FORDHAM L. REV. 1209, 1217 (1986). Art. V(a) of the IAD requires a state receiving a request for a prisoner to deliver temporary custody of the prisoner to the demanding state. Keith G. Meyer, *Effective Utilization of Criminal Detainer Procedures*, 61 IOWA L. REV. 659, 670 (1976). Furthermore, Art. V(e) of the IAD mandates that the demanding state return the prisoner to the original state at the earliest practicable time. *Id.* See *infra* notes 25-40 and accompanying text for a

The inmate relinquishes all appeals relating to his death sentence and prefers to die immediately.[8] However, instead of allowing the inmate to remain in Oklahoma for execution, New York requests the prisoner's return[9] pursuant to a provision of the IAD that requires the return of the prisoner after the second state has disposed of all outstanding charges against the inmate.[10] A federal court then decides the dispute[11] and gives New York the option of waiving the return requirement.[12] New York refuses,[13] and the judge orders the prisoner returned to New York for service of the remaining sentence.[14]

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further discussion of the IAD.

7. Coughlin, *supra* note 5, at 2. An Oklahoma court found Grasso guilty of murder and sentenced him to death. *Id.*

8. *Inmate Asks to be Executed in Oklahoma*, N.Y. TIMES, May 23, 1994, at B5.

9. State of New York *ex rel.* Coughlin v. Poe, 835 F. Supp. 585, 588 (E.D. Okla. 1993). The *Poe* case sets forth the procedural events that precipitated the State of New York to file suit in federal district court seeking the return of Grasso. In July of 1992, pursuant to the IAD, Oklahoma filed a detainer against Grasso for the 1991 Oklahoma murder. *Id.* at 587. As part of the request Oklahoma promised to return Grasso to New York immediately after trial. *Id.* In August 1992, New York formally agreed to give Oklahoma temporary custody of Grasso. *Id.* at 587-88. In October of 1992, after Oklahoma sentenced Grasso to death, New York requested his return and stated Grasso's eligibility for parole would commence on July 9, 2011. *Id.* at 588. Oklahoma officials then informed New York that Grasso had waived his rights under the IAD and that he desired to be executed as quickly as possible. *Id.* In July of 1993, the Oklahoma Court of Criminal Appeals declared that Grasso had properly waived his right of direct appeal and affirmed his sentence of death. *Id.* New York Governor Mario Cuomo sent a letter to Oklahoma Governor David L. Walter indicating that he was not demanding Grasso's return because of his opposition to the death penalty but because of "his loyalty to [following] the letter of the law." Robert D. McFadden, *Oklahoma Death Row Inmate Is Returned To New York*, N.Y. TIMES, Oct. 31, 1993, § 1, at 49.

10. IAD, Art. V(e).

11. *Poe*, 835 F. Supp. at 593.

12. *Id.* at 592. The court concluded that the IAD did not prohibit New York from waiving Grasso's return. *Id.* at 592-93.

13. *See* McFadden, *supra* note 9, at 49. Governor Cuomo chose not to waive New York's rights concerning Grasso. *Id.* However, Cuomo conceded that forcing Grasso to remain in a New York prison for 20 years might constitute cruel and unusual punishment. Hansen, *supra* note 4, at 32.

14. State of New York *ex rel.* Coughlin v. Poe, 835 F. Supp. 585, 593 (E.D. Okla. 1993). The judge ruled that Grasso was required to first serve the New York sentence because the IAD only allowed for the sending state (New York) to turn over temporary custody of a prisoner to a receiving state for the purpose of prosecuting an untried charge. *Id.* at 590. The court also denied Grasso's waiver of his return to New York, stating, "the question of jurisdiction and custody of prisoners is essentially one of comity between the member States and not a personal right of prisoners." *Id.* at 592 (citing Jones v. Taylor, 327 F.2d 493 (10th Cir.), *cert. denied*, 377 U.S. 1002 (1964)). The court analogized Grasso's situation to that of a prisoner in violation of both federal and state laws because such an inmate has no right to contest the order of punishment or trial. *Id.* (citing Lionel v. Day, 430 F. Supp. 384, 386 (W.D. Okla. 1976)). The *Poe* judge also distinguished Grasso's situation from

The courts would have decided the constitutionality of the previous situation had former Governor Mario Cuomo remained in office.[15] However, because George Pataki defeated Cuomo in the 1994 gubernatorial election,[16] the inmate in the previous scenario, Thomas Grasso, only spent one year in New York after the federal court in Oklahoma ordered his return to New York.[17]

The above scenario of an inmate forced to serve a prior sentence before execution in another state sounds like justice. However, a state's lawful compliance with the IAD can create a wait of multiple years on death row for the inmate[18] prior to execution.

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three other cases involving the death penalty and the IAD. *Id.* at 591-92. The three other cases involved prisoners extradited under the IAD, who received death sentences in the receiving states. *Id.* at 592. However, instead of the sending state requesting the prisoner's return, the prisoners themselves filed suit seeking an order of return to the sending state. *Id.* The courts in the other cases determined that the section of the IAD mandating a prisoner's return after prosecution did not apply after a sentence of death. *Id.* (discussing Moon v. State, 375 S.E.2d 442 (Ga. 1988), *cert. denied*, 499 U.S. 982 (1991); People v. Pitsonbarger, 568 N.E.2d 783 (Ill. 1990), *cert. denied*, 502 U.S. 871 (1991); People v. Guest, 503 N.E.2d 255 (Ill. 1986), *cert. denied*, 483 U.S. 1010 (1987)). The *Poe* court declined to accept the analysis of the previous cases concluding that the plain language of the IAD required Grasso's return to New York, and that the governors in the other cases had entered into special agreements regarding the custody of the specific prisoners. *Id.* Upon Grasso's return to New York, he filed suit in state court, claiming that serving the New York sentence prior to his execution in Oklahoma would constitute cruel and unusual punishment. People v. Grasso, 616 N.Y.S.2d 156, 157 (N.Y. Sup. Ct. 1994). The court ruled against Grasso, and stated that a sentence of 20 years to life under mandatory narcotics sentencing laws did not constitute cruel and unusual punishment. *Id.* at 158 (citing Harmelin v. Michigan, 501 U.S. 957 (1991)). In further support for keeping Grasso in New York, the court depicted some of the details of the New York murder committed by Grasso:

> When the body was discovered . . . [the victim] appeared to be in a kneeling position, head up, with face and head trauma and an electrical cord wrapped five times around his neck. The crime scene photos confirmed . . . that a struggle took place in the room. The defendant's own statement as to how he murdered the senior citizen adds that . . . [the victim] was stomped . . . because the victim put his hands together as if to pray.

Id. at 159. The judge characterized Grasso's argument for his return to Oklahoma as a "perverse mercy plea by the murderer." *Id.* Finally, the judge reasoned that granting Grasso's request "would be tantamount to facilitating state-sponsored suicide in direct contravention of this state's [New York] clear policy considerations regarding the death penalty." *Id.* at 160.

15. *Grasso Starts 20-year Term in Special Unit at Attica*, BUFF. NEWS, Nov. 1, 1993, at 4.

16. *Pataki Topples Cuomo in New York*, REUTERS, Nov. 8, 1994, at 1.

17. Kevin Sack, *New York Transfers Killer to Oklahoma to Await Execution*, N.Y. TIMES, Jan. 12, 1995, at A1. Upon Pataki's election as Governor of New York he signed an executive agreement with the Governor of Oklahoma. *Id.* The agreement provided for the transfer of Grasso from New York to Oklahoma. *Id.* Thus, on March 20, 1995 the State of Oklahoma executed Thomas Grasso. John Kifner, *Inmate is Executed in Oklahoma, Ending N.Y. Death Penalty Fight*, N.Y. TIMES, Mar. 20, 1995, at A1.

18. For example, had Governor Pataki not returned Grasso to Oklahoma for

This situation creates an unconstitutional result in the form of cruel and unusual punishment.[19] The cruel and unusual punishment does not arise from physical conditions on death row,[20] but rather from the psychological torture caused by the prolonged wait in anticipation of the execution.[21] An emerging line of cases has begun to recognize that mental suffering, even in the absence of physical harm, may constitute cruel and unusual punishment under the Eighth Amendment.[22]

The present construction of the IAD can subject a prisoner to an extended wait before execution that is similar to the conditions faced by an inmate on death row.[23] Consequently, the emotional injury suffered by an IAD prisoner awaiting execution constitutes a violation of the Eighth Amendment. Therefore, this Note proposes that Congress amend the IAD to negate the non-death sentence of the first state if the second state imposes the death penalty. This proposed revision is particularly relevant in light of the increasing number of cases in which a person commits murder in multiple states.[24]

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execution, Grasso would have remained in New York for 18 years. Sack, *supra* note 17, at A1.

19. The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

20. Smith v. Coughlin, 748 F.2d 783, 787 (2d Cir. 1984). In *Smith*, the court stated: "[t]hough the [E]ighth [A]mendment bars more than physical torture, 'discomfort compelled by conditions of confinement, without more, does not violate the amendment.'" *Id.* at 787 (quoting Jackson v. Meachum, 699 F.2d 578, 581 (1st Cir. 1983)). *See also* Peterkin v. Jeffes, 855 F.2d 1021 (3d Cir. 1988) (holding that the conditions of confinement faced by death row inmates in Pennsylvania did not constitute cruel and unusual punishment).

21. *See* Johnson, *supra* note 1, at 141-92; Note, *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814 (1972) [hereinafter *Mental Suffering*].

22. Hudson v. McMillian, 503 U.S. 1, 16 (1992) (Blackmun, J., concurring) (stating that psychological harm without physical suffering might amount to cruel and unusual punishment); Strickler v. Waters, 989 F.2d 1375, 1381 (4th Cir.) (holding that an Eighth Amendment violation may result from serious or significant physical or emotional injury), *cert. denied*, 114 S. Ct. 393 (1993).

23. State of New York *ex rel.* Coughlin v. Poe, 835 F. Supp. 585, 593 (E.D. Okla. 1993).

24. *See* Maryclaire Dale, *Caperton may not Block Killer's Execution*, CHARLESTON GAZETTE, July 14, 1995, at A1 (discussing a prisoner who killed two police officers during an escape in West Virginia and before capture, killed a man in Arizona); Lou Michel, *Niagara County Judge Removes Herself from Lasage's Trial in Death of Girl; Tactic by Murder-Rape Defendant Likely to Delay Case until September*, BUFF. NEWS, Mar. 8, 1994, at 4 (discussing a person who committed murder in Iowa and New York); Richard Pyle, *Murder Suspect Held in Georgia Wanted in 6 States*, THE RECORD, May 13, 1994, at A4 (discussing individual who committed murder in New York and Georgia and was also wanted in Massachusetts, Connecticut and South Carolina).

Part I of this Note discusses the operation of the IAD and the disposition of death penalty cases before and after the enactment of the IAD. Part II analyzes three different lines of cases in arguing that an extended wait on death row created by the IAD constitutes cruel and unusual punishment in violation of the Eighth Amendment. Finally, Part III proposes a change to the IAD that would prevent a state from violating a prisoner's Eighth Amendment rights.

I. THE IAD AND THE DEATH PENALTY

To understand the potential problem facing prisoners, it is first necessary to examine a historical background of the interrelationship between the IAD and the death penalty. Section A explains the history and the operation of the IAD. Next, Section B examines how courts have handled cases before and after the enactment of the IAD involving prisoners convicted of murder in two states and facing execution in one of those states.

A. The Background and Operation of the IAD

The need for a solution to the problems that stemmed from the filing of detainers[25] precipitated the creation of the IAD.[26] Consequently, in 1956 the Council of State Governments[27] proposed and approved the IAD.[28] Courts now refer to the IAD[29] as

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25. A detainer is "a request filed by a criminal justice agency with the institution in which a prisoner is incarcerated, asking that the prisoner be held for the agency, or that the agency be advised when the prisoner's release is imminent." Fex v. Michigan, 113 S. Ct. 1085, 1087 (1993). A detainer generally results from outstanding probation or parole violations, or further sentences faced by a prisoner in another jurisdiction. Carchman v. Nash, 473 U.S. 716, 719 (1985). Problems associated with the filing of a detainer prior to the enactment of the IAD included: a prisoner's facing anxiety and apprehension because of a lodged detainer; a prisoner facing a detainer who is no longer eligible for parole; and a prisoner no longer responding to prisoner training programs aimed at rehabilitation because the inmate becomes embittered by the continuing possibility of indefinite imprisonment. *Id.* at 719-20 (quoting Council of State Governments, *Suggested State Legislation: Program for 1957* 74 (1956)). For a further discussion of the problems created by detainers, see generally Note, *The Detainer: A Problem in Interstate Criminal Administration*, 48 COLUM. L. REV. 1190 (1948); Comment, *The Detainer System and the Right to a Speedy Trial*, 31 U. CHI. L. REV. 535 (1964).

26. United States v. Mauro, 436 U.S. 340, 349 (1978). In 1948 the Joint Committee on Detainers presented a report that identified problems arising from the use of detainers and made five proposals to help reform the system. *Id.* at 349-50.

27. The Council of State Governments consisted of representatives from the following groups: Parole and Probation Compact Administrators Association; National Association of Attorneys General; National Conference of Commissioners on Uniform State Laws; American Prison Association; and the Section on Criminal Law of the American Bar Association. *Id.* at 349 n.16.

28. *Id.* at 350. By 1956 the Joint Committee on Detainers had become an entity

a compact entered into by forty-eight of the fifty states, the federal government[30] and the District of Columbia.[31] The IAD contains nine articles (I-IX) with articles I, III, IV and V constituting the essential elements of the agreement.[32]

Prior to the examination of a legal issue created by the IAD, courts invariably look to the agreement's purpose.[33] Article I states that the purpose of the IAD is "to encourage the expeditious and orderly disposition of outstanding charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints."[34] The IAD's purpose stems from the need to alleviate the uncertainties created by untried charges and detainers which interfere with programs of inmate treatment and rehabilitation.[35]

Two further provisions of the IAD require only a brief mention for purposes of this Note. Article III allows a prisoner to demand the speedy disposition of charges stemming from a detainer lodged against him by another state.[36] Article IV gives a prosecutor the ability to obtain custody of an inmate for disposition of untried charges.[37]

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of the Council of State Governments. *Id.* The Council endorsed the IAD and included the agreement in the suggested State Legislature Program for 1957. *Id.* at 350-51.

29. The IAD gives a participating state the ability to gain custody of an inmate serving a sentence in another state for the purpose of trying the prisoner on criminal charges. Reed v. Farley, 114 S. Ct. 2291, 2293 (1994).

30. The United States became a signatory member of the IAD in 1970 by enacting the Interstate Agreement on Detainers Act, Pub. L. No. 91-538, 84 Stat. 1397 (1970) (codified at 18 U.S.C. §§ 1-9 (1994)).

31. Carchman v. Nash, 473 U.S. 716, 719 (1985).

32. Larry W. Yackle, *Taking Stock of Detainer Statutes*, 8 LOY. L.A. L. REV. 88, 97 (1975). Article II of the IAD acts as the definition article. *Id.* at 97 n.62. The term "state" means any state of the United States, and includes the United States and the District of Columbia. *Id.* The "sending" state refers to the state incarcerating the inmate when a detainer is filed. *Id.* The "receiving" state is the state where an untried charge is pending against a prisoner. *Id.*

33. *Carchman*, 473 U.S. at 719-20.

34. *Id.* at 720 (alteration in original).

35. *Id.* at 719-20.

36. IAD, Art. III.; Carchman v. Nash, 473 U.S. 716, 720 (1985). Article III mandates the warden of the institution incarcerating the inmate to advise the prisoner that he faces a detainer and that he may request final disposition of the charges. IAD, Art. III(c); *Carchman*, 473 U.S. at 721. If the prisoner does request final disposition of charges, the state filing the detainer has 180 days to bring the inmate to trial. IAD, Art. III(d); *Carchman*, 473 U.S. at 721. Finally, a request for final disposition of charges acts as a waiver of extradition. IAD, Art. III(d); United States v. Mauro, 436 U.S. 340, 351 (1978). For a further explanation of the operation of the IAD, see Clark, *supra* note 6, at 1216-24; Meyer, *supra* note 6, at 664-77.

37. IAD, Art. IV; *Mauro*, 436 U.S. at 351. Upon the filing of a detainer against a prisoner, the prosecutor sends a written request for temporary custody of the

Article V sets forth the parameters for a prisoner's stay in the receiving state and the inmate's return to the sending state.[38] The receiving state obtains only temporary custody of a prisoner for the sole purpose of prosecuting any untried charges against the inmate.[39] More importantly, Article V states, "[a]t the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending State."[40]

B. The Death Penalty Before and After the IAD

Prior to the enactment of the IAD, the question of whether a prisoner needed to serve out an unexpired sentence in state A before execution of the death penalty in state B was a matter of comity between the two jurisdictions.[41] In *Chapman v. Scott*,[42] a prisoner argued that he must first serve out a federal sentence before a Connecticut court's death sentence was imposed.[43] The *Chapman* court held that an inmate may not choose which sentence he serves first.[44] The court reasoned that a prisoner could not commit multiple crimes and then claim protection against trial and punishment merely because of a prior and unexpired sentence.[45]

Similarly, in *United States ex. rel. Buchalter v. Warden of*

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inmate to the authorities of the state currently incarcerating the prisoner. IAD, Art. IV(a); *Mauro*, 436 U.S. at 351-52. Article IV requires the receiving state to commence the trial no later than 120 days after the arrival of the prisoner. IAD Art. IV(c); *Mauro*, 436 U.S. at 352. Article IV also requires the receiving state to try the prisoner on all charges before his return to the sending state. IAD, Art. IV(e); *Mauro*, 436 U.S. at 352-53. In the event a state fails to meet either of the two prior requirements, the charges against the prisoner are dismissed. IAD, Art. IV(e), V(c); *Mauro*, 436 U.S. at 352-53.

38. IAD, Art. V.

39. IAD, Art. V(d).

40. IAD, Art. V(e)

41. William A. Meadows, *Interstate Agreement on Detainers and the Rights It Created*, 18 AKRON L. REV. 691, 704 (1985) (discussing whether the IAD allows a prisoner to avoid execution by serving out an unexpired sentence).

42. 10 F.2d 690 (2d Cir.), *cert. denied*, 270 U.S. 657 (1926). For a further discussion of cases involving the death penalty at common law before the enactment of the IAD see Meadows, *supra* note 41, at 704-05.

43. *Chapman*, 10 F.2d at 691. In *Chapman*, the inmate escaped from a federal prison and while at large murdered a police officer. *Id.* at 690. After the state court sentenced the inmate to death, the President of the United States commuted the inmate's federal sentence. *Id.* at 690-91. The inmate, nevertheless, refused to accept the President's decision and filed suit in federal court. *Id.* at 691.

44. *Id.* at 691. The court further stated that the United States government was the only party which could object. *Id. See also* Kelly v. Oregon, 273 U.S. 589, 593 (1927) (holding that a prisoner possesses no constitutional right to serve out an unexpired sentence before the imposition of a death sentence).

45. *Chapman*, 10 F.2d at 691.

Sing Sing Prison,[46] an inmate asserted that he could not receive the death penalty before the expiration of a previous sentence.[47] The *Buchalter* court rejected the argument,[48] stating, "[i]mprisonment is punishment exacted by the state; it gives the convict no asylum, temporary or permanent, against his prosecution or punishment for other crimes."[49] Consequently, prior to the inception of the IAD, a prisoner could not use an unexpired sentence as a shield to avoid the imposition of the death penalty.[50]

After the IAD became law, several courts ruled on the same issue faced by the *Chapman* and *Buchalter* courts. In *People v. Guest*,[51] a prisoner argued that the IAD required him to serve out an unexpired sentence in Missouri before Illinois could execute him.[52] The court held that returning the prisoners to Missouri was not consonant with the purposes of the IAD.[53] The court further reasoned that the terms of the IAD were not meant to apply when the receiving state imposes the death penalty.[54]

Similarly, in *People v. Pitsonbarger*,[55] the court rejected an inmate's argument that the IAD prohibited Illinois from executing him until the completion of his life sentence in Nevada.[56] The court held that even though the IAD requires the return of a prisoner to the sending state for service of his uncompleted sentence,

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46. 141 F.2d 259 (2d Cir.), *cert. denied*, 321 U.S. 780 (1944).

47. *Id.* In *Buchalter*, the inmate was serving a federal sentence when the United States Attorney General transferred custody of the prisoner to a state court for trial. *Id.* The inmate received a death sentence in state court and the Attorney General then surrendered federal custody of the prisoner to the state. *Id.*

48. *Id.* at 259-60.

49. *Id.*

50. Chapman v. Scott, 10 F.2d 690, 691 (2d Cir.), *cert. denied*, 270 U.S. 657 (1926).

51. 503 N.E.2d 255 (Ill. 1986), *cert. denied*, 483 U.S. 1010 (1987).

52. *Id.* at 274. In *Guest*, an inmate serving a life sentence in Missouri requested the disposition of charges he faced in Illinois. *Id.* The prisoner received a sentence of death in Illinois, but claimed the terms of the IAD required Illinois to return him to Missouri to serve out the remainder of his unexpired sentence. *Id.*

53. *Id.* at 274. The court reasoned that the disposition of outstanding charges against a prisoner was a primary goal of the IAD because such detainers created questions that could interfere with an inmate's eligibility for treatment and rehabilitation programs. *Id.*

54. *Id.* at 275. The doubt of the IAD's applicability in a death penalty situation prompted the *Guest* court to instruct the Illinois Attorney General to determine if Missouri desired to waive or enforce any of the state's rights in relation to the prisoner. *Id.*

55. 568 N.E.2d 783 (Ill. 1990), *cert. denied*, 502 U.S. 871 (1991).

56. *Id.* at 803. In *Pitsonbarger*, the defendant killed two people in Illinois. *Id.* at 786. He then murdered a man in Missouri and committed a robbery and attempted to murder a woman in Nevada. *Id.* at 788. Nevada was first to capture and convict the defendant. *Id.* The prisoner received four life sentences without the possibility of parole for the Nevada crimes. *Id.*

a prior executive agreement between the states of Illinois, Missouri and Nevada acted as a waiver of the IAD's requirements.[57] The court reasoned that the IAD was not intended to apply when the prisoner receives a death sentence from the second state.[58]

In summary, cases adjudicated both before and after the implementation of the IAD hold that a state may enforce or waive any rights pertaining to a prisoner,[59] and the inmate possesses no right to choose the order in which to serve multiple sentences.[60] Therefore, an inmate cannot avoid a death sentence by claiming he must first serve out an unexpired prison sentence in another state.

II. THE IAD AS A MEANS OF INFLICTING CRUEL AND UNUSUAL PUNISHMENT

This Part contends that an extended wait on death row as a result of the IAD constitutes cruel and unusual punishment. First, Section A defines cruel and unusual punishment. Section A then questions whether an involuntary wait before execution acts as an exception to the general rule that cruel and unusual punishment cannot occur when the inmate's extended wait on death row stems from his own appeals. Next, Section B examines an emerging line of cases that accepts the possibility of cruel and unusual punishment based solely on a prisoner's emotional injuries. Finally, Section C draws an analogy between prisoners forced to endure a protracted period of time in solitary confinement and inmates subjected to a prolonged wait before execution as a result of the IAD.

A. Cruel and Unusual Punishment and the Wait For Death

Through the years, courts have struggled to assign a precise definition to the Eighth Amendment's prohibition against cruel and unusual punishment.[61] Courts generally gauge cruel and

57. *Id.* at 803. The agreement provided for the prisoner's return to Nevada to serve the prior life sentence only if the inmate did not receive the death penalty in either Illinois or Missouri. *Id.* The agreement also granted Missouri temporary custody of the prisoner, but required his return to Illinois if he was already under a sentence of death in Illinois. *Id.*; *see also* Moon v. State, 375 S.E.2d 442, 447 (Ga. 1988) (holding that the IAD allows states to enter into cooperative agreements concerning the final custody of a prisoner facing a possible death sentence in the receiving state), *cert. denied*, 499 U.S. 982 (1991).

58. *Pitsonbarger*, 568 N.E.2d at 802 (citing People v. Guest, 503 N.E.2d 255 (Ill. 1986), *cert. denied*, 483 U.S. 1010 (1987)).

59. *See* Chapman v. Scott, 10 F.2d 690, 691 (2d Cir.), *cert. denied*, 270 U.S. 657 (1926); *Guest*, 503 N.E.2d at 275.

60. *See* United States *ex rel.* Buchalter v. Warden of Sing Sing Prison, 141 F.2d 259, 259-60 (2d Cir.), *cert. denied*, 321 U.S. 780 (1944); People v. Pitsonbarger, 568 N.E.2d 783 (Ill. 1990), *cert. denied*, 502 U.S. 871 (1991).

61. *See* Thompson v. Oklahoma, 487 U.S. 815, 821 (1988). The court stated,

unusual punishment against the "evolving standards of decency that mark the progress of a maturing society."[62] The Eighth Amendment further bars practices that could not occur under the common law at the time that the Bill of Rights was adopted.[63] One court has stated that the word cruel "implies 'something inhuman and barbarous, something more than the mere extinguishment of life.'"[64] The case of an inmate serving out an unexpired sentence prior to execution appears to fall within this definition because the prisoner does not merely face execution, but a protracted wait for death.

Over the years, several cases have involved prisoners claiming that an extended wait on death row before execution constitutes cruel and unusual punishment.[65] In *People v. Chessman*,[66] the court admitted that an inmate spending eleven years on death row was unusual, and that under the circumstances the prisoner must have incurred some mental suffering.[67] However, the *Chessman* court concluded that the prolonged wait on death row stemmed from the legal proceedings initiated by the inmate and not from an unreasonable delay caused by the state of California.[68] Consequently, the court held that California did not inflict any cruel or unusual punishment upon the prisoner.[69] In the

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"The authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishments, but they made no attempt to define the contours of that category. They delegated that task to future generations of judges. . . ." *Id.*

62. *Id.* (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion) (Warren, C.J.)).

63. Penry v. Lynaugh, 492 U.S. 302, 330 (1989). The court expanded the notion that a definition of cruel and unusual punishment procures from a society's evolving standards of decency. *Id.* at 330-31. The Court felt that the criterion derives from objective evidence, as expressed by legislative enactments and the decisions of sentencing juries. *Id.* at 331.

64. Campbell v. Wood, 18 F.3d 662, 683 (9th Cir.), *cert. denied*, 114 S. Ct. 2125 (1994) (quoting *In re* Kemmler, 136 U.S. 436, 447 (1890)). The *Campbell* court also defined punishments as cruel, "when they involve torture or a lingering death." *Id.* (quoting *Kemmler*, 136 U.S. at 447).

65. Richmond v. Lewis, 948 F.2d 1473, 1491 (9th Cir. 1990), *rev'd on other grounds*, 506 U.S. 40 (1992); People v. Hill, 839 P.2d 984, 989 (Cal. 1992), *cert. denied*, 114 S. Ct. 438 (1993).

66. 341 P.2d 679 (Cal.), *cert. denied*, 361 U.S. 925 (1959).

67. *Id.* at 699. In *Chessman*, the inmate claimed that the state of California inflicted cruel and unusual punishment through alleged delays in his prosecution and appeals. *Id.* The prisoner believed that the state's actions warranted his immediate release from incarceration. *Id.*

68. *Id.*

69. *Id.* The court noted that because of the prisoner's own choice the case was simultaneously before the California and federal courts. *See id.* Under such circumstances, the court believed the inmate did not incur any unreasonable delays that constituted cruel and unusual punishment. *See id.*

companion case of *Chessman v. Dickson*,[70] the same inmate argued before the United States Court of Appeals for the Ninth Circuit that an extended stay on death row constituted cruel and unusual punishment.[71] The *Dickson* court rejected the argument, stating, "[we] do not see how we can offer life (under a death sentence) as a prize for one who can stall the processes for a given number of years, especially when in the end it appears the prisoner never really had any good points."[72]

A prisoner awaiting execution on death row should not receive a penalty for exercising his rights of appeal because such rights are protected by the Constitution.[73] However, the same prisoner should not prevail upon an Eighth Amendment claim when his appeals do not succeed.[74] Courts believe a "mockery of justice" would occur if every death row inmate could toll the years spent making appeals into a substantive claim of relief when the prior appeals have already failed upon the merits.[75] Consequently, the courts have prevented prisoners from escaping execution on a cruel and unusual punishment claim by simply dragging out the appellate process for an extended period of time.[76]

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70. 275 F.2d 604 (9th Cir. 1960).

71. *Id.* at 607. On appeal, the prisoner claimed the trial court judge erred when he refused to release the inmate from confinement. *Id.* The prisoner reasoned that the cruel and unusual punishment stemming from 11 years on death row warranted a reversal of the trial court. *Id.*

72. *Id.* The inmate's attorney attempted to make a case for an Eighth Amendment violation by recounting the suffering associated with death row. *Id.* The court responded by acknowledging the horrors of death row, but at the same time portraying the prisoner as a man deserving such a fate:

> True, it would be hell for most people. But here is no ordinary man. In his appearances in court one sees an arrogant, truculent man, the same qualities that [the victims] met, spewing vitriol on one person after another. We see an exhibitionist who never before had such opportunities for exhibition. . . . And, I think he has heckled his keepers long enough.

Id. at 607-08.

73. Richmond v. Lewis, 948 F.2d 1473, 1491-92 (9th Cir. 1990), *rev'd on other grounds*, 506 U.S. 40 (1992). In *Richmond*, the inmate alleged that execution after a 16 year wait on death row would constitute cruel and unusual punishment. *Id.* at 1491. The court refused to find that the prisoner's prolonged wait on death row resulting from his own appeals violated the Constitution. *Id.* at 1492.

74. *Id.* The court believed that a prisoner prevailing on an Eighth Amendment claim would perceive the victory as a reward for merely filing enough appeals to create a protracted stay on death row. *Id.*

75. *Id.*; *see also* Andrews v. Shulsen, 600 F. Supp. 408 (D. Utah 1984), *aff'd* 802 F.2d 1256 (10th Cir. 1986), *cert. denied*, 485 U.S. 919 (1988). In *Andrews*, the inmate spent 10 years on death row before making an Eighth Amendment claim. *Id.* at 431. The court noted that the extensive appeals and consequent delay in execution stemmed from the inmate and not a desire by the state to delay the execution. *Id.* The court concluded that, "to accept the petitioner's argument would create an irreconcilable conflict between constitutional guarantees and would be a mockery of justice." *Id.*

76. *Richmond*, 948 F.2d at 1492. If inmates could escape execution by merely

One court has explicitly stated that the time spent on death row prior to execution is a part of the punishment for the crime committed and therefore not a violation of the Eighth Amendment.[77] However, an IAD inmate's extended wait before execution is not caused by the death sentence, but rather by the service of a prior prison sentence in another state. Thus, an IAD inmate does not voluntarily remain on death row because of the appeals process; instead, the involuntary and protracted wait for execution stems from the present construction of the IAD.

Just before the United States Supreme Court found the death penalty unconstitutional in *Furman v. Georgia*,[78] the California Supreme Court held that an extended wait before execution constituted cruel and unusual punishment[79] even if the delays resulted from the inmate's own appeals.[80] The court concluded that any analysis of the cruelty connected with the death penalty required an examination of the devastating psychological effects associated with the wait for execution.[81] The court's ultimate holding derived from several older cases that included mental suffering as part of the reason for finding an Eighth Amendment violation.[82] A California inmate recently attempted to use the case of

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filing appeals for a requisite number of years an injustice would occur because prisoners not as successful in the appeals process would still face execution. *Id.* The court reasoned that utilization of the previous system "would be far more 'arbitrary and unfair' and 'cruel and unusual' than the current system of fulfilling sentences when the last in line of appeals fails on the merits. . . ." *Id.*

77. People v. Rittger, 362 P.2d 38, 40 (Cal. 1961) (citing *Ex parte* Watts, 241 P. 886 (Cal. 1925)). The *Rittger* court concluded that pursuant to the California Penal Code an inmate was required to await execution at the San Quentin State Prison. *Id.*

78. Furman v. Georgia, 408 U.S. 238, 242 (1972) (holding that the death penalty constituted cruel and unusual punishment).

79. People v. Anderson, 493 P.2d 880, 894 (Cal.), *cert. denied*, 406 U.S. 958 (1972). The *Anderson* court believed that the cruelty of the death penalty involved not only the actual execution, but additionally, the dehumanizing effects associated with a prolonged stay on death row. *Id.*

80. *Id.* at 895.

81. *Id.* The court also partially relied upon the conclusions of penologists and medical experts. *Id.* at 894. The court stated, "experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture." *Id.*

82. *Id.* at 895. The *Anderson* court believed that the psychological consequences of a criminal punishment became dispositive in finding an Eighth Amendment violation. *Id.* The court then relied upon the case of *Trop v. Dulles*, where the United States Supreme Court concluded that stripping an American of his citizenship constituted cruel and unusual punishment. *Id.* The *Anderson* court then used a quote from *Trop* to describe the effects of a person losing his citizenship: "This punishment is offensive to the cardinal principles for which the constitution stands. It subjects the individual to a fate of ever increasing fear and distress. . . . The threat makes the punishment obnoxious." *Id.* (quoting Trop v. Dulles, 356 U.S. 86, 102 (1958)). Consequently, the *Anderson* court believed that the dignity of man

People v. Anderson[83] to prevail upon an Eighth Amendment claim.[84] In rejecting the prisoner's argument the court distinguished the *Anderson* case by stating:

> [f]irst, the defendant bases his challenge only on the federal Constitution, but the *Anderson* court explicitly based its decision solely on the California Constitution. Second, *Anderson* was promptly repudiated by California voters, who amended the California Constitution to make clear that the death penalty . . . [does] not constitute cruel and unusual punishment.[85]

In distinguishing the *Anderson* case, the court also discussed the advantages and disadvantages the appeals process bestows upon a death row inmate.[86] The court reasoned that if a prisoner's appeals succeed he has saved his life and, conversely, even if the appeals ultimately fail the inmate has still prolonged his life.[87]

The preceding cases all involved prisoners spending a prolonged period of time on death row prior to execution.[88] However, each of the inmates voluntarily created the wait by utilizing the appeals process.[89] Conversely, a prisoner facing execution in another state after the service of a prior sentence is not voluntarily prolonging his execution because the IAD imposes the delay. Therefore, the IAD actually imposes a mandatory and extended wait for execution when the first sentencing state refuses to waive jurisdiction over the inmate.[90] Consequently, the reasoning used by the courts[91] indicates that an IAD inmate should prevail upon

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encompassed the basic tenet of the Eighth Amendment and therefore, concluded that the death penalty violated the California Constitution. *Id.*

83. 493 P.2d 880.

84. People v. Hill, 839 P.2d 984, 1017 (Cal. 1992), *cert. denied*, 114 S. Ct. 438 (1993). In *Hill*, the prisoner claimed his execution could not take place because of the extended time spent on death row while his appeals were litigated. *Id.* However, the court believed that, "[a]utomatic appeal under state law is not a constitutional defect; it is a constitutional safeguard." *Id.*

85. *Id.* The court further rejected the prisoner's Eighth Amendment claim because of a lack of state or federal support. *Id.* (citing Richmond v. Lewis, 948 F.2d 1473, 1491 (9th Cir. 1991), *rev'd on other grounds*, 113 S. Ct. 528 (1992); People v. Chessman, 341 P.2d 679, 699 (Cal.), *cert. denied*, 361 U.S. 925 (1959)).

86. *Hill*, 839 P.2d at 1017-18. The court characterized a death row inmate as having only two options. *Id.* at 1017. First, death and second, life in prison without the possibility of parole, if the appeals succeeded. *Id.*

87. *Id.* at 1017-18.

88. *See Richmond*, 948 F.2d at 1491; *Chessman*, 341 P.2d at 699.

89. *See Richmond*, 948 F.2d at 1492; Andrews v. Shulsen, 600 F. Supp. 408, 431 (D. Utah 1984), *aff'd*, 802 F.2d 1256 (10th Cir. 1986), *cert. denied*, 485 U.S. 919 (1988).

90. *See* IAD, *supra* note 6, at 84 (stating that at the conclusion of the legal proceedings in the receiving state, the prisoner will return to the sending state to serve out the remainder of his sentence).

91. *See* People v. Chessman, 341 P.2d 679, 699 (Cal.), *cert. denied*, 361 U.S. 925 (1959); Richmond v. Lewis, 948 F.2d 1473, 1491 (9th Cir. 1991), *rev'd on other*

an Eighth Amendment claim since the protracted wait for execution stems from the IAD and not from voluntarily induced appeals.

Finally, cruel and unusual punishment does not occur when an execution fails to take place because of technical difficulties and the inmate must suffer through another wait before the execution actually takes place.[92] Therefore, a prisoner must psychologically prepare for the first execution and then endure the very same process in an effort to deal with the second attempt.[93] Such a scenario does not create an Eighth Amendment problem when the first execution fails to occur because of an unforeseeable accident.[94] However, if a second execution stemmed from a willful attempt to delay the prisoner's death, the situation may rise to the level of cruel and unusual punishment.[95] Again, an IAD-type inmate does not endure a prolonged wait before execution because of an unfortunate mishap, but because a state refuses to waive its rights against the prisoner under the IAD.

B. Emotional Injury as Cruel and Unusual Punishment

A small number of courts tacitly acknowledge that an inmate endures some mental suffering during the extended wait before execution.[96] Still, these same courts have refused to find that the wait on death row constitutes cruel and unusual punishment.[97] However, several commentators have written about the psychological effects upon prisoners who spend extended periods of time on death row.[98] Recently, a small number of courts have recognized

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grounds, 113 S. Ct. 528 (1992). The prolonged wait before execution stems from the inmate's assertion of his right to appeal. *Richmond*, 948 F.2d at 1492.

92. State of Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463 (1947). In *Resweber* the inmate faced death by electrocution, but because of a mechanical failure the execution did not occur. *Id.* at 460. The Governor of Louisiana then issued a new death warrant for seven days later. *Id.* at 460-61.

93. *Id.* at 464. The prisoner claimed that forcing him to prepare for his execution a second time would subject him to a lingering and cruel and unusual punishment. *Id.*

94. *Id.* The *Resweber* court based its decision upon the fact that the Louisiana officials attempted the first execution in a careful and humane manner. *Id.* at 462. Therefore, the court reasoned that even though, "an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution." *Id.* at 464.

95. *Resweber*, 329 U.S. at 470-71 (Frankfurter, J., concurring). Justice Frankfurter believed, as did the majority, that the failed execution resulted from an innocent accident, but he also suggested that a willful delay on the part of state officials would raise a different set of questions. *Id.*

96. Chessman v. Dickson, 275 F.2d 604, 607 (9th Cir. 1960); People v. Chessman, 341 P.2d 679, 699 (Cal.), *cert. denied*, 361 U.S. 925 (1959).

97. *Dickson*, 275 F.2d at 607; *Chessman*, 341 P.2d at 699.

98. Harvey Bluestone & Carl McGahee, *Reaction to Extreme Stress: Impending*

that a prisoner's purely emotional injury can constitute cruel and unusual punishment.[99] Consequently, the psychological trauma faced by an IAD inmate presents a situation ripe for consideration as an Eighth Amendment violation.

1. The Death Row Environment

A description of a prisoner's experience on death row provides a better understanding of the tortuous extended wait a condemned prisoner faces. For example, the Alabama unit used to keep inmates awaiting execution resided behind five locked gates[100] and created a completely isolated area from the rest of the prison.[101] The actual death row is divided into four separate levels that isolate the prisoners even further from each other.[102] The cells housing the inmates are extremely small and contain only the bare essentials.[103] The prisoners on death row for all practical purposes live in solitary confinement because they are locked in their cells for twenty-three and a half hours a day.[104] The prisoners are not allowed any contact with the other members of death row and receive only a half an hour of exercise in a small outdoor cage.[105]

The psychological trauma a prisoner faces often begins with his admission to death row when the guards give a newly arrived inmate a tour of the death room that holds the electric chair.[106] Inmates also claim that guards pass by their cells and taunt them about the impending execution:[107] "Hey I went for a walk today and the Room told me to tell you 'hello!'"[108] Another source of

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Death by Execution, 119 AM. J. PSYCH. 393 (1962); Johnston, *supra* note 1, at 141-92; *Mental Suffering*, *supra* note 21, at 814-33.

99. Strickler v. Waters, 989 F.2d 1375, 1380-81 (4th Cir.), *cert. denied*, 114 S. Ct. 393 (1993); Jordan v. Gardner, 986 F.2d 1521, 1525-26 (9th Cir. 1993).

100. Johnston, *supra* note 1, at 156.

101. *Id.*

102. *Id.* The four levels are so isolated from each other that prisoners do not even know what happens in another tier. *Id.* The extreme isolation of the four levels comprising death row, effectively creates four miniature death rows. *Id.*

103. *Id.*

104. *Id.*

105. Johnston, *supra* note 1, at 157. Even adjacent prisoners are barely able to converse because of the extremely thick walls that separate the individual cells. *Id.* Even during the one half hour of recreation time the inmates must exercise alone. *Id.* at 157-58.

106. *Id.* at 171. Prisoners depict the guards as showing off the electric chair as if it was a museum exhibit. *Id.* Inmates also claim that during the tour of the death room the guards describe how they will strap the prisoner into the chair and then follow up the narration by asking the inmate if he is ready to die. *Id.* at 172.

107. *Id.* at 165. Prisoners claim the guards often stop in front of their cells and ask if the inmate is ready to die and then walk away laughing. *Id.*

108. *Id.*

emotional strain for death row inmates stems from the testing of the electrical chair.[109] Inmates state that the noise and vibrations of the test are readily felt and heard throughout the unit.[110]

Once a prisoner begins his stay on death row he often begins to ruminate about what the execution will be like.[111] Inmates ponder in detail what the electricity of the chair will do to their bodies.[112] Barely a day passes without an inmate contemplating his impending execution.[113] Even during periods of sleep many prisoners cannot escape the thought of execution because of constant nightmares.[114] Consequently, the extreme emotional stress causes many inmates to wonder whether they have become insane.[115] Not surprisingly, over one half of the prisoners interviewed on Alabama's death row considered suicide as an alterna-

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109. *Id.* at 172.

110. Johnston, *supra* note 1, at 172.

111. *Id.* at 174. Contemplating ones own execution creates high levels of anxiety and fear within a prisoner. *Id.*

112. *Id.* at 173. The inmates asked themselves such questions as: "How am I going to approach and sit in that chair? What's it going to be like? How is it going to feel?" *Id.* at 172. One prisoner described his thoughts concerning execution as follows:

> [J]ust think about the insides of your body, you know, how such organs could be burned, you know, thousands of high voltage. Think about that precious brain that is in your head, you know? Think about your eyes? What will become of them through such hundreds of volts being ran through your body? It's just really unpredictable what all can happen through such an experience, and what it will be like to go through it, to die right there, strapped in the chair. . . . The body sears when the currents start going through the body; this makes a guy shiver to think of it. Does he feel it? What does he feel to start off with? When the current goes through, does he, is he unconscious right when it strikes him? Or what really happens? I'm pretty sure he's unconscious. But still it's just something. A person don't know what the soul feels or nothing else. But one of these days all of us might feel that. And we're there wondering about it. You know, I think about it quite a bit, and it goes through my mind. And I wonder what's really going to happen.

Id. at 173.

113. *Id.* at 175.

114. *Id.* at 174. One prisoner described his recurring nightmare involving execution as follows:

> I go to sleep and I dream of me sitting down in that chair. I mean it's such a fearful thought. Me walking down the tier, sitting down in it, them hooking it up and turning it on . . . I don't know. I can wake up, my heart's beating fast, I'm sweating like hell, just like I'd rinsed my head in water. . . . I feel I'm gonna have a heart attack.

Id.

115. Johnston, *supra* note 1, at 179. Inmates describe the death row experience as a process where part of the mind is lost every day. *Id.* One inmate characterized death row in terms of walking on a tightrope and not knowing from day to day whether insanity had set in. *Id.* at 180.

tive to the continuing psychological anguish of contemplating execution.[116]

Death row inmates employ various defense mechanisms to combat the psychological anxiety caused by the thoughts of impending execution.[117] One study interviewed nineteen prisoners awaiting execution on New York's former death row and related how the inmates coped with their thoughts of death.[118] One inmate would slowly and methodically wash his clothes while completely ignoring his surroundings.[119] The same prisoner also spent his remaining time reading philosophical works that were far beyond his comprehension.[120] A second inmate believed he could appeal his case forever and took great satisfaction from the notion that his lawsuit against a district attorney kept the man from winning re-election.[121] Another prisoner occupied his time with thoughts of voodoo spells and obsessively worked on a taunting poem that he planned to recite just prior to his execution.[122]

The extended time inherent in a wait on death row readily offers inmates an atmosphere conducive for introspection.[123] Once on death row, a prisoner often subsumes himself with a deep concern for day-to-day matters.[124] Some inmates undergo a religious conversion that serves to alleviate anxiety, and more importantly, provides a means of creating a smooth transition to the hopefully blissful life in the hereafter.[125] Many prisoners, howev-

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116. *Id.* at 174.

117. Bluestone & McGahee, *supra* note 98, at 395-96. The study determined that the inmates used denial, projection and the practice of constantly thinking about something else as defense mechanisms to combat the thoughts of impending execution. *Id.* Prisoners utilizing denial adamantly believed execution would not take place because of a successful appeal. *Id.* at 395. The use of projection by inmates took the form of persecutory delusions because the prisoners inherently blamed others for their actions. *Id.* Finally, those inmates constantly thinking about something else attempted to squeeze the concept of execution from their minds. *Id.*

118. *Id.* at 393. The study included in depth interviews with 18 men and one woman. *Id.*

119. *Id.* Another prisoner steadfastly believed he would ultimately receive a pardon because the legal system and medical authorities had framed him. *Id.*

120. *Id.* The same prisoner showed signs of becoming "progressively more suspicious and grandiose during his death house stay." *Id.* at 394.

121. *Id.* Still another inmate maintained his innocence until shortly before his execution, when he became so confused that he requested an injection of truth serum to determine if he was telling the truth. *Id.* The same prisoner also believed his execution would make him a martyr for the cause of anti-imperialism. *Id.*

122. Bluestone & McGahee, *supra* note 98, at 394. Yet another inmate created an elaborate scheme where he convinced himself that murder was not only justifiable, but a respectable crime to commit. *Id.* at 395.

123. Johnston, *supra* note 1, at 145. Even though death row allows extended time for a prisoner to probe his fate, many inmates employ defense mechanisms in an effort to avoid such an ordeal. *Id.*

124. *Id.*

125. *Id.* at 396. The conversion to religion also allows a prisoner the opportunity

er, recede into a "private psychotic world in which they presume themselves free men, exempt from execution."[126] Still other inmates escape the thought of execution by sleeping the day away or actually hiding in the corner of their cells in an attempt to create a private sanctuary.[127]

2. *Psychological Stress and the Effects of the IAD on Prisoners Condemned to Death*

The emotional suffering a death row inmate incurs has received almost no attention from the courts.[128] The primary reason stems from the courts' focus on the constitutionality of the actual death penalty and the specific method of execution.[129] The prior examples and interviews with inmates depicts the psychological impact on prisoners who had only resided on death row for several years.[130] The present structure of the IAD could force an inmate to endure the same emotional trauma as the other death row prisoners, only for a much longer period of time. Thus, an IAD inmate could hypothetically suffer through a fifty year sentence before execution and have the opportunity to continuously contemplate his execution for 18,250 days. Such a situation demonstrates far more than the mere extinguishment of life.[131] In effect, the IAD creates a private psychological torture chamber that in turn creates cruel and unusual punishment.

A prisoner hoping to prevail upon an Eighth Amendment claim based on the conditions of confinement must prove the serious deprivation of a basic human need[132] and a deliberate indifference by the prison officials to the conditions at issue.[133] How-

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to purge himself of guilt that stems from his crime. *Id.*

126. Johnston, *supra* note 1, at 145.

127. *Id.* at 168. A prisoner who sleeps all day or hides in the corner of his cell essentially endeavors to protect himself from the dangers he believes await outside his cell. *Id.*

128. *Mental Suffering*, *supra* note 21, at 815.

129. *Id.*

130. Bluestone & McGahee, *supra* note 98, at 393. A length of two years constituted the longest time spent on death row by any inmate in the Bluestone and McGahee study. *Id.*

131. Campbell v. Wood, 18 F.3d 662, 683 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2125 (1994).

132. Rhodes v. Chapman, 452 U.S. 337, 347 (1981). In *Rhodes*, two prisoners filed suit claiming that the housing of two inmates in one cell constituted cruel and unusual punishment. *Id.* at 344. The court concluded that double celling did not cause deprivation of food, medical care or sanitation and the practice did not result in an increase of violence. *Id.* at 347-48.

133. Wilson v. Seiter, 501 U.S. 294, 303 (1991). The second element of an Eighth Amendment claim is subjective and involves an examination of the prison officials' states of mind. *Id.* at 302. Furthermore, the conduct of the prison officials must be wanton. *Id.* The *Wilson* court held that deliberate indifference to the prison condi-

ever, an inmate does not have to prove the second element, deliberate indifference, when the cruel and unusual claim stems from a statute or sentencing judge and not the actions of the prison officials.[134] Similarly, an IAD prisoner's prolonged wait before execution derives from Article V(e)[135] of the IAD and not a prison official. The first requirement mandates an objective analysis of whether the wrongdoing claimed by the prisoner was harmful enough to constitute a constitutional violation.[136] Therefore, to prevail upon an Eighth Amendment claim, an IAD inmate must argue that the severe emotional suffering caused by serving the prior sentence before execution deprives him of the basic human need not to endure a prolonged period of mental agony.

Prison conditions that constitute cruel and unusual punishment must cause the inmate to endure a serious medical or emotional deterioration.[137] One area of Eighth Amendment claims revolves around a prisoner claiming the infliction of cruel and unusual punishment because of the fear of assault from other prisoners.[138] Such an inmate must prove more than simple anxiety; rather, he must show that the fear of assault causes significant emotional injury.[139] Consequently, a court will not find an Eighth Amendment violation when the prisoner does not incur a serious mental injury from the challenged condition.[140]

A successful cruel and unusual claim does not require that an

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tions complained of would constitute wantonness. *Id.* However, wanton takes on a different meaning if the act in question was taken during an emergency situation, such as a prison riot. *Id.* Under those circumstances, the inmate must prove the prison officials acted "maliciously and sadistically for the very purpose of causing harm." *Id.*

134. *Id.* at 300. The *Wilson* court further stated that an inquiry into the state of mind need not take place when the Eighth Amendment claim derives from the penalty formally imposed for the crime. *Id.* at 302.

135. IAD, Art. V(e).

136. Hudson v. McMillian, 503 U.S. 1, 6-7 (1992). While a court's own judgment plays a role in determining whether a punishment is acceptable, the court must use objective factors to the greatest possible extent. *Chapman*, 452 U.S. at 346. Therefore, the test for an Eighth Amendment violation "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

137. Strickler v. Waters, 989 F.2d 1375, 1381 (4th Cir.), *cert. denied*, 114 S. Ct. 393 (1993). In *Strickler*, the inmate claimed that deprivations caused by double bunking, limited exercise opportunities and poor ventilation constituted cruel and unusual punishment. *Id.* at 1378-79. However, the court found no Eighth Amendment infraction because the prisoner presented no evidence of serious physical or emotional injury stemming from the conditions. *Id.* at 1381.

138. *Id.* at 1380.

139. *Id. See also* Purvis v. Ponte, 929 F.2d 822, 825 (1st Cir. 1991) (holding that a successful Eighth Amendment claim, based on the fear of assault, must show the prisoner incurred more than mere anxiety).

140. *Strickler*, 989 F.2d at 1381.

inmate be the victim of an attack; rather, the prisoner must only show that he lives with a reasonable fear of attacks from other inmates.[141] The prisoner's fear must also result in significant emotional injury.[142] The mental suffering must then reach a level that interferes to some degree with the inmates day to day existence.[143] On the other hand, the prisoner need not become completely incapacitated to prevail upon an Eighth Amendment claim.[144]

If the courts can determine that an inmate can incur cruel and unusual punishment by merely living in the fear of a physical or sexual assault,[145] then surely these same courts would find that the IAD subjects a prisoner serving a prior sentence before execution to cruel and unusual punishment. An IAD inmate does not merely contemplate the possibility of an assault; instead, he must contemplate for an extended number of years his imminent death. If the chance of a sexual assault can cause a prisoner to incur serious emotional injury, then an IAD inmate thinking about his impending death must not only suffer from mental injury, but moreover, from continuous psychological torture.

The United States Supreme Court has not directly addressed the possibility that a purely emotional injury can constitute cruel and unusual punishment. However, several Justices have discussed the issue in concurring and dissenting opinions.[146] As Justice Blackmun stated, "[i]t is not hard to imagine inflictions of psychological harm without corresponding physical harm that might prove to be cruel and unusual punishment."[147] Furthermore, no Supreme Court precedent prevents the recognition of emotional pain for constitutional purposes.[148] Justice Clarence Thomas also believes an injury could occur without any corre-

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141. Shrader v. White, 761 F.2d 975, 978-79 (4th Cir. 1985). In *Shrader*, several prisoners filed suit claiming that they were the recipients of cruel and unusual punishment because of the fear of physical and sexual assault from other inmates. *Id.* at 977. The court rejected the Eighth Amendment claims because none of the prisoners were actually attacked and, more importantly, they held no fear of an actual physical or sexual assault. *Id.* at 981.

142. *Id.* at 979. The *Shrader* court believed that the mere anxiety of an attack was not enough to establish a fear of constitutional proportions. *Id.*

143. *Id.*

144. *Id.*

145. Purvis v. Ponte, 929 F.2d 822, 825 (1st Cir. 1991); *Shrader*, 761 F.2d at 978-79.

146. Hudson v. McMillian, 503 U.S. 1, 16 (1992) (Blackmun, J., concurring).

147. *Id.* at 16. Blackmun further believed emotional injury alone could constitute cruel and unusual punishment because well established clinical methods allow for an accurate diagnosis of psychological pain. *Id.* at 17.

148. *Id.* at 16. Blackmun cited to *Brown v. Board of Education* as an example of the court recognizing psychological injury for constitutional purposes. *Id.* at 16-17 (citing Brown v. Board of Education, 347 U.S. 483, 494 (1954)).

sponding physical harm.[149] Such an injury could arise when prisoners are subjected to constant and high pitched noise or continuous reruns of the same television show.[150]

Cruel and unusual punishment can also occur when a female inmate incurs psychological harm from a cross-gender body search.[151] The search generally lasts several minutes and entails the male guard thoroughly probing the female's body with special attention given to the areas around the prisoner's sexual organs.[152] Such a body search does not merely inflict psychological injury and emotional suffering on a one time basis.[153] Instead, the inmate must indefinitely live with the mental harm caused by the incident.[154] Consequently, one court has concluded that the standards of decency in a modern society prohibit the infliction of serious emotional suffering caused by cross-gender body searches.[155] Additionally, several other courts have faced cruel and unusual punishment claims based upon emotional injury.[156] Most

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149. *Hudson*, 503 U.S. at 26 (Thomas, J., dissenting). Furthermore, Thomas does not believe a cruel and unusual claim must involve some kind of physical injury. *Id.*

150. *Id.* Thomas further expanded upon punishments that leave no physical injury by stating that "the state is not free to inflict such pains without cause just so long as it is careful to leave no marks." *Id.* (quoting Williams v. Boles, 841 F.2d 181, 183 (7th Cir. 1988)).

151. *See* Jordan v. Gardner, 986 F.2d 1521, 1526 (9th Cir. 1993). In *Jordan*, several female inmates claimed that cross-gender body searches constituted cruel and unusual punishment because of the resulting emotional injury. *Id.* at 1524. The inmates incurred psychological harm because the full body searches triggered memories of prior sexual abuse. *See id.* at 1525-26. One prisoner in particular suffered severe mental distress, as evidenced by the fact that guards needed to physically pry her fingers from the cell bars and carry her back to her cell. *Id.* at 1523.

152. *Id.* The *Jordan* court described the cross-gender body search as follows:

> [T]he male guard stands next to the female inmate and thoroughly runs his hands over her clothed body starting with her neck and working down to her feet. According to the prison training material, a guard is to "[u]se a flat hand and pushing motion across the [inmate's] crotch area." The guard must "[p]ush inward and upward when searching the crotch and upper thighs of the inmate." All seams in the leg and the crotch area are to be "squeez[ed] and knead[ed]." Using the back of the hand, the guard also is to search the breast area in a sweeping motion, so that the breasts will be "flattened."

Id. (alteration in original) (citations omitted).

153. *Id.* at 1528. The *Jordan* court believed an important factor in finding the Eighth Amendment violations stemmed from the continuing emotional harm the female inmates would incur from the searches. *Id.*

154. *Id.* The court also took into account the fact that several of the prison psychologists had cautioned the warden that cross-gender body searches could potentially cause extreme emotional trauma. *Id.* at 1523. Even in the face of these warnings, the warden implemented the new search procedure. *Id.*

155. *Id.* at 1531. The *Jordan* court did state that an Eighth Amendment violation might not occur if the guards conducted the searches in conjunction with a prison emergency. *Id.* at 1528.

156. In *Baumann v. Arizona Dep't of Corrections*, an inmate claimed that the

notably, the court in *Smith v. Aldingers*[157] defined the issue as whether the Eighth Amendment protects against purely psychological injury.[158]

Again, if the psychological harm inflicted by a cross-gender body search[159] or an inmate receiving a death threat from a prison guard[160] can establish cruel and unusual punishment, then the emotional trauma incurred by an IAD prisoner must constitute cruel and unusual punishment. While an inmate threatened with death by a corrections officer's gun must suffer from some degree of emotional harm,[161] that suffering only stems from the possibility of death. However, the case of an IAD prisoner serving out the remainder of a non-death sentence presents a much more serious situation. The average death row inmate waits eight years between the commission of his crime and his execution because of the appeals process.[162] However, an IAD prisoner will not face execution after the average eight-year period because the inmate must first serve the remainder of a prior sentence. Thus, the IAD forces a prisoner serving a twenty-year sentence to spend twelve years after the completion of his appeals with the certain knowledge that his death will occur immediately after the conclusion of his prior sentence.

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denial of an anticipated parole caused him emotional trauma and therefore constituted cruel and unusual punishment. 754 F.2d 841, 846 (9th Cir. 1985). The *Baumann* court rejected the inmates claim, reasoning that a prisoner's mere disappointment over not receiving parole does not offend the standards of decency that are encompassed in modern society. *Id.* In *Northington v. Jackson* an inmate claimed that the psychological injury stemming from a guard placing a gun in his face and threatening to kill him, established an Eighth Amendment violation. 973 F.2d 1518, 1520 (10th Cir. 1992). The *Northington* court concluded that the emotional injury incurred by the inmate could rise to the level of an Eighth Amendment violation. *Id.* at 1524. *See also* Thomas v. Farley, 31 F.3d 557, 559 (7th Cir. 1994) (recognizing that other Courts of Appeals had held mental torture as a cognizable cruel and unusual punishment claim); White v. Gregory, 1 F.3d 267, 269 (4th Cir. 1993) (holding that in a successful cruel and unusual punishment case, the prisoner must demonstrate some serious physical or emotional injury), *cert. denied*, 114 S. Ct. 931 (1994).

157. 999 F.2d 109 (5th Cir. 1993).

158. *Id.* at 110. In *Smith*, the inmate based his cruel and unusual claim on the psychological injury caused by witnessing the assault of another inmate by a prison guard. *Id.* at 109-10. The *Smith* court refused to decide whether a purely emotional injury was recognizable under the Eighth Amendment. *Id.* at 110. However, the court remanded the case with instructions for the trial judge to review other Court of Appeals decisions that had recognized mental injury as cruel and unusual punishment. *Id.*

159. Jordan v. Gardner, 986 F.2d 1521, 1531 (9th Cir. 1993).

160. *Northington*, 973 F.2d at 1524.

161. *Id.*

162. Walton v. Arizona, 497 U.S. 639, 669 (1990) (Scalia, J., concurring) (citing E. Carnes & S. Stewart, *Summary of Post-Furman Capital Punishment Data*, § VIII (1988) (unpublished report, on file with the Harvard Law School Library)).

Instead of merely thinking about the possibility of death, Article V(e) of the IAD[163] forces an inmate to contemplate for an extended number of years what the actual execution will feel like and do to his body. Consequently, the severe emotional trauma inflicted upon a prisoner by the IAD must rise to the level of an Eighth Amendment violation. A scenario similar to an IAD inmate forced to wait an extended number of years before execution is the situation of a prisoner placed in solitary confinement for a prolonged period of time.[164]

C. A Comparison Between a Prolonged Wait for Execution and Solitary Confinement

The psychological injury[165] inflicted upon an IAD inmate stems from the protracted period of time he must wait before execution. On the other hand, a prisoner placed in solitary confinement for an extended period of time can also incur emotional injury from the almost complete removal from human contact.[166] An inmate in solitary confinement often suffers from hallucinations, severe anxiety and can exhibit child-like emotional responses.[167]

The IAD can also subject a prisoner to a variation of solitary confinement prior to execution. Most inmates only serve a prison sentence for a predetermined number of years or spend their time on death row utilizing the appeals process before execution. However, the IAD constructively places the prisoner in solitary con-

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163. IAD, Art. V(e).

164. Sheley v. Dugger, 833 F.2d 1420, 1422-23 (11th Cir. 1987); Morris v. Travisono, 549 F. Supp. 291, 293 (D.R.I. 1982), *aff'd*, 707 F.2d 28 (1st Cir. 1983).

165. *See supra* notes 106-27 and accompanying text.

166. Maria A. Luise, *Solitary Confinement: Legal and Psychological Considerations*, 15 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 301, 317 (1989). Inmates placed in solitary confinement often complain of losing touch with reality and a feeling that their minds are deteriorating. *Id.* at 318. One study on the psychological effect of solitary confinement on prisoners stated:

> [The inmates] complain that they become aggressive and jumpy. They have intense reactions to relatively minor incidents; a guard slamming a steel door too hard will instill a severely hostile reaction. . . . [T]here is no way to express the rage which always builds. . . . Often prisoners turn the rage against themselves. In addition to suicide, many are seen banging their heads against the cement walls.

Id. at 319 (quoting Benjamin & Lux, *Constitutional and Psychological Implications of the Use of Solitary Confinement: Experience at the Maine State Prison*, 2 NEW ENG. J. PRISON L. 27, 31 1975)).

167. Raymond H. Thoenig, Note, *Solitary Confinement-Punishment Within the Letter of the Law, Or Psychological Torture?*, 1972 WIS. L. REV. 223, 232 (quoting Heron, *The Pathology of Boredom*, 196 SCI. AM. 52, 56 (1957)). The inmate's emotional injury stems from the sensory deprivation caused by the isolation of solitary confinement. *Id.*

finement because he must not only serve the time a death row inmate would normally serve during his appeals process, but also an extended and involuntary wait for execution. Consequently, a prisoner incurring psychological injury from an extended stay in solitary confinement presents a ready analogy to an IAD inmate suffering from severe emotional trauma due to the IAD inmate's protracted wait for execution.

Generally, solitary confinement alone does not constitute cruel and unusual punishment.[168] Courts have held that a state's Eighth Amendment obligations terminate if the prisoner receives adequate food, medical care, clothing and sanitation.[169] Some courts have recognized the fact that solitary confinement can cause an inmate's mental and emotional state to deteriorate.[170] However, these same courts declined to find an infliction of cruel and unusual punishment based solely on the routine psychological injury associated with solitary confinement.[171]

An exception to the general rule that solitary confinement does not constitute cruel and unusual punishment unless substandard physical conditions are present may arise when an inmate is subjected to a prolonged period of solitary confinement and a threat of critical psychological injury is present.[172] The United States Supreme Court has warned that the length of confinement plays a vital role in determining whether a constitutional violation occurred.[173] Accordingly, the length of time spent in solitary confinement tends to predominate in the few cases that have found an Eighth Amendment violation when the physical conditions of confinement were satisfactory.[174] In one of these

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168. *Sheley*, 833 F.2d at 1428-29 (citing Hutto v. Finney, 437 U.S. 678, 686 (1978)).

169. Sheley v. Dugger, 833 F.2d 1420, 1429 (11th Cir. 1987). *See also* Bono v. Saxbe, 620 F.2d 609, 613-14 (7th Cir. 1980); Novak v. Beto, 453 F.2d 661, 665 (5th Cir. 1971), *cert. denied*, 409 U.S. 968 (1972). The general reluctance of courts to address the constitutionality of solitary confinement stems from the belief that prison officials are in a much better position to manage a prison's internal security than a court. Rhodes v. Chapman, 452 U.S. 337, 351-52 (1981).

170. Jackson v. Meachum, 699 F.2d 578, 582-83 (1st Cir. 1983); Newman v. Alabama, 559 F.2d 283, 291 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); Sweet v. South Carolina Dep't of Corrections, 529 F.2d 854, 861 (4th Cir. 1975).

171. *Jackson*, 699 F.2d at 583-84. The *Jackson* court believed that an inmate did not hold a constitutional right to prohibit the imposition of solitary confinement merely because emotional injury could occur. *Id.* at 583.

172. *Sheley*, 833 F.2d at 1428-29.

173. Hutto v. Finney, 437 U.S. 678, 686 (1978).

174. Sheley v. Dugger, 833 F.2d 1420, 1429 (11th Cir. 1987). In *Sheley*, the inmate filed suit claiming that a 12 year stay in solitary confinement constituted cruel and unusual punishment. *Id.* at 1423. The prisoner's placement in solitary confinement stemmed from the fact that prison officials believed he presented an extreme escape risk. *Id.* at 1422. The inmate claimed the prolonged period in segregation caused him to experience mental and physical deterioration. *Id.* at 1428.

cases an inmate suffered through twelve years of solitary confinement[175] and in another case the prisoner remained in segregated confinement for eight and a half years.[176]

In a rare instance a court may actually evaluate the psychological impact of solitary confinement upon an inmate in determining whether a cruel and unusual claim has merit.[177] Thus, important factors become the degree of loneliness, the level of isolation and the feelings of inadequacy that a prisoner may incur from solitary confinement.[178] Consequently, when an inmate incurs substantial emotional injury, that harm becomes as atrocious as the squalid physical conditions that have supported prior cruel and unusual punishment claims.[179]

The case of *Griffin v. Coughlin*[180] holds particular relevance for an IAD inmate.[181] In *Griffin*, the court articulated a test for finding cruel and unusual punishment that is based particularly upon emotional injury: "an Eighth Amendment violation from psychological deterioration is more likely when the facts presented demonstrate 'the threat of substantial, serious and possibly irre-

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The court believed the inmate's 12 year stay in isolation raised serious constitutional questions. *Id.* at 1429. However, the court remanded the case for an evidentiary hearing because the prisoner failed to present enough evidence to determine if an Eighth Amendment violation occurred. *Id.* at 1429-30.

175. *Id.* at 1422.

176. Morris v. Travisono, 549 F. Supp. 291, 292 (D.R.I. 1982), *aff'd*, 707 F.2d 28 (1st Cir. 1983).

177. *Id.* at 295-97. In *Morris*, an inmate spent eight-and-a-half years in solitary confinement before filing a cruel and unusual punishment claim. *Id.* at 292. Prison officials claimed the inmate presented a danger to corrections guards and other prisoners. *Id.* at 293. Such reasoning was used as justification for keeping the inmate in solitary confinement. *Id.* The prisoner utilized the testimony of a psychologist to substantiate the emotional effects of an extended stay in solitary confinement. *Id.* The doctor stated the inmate's prolonged segregation had caused traumatic neurosis and acute depression. *Id.*

178. *Id.* at 296. The *Morris* court reasoned that isolation in a palace could cause emotional injury: "even if a person is confined to an air-conditioned suite at the Waldorf Astoria, denial of meaningful human contact for such an extended period may very well cause severe psychological injury." *Id.* at 295 (quoting Morris v. Travisono, 499 F. Supp. 149, 160 (D.R.I. 1980)). The court believed that eight-and-a-half years of solitary confinement had resulted in extreme loneliness and feelings of inadequacy. *Id.* at 296.

179. *Id.* at 297. The *Morris* court further believed that the present day standards of decency did not allow for eight-and-a-half years of solitary confinement. *Id.*

180. 743 F. Supp. 1006 (N.D.N.Y. 1990).

181. In *Griffin*, several inmates filed a cruel and unusual punishment suit claiming that the conditions of solitary confinement caused them emotional injury. *Id.* at 1016. The prisoners argued that a lack of activity, a high level of noise and undesirable conversation between inmates caused adverse emotional problems. *Id.* One prisoner stated that solitary confinement had caused him to become hopeless and depressed. *Id.* Yet another inmate claimed that he incurred hallucinations where he believed he was flying because of the conditions within the segregation unit. *Id.*

versible if not critical psychological illness together with prolonged or indefinite segregated confinement.'"[182] Thus, the important factor becomes whether the prisoner's emotional injury has caused substantial, serious and possibly irreversible psychological harm.[183] The *Griffin* court also cautioned that a successful cruel and unusual punishment claim, based upon mental injury, must include the expert testimony of a psychologist or a psychiatrist.[184]

The test for an Eighth Amendment violation enunciated in *Griffin v. Coughlin*[185] readily applies to an inmate forced to wait an extended period of time before execution by Article V(e) of the IAD. First, an IAD prisoner faces a serious threat of substantial emotional injury[186] from the prospect of facing execution upon the completion of his prior sentence. A prisoner facing execution invariably suffers from extreme and perpetual anxiety caused by the prospect of execution.[187] The inmate may often sleep all day or create a fictional world in an effort to escape the constant thoughts of execution.[188] Furthermore, the strain of continuously thinking about the impending execution could cause the IAD inmate to suffer irreversible mental injury in the form of insanity.[189]

Second, the length of time a prisoner has spent in solitary confinement becomes a critical factor in a cruel and unusual punishment claim.[190] Even after an inmate has exhausted his appeals, the IAD constructively places the prisoner in solitary confinement. The constructive solitary confinement faced by an IAD prisoner arises from the uniqueness of his situation. Although almost all inmates either serve a general prison sentence or spend a term of years on death row before execution, the IAD forces an

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182. *Id.* at 1017 (quoting Jackson v. Meachum, 699 F.2d 578, 584-85 (1st Cir. 1983)). The *Griffin* court concluded that most of the prisoners' claims of frustration, hopelessness and anger did not reach the required level of substantial or serious emotional injury. *Id.* The court reasoned that boredom alone does not create psychological injury serious enough to support an Eighth Amendment claim. *Id.* (quoting Peterkin v. Jeffes, 855 F.2d 1021, 1030 (3d Cir. 1988)). However, the court believed the hallucinations experienced by the one inmate created serious questions of emotional injury. *Id.* at 1018.

183. *Id.* at 1017.

184. *Id.* at 1018. The *Griffin* court believed that the use of expert testimony would enhance the credibility of a cruel and unusual punishment claim based upon mental injury. *Id.* Furthermore, the inmate should use the expert to show that the solitary confinement was the cause of the claimed emotional harm. *Id.*

185. Griffin v. Coughlin, 743 F. Supp. 1006, 1017 (N.D.N.Y. 1990).

186. Johnston, *supra* note 1, at 174.

187. *See supra* notes 117-27 and accompanying text.

188. *See supra* notes 126-27 and accompanying text.

189. Johnston, *supra* note 1, at 180.

190. Jackson v. Meachum, 699 F.2d 578, 584-85 (1st Cir. 1983).

inmate to do both. Thus, under the *Griffin* test,[191] the present construction of the IAD subjects a prisoner to cruel and unusual punishment because of the serious threat of emotional injury that becomes amplified by the extended wait before execution. Consequently, the potential for an inmate to suffer cruel and unusual punishment stemming from the extended wait for execution mandates an amendment to the IAD.

III. AN AMENDMENT TO THE IAD THAT WILL PREVENT THE INFLICTION OF CRUEL AND UNUSUAL PUNISHMENT

This section will first address whether the IAD is federal law. Second, this section will propose an amendment that would render the IAD inoperable when the death penalty is involved. Finally, this section will examine the proper method for amending the IAD.

Cuyler v. Adams[192] presented the United States Supreme Court with the question of whether the IAD is federal law.[193] The Court's analysis revolved around determining whether the IAD is a Congressionally-sanctioned interstate compact under Article I, § 10, of the Constitution.[194] The Compact Clause converts state law into federal law when an agreement requires Congressional approval.[195]

The Court concluded that the Crime Control Consent Act of 1934[196] acted as congressional consent for the enactment of the IAD.[197] Consequently, the *Cuyler* Court held, "[w]here Congress

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191. Griffin v. Coughlin, 743 F. Supp. 1006, 1017 (N.D.N.Y. 1990).

192. 449 U.S. 433 (1981).

193. *Id.* at 438.

194. *Id.* at 438-39. The Compact Clause of the United States Constitution states, "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . . " U.S. CONST. art. I, § 10, cl. 3.

195. *Cuyler*, 449 U.S. at 438. The consent requirement of the Compact Clause stems from the desire of the Constitution's Framers that, "Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority." *Id.* at 440 (citing Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution - A Study in Interstate Adjustments*, 34 YALE L.J. 685, 694-95 (1925)). When an agreement does not increase the states' political power and the act does not intrude upon the supremacy of the United States, the agreement does violate the Compact Clause and requires congressional consent. *Cuyler*, 449 U.S. at 440 (citing United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 468 (1978) (quoting Virginia v. Tennessee, 148 U.S. 503, 519 (1893)); New Hampshire v. Maine, 426 U.S. 363, 369-70 (1976)).

196. *Cuyler*, 449 U.S. at 441. The Crime Control Consent Act of 1934 gave congressional consent for "any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and for other purposes." Crime Control Consent Act of 1934, ch. 406, 48 Stat. 909 (codified at 4 U.S.C. § 112(a) (1994)).

197. Cuyler v. Adams, 449 U.S. 433, 441 (1981). The Court concluded from the

has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States' agreement into federal law under the Compact Clause."[198] Therefore, the interpretation of the IAD becomes a question of federal law[199] and an amendment to the IAD must comport with a federal court's scrutiny.

The present construction of the IAD can force a prisoner to endure a protracted wait in the first sentencing state before he is returned to the second state for execution. A state imposing the death penalty upon a prisoner legally complies with the terms of the IAD[200] when the inmate is returned to the state that first convicted the prisoner for completion of an unexpired sentence. However, such an action inflicts severe emotional injury upon the prisoner and, therefore, creates an even greater concern in the form of an Eighth Amendment violation.

The IAD already contains an article that renders the entire agreement inapplicable when the inmate is found insane.[201] A logical extension to the mentally ill provision would come in the form of a clause negating the operation of the IAD when the death penalty becomes an issue in a prisoner's case. Thus, the amended article would contain all the circumstances under which the IAD would become inoperable. Upon its enactment, one state incorporated a provision into the IAD that prevents the application of the IAD when an inmate is under the sentence of death.[202] While such a clause is a step in the right direction, an amendment to the IAD must contain a more detailed description of when the IAD becomes inoperable.

An amendment to the IAD must address the situation of a prisoner who is already under a death sentence and the case of an inmate who could face the imposition of the death penalty when he is sent to another state for disposition of outstanding charges. First, the terms of the IAD should not apply to a prisoner already facing execution. Trying such an inmate in another state would serve no purpose since the prisoner already faces execution and he could never fulfill the subsequent prison sentence.

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legislative history pertaining to the Crime Control Consent Act of 1934 that Congress passed the Act to comply with the consent requirement of the Compact Clause. *Id.* at 441 n.9.

198. *Id.* at 440.

199. *Id.* at 442.

200. *See supra* notes 40-42 and accompanying text.

201. IAD, *supra* note 6, at 85. This section states, "No provision of this agreement, and no remedy made available by this agreement, shall apply to any person who is adjudged to be mentally ill." *Id.*

202. Interstate Agreement on Detainers, OHIO REV. CODE ANN. § 2963.30, art. VI(b) (Anderson 1993).

Second, and more importantly, an amendment to the IAD should render all provisions of the agreement null and void if an inmate receives the death penalty and still faces service of an unexpired sentence in another state. Thus, the amendment would ensure that a prisoner does not become the subject of cruel and unusual punishment because he must first serve a prior sentence before execution. Such an amendment would nullify Article V(e)'s requirement that the state imposing the death penalty must return the prisoner to the sending state upon the conclusion of all legal proceedings in the receiving state.[203] Thus, if state X requested custody of a prisoner serving a thirty-year sentence in state Y and state X imposed the death penalty, the prisoner would remain in state X for execution and never return to state Y for completion of his prior sentence.

The proposed amendment to the IAD requires a procedure of implementation that will allow for an expedited application of the amendment to all signatory members of the agreement. An individual state is forbidden from substantially altering the terms of the IAD.[204] The necessity of such a rule stems from the fact that the rights and duties created by the IAD derive from the mutual agreement among the compact's member states to abide by the terms of the IAD and not the interpretations or amendments of a single or handful of states.[205] Consequently, the above rule requires the utilization of an alternative procedure for amending the IAD.

The Council on State Governments presents one possibility for amending the IAD. Since the Council created the original agreement,[206] the group could propose the amendment that would render the IAD inoperable when a prisoner receives the death penalty. However, such a course of action would not expedite the implementation of the amendment because even after the Council would ratify the change to the IAD, each of the signatory states' respective legislatures would still need to approve the

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203. IAD, Art. V(e); *see supra* notes 38-40 and accompanying text.

204. Bush v. Muncy, 659 F.2d 402, 411 (4th Cir. 1981), *cert. denied*, 455 U.S. 910 (1982). In *Bush*, the State of Maryland added a supplementary provision to the IAD when the state's legislature enacted the agreement. *Id.* at 405. Normally under Art. IV(e) of the IAD the receiving state must try the prisoner before he is returned to the sending state. *Id.* However, under Maryland's amendment, the requirements of Art. IV(e) only arose if Maryland officials had actual notice of the request. *Id.* The *Bush* court began its inquiry by stating that no prior Supreme Court decision had dealt with the issue of whether an individual state could alter the terms of the IAD. *Id.* at 410. The court held that under the Supremacy Clause no party state to the IAD had the power to substantially alter the agreement. *Id.* at 411.

205. United States v. Mauro, 436 U.S. 340, 350-51 (1978). The Council of State Governments created the IAD and recommended its adoption in 1956. *Id.*

206. *Id.*

amendment. Such a process could entail years of waiting without any assurances that all of the member states would even agree to the amendment.

A better method of amending the IAD lies within the fact that the United States Supreme Court considers the agreement federal law under the Compact Clause.[207] Furthermore, when the United States became a party member to the IAD the federal government specifically retained the capability of altering or amending the IAD.[208] Thus, a Congressional amendment to the IAD would serve two very important functions. First, Congress could effectuate the amendment with a single Act instead of forty-eight separate Acts by the individual signatory members of the IAD. Second, Congressional action would ensure the applicability of the amendment to all party states in a timely manner. Consequently, an Act of Congress presents the best procedure for amending the IAD to ensure that prisoners will not endure cruel and unusual punishment because of a protracted wait for execution in another state.

CONCLUSION

In summary, given the present construction of the IAD, a state's compliance with Article V(e) of the IAD can create an Eighth Amendment violation. The IAD subjects a prisoner to an extended wait for execution when he must first serve out an unexpired sentence in another state. Under these circumstances an inmate can incur serious emotional injury,[209] which would constitute cruel and unusual punishment.[210] Consequently, the presence of an Eighth Amendment violation necessitates a change to the IAD.

An Act of Congress can best effectuate a change to the IAD because such a procedure will immediately amend the IAD. If Congress does not act, the responsibility of amending the IAD will fall upon individual state legislatures. As a result, it would take years to create a uniform IAD. A Congressionally-amended IAD would prevent a prisoner from serving a prior sentence that would create a protracted wait before execution, thus avoiding subjecting

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207. Cuyler v. Adams, 449 U.S. 433, 442 (1981).

208. *Bush*, 659 F.2d at 412 n.11. The *Bush* court also pointed out the fact that while the federal government retained the right to amend the IAD, no such power was available to the party states. *Id.*

209. *See supra* notes 106-16 and accompanying text.

210. *See* Strickler v. Waters, 989 F.2d 1375, 1380-81 (4th Cir.) (holding that an Eighth Amendment violation may result from serious or significant emotional injury), *cert. denied*, 114 S. Ct. 393 (1993); Jordan v. Gardner, 986 F.2d 1521, 1527 (9th Cir. 1993) (stating that the psychological injury inflicted by a prison cross-gender body search constituted cruel and unusual punishment).

the inmate to cruel and unusual punishment.

Edward G. Hild[*]

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* I would like to thank my mom and dad for all their support over the years, and Lauren for all her patience and help while I was writing this Note.

APPENDIX
Proposed Amendment to Article VI(b) of the
Interstate Agreement on Detainers
Article VI:

(a) In determining the duration and expiration dates of the time periods provided in articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

(b) No provision of this agreement, and no remedy made available by this agreement shall apply to any person who is adjudged to be mentally ill *or any person under the sentence of death at the time a detainer is filed or any person sentenced to death by a state, who has gained custody of the person pursuant to a detainer.*