

BREYER, J., dissenting

SUPREME COURT OF THE UNITED STATES

JOE CLARENCE SMITH *v.* ARIZONA

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

No. 07–5847. Decided October 15, 2007

The petition for a writ of certiorari is denied.

JUSTICE BREYER, dissenting from denial of certiorari.

Joe Clarence Smith, petitioner in this case, was first sentenced to death 30 years ago. Due to constitutional error, the Arizona courts in 1979 set this first sentencing aside. Smith was again sentenced to death later that year. Due to ineffective assistance of counsel, the federal courts in 1999 set this second sentencing aside. Smith was again sentenced to death in 2004. He now argues that the Federal Constitution’s prohibition against cruel and unusual punishments forbids his execution more than 30 years after he was initially convicted.

In my view, Smith can reasonably claim that his execution at this late date would be “unusual.” I am unaware of other executions that have taken place after so long a delay, particularly when much of the delay at issue seems due to constitutionally defective sentencing proceedings. And whether it is “cruel” to keep an individual for decades on death row or otherwise under threat of imminent execution raises a serious constitutional question. I have elsewhere explained (in cases involving less lengthy delays) why I believe that is so. See *Foster v. Florida*, 537 U. S. 990, 991–993 (2002) (BREYER, J., dissenting from denial of certiorari); *Knight v. Florida*, 528 U. S. 990, 993–999 (1999) (same); *Elledge v. Florida*, 525 U. S. 944 (1998) (same); see also *Lackey v. Texas*, 514 U. S. 1045 (1995) (STEVENS, J., respecting denial of certiorari).

I would grant the petition for certiorari in this case.