

07-5439 BAZE V. REES

DECISION BELOW:217 SW3d 207

LOWER COURT CASE NUMBER: 2005-SC-0543

QUESTIONS PRESENTED:

Although the Court has authorized civil actions challenging portions of a method of execution, it has not addressed the constitutionality of a method of execution or the legal standard for determining whether a method of execution violates the Eighth Amendment in over 100 years-- leaving lower courts with no guidance on the law to apply to the many lethal injection challenges filed since the Court's rulings allowing the claim in a civil action. Lower courts have been left to look to cursory language in the Court's opinions dealing with the the death penalty on its face and prison conditions. As a result, the law applied by lower courts is a haphazard flux ranging from requiring "wanton infliction of pain," "excessive pain," "unnecessary pain," "substantial risk", "unnecessary risk," "substantial risk of wanton and unnecessary pain," and numerous other ways of describing when a method of execution is cruel and unusual.

Considering that at least half the death row inmates facing an imminent execution in the last two years have filed suit challenging the chemicals used in lethal injections, certiorari petitions and stay motions on the issue are arriving before the Court so often that this issue is one of the most common issues. Thus, it is important for the Court to determine the appropriate legal standard, particularly because the difference between the standards being used is the difference between prevailing and not.

This case presents the Court with the clearest opportunity to provide guidance to the lower courts on the applicable legal standard for method of execution cases. This case arrives at the Court without the constraints of an impending execution and with a fully developed record stemming from a 20-witness trial. The record contains undisputed evidence that any and all of the current lethal injection chemicals could be replaced with other chemicals that would pose less risk of pain while causing death than the tri-chemical cocktail currently used. Although this automatically makes the risk of pain associated with the use of sodium thiopental, pancuronium bromide, and potassium chloride unnecessary, relief was denied on the basis that a "substantial risk of wanton and unnecessary pain" had not been established. This squarely places the issue of whether "unnecessary risk" is part of the cruel and unusual punishment equation and whether an "unnecessary risk" exists upon a showing that readily available alternatives are known.

The Kentucky Supreme Court's decision gives rise to the following important questions:

I. Does the Eighth Amendment to the United States Constitution prohibit means for carrying out a method of execution that create an unnecessary risk of pain and suffering as opposed to only a substantial risk of the wanton infliction of pain?

II. Do the means for carrying out an execution cause an unnecessary risk of pain and suffering in violation of the Eighth Amendment upon a showing that readily available alternatives that pose less risk of pain and suffering could be used?

III. Does the continued use of sodium thiopental, pancuronium bromide, and potassium chloride, individually or together, violate the cruel and unusual punishment clause of the Eighth Amendment because lethal injections can be carried out by using other chemicals that pose less risk of pain and suffering?

IV. When it is known that the effects of the chemicals could be reversed if the proper actions are taken, does substantive due process require a state to be prepared to maintain life in case a stay of execution is granted after the lethal injection chemicals are injected?

CERT. GRANTED 9/25/2007

EXPEDITED BRIEFING SCHEDULE

OCTOBER 3, 2007 ORDER:

THE ORDER GRANTING THE PETITION FOR A WRIT OF CERTIORARI IS AMENDED AS FOLLOWS: THE MOTION OF PETITIONERS FOR LEAVE TO PROCEED IN FORMA PAUPERIS IS GRANTED. THE PETITION FOR A WRIT OF CERTIORARI IS GRANTED LIMITED TO QUESTIONS 1, 2, AND 3 PRESENTED BY THE PETITION.