IN THE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHRISTOPHER SCOTT EMMETT,

***Plaintiff-Appellant*,**

v.

GENE JOHNSON, DIRECTOR, GEORGE HINKLE, WARDEN, GREENSVILLE CORRECTIONAL CENTER, LORETTA K. KELLY, WARDEN, SUSSEX I STATE PRISON, JOHN DOES, 1-100,

***Defendants-Appellees*.**

Appeal from the United States District Court for the Eastern District of Virginia, Richmond Division

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APPELLEES' SUPPLEMENTAL BRIEF

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INTRODUCTION

This Court's August 16, 2000, Order directs the parties to file a supplemental brief addressing the impact of Baze v. Rees, 553 U.S.___, 2008 U.S. Lexis 3476 (2008) on the appeal presently before this Court. The decision in Baze does not change the arguments made in Defendants—Appellees' previous brief and further confirms the correctness of the decision reached by the district court.

The lethal injection procedure used by Kentucky and affirmed by the Court as constitutional is substantially similar to the Virginia procedure affirmed as constitutional by the district court in Emmett's case. Indeed, the standard of review and analysis employed by the Court in Baze parallels that of the district court when it analyzed the Virginia protocol and procedure.

SUPPLEMENTAL ARGUMENT

In Baze, the Court affirmed the Kentucky Supreme Court's decision upholding the constitutionality of the Kentucky lethal injection procedure. Specifically, Chief Justice Roberts, writing for the plurality that included Justice Kennedy and Justice Alito, concluded that *only* a "substantial" or "objectively intolerable" risk of harm would constitute cruel and unusual punishment when challenging a State's lethal

injection procedures. Neither the plurality decision nor five concurring opinions altered the existing Eighth Amendment jurisprudence in method of execution challenges. Because none of the opinions in Baze garnered the votes of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." See Gregg v. Georgia, 428 U.S. 153, 169 (1976); Marks v. United States, 430 U.S. 188, 195 (1977); United States v. Mashburn, 406 F.3d 303 (4th Cir. N.C. 2005).

However, seven Justices agreed that the Kentucky lethal injection procedure does not violate the Eighth Amendment. Thus, any State with a lethal injection protocol substantially similar to the Kentucky protocol would not create a risk of harm that demonstrates a constitutional violation. See Baze, 2008 U.S. Lexis 3476 at *47 (Plurality Opinion). Virginia's lethal injection procedure is identical in all material respects to that of Kentucky, thus, under Baze, the Virginia procedure for lethal injection does not violate the Eighth Amendment. The District Court's decision granting Defendants summary judgment is clearly correct and should be affirmed.

A. VIRGINIA'S LETHAL INJECTION PROCESS IS IDENTICAL IN ALL MATERIAL RESPECTS TO THAT FOUND CONSTITUTIONAL IN BAZE.

Like Kentucky, Virginia's process entails the "sequential introduction of three chemicals" separated by saline flushes "remotely introduced by pre-established intravenous ("IV") lines." JA 353-354. The chemicals and the dosages used by the two States are virtually identical.[1] In Virginia and Kentucky, two separate IV lines are set up as safeguards. See Baze, 2008 U.S. Lexis 3476 at *37 (Plurality Opinion); JA 212. Setting up the IV tubing, accessing the veins and insertion of the catheter are all jobs performed by the IV team, all of whom are qualified medical personnel under both States' protocols. See Baze, 2008 U.S. Lexis 3476 at *36 (Plurality Opinion); JA 357-358.

As in Kentucky, the condemned Virginia prisoner can be observed by the IV team and the executioner during the execution. In Kentucky, the IV team is located in a separate room with visual access through a window. See Baze, 2008 U.S. Lexis 3476 at *21 (

[1] The only difference is that Kentucky uses 3 grams of sodium thiopental while Virginia uses 2 grams. However, the difference is inconsequential. Experts for both sides agreed that 2 grams is more than sufficient to induce unconsciousness prior to the administration of the second or third chemicals. JA 361.

Plurality Opinion). In Virginia, the IV team remains in the chamber but steps behind a curtain to administer the injections and has visual access through a window and through portholes. JA 354. Similar to Kentucky's procedure, the Virginia Department of Corrections' officials remain in the execution chamber observing the condemned prisoner as the execution proceeds. JA 1813, 2010. In both States, there are rooms adjacent to the execution chamber in which citizen witnesses observe the process. See Baze, 2008 U.S. Lexis 3476 at *21 (Plurality Opinion); JA 205-206.

Similar to Kentucky, Virginia's protocol mandates that the chemical injections be made in a rapid flow. JA 213. Neither Kentucky nor Virginia pauses during the administration of the chemical sequence between any of the injections. Kentucky's protocol provides for the paralytic as the second chemical injection (not counting the saline flushes) as does Virginia's protocol.[2] See Baze, 2008 U.S. Lexis 3476 at *18 (Plurality Opinion); JA 354-355.

Neither Kentucky nor Virginia conducts physical tests to determine whether the condemned prisoner is unconscious prior to

[2] The prisoner in Baze argued that the use of the paralytic was unnecessary and that it created an unconstitutional risk of harm. This was rejected by all of the Justices.

the administration of the second and third chemicals. See Baze, 2008 U.S. Lexis 3476 at *145 (Ginsburg, J., Dissenting); JA 211-213. Similarly, neither State monitors the "depth of unconsciousness" with any medical instrumentation (e.g. blood pressure cuff, BIS monitor). See Baze, 2008 U.S. Lexis 3476 at *145 (Ginsburg, J., Dissenting).[3] If however, the Kentucky corrections officials observe that, prior to the administration of the second drug, the prisoner is not sedated, a second dose of thiopental can be administered through the secondary line.

Virginia's procedure is similar. In Virginia, two complete sets of chemicals are loaded into syringes and are arranged in order on two

[3] None of the 7 Justices concurring in the judgment expressed any concern with the lack of either the use of "basic tests" of consciousness or the lack of monitoring of the degree of consciousness. The plurality opinion noted that the risks of not monitoring are more remote than the risks of alleged inadequacies of procedures designed to ensure the delivery of the chemicals. Baze, 2008 U.S. Lexis 3476 at *43 (Plurality Opinion). Furthermore, just as in Virginia, any need for testing or monitoring was obviated due to the high dose of sodium thiopental. See Baze, 2008 U.S. Lexis 3476 at *43 (Plurality Opinion).

separate trays.[4] JA 210-211. Likewise, Virginia corrections officials are in the chamber with the prisoner. Unlike Kentucky, Virginia's IV team is also in the chamber and can observe the prisoner through the privacy curtain. JA 212. Therefore, if the inmate remained conscious

[4] The additional set of the second and third chemicals are used in the event that the prisoner, though fully sedated, has not expired in less than ten minutes. The Virginia protocol provides that, if the heart monitor does not indicate a flat line reading within ten minutes after completing the first set of lethal chemicals, then a second dose of the pancuronium bromide and potassium chloride will be administered through the alternate line. JA 255, 355. The second administration of the second and third chemicals is not premised on any question of sedation but rather on the length of time of the process. Virginia has used this in 10 out of 70 executions. Emmett argued that the use of such second and third chemicals indicated that the prisoner might not have been sedated but the district court rejected this argument as being purely speculative and in conflict with eyewitness accounts. JA 187-188. Upon review of the execution records, it found that the administration of the additional dosages was not an indication of inadequate sedation. JA 187. The district court found "the fact that the same IV tube is ordinarily used to deliver all the drugs minimizes the risk that an inmate would not receive the beneficial effects of sodium thiopental, but would nevertheless experience any pain associated with the subsequently administered pancuronium bromide and potassium chloride." JA 356. Further, the district court found that such action is "indicative of Defendants' attentiveness and willingness to ensure that those executions did not involve 'torture or a lingering death.'" JA 193A.

after the administration of the thiopental, a second dose of thiopental taken from the second set of syringes could be administered.[5]

The most significant safeguard in Kentucky to ensure that an adequate dose of sodium thiopental is delivered to the condemned prisoner is the requirement that members of the IV team be qualified and well trained. Baze, 2008 U.S. Lexis 3476 at *36 (Plurality Opinion).[6] The Virginia IV team is made up of the same types of qualified medical personnel as in Kentucky: a phlebotomist and emergency medical technician. See Baze, 2008 U.S. Lexis 3476 at *19-20 (Plurality Opinion); See also; JA 357-358. In Virginia, these medical- trained IV team members perform additional tasks. The team mixes the solution of sodium thiopental (the only chemical that needs preparation) and loads each of the chemicals in separately

[5] The plurality noted that "problems with the intravenous administration of sodium thiopental would be obvious…based on not only the pain that would result from injecting the first drug into tissue rather than the vein…but also the swelling that would occur." Baze, 2008 U.S. Lexis 3476 at *46, n.6 (Plurality Opinion).

[6] Justice Breyer believes that Kentucky's use of such trained personnel and the presence of observers should prevent the "botched executions" that Petitioner claims has happened in other States. Baze, 2008 U.S. Lexis 3476 at *133.(Breyer, J., concurring).

labeled syringes.[7] JA 357, 209. After inserting the IVs, the Virginia IV team supervises the application of the restraints to ensure the proper flow of the chemicals through the vein. Prior to the administration of the first injection, the IV team tests the IV lines to determine that they are patent and flowing. JA 211-212. The Virginia IV team also is responsible for ensuring that the correct syringe is given to the executioner and that it is fully emptied before proceeding to the next syringe. JA 212. Virginia thus exceeds the expertise observed by the Court in Kentucky.

The ongoing training of its execution team members also was recognized by the Court as a significant safeguard to Kentucky's process. See Baze, 2008 U.S. Lexis 3476 at *19-20 (Plurality Opinion). Kentucky conducts ten training sessions per year. Baze, 2008 U.S. Lexis 3476 at *37 (Plurality Opinion). Virginia's training requirement here again *exceeds* that of Kentucky. In Virginia, all members of the execution team participate in eight hours of thorough, intensive training per month. JA 358. The Virginia IV team also regularly trains with a physician "to assure their continued proficiency

[7] Under Kentucky's protocol, non-medical personnel mix the sodium thiopental and load the syringes. See Baze, 2008 U.S. Lexis 3476 at *36.

in placing the IV lines." JA 358. "All new members of the IV team receive twenty hours of training with a physician prior to being permitted to participate in an execution." JA 358. Part of the training includes simulating unexpected malfunctions of the IV equipment, such as a pinched IV line or leak in the tubing. JA 209-210. All of this is to assist the executioner in recognizing malfunctions which could hinder a successful execution.[8] This type of contingency training, which occurs monthly, is but a fraction of the redundant safeguards Virginia has in place to ensure that "human error or defective equipment do not increase the risk" to Emmett. JA 184-185.

In contrast to Kentucky, Virginia has substantial experience in conducting executions by lethal injection. Since 1995, Virginia has conducted 70 lethal injections.[9] The average length of time for lethal injection in Virginia from the administration of the first drug, sodium thiopental, to the pronouncement of death, is 4.5 minutes. JA 100. The two longest executions, the first and the latest, took 13 minutes. JA 91. In each of these, the execution records demonstrate that each

[8] Because of the ethical restrictions on the medical professionals, the executioner is not a medical professional in either Kentucky or Virginia. However, Virginia does train its executioner.

[9] Kentucky has conducted only one execution by lethal injection. Baze, 2008 U.S. Lexis 3476 at *21 (Plurality Opinion).

inmate was administered the full dosage of sodium thiopental. "The significant dose of sodium thiopental administered, coupled with the practices and procedures adopted by the Virginia Department of Corrections, is more than sufficient to ensure Plaintiff's unconsciousness." JA 365. Further, this same protocol has been reviewed and found to be acceptable in Reid v. Johnson, 333 F. Supp. 2d 543 (E.D. Va. 2004), (injunction denied), No. 04-25 (4th Cir. Sept. 8, 2004), (injunction denied), 542 U.S. 963 (2004); Vinson v. Johnson, Case No. 3:06cv230-HEH (E.D. Va. 2006), No. 06-10 (4th Cir. April 25, 2006) (denying preliminary injunction); Walker v. Johnson, 448 F. Supp.2d 719 (E.D. Va. 2006), (granting defendants' summary motion for summary judgment) and Lenz v. Johnson, 443 F. Supp.2d 785 (E.D. Va. 2006) (dismissing suit and denying injunction).

Given that Kentucky's lethal injection procedure is constitutional and the Virginia lethal injection procedure is virtually identical in all material respects, it follows that the Virginia procedure is constitutionally acceptable. The district court in Emmett's case, even without the benefit of the decision in Baze, independently and on the record before it, applied the same standard Baze took from Farmer v. Brennan, 511 U.S. 825 (1994) and *correctly* concluded that Virginia's

lethal injection protocol does not violate the Eighth Amendment. With the Supreme Court's affirmation of a protocol virtually identical to Virginia's in Baze, there can be no question but that the district court's decision should be affirmed.

B. THE DISTRICT COURT CORRECTLY APPLIED THE SAME STANDARD OF "SUBSTANTIAL RISK OF HARM" AS ARTICULATED IN FARMER V. BRENNAN AND BAZE V. REES.

After extensive discovery and briefing by both parties, the district court held that Virginia's lethal injection procedure passes constitutional muster under the "substantial risk of harm" standard enunciated in Wilson v. Seiter, 501 U.S. 294 (1991), Estelle v. Gamble, 429 U.S. 97 (1976), Farmer v, Brennan, supra, and Strickler v. Waters, 989 F.2d 1375 (4th Cir. 1993). In Baze, the Supreme Court reaffirmed this same longstanding precedent interpreting the Eighth Amendment, most notably Helling v. McKinney, 509 U.S. 25 (1993), and Farmer v. Brennan, supra. Baze, 2008 U.S. Lexis 3476 at *27 (Plurality Opinion). The Court built on that precedent to expressly hold that the "substantial risk of serious harm" test of Farmer should apply directly to method of execution challenges.

The Kentucky state court had rejected Baze's complaint that lethal injection constitutes cruel and unusual punishment when the

protocol creates an "unnecessary risk" of pain. In rejecting this standard, the state court firmly held that a method of execution violates the Eighth Amendment *only* when it "creates a substantial risk of wanton and unnecessary infliction of pain, torture or lingering death." See Baze v. Rees, 217 S.W. 3d 207, 209 (Ky. 2006). Applying the standard followed by the state court, the plurality in Baze affirmed the decision of the Kentucky state court.[10] To establish a violation of the Eighth Amendment, "the conditions presenting the risk must be '*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.'" Baze, 2008 U.S. Lexis 3476 at *27 (Plurality Opinion).

The Court held that "some risk of pain is inherent in any method of execution—no matter how humane." Baze, 2008 U.S. Lexis 3476 at *23 (Plurality Opinion). It observed that the "Constitution does not demand the avoidance of all risk of pain in carrying out executions."

[10] Baze affirmed a declaratory judgment action brought in state court challenging the method of execution. Emmett's case was brought and decided as a 42 U.S.C.§1983 civil rights action as permitted by Nelson v. Campbell, 541 U.S. 637 (2004) and Hill v. McDonough, 547 U.S. 573 (2006). To the extent the type of action makes a difference, it makes none in Emmett's case because the district court applied the standard addressed in Baze and Emmett asked this Court expressly to apply whatever standard the Supreme Court would announce in Baze.

Baze, 2008 U.S. Lexis 3476 at *23 (Plurality Opinion). Indeed, the Court distinguished cases in which the method of execution was employed for purposes of deliberately inflicting "pain for the sake of pain" and torture. Baze, 2008 U.S. Lexis 3476 at * 25. "Punishments are deemed cruel when they involve torture or a lingering death . . . " In re Kemmler, 136 U.S. 436, 447 (1890). The challenged procedure must result in the "unnecessary and wanton infliction of pain." Wilson v. Seiter, 501 U.S. 294, 298 (1991). If there is no "substantial risk of serious harm" then the inquiry as to the sufficiency of the method of execution ends. Baze, 2008 U.S. Lexis 3476 at *32 (Plurality Opinion). This factor is a threshold requirement that first must be met. Baze, 2008 U.S. Lexis 3476 at *32 (Plurality Opinion).

The district court in Emmett's case found that Emmett did not demonstrate that he faces a substantial risk of serious harm. JA 368. The district court specifically found that the evidence demonstrated that the risk of pain to Emmett was "less than 3/100 of one percent (.03%), a risk that is not constitutionally significant." JA 363. Further, the district court found: "the record fails to demonstrate that the execution team's experience, training and expertise are less than adequate to address any complications that may arise during the

course of the lethal injection procedure." JA 364. It found that, in 70 executions, Virginia diligently and successfully has administered the full 2g dose of sodium thiopental to each inmate. JA 193; 365. The district court therefore concluded that Emmett cannot prevail because, although there will always be the possibility of risks, Emmett failed to demonstrate a substantial risk of harm. JA 368.

The district court's findings are binding on appeal and its conclusions consistent with the standards articulated in Baze. The district court applied the standard of Gregg v. Georgia, 428 U.S. 153, Farmer and Helling which is the "substantial risk of serious harm:"

> Plaintiff asserts that the Eighth Amendment prohibits methods of execution that "involve the unnecessary and wanton infliction of pain."…The Court does not disagree. The test set forth by the Court merely gives effect to what these terms require of Plaintiff in the present context. Wantonness requires the inmate to demonstrate deliberate indifference. Deliberate indifference requires the inmate to demonstrate that prison officials disregarded a substantial risk of serious harm. (Case citations omitted.)

JA 361.

This is the same standard recognized by at least six of the nine[11]

[11] Justices Thomas and Scalia would not weigh the risk at all. They would not find that a method of execution violates the Eighth Amendment unless the method was deliberately designed to inflict pain. Baze, 2008 U.S. Lexis 3476 at *127 (Thomas, J., concurring). Justice Stevens did not address the standard in his concurring opinion.

Justices in Baze. Baze, 2008 U.S. Lexis 3476 at * 27, 32 (Plurality Opinion), * 56 (Alito, J., concurring), *127 (Breyer, J., concurring) *142 (Ginsburg, J., Dissenting).

Virginia's lethal injection protocol does not create a "substantial risk of harm" to Emmett. Since there is no substantial risk of harm, there is no occasion to consider an alternative to significantly reduce a substantial risk of harm. Baze, 2008 U.S. Lexis 3476 at *32 (Plurality Opinion). The district court correctly found that Virginia's lethal injection procedures do not violate the Eighth Amendment.

C. JUST AS IN KENTUCKY, A REFUSAL BY VIRGINIA TO ADOPT AN ALTERNATIVE PROCEDURE WOULD NOT VIOLATE THE EIGHTH AMENDMENT.

A State violates the Eighth Amendment *only* if, without a legitimate penological justification for adhering to its current method of execution, it rejects a feasible, readily implemented method that would significantly reduce a substantial risk of severe pain. Baze, 2008 U.S. Lexis 3476 at *32 (Plurality Opinion). The Court rejected both of Baze's proposed alternatives: that Kentucky eliminate the use of pancuronium bromide and potassium chloride and amend the protocol to require qualified personnel to monitor the anesthetic depth with appropriate medical equipment.

In rejecting Baze's contention, the Court first noted that simply requiring States to adopt a "marginally safer alternative" is not supported by case precedent, would embroil courts in ongoing scientific controversies, and intrude on legislative functions. Baze, 2008 U.S. Lexis 3476 at *29-30 (Plurality Opinion). This is particularly true when the proposed alternative fails to address a "substantial risk of harm" articulated in Farmer, is not practicable and is not supported by a broad scientific consensus. Baze, 2008 U.S. Lexis 3476 at *32 (Plurality Opinion).

With regard to the proposed alternative that the second chemical, pancuronium bromide, be eliminated from the protocol, not a single Justice agreed. As the Court observed, the inclusion of pancuronium bromide prevents involuntary physical movements which may accompany the injection of the potassium chloride, and it hastens death.[12] Baze, 2008 U.S. Lexis 3476 at *40-41 (Plurality Opinion). Justices Alito and Breyer noted that pancuronium bromide

[12] Likewise all but one of the seven Justices affirming Kentucky's protocol were unimpressed with the argument that judicial executions should look to veterinarian medicine to determine whether the use of pancuronium bromide was proper. Only Justice Stevens found this argument to be at all persuasive. He concluded that it was "unseemly" but still found the use of the drug to be constitutionally acceptable. Baze, 2008 U.S. Lexis 3476 at *64 (Stevens, J., concurring).

actually is recommended for purposes of lawfully assisted suicide in the Netherlands. Baze, 2008 U.S. Lexis 3476 at *59 (Alito, J., concurring); Id. at *135 (Breyer, J., concurring).[13]

The proposal that qualified personnel monitor the degree of consciousness with appropriate medical equipment was rejected by all seven Justices affirming Kentucky's protocol. "[A] proper dose of thiopental obviates the concern that a prisoner will not be sufficiently sedated." Baze, 2008 U.S. Lexis 3476 at *43 (Plurality Opinion). Therefore, the risks of not monitoring are "even more 'remote' and attenuated than the risks posed by the alleged inadequacies of Kentucky's procedures designed to ensure the delivery of thiopental." Baze, 2008 U.S. Lexis 3476 at *43 (Plurality Opinion). Further, where the qualified personnel necessary for such monitoring would be prohibited from participating in the execution process based on their ethics rules or traditions, such a modification cannot be

[13] Even Justice Stevens who urged the States to eliminate pancuronium bromide nevertheless did not find the inclusion of the drug in Kentucky's execution protocol to be of constitutional significance. Baze, 2008 U.S. Lexis 3476 at *75 (Stevens, J., concurring).

considered as "feasible" or readily available. Baze, 2008 U.S. Lexis 3476 at *56 (Alito, J., concurring).[14]

Emmett, like Baze, argued for the same two proposed modifications: the elimination of the pancuronium bromide and the adoption of monitoring the degree of consciousness. Just as the Court rejected those proposed alternatives in Baze, the district court in Emmett rejected these same proposals for similar reasons.

The district court acknowledged that "it is not the office of a federal court to dictate to the Commonwealth of Virginia the precise methodology it should employ in carrying out a lawful death sentence, as long as the procedure is constitutionally sound and does not subject the inmate to cruel and unusual punishment." JA 359. The district court rejected the argument that the Eighth Amendment required the "intervention of medical professionals." JA 363-364. The district court further noted that an execution by lethal injection is not a medical procedure (JA 365) and that "surgery and executions have the polar opposite medical objectives." JA 366.

Specifically rejecting Emmett's demand for monitoring of the degree of consciousness, the district court stated "there is no

[14] See also Baze, 2008 U.S. Lexis 3476 at *135-136 (Breyer, J., concurring).

persuasive evidence that prior Virginia inmates have experienced an insufficient depth of anesthesia." JA 365. "The significant dose of sodium thiopental administered, coupled with the practices and procedures adopted by the Virginia Department of Corrections, is more than sufficient to ensure Plaintiff's unconsciousness." JA 365. The district court concluded that Virginia has "taken considerable precautions to ensure that neither human error nor defective equipment increase the risk that plaintiff will feel any pain." JA 357. Ultimately, the district court rejected both proposals because Emmett failed to demonstrate a substantial risk of harm. JA 368.

Failing to meet that threshold test, the proposals are of no constitutional consequence and Emmett's challenge fails to support an Eighth Amendment claim. Clearly, the subsequent holding in Baze only confirms the correctness of the district court's decision in every respect.

CONCLUSION

Under Baze, Virginia's lethal injection procedure does not violate the Eighth Amendment. This Court should affirm the judgment of the district court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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