Justices to Enter the Debate Over Lethal Injection

By LINDA GREENHOUSE

WASHINGTON, Sept. 25 — The Supreme Court on Tuesday stepped into the debate over whether the most commonly used drug “cocktail” used to execute prisoners on death row is so likely to produce needless pain and suffering as to be unconstitutional.

The justices agreed to hear an appeal by two men on Kentucky’s death row who argue that the combination of three drugs amounts to cruel and unusual punishment, in violation of the Eighth Amendment.

The case, which comes at a time when challenges to lethal injections have effectively stopped executions in a growing number of states, will be argued in January or February and decided by early next summer. While it is pending, judges around the country are certain to be asked to bar executions in those states that are not already under an official or de facto moratorium.

In 2004, while the Supreme Court was considering an ultimately successful challenge to the execution of juvenile killers, judges blocked all such executions.

Of the 38 states with the death penalty, 37 use lethal injection — all except Nebraska, which still uses the electric chair. Lethal injection was adopted in the 1980s as a more palatable alternative to electrocution, but it has proven increasingly troublesome. Leading medical organizations have told their members not to participate, and lawyers for death-row inmates have produced evidence showing that in the absence of expert medical attention, there is a substantial risk of error in administering the combination of anesthesia and paralyzing drugs necessary to bring about a quick and painless death.

Litigation over the issue has brought executions to a halt in nine states: California, Delaware, Florida, Maryland, Missouri, New Jersey, North Carolina, Oklahoma and Tennessee, according to lawyers at the Death Penalty Clinic at the Boalt Hall School of Law at the University of California.

The issue in the case, Baze v. Rees, No. 07-5439, is not whether lethal injection, in the abstract, is constitutional or unconstitutional; the question is more specific and less conclusive than that. It is, rather, the standard by which courts are to evaluate the evidence that lethal injection, predictably and with some regularity, goes wrong: that a paralyzing drug can leave an inadequately anesthetized inmate with the ability to feel severe pain as another drug stops the heart, but without the ability to move or call for help.

There have been other problems with lethal injection as well. Four months ago, an execution in Ohio was delayed 90 minutes as medical workers struggled to find a vein in the prisoner’s arm into which they could insert the shunts to carry the intravenous lines.

Under the Supreme Court’s precedents on prison conditions, inadequate medical care is not deemed to violate the Eighth Amendment unless it is the product of “deliberate indifference.” Under the court’s death
penalty precedents, a method of execution must not be “contrary to evolving standards of decency” and may not inflict “unnecessary pain.”

In rejecting the challenge to lethal injection last year, the Kentucky Supreme Court found that the method did not present a “substantial” risk of pain and suffering, and so met these constitutional standards. “The prohibition is against cruel punishment and does not require a complete absence of pain,” the state court said.

In their appeal, the two inmates, Ralph Baze and Thomas C. Bowling, represented by the Kentucky Public Advocate’s office, said the Kentucky court failed to consider that the risk of pain was “unnecessary,” in that alternative methods of lethal injection could eliminate the chance that inmates would remain conscious but paralyzed. They urge the justices to incorporate “unnecessary risk” into the standard for evaluating lethal injection.

The three chemicals used for lethal injections are sodium thiopental, which renders a person unconscious; followed by Pavulon, which paralyzes the muscles, including those that control breathing; followed by potassium chloride, which causes cardiac arrest. Lawyers have argued that the second drug could be eliminated and that a less painful drug could be substituted for the third.

The Kentucky attorney general’s office, in urging the justices to turn down the appeal, argued that the fact that the three chemicals were so widely used demonstrated that the protocol was acceptable. “Condemned inmates will never run out of ideas for changes to the procedures, drugs or equipment used during lethal injection,” the state said, warning that the Supreme Court would go “down an endless road of litigation” if it accepted the case.

The two inmates were convicted of separate, unrelated crimes: Mr. Baze for killing a sheriff and deputy sheriff who were trying to serve him with a warrant, and Mr. Bowling for killing a couple whose car he had damaged in a parking lot.

In two earlier cases on lethal injection, the Supreme Court removed procedural obstacles to bringing such cases but did not deal directly with the constitutionality of the method. But those two rulings led to an explosion of litigation.

The only time the court ever ruled directly on a method of execution was in 1878, when it upheld the use of the firing squad. In 1999, the justices agreed to hear a challenge to Florida’s use of the electric chair, but the state substituted lethal injection for electrocution before the case could be decided.

In 1972, the court struck down all existing death penalty statutes, but in 1976 allowed executions to resume under newly written laws that gave jurors more precise guidance in an effort to make death sentences less arbitrary. There have been 1,097 executions since then, with Texas accounting for 403. There have been 40 executions this year, 24 of them in Texas.