

Supreme Court to review lethal injection methods

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(09-25) 17:34 PDT WASHINGTON -- The U.S. Supreme Court took up a constitutional challenge to lethal injections Tuesday, agreeing to decide how far states must go to reduce the risk of excruciating pain during an execution.

The court's decision to accept an appeal from two Death Row inmates in Kentucky will almost certainly slow the pace of executions around the nation in the short term. While the case is under review, moratoriums will continue in California and nine other states where judges have halted lethal injections during court challenges.

Of the 27 other states with death penalty laws, lethal injection is the sole or primary means of execution in all but one - Nebraska, which uses the electric chair - and it is also used in federal executions. Legal commentators expect judges or prison officials in many of those states to delay executions until after the Supreme Court's ruling, due by June. The case is scheduled to be argued in early January.

"This is huge news which could (and probably should) lead to a de facto moratorium on all lethal injection executions nationwide until the Supreme Court issues a ruling," Douglas Berman, a law professor and sentencing law expert at Ohio State University, wrote in his blog on sentencing issues.

But the ruling could also remove long-term legal obstacles to lethal injections if, as expected, the court sets a constitutional standard under the Eighth Amendment, which prohibits cruel and unusual punishment. Federal and state courts around the nation have been weighing legal challenges to lethal injection from condemned prisoners for most of this decade, with varying results and with no clear guidance from the high court.

"Having the court take the issue up will mean that we're going to get some finality on this method of punishment," said Michael Rushford, president of the Criminal Justice Legal Foundation in Sacramento, which supports capital punishment. He said his organization will file arguments urging the court to give states considerable leeway in lethal injection, which he likened to euthanasia.

Fordham Law Professor Deborah Denno, a death penalty opponent who testified for the inmates in the Kentucky case, agreed that the ruling should help to clear up confusion about execution methods.

"The lack of Eighth Amendment guidance has unraveled the death penalty in this country," she said.

Berman said he expects the court to allow lethal injections to continue while concluding that some



safeguards are needed to reduce the risk of a botched and painful execution.

Although the justices have been divided over capital punishment-related issues, the Ohio State professor said, they probably will reach a consensus that "the state can't be sloppy to the point of risking extreme pain when it may not be necessary, but the Constitution doesn't demand eliminating all risks of pain."

The court in recent years has barred executions of juveniles and mentally retarded prisoners. But a ruling last term made it easier for prosecutors in capital cases to remove jurors who had qualms about the death penalty.

According to documents filed by defense lawyers in the Kentucky case, this will be the first time that the Supreme Court has reviewed the constitutionality of a method of execution since 1878, when the court upheld Utah's use of a firing squad.

In that ruling, the court said the Constitution prohibits executions that involve torture, such as burning alive or drawing and quartering, and other infliction of "unnecessary cruelty" that the justices did not define. Lawyers for the Kentucky inmates argue that the state is violating that standard by using drugs that pose a risk of extreme pain if something goes wrong, and by failing to provide adequate safeguards.

The two inmates, Ralph Baze, 49, and Thomas Bowling, 52, were both convicted of double murders and have lost appeals of their death sentences. Baze shot a sheriff and his deputy who were serving warrants on him in 1992. Bowling killed a husband and wife outside their dry-cleaning store in 1990.

A state judge upheld Kentucky's procedures after hearing testimony from medical experts and other witnesses in a 2005 trial, and the Kentucky Supreme Court affirmed that decision in a brief ruling last November, saying the Constitution "does not require a complete absence of pain."

Lethal injection was first used by Texas in 1982 and was adopted by California in 1996 after a federal judge barred use of the state's gas chamber. Executions by injection, largely the same in all states, begin with the use of a powerful sedative to render the inmate unconscious and conclude with drugs to paralyze the muscles and stop the heart.

The medical-style procedure was widely viewed as a humane alternative to more traumatic execution methods such as hanging, electrocution and lethal gas. But in recent years some studies have suggested that flaws in states' administration of the sedative, sodium pentothal, have left prisoners conscious and in agony, but paralyzed and unable to cry out, while they are dying.

In California, U.S. District Judge Jeremy Fogel of San Jose ruled last December that the state's lethal injection procedures were so haphazard, with poorly trained prison staff operating in a dimly lit chamber, that they created an undue risk of a needlessly painful execution.

Fogel had previously blocked the February 2006 execution of Michael Morales of Stockton, convicted of raping and murdering 17-year-old Terri Winchell near Lodi in 1981. The judge said then that the state could execute Morales if a doctor was present to make sure he was unconscious, but prison officials were unable to find a physician who would participate. Ethical standards set by medical associations bar doctors from taking part in executions.

The state has since announced changes in its execution protocol, including better training for prison staff and closer monitoring of the inmate, and is building a new execution chamber at San Quentin State Prison.

Fogel plans to visit the prison in November and is scheduled to hold a hearing on the new procedures in December.

It's not clear whether those plans will be affected by Monday's Supreme Court order, said Ronald Matthias, a senior assistant attorney general who oversees death penalty cases in California. Morales' lawyers were unavailable for comment.

In Business: Court to consider legality of federally ordered revisions in power contracts between suppliers and states. **D3**

What it means

What the court did: Agreed to review an appeal by two Kentucky Death Row inmates who challenged the state's plans to execute them by lethal injection. They argued that the three drugs used in executions, and the state's procedures, poses a needless risk of causing severe pain to a dying inmate.

The implications: The ruling, due by June, is likely to set constitutional standards for the 37 states and the federal government that use lethal injection as their sole or primary method of execution.

California: A federal judge in San Jose has halted all lethal injections in the state since granting a stay of execution in February 2006 to Michael Morales, convicted of a 1981 rape and murder. The Supreme Court's decision to review the Kentucky case extends court-imposed moratoriums on executions in California and nine other states.

The Supreme Court case is [Baze vs. Rees, 07-5439](#). E-mail Bob Egelko at begelko@sfchronicle.com.

<http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/09/26/MNUVSDQOT.DTL>

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