

# Supreme Court justices to take up lethal injection

## HIGH COURT RULING COULD PROVIDE ROAD MAP FOR CALIFORNIA

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Mercury News  
San Jose Mercury News

Article Launched: 09/26/2007 01:39:32 AM PDT

Facing legal chaos in states that use the death penalty, the U.S. Supreme Court's decision Tuesday to review a Kentucky lethal-injection case signals the justices are prepared to try to settle the issue for California and other states.

The Supreme Court's brief order to review the appeal of two Kentucky death row inmates marks the first time the justices will consider the constitutionality of an execution method since 1879, when the high court upheld Utah's firing squad. The Supreme Court will now examine whether a fatal three-drug cocktail most of the states use to execute inmates may violate the ban on cruel and unusual punishment.

Among the four key questions the justices will consider is whether states can execute an inmate if there is a "substantial risk" of pain and suffering through lethal-injection. By taking the Kentucky case, the justices are expected to provide a road map for judges around the country, including in California, where a San Jose federal judge has been reviewing the issue for more than a year.

"They decided to take the bull by the horns," said Ronald Matthias, a senior assistant attorney general in charge of California's death penalty appeals. "It is a very significant development and we expect a very far-reaching and important decision which we'll obviously be bound by."

The Supreme Court review is likely to further delay California's effort to resume executing death row inmates. Matthias would not speculate whether the court's intervention would halt the ongoing challenge in California by death row inmate Michael Morales, whose case has already prompted Gov. Arnold Schwarzenegger to overhaul this state's lethal-injection procedures. U.S. District Judge Jeremy Fogel is scheduled to hold additional hearings in the Morales case in December and tour a newly constructed death chamber in November. But some legal experts now expect the case may wait until the Supreme Court rules.

### Broad implications

California has put executions on hold since early 2006 while Fogel has been reviewing Morales' lawsuit, which maintains the state's lethal-injection method poses an undue risk of an inhumane execution for the more than 650 inmates on the state's death row.

John Grele, one of Morales' lawyers, said Tuesday he would need to review the Kentucky case more closely to determine its impact on the California litigation.

But legal experts agreed the decision to hear the Kentucky case would have broad implications for states across the country, particularly given the scattershot results that have come from different courts asked to review the arguments of death row inmates. In some states, executions have been put on hold while other states have kept executing murderers despite nearly identical challenges pending in their courts.

The Supreme Court's decision to take the Kentucky case is "huge news" that should lead to a "de facto moratorium" on executions nationwide, Douglas Berman, an Ohio State University law professor and leading expert on the issue, said on his popular law blog. Berman does not expect a ruling until the end of the court's next term in June 2008.

Elisabeth Semel, head of Boalt Hall School of Law's death penalty clinic, also said the case is crucial to settling questions surrounding lethal injection, but cautioned that the justices do not necessarily have to settle them all.

"The court is taking a bite of the apple," she said. "But how big a bite is not known.

"It puts Judge Fogel and other judges in the middle of this process in a position where they have to step back," she added.

A Supreme Court review of lethal injection has been brewing for years. Most states with a death penalty have turned to the method following similar legal challenges of alternatives, such as the gas chamber and the electric chair. A federal appeals court declared California's gas chamber unconstitutional in the mid-1990s, prompting the switch to lethal injection.

In recent years, the Supreme Court has been repeatedly asked to review challenges to various states' lethal-injection procedures,

but has steered clear of the central constitutional issue. The justices did make it easier for condemned inmates to file challenges, prompting a number of cases to unfold in states such as Missouri, Tennessee and Kentucky.

A federal judge in Tennessee recently put executions on hold there after concluding that the state's lethal-injection method was too flawed. Fogel, in the California case, called this state's execution procedures "broken," but fixable.

In the Kentucky case, the state courts rejected challenges from death row inmates Ralph Baze and Clyde Bowling Jr. after a trial was held in 2005 to review Kentucky's execution method. It was the Baze and Bowling case the Supreme Court agreed to hear Tuesday.

### **Same method**

Kentucky uses the same three drugs to put an inmate to death as California - sodium thiopental to sedate the inmate; pancuronium bromide to paralyze the muscles in breathing; and potassium chloride, which stops the heart. Lawyers for death row inmates say pancuronium bromide conceals an inmate's suffering and masks the potential of the third drug causing a searingly painful death.

One of the four issues the Supreme Court may address is whether it is unconstitutional to use those three drugs if other chemicals are available that pose "less risk of pain and suffering." But legal experts say the court's ultimate ruling may focus more on how a state administers those drugs, rather than what drugs are used.

The Supreme Court, experts say, can instead clarify the standard for what amounts to a cruel and unusual execution and the obligations of states to administer the fatal drugs with proper safeguards.

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