

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 1990-000066

10/05/2009

HONORABLE RAYMOND P. LEE

CLERK OF THE COURT
B. Kredit
Deputy

STATE OF ARIZONA

KENT E. CATTANI

v.

JEFFREY TIMOTHY PAGE LANDRIGAN (A) SYLVIA J LETT

COURT ADMIN-CRIMINAL-PCR
VICTIM SERVICES DIV-CA-CCC

RULING

The Court has reviewed all the pleadings regarding the defendant's Amended Petition for Post-Conviction Relief. The defendant raises two claims in his petition: (1) Arizona's lethal injection protocol is unconstitutional, and (2) favorable results of DNA testing entitle him to a new trial. For the reasons that follow, the Court finds that neither claim warrants relief.

Lethal Injection Claim

The defendant first challenges the constitutionality of Arizona's lethal injection protocol. This Court previously ruled that it accepts the findings of fact as stated in *Dickens v. Brewer*, No. CV07-1770-PHX-NVW, the federal action brought by several Arizona death row inmates challenging the constitutionality of Arizona's lethal injection protocol under 42 U.S.C. §1983. It now also accepts Judge Wake's conclusion that Arizona's lethal injection protocol does not violate the Eighth Amendment.

There is no clearly established federal law holding that lethal injection in general or Arizona's protocol in particular constitutes cruel and unusual punishment. *See Baze v. Rees*, ___ U.S. ___, 128 S.Ct. 1520, 1530 (2008) ("This Court has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment."); *State v. Andriano*, 215 Ariz. 497, ¶¶61-62 (2007) ("the United States Supreme

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Court has never held that death by lethal injection is cruel and unusual absent specific procedures for implementation, nor does Andriano cite any cases to that effect"). To the contrary, *Baze* upheld the constitutional validity of Kentucky's three-drug lethal injection protocol. *Id.* at 1537-38.

As Judge Wake and other jurists have noted, the *Baze* decision did not provide a majority opinion or decision. In such a circumstance, the United States Supreme Court has instructed that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent 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.'" *Marks v. United States*, 430 U.S. 188, 193 (1977)(quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)(plurality opinion)). However, there are no reliable means of determining the "narrowest grounds" presented in *Baze* because three blocks of Justices provided three separate standards for determining the constitutionality of a mode of execution. As a consequence, the *Baze* plurality further instructed that "[a] State with a lethal injection protocol similar to the protocol we uphold today" would not violate the Eighth Amendment. 128 S.Ct. at 1537 (Roberts, C.J., joined by Kennedy and Alito, JJ.). This Court believes that it is this basis upon which the Arizona Supreme Court will analyze Arizona's lethal injection protocol: the protocol does not violate the Eighth Amendment if it is similar to Kentucky's or provides greater protection against the risk of severe pain than Kentucky's.¹

After *Baze*, and during the *Dickens* litigation, the Arizona Department of Corrections (ADOC) revised its lethal injection protocol to add additional safeguards to ensure that there is no substantial risk of severe pain to the inmate. *See*, ADOC Department Order 710, Execution Procedures.² This Court agrees with Judge Wake's finding that this amended protocol provides more safeguards than does Kentucky's protocol against the risk that the sodium thiopental will be improperly administered and the pancuronium bromide and potassium chloride will be administered to a conscious inmate. Although the defendant contends that using only a fatally-sufficient dose of sodium thiopental would avoid any possibility of severe pain from the pancuronium bromide and potassium chloride, the Eighth Amendment "does not demand the avoidance of all risk of pain in carrying out executions;" it protects only against a substantial risk of serious harm. *Baze*, 128 S.Ct. at 1529.

¹ The Court notes that although the defendant also claims that lethal injection violates the Arizona Constitution, he makes no separate argument and cites no authority supporting the proposition that the Arizona Constitution provides greater protection than the Eighth Amendment. Therefore, the Court confines its analysis to whether Arizona's protocol violates the Eighth Amendment.

² ADOC Department Order 710 is published in its entirety on its website:

http://www.azcorrections.gov/Zoya_DO710.aspx

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The defendant also states that his challenge is not simply to the drugs themselves, but the selection of the people in charge of administering the drugs, and the safety measures in place to prevent potential suffering. These contentions are identical to those raised by the plaintiff inmates in *Dickens*, and are also resolved by ADOC's amended protocol.

This Court finds that it agrees with Judge Wake's findings and conclusions regarding the constitutionality of Arizona's lethal injection protocol, and incorporates in its entirety the *Dickens* order. Based upon these findings and conclusions, Arizona's three-drug protocol is "substantially similar" to the protocol approved by the United States Supreme Court in *Baze* and does not violate the Eighth Amendment. *Dickens v. Brewer*, at 38 (concluding that the Arizona Protocol is substantially similar to Kentucky's, does not subject inmates to a substantial risk of serious harm, and "the record does not demonstrate a substantial risk that [ADOC] will violate the Arizona Protocol in the future in a manner that is sure or very likely to cause needless suffering").

The Court finds that the defendant has failed to state a colorable claim for relief regarding his lethal injection claim.

DNA Claim

The Court also previously ruled that the facts were not in dispute regarding the results of the DNA testing, and therefore an evidentiary hearing was not required under either A.R.S. §13-4240 or Rule 32.8.

Semen and blood present on the victim's pants, blanket and curtains were tested and no DNA matched the defendant's. The Court finds that this fact would not have affected the jury's verdict of guilt or the trial court's sentence of death. The Arizona Supreme Court stated that the facts as follows:

"Evidence at trial established that the victim's body was found in his residence on December 15, 1989. According to the testimony of a friend ('Michael'), the victim had been a promiscuous homosexual who frequently tried to 'pick up' men by flashing a wad of money. This would invariably occur after he got paid. The victim told Michael that he had recently met a person named 'Jeff,' with whom he wanted to have sex. The victim's physical description of Jeff was later found to closely approximate defendant.

"Michael received three phone calls from the victim on Wednesday, December 13, 1989. During the first, the victim said he had picked up Jeff, that

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they were at the apartment drinking beer, and he wanted to know whether Michael was coming over to 'party.' Approximately 15 minutes later, the victim called a second time and said that he was in the middle of sexual intercourse with Jeff. Shortly thereafter, the victim called to ask whether Michael could get Jeff a job. Jeff spoke with Michael about employment, and asked if he was going to come over. Michael said no. During one of these conversations, the victim indicated that he had picked up his paycheck that day.

"The victim failed to show up for work the following day, and calls to him went unanswered. On Friday, a co-worker and two others went to the victim's apartment and found him dead. He was fully clothed, face down on his bed, with a pool of blood at his head. An electrical cord hung around his neck. There were facial lacerations and puncture wounds on the body. A half-eaten sandwich and a small screwdriver lay beside it. Blood smears were found in the kitchen and bathroom. Partial bloody shoeprints were on the tile floor.

"Cause of death was ligature strangulation. Medical testimony at the presentence hearing indicated that the victim probably was strangled after being rendered unconscious from blows to the head with a blunt instrument.

"Acquaintances testified that the apartment usually was neat. When the body was found, however, the apartment was in disarray. Drawers and closets were open; clothes and newspapers were strewn on the floor. The remnants of a Christmas present lay open and empty at the foot of the bed. In the kitchen area were two plates, two forks, a bread wrapper, luncheon meat, cheese wrappers, and an open jar of spoiled mayonnaise. A five-pound bag of sugar was spilled on the floor. A clear impression of the sole of a sneaker appeared in the sugar. Neither the paycheck nor its proceeds were located. Although the apartment had been ransacked, nothing else seemed to be missing.

"When defendant first was questioned, he denied knowing the victim or ever having been to his apartment. When arrested, however, he was wearing a shirt that belonged to the victim. Seven fingerprints taken from the scene matched defendant's. The impression in the sugar matched his sneaker, down to a small cut on the sole. Tests also revealed that a small amount of blood had seeped into the sneaker. The blood matched that found on the shirt worn by the victim.

"Defendant's ex-girlfriend testified that she had three telephone conversations with him in December of 1989. During one of those, defendant told her that he was 'getting along' in Phoenix by 'robbing.' Defendant placed the last

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call to her from jail sometime around Christmas. He said that he had 'killed a guy ... with his hands' about a week before." *State v. Landrigan*, 176 Ariz. 1, 3-4, 859 P.2d 111, 113-14 (1993).

In reviewing the sufficiency of the evidence of the defendant's guilt, the Supreme Court found that "[t]he evidence clearly placed defendant, who admitted getting along by 'robbing,' and who was wearing one of the victim's shirts when arrested, in the ransacked apartment" and defendant admitted to his ex-girlfriend that he killed a man about a week before December 23rd, and the blood on his shoe matched that on the victim's shirt." *Id.* at 4-5.

The new DNA evidence does not undermine the defendant's guilt; it shows only that someone else may have been involved in the crimes. In fact, the defendant admitted to his psychological expert that he went to the victim's apartment intending to rob the victim, and assisted an accomplice in murdering the victim. He told the expert that he put the victim in a headlock while his accomplice hit the victim. As shown by the Supreme Court's statement of facts, the new DNA evidence is not the only physical evidence linking the defendant to the crimes. Based on the evidence admitted at trial and the defendant's admissions, the DNA evidence would not have changed the jury's verdict of guilt.

The DNA evidence also would not have changed the trial judge's death verdict. Both the trial judge and the Supreme Court, independently reviewing the propriety of the death sentence, determined that the record did not present mitigating evidence sufficiently substantial to call for leniency. *Id.* at 7. If an accomplice was involved in the murder and the defendant believed he was less culpable, he could have presented this fact as mitigation at his sentencing hearing. He chose not to present mitigation and that choice was upheld by the United States Supreme Court. *Schriro v. Landrigan*, 550 U.S. 465 (2007). The Arizona Supreme Court agreed with the trial judge that the defendant's comments at the sentencing hearing "demonstrate a lack of remorse that unfavorably distinguishes him from other defendants and supports imposition of this severe penalty." *State v. Landrigan*, 176 Ariz. at 7-8.

The Court finds that the defendant has failed to state a colorable claim for relief regarding the DNA evidence claim.

IT IS THEREFORE ORDERED dismissing defendant's Amended Petition Post-Conviction Relief.

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>