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Splintered Opinion Addresses Lethal Injection Challenges

Nationwide Lethal Injection Challenges to Move Forward Following Ruling on Kentucky's Execution Procedures

The United States Supreme Court's splintered decision in *Baze v. Rees* will allow lethal injection litigation to resume after a *de facto* moratorium on executions, attorneys at the Death Penalty Clinic at the U.C. Berkeley School of Law said today. The Court's ruling today provided some clarification to lower courts, but did nothing to conclusively resolve the dozens of lethal injection challenges pending throughout the country.

A three-justice plurality announced a standard that lower courts likely must apply in lethal injection cases to decide whether the procedures violate the Eighth Amendment's ban on cruel and unusual punishment. Although the record of Kentucky's procedures was insufficient to meet the standard set by Justices Roberts, Kennedy, and Alito, evidence is likely to satisfy the standard in states where judges have allowed fuller inquiries into the lethal injection process.

The plurality's standard requires death row inmates to establish a substantial risk of serious harm, but also makes clear that if alternative lethal injection procedures are proposed that are "feasible, readily implemented, and in fact substantially reduce" the risk of harm, a state's refusal to change its method will violate the Constitution. There was no evidence of this alternative presented in the *Baze* case. But in other states, such as Tennessee, there is such a record: the state's experts have conceded, and the court has found, that alternative procedures are available that meet the plurality's test.

"No one should be subjected to an inhumane, torturous death when it can be avoided. The Court's ruling today approves Kentucky's lethal injection procedures based upon the evidence presented, but calls into serious question the procedures in a number of other states," said Elisabeth Semel, Director of the Death Penalty Clinic.

Each jurisdiction has its own lethal injection procedures, and for that reason, the facts in each case will be different. However, three aspects of the procedures are consistent across the country, and raise similar constitutional concerns:

- 1) the commonly-used **three-drug formula poses serious risks** of causing unnecessary, excruciating pain and a torturous death, and **does not comply with veterinary standards for animal euthanasia**;
- 2) overwhelmingly, the prison employees who carry out the lethal injection process are **poorly trained and profoundly unqualified for the task**, and are often required to follow outdated, nonsensical protocols; and
- 3) **the secrecy that surrounds the process** denies the public of an understanding of the inhumane torture that is inflicted and meaningful legislative or executive oversight.

First, government officials have chosen to use the fundamentally flawed three-drug formula despite awareness of the unnecessary risks inherent in the formula, and the ready availability of safer alternatives – such as the procedures veterinarians have been using for decades in animal euthanasia. In fact, the procedure used in lethal injection would be illegal in 42 out of 50 states if used to euthanize an animal.

Second, lethal injections are carried out in many states by untrained, unqualified prison employees using inadequate equipment and following incomprehensible protocols. The plurality opinion in *Baze* notes that the personnel in Kentucky were “trained and experienced.” This is not the case in many other states, as federal judges have found.

Third, much about the lethal injection process – from the drafting of the protocols to what takes place during executions – has been scrupulously kept secret by state and federal officials. Moreover, because nearly all jurisdictions paralyze inmates before injecting them with potassium chloride, the experience – and occurrence – of conscious pain or suffering is often not apparent to execution witnesses.

“Whether you support the death penalty or oppose it, the fact is, lethal injection can be carried out in a more humane, less torturous manner. The states and the federal government have no justification for refusing to reform their lethal injections procedures, except their desire to continue to operate behind a shroud of secrecy,” said Ty Alper, Associate Director of the Death Penalty Clinic.

The Death Penalty Clinic filed an *amicus* brief in *Baze v. Rees* on behalf of death-sentenced inmates who are litigating lethal injection challenges in California, Missouri, Maryland and Florida. For more information on lethal injection, please visit www.lethalinjection.org. For more information about the Death Penalty Clinic, please visit www.deathpenaltyclinic.org.

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