

No. 07-5439

IN THE
SUPREME COURT OF THE UNITED STATES

RALPH BAZE, ET AL.,

Petitioner

v.

JOHN D. REES, ET AL.,

Respondent

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY**

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

CAPITAL CASE

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I. THE PETITION FOR A WRIT OF CERTIORARI PRESENTS A SUBSTANTIAL AND RECURRING CONSTITUTIONAL ISSUE THAT HAS DIVIDED THE COURTS AND FOR WHICH GUIDANCE FROM THIS COURT WOULD SUBSTANTIALLY ASSIST THE LOWER COURT'S IN DETERMINING HOW TO CONSISTENTLY APPLY THE EIGHTH AMENDMENT CRUEL AND UNUSUAL PUNISHMENT CLAUSE TO METHOD OF EXECUTION CLAIMS.

Respondents' statement that this case presents no unique issues of law that merit granting certiorari is disingenuous. Shortly after the Kentucky Supreme Court rendered its decision in this case, counsel of record for Respondents went on national television to discuss the lethal injection issue and the Kentucky litigation in particular. During that television interview, counsel of record for Respondents, Jeff Middendorf, was asked if he considers whether lethal injection can be administered in a reliable, consistent way to be a "fundamental question." He responded, "Well, certainly." Exhibit A (Transcript of PBS Newshour: Debate –Lethal Injection Suspended, December 19, 2006).

The debate later turned to the likelihood and need for this Court to get involved. Counsel of record for Respondents was asked if he thought it was likely that this case would end up being decided by the United States Supreme Court. He responded, "Well, it certainly could end up there." *Id.* Then, at the end of the interview, in reference to this Court addressing the issue, he stated, "I think eventually the Supreme Court – this is a constitutional issue that affects the whole country - - they may well step in." *Id.*¹ While counsel of record for Respondents suggests that this case is unimportant now that it is convenient for him to do so, his original statement on national television that this issue needs to be resolved by this Court, and that this issue is likely to be resolved by this Court is the more accurate reflection of the importance of the issues

¹ The transcript reflects that this last statement was made by Richard Dieter. Crediting the statement to Dieter was a typographical error. The question itself was posed to Jeff Middendorf and the video feed of the debate shows Middendorf making this statement.

presented in this petition for a writ of certiorari. And, this case is the perfect case for this Court to settle the important constitutional issues now before this Court that have divided the lower courts.

As stated in the petition for a writ of certiorari, this case is based on a fully developed record and does not involve the precursor issue of whether a stay of execution is necessary to reach the merits. Further, because there is no dispute in the trial record that readily available alternative chemicals could be used that pose less risk of pain and suffering, whether the Eighth Amendment is violated solely upon a finding that the risk is “unnecessary” is dispositive of the outcome.

Rather than admit the importance of this Court resolving this issue, Respondents state that the Kentucky Supreme Court applied the correct legal standard of a “substantial risk” and that no court has yet to find lethal injection unconstitutional. While it is true that no court has reached a final decision striking down lethal injection, neither of these arguments are relevant to the questions presented and are best reserved for a merits brief. The issue currently before this Court is whether this Court should take the case to decide the appropriate legal standard. In that regard, there can be no dispute that “substantial” and “unnecessary” are words with materially different meanings that could change the outcome of case. Thus, regardless of the correctness of the state court decision, this Court should take this case, as counsel of record for Respondent stated on national television, to determine the appropriate legal standard to apply to this type of lawsuit.

As laid out in the petition, courts across the country (both state and federal) have applied different legal standards and struggled to determine the appropriate legal standard. Regardless of the outcome, this remains the same and is a basis for this Court granting certiorari. There can be

no rebuttal of the fact that the number of lethal injection cases percolating throughout the country is enormous and that this Court has yet to address the appropriate Eighth Amendment legal standard to apply to this type of action. Indeed, the strength of this as a reason to grant certiorari is so high that Respondents fail to address it or even acknowledge it, instead focusing on misleading statements about the posture of the cases and the legal standard that has been applied.

Respondents take issue with the cases cited by Petitioners, claiming that the cases all involve interlocutory trial court rulings on preliminary injunction motions. *Brief in Opposition* at 6-7. This is also inaccurate. Many of the cases, including *Webb* and *Abdur'Rahman*, did not involve rulings on preliminary injunctions. Regardless, Respondents' argument is curious at best since two of the three cases it relies upon as a basis to deny certiorari also were decided in the context of interlocutory rulings on preliminary injunction motions (*Workman* and *Jones*).² Contrary to Respondents' argument, this shows the importance of taking this case because it is one of the few cases that has arisen before this Court on a fully developed record outside the auspices of the law governing injunctions or stays of executions and the expedited decisions that such a situation requires. In short, if this Court is going to resolve the issues presented in the petition for certiorari, now is the time and this petition for certiorari is the most appropriate vehicle to do so.

II. BECAUSE THE STATE COURT ADDRESSED PETITIONERS' CLAIMS ON THE MERITS WITHOUT RELYING ON ANY DEFAULT DOCTRINE, THE PROCEDURAL DEFAULT DOCTRINE IS INAPPLICABLE.

Respondents' argument that Petitioners' claims are procedurally defaulted demonstrates an utter lack of understanding of the doctrine of procedural default, and must fail for three reasons: 1) the state court never found the claim waived or defaulted, so procedural default

² The other case, *Taylor*, will likely arrive before this Court in the near future.

cannot apply; 2) Respondent has waived the affirmative defense of procedural default; and, 3) Petitioners' claim does not challenge the sentence of death itself; instead, it challenges only particular aspects of the means and procedures for carrying out that sentence, which this Court has recognized is cognizable in a civil action. *See, Hill v. McDonough*, 126 S.Ct. 2096 (2006).

The purpose of the procedural default doctrine is “to avoid the unnecessary friction between the federal and state court systems that would result if a [] federal court upset a state court conviction without first giving the state court system an opportunity to correct its own errors.” *Preiser v. Rodriguez*, 411 U.S. 475, 490 (1973). To that end, federal courts are barred from reviewing “a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.” *Lambrix v. Singletary*, 520 U.S. 518, 522-23 (1997) (quoting, *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)). Procedural default bars review only when “the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar.” *Harris v. Reed*, 489 U.S. 255, 263 (1989). Where a claim was addressed on the merits without any reference to a default, the doctrine of procedural default does not apply. *See, County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 149 (1979). That is the case here.

The Kentucky Supreme Court, the last state court to issue a judgment in this case, never mentioned waiver, default, or jurisdiction as a potential defense to this cause of action. Indeed, the court implicitly rejected such an affirmative defense, which had not been raised by Respondents, when the court said “[t]his action was filed in accordance with CR 57, which outlines the procedure for obtaining a declaratory judgment.” *Baze, et al. v. Rees, et al.*, 217 S.W.3d 207, 209 (Ky. 2006). Then, in upholding the trial court's judgment rendered after a

seven day trial, the court held, “[t]he lethal injection method used in Kentucky is not a violation of the Eighth Amendment to the United States Constitution or Section 17 of the Kentucky Constitution’s ban on cruel and unusual punishment. Baze and Bowling have not met their burden of proof by a preponderance of the evidence as necessary in a declaratory judgment action. The findings of fact by the trial judge are not clearly erroneous. The conclusions of law are correct.” *Id.* at 212-13. This language makes it clear that the Kentucky Supreme Court addressed the claim on the merits without applying a procedural bar, thereby leaving nothing for which the procedural default doctrine could apply.

Further, Respondents have waived any argument concerning procedural default by failing to raise it to the state court. They neither raised it in response to the CR 76.44 motion referenced in the Brief in Opposition nor in the appellate brief they filed in the Kentucky Supreme Court. *See* Appendix B (Response to CR 76.44 Motion); Appendix C (Appellees’ Brief in the Kentucky Supreme Court). By failing to raise the affirmative defense of waiver or procedural default in state court, Respondents have waived all potential application of the defense. *See, e.g., Trest v. Cain*, 522 U.S. 87, 90-91 (1997).

Finally, neither the filing of a CR 76.44 motion in state court nor anything said within that motion makes this Petition a successive habeas petition. As both the trial court and Kentucky Supreme Court ruled, this case was properly brought as a civil action under the applicable law and thus was cognizable as a civil action. The fact that the Kentucky Supreme Court then applied CR 76.44 to that action does not mean that the state court suddenly changed its mind and ruled that the action was not a civil action, but instead means that the Kentucky Supreme Court recognized that CR 76.44 is applicable to a civil action challenging particular aspects of a lethal injection procedure.

CR 76.44 deals with stays of execution pending the filing of a petition for a writ of certiorari in this Court. In relevant part, the rule says a stay “shall be granted in appeals involving a sentence of death.” CR 76.44(a). The rule does not define “involving.” But, state law looks to the plain meaning of words when interpreting a rule. *Cf., Stopher v. Conliffe*, 170 S.W.3d 307, 308-09 (Ky. 2005) (discussing the application of the plain meaning doctrine when interpreting a statute). Include is defined in Merriam Webster’s Collegiate Dictionary, 10th ed. as: 1) “to take in or comprise as a part of a whole”; 2) “to contain between or within.” Any action involving portions of a lethal injection protocol surely fall within this definition of include for if not for a sentence of death, Petitioners would not have standing to challenge part of the lethal injection protocol. Thus, this petition “involves” a sentence of death in the obvious sense that Petitioners will be executed, but that does not mean that they are challenging the sentence on its face.

As this Court ruled in *Hill v. McDonough*, the key factor in determining whether a lethal injection challenge falls outside the realm of a civil action is whether the nature of the challenge “necessarily implies] the invalidity of the confinement of the sentence.” 126 S.Ct. at 2103. Just as in *Hill*, Petitioners’ action does not imply the invalidity of their death sentence for, as the state court recognized, Petitioners could be executed by lethal injection regardless of the outcome of this suit. The arguments presented to this Court in the petition for a writ of a certiorari are no different in this regard. Petitioners raise an argument concerning the appropriate legal standard for determining whether the chemicals and procedures Respondents intend to use to execute them violate the Eighth Amendment to the United States Constitution and argue that Respondents will deprive them of due process by not using the proper equipment to maintain life if a stay of execution is granted after the first or second lethal injection chemicals are injected.

As Petitioners pointed out throughout the litigation in this case, these claims can easily be resolved by Respondents obtaining the proper equipment and training and by changing the chemicals they inject. Because neither the current chemicals nor the current procedures are required by state law, *see* K.R.S. 431.220, Petitioners' claims do not necessarily imply the invalidity of their death sentences. Thus, Petitioners' claims are cognizable in a civil action (as the state courts already ruled) and are cognizable before this Court.

In sum, Petitioners have not procedurally defaulted their claim, Respondents have waived any procedural default defense, and this action is cognizable as a civil action. Thus, the petition for a writ of certiorari is properly before this Court on the merits.

CONCLUSION

For the reasons stated above, as well as those stated in the main petition, Petitioners respectfully request that a writ of certiorari be granted to review the judgment of the Kentucky Supreme Court.

Dated: August 21, 2007.

Respectfully submitted,

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