COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
No. 2005-SC-00543

RALPH BAZE AND THOMAS C. BOWLING **APPELLANTS**

VS. **APPEAL FROM FRANKLIN CIRCUIT COURT**
HONORABLE ROGER L. CRITTENDEN, JUDGE
NO. 04-CI-1094

JONATHAN D. REES, ET AL. **APPELLEES**

REPLYBRIEF FOR APPELLANTS BAZE AND BOWLING

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Certificate required by CR 76.12(6)

The undersigned does hereby certify that copies of this reply brief was served upon the following individuals by mail on January 6, 2006: Hon. Roger Crittenden, Judge Franklin Circuit Court, P. O. Box 678, Frankfort, Ky. 40602, Hon. Jeff Middendorf, General Counsel, Department of Corrections, 125 Holmes Street, Frankfort, Ky. 40601, Hon. Holly Harris Ray, Justice and Public Safety Cabinet, 125 Holmes Street, Frankfort, Ky. 40601 and to the Hon. David Smith, Assistant Attorney General, at 1024 Capital Center Drive, Frankfort, Ky. 40601.

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PURPOSE OF REPLY BRIEF

The purpose of this reply brief is to respond to Appellees' 1) procedural defenses to Appellants' electrocution claim, 2) misstatements of fact; 3) incorrect legal conclusions; and, 4) factual and legal arguments raised for the first time on appeal.

STATEMENT CONCERNING ORAL ARGUMENT

Appellants agree with the Commonwealth that "because this case presents an issue of first impression in the Commonwealth, and addresses issues of great consequence regarding how Kentucky's condemned inmates are put to death, oral argument is necessary." *Appellees' Brief* at ii.

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

All parties agree that "the sole issue in this action [is] whether the manner in which the Commonwealth of Kentucky carries out the sentences on condemned inmates is constitutionally sound. This case [does] not address issues involving the Plaintiffs' guilt or their conviction at trial. Moreover, [Appellants do] not question their recommended death sentences."[1] Thus, the facts of Appellants' crimes are irrelevant to this action. What is important is that Baze and Bowling have not defaulted their challenge to electrocution, that Appellees and the lower court have misunderstood the 8th Amendment standard for challenges to method of executions, and that Appellants have proven by a preponderance of the evidence that 1) the chemicals and procedures Appellees use to carry out lethal injections in Kentucky pose an unnecessary risk of pain and suffering in violation of the 8th Amendment to the U.S. Constitution; and, 2) Appellees do not have the proper equipment and training to maintain life if a last-minute stay of execution is granted. Each of these arguments is discussed in individual sections below. But before doing so, Baze and Bowling point out that Appellees are attempting to defend the chemicals they use in lethal injections by raising arguments on appeal that were not raised in the court below and that are unsubstantiated by any record facts.

Appellees assert that pancuronium bromide is necessary because it prevents muscle reactions that could dislodge the I.V. catheters.[2] No record citations are provided for this factual assertion, which is not surprising since no evidence was introduced at trial in support of this conclusion. Appellees gloss over this by claiming that the lower court ruled that pancuronium, which does not relieve pain,[3] is necessary to

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[1] *Appellees' Brief* at 5.
[2] *Id.* at 22.
[3] TR 2, Vol. V at 691 (Order denying declaratory judgment) (Appendix at 13); Tape 10; 4/20/05; 1:55:57 (Test. Dr. Heath).

preclude any possible involuntary movements that could disrupt the administration of the drugs.[4] The lower court found that pancuronium prevents involuntary muscle movements caused by potassium chloride, but the court never mentioned that pancuronium is necessary to prevent the I.V. from dislodging.[5] Because this argument was neither raised in the lower court nor addressed by that court *sua sponte*, this Court should ignore Appellees' belated attempt to justify the use of pancuronium. If this Court addresses Appellees' new idea, Appellants request a remand for further development of the record and factual findings on whether pancuronium is necessary to ensure that the I.V. does not dislodge.

Appellees' argument is a red herring. Pancuronium is not necessary to cause death since potassium chloride causes death before pancuronium or thiopental has the time to do so (as would many other chemicals that would stop the heart).[6] As Appellees' expert, Dr. Dershwitz, testified, they could easily avoid the involuntary muscle reactions by replacing potassium chloride (the chemical that causes the involuntary movements) with a less painful chemical to stop the heart, such as Dilantin.[7] Thus, pancuronium bromide is unnecessary.

As Appellees eloquently state, "[i]t is far more important that the execution of a human being [rather than a pet] be carried out in a dignified, uninterrupted manner."[8] Unfortunately, the use of pancuronium- - which is banned for the euthanasia of animals - - and the other chemicals and procedures used in Appellees' lethal injection process make execution of human beings in Kentucky less dignified than euthanasia of pets.

I. The electrocution claim is properly before this Court, and not procedurally defaulted.

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[4] *Id*. at 24.
[5] TR 2, Vol. V at 691 (Order denying declaratory judgment) (page 13 of Appellants' Appendix).
[6] Tape 10; 4/20/05; 2:03:00 (Test. Dr. Heath) (potassium chloride is the killing agent in Kentucky's lethal injection process); Tape 13; 5/2/05; 9:40:28 (Test. Dr. Dershwitz) (heart stops beating causing death as soon as potassium chloride circulates through the body).
[7] Tape 13; 5/2/05; 11:15:10 (Dr. Dershwitz explaining that Dilantin would stop the heart in a matter of minutes without causing the muscle contractions that potassium chloride causes).

The U.S. Supreme Court has recognized that because the evolving standards of decency change over time, courts can revisit previously decided issues.[9] The Court would have done so if Florida did not change its sole method of execution away from electrocution.[10] The Georgia Supreme Court did so in 2001, ruling that electrocution is cruel and unusual punishment.[11] And this Court has recognized that the constitutionality of electrocution can be revisited.[12] Thus, the fact that this Court previously found electrocution constitutional does not prohibit this Court from revisiting the issue.[13]

The electrocution claim also is not defaulted by the alleged failure to file a timely appeal or by Appellants' refusal to select a method of execution. Appellants originally filed an appeal from the lower court order dismissing the electrocution claim. The lower court's order, which involved other legal matters, did not state that the order was a final and appealable order, as required to appeal. Appellants brought this to the attention of the lower court, but the court refused to modify its order.[14] Thus, Appellants could not have appealed the electrocution claim until the lethal injection appeal was filed.

By refusing to select electrocution as a method of execution, Appellants have not waived their electrocution challenge. Appellees' argument to the contrary creates the ultimate catch-22. By affirmatively choosing a method of execution, a death-sentenced prisoner waives a challenge to that method of execution.[15] Thus, if Appellants chose electrocution as a method of execution, they could not challenge its constitutionality. Appellees' argument would make it impossible to ever challenge the

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[8] *Appellees' Brief* at 23.
[9] *See, e.g., Roper v. Simmons*, 125 S.Ct. 1183 (2005) (holding that execution juveniles is now unconstitutional because the standards of decency have changed since the court last visited the issue).
[10] *Bryan v. Moore*, 528 U.S. 1133 (2000).
[11] *Dawson v. State*, 554 S.E.2d 137 (Ga. 2001). Appellees' assertion that no state has ruled that electrocution is unconstitutional is incorrect. They overlooked Georgia law.
[12] *McQueen v. Parker*, 950 S.W.2d 226, 227 (Ky. 1997).
[13] Appellees' *res judicata* defense is waived because it was not raised in the court below. *Sedley v. City of West Buechel*, 461 S.W.2d 556, 559 (Ky.App. 1970) (*res judicata* must be asserted in a responsive pleading, such as an answer, not a motion, or it is waived). *Res judicata* cannot apply to Baze because he did not raise the claim on direct appeal.
[14] Franklin Circuit Court Order, dated Dec. 21, 2004 (attached).
[15] *Stewart v. LaGrand*, 526 U.S. 115, 119 (1999) (holding that death sentenced prisoner waived a challenge to execution by

constitutionality of a method of execution when an alternative method is provided - - according to Appellees, the challenge is waived if you select the method of execution and waived if you do not. The law does not operate in this manner. As the Sixth Circuit recognized, challenging both methods of execution without choosing either method bars a finding that the challenge was waived by selecting a method directly or by default.[16] The cases cited by Appellees on page 7 of their brief also lead to this conclusion. In each of these cases, the death-sentenced inmate challenged only one of the two methods of execution that he could choose from. Thus, by challenging both methods of execution in Kentucky, Appellants have preserved their challenge to electrocution.

II. Both Appellees and the lower court applied the wrong legal standard to this case.

The cruel and unusual punishment clause does not begin and end with whether there is a societal consensus against Kentucky's lethal injection chemicals and procedures.[17] Logically, this cannot be true because a consensus has to start somewhere. Legally, it is not the correct standard.

The 8th Amendment is not frozen in time, circa 1910, when the Court decided *Weems*. *Weems* has nothing to do with methods of executions. Yet, Appellees claim it contains the entire legal analysis for cruel and unusual punishment claims. On the contrary, the cruel and unusual punishment standard has evolved over time. The cases Appellees cite go back to 1978 - - before the first lethal injection, and before propafol, a safer and less painful alternative to thiopental, was developed. These cases are neither binding nor persuasive authority for the issues presented by this case.[18]

As discussed in Appellants' Opening Brief, the unnecessary pain and suffering language that first

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gas when he chose gas as a method of execution despite the state providing other constitutional methods of execution).

[16] *Buell v. Mitchell*, 274 F.3d 337, 370 (6th Cir. 2001) (holding that a challenge to a method of execution was waived, where the defendant had the opportunity of choosing an alternative method of execution that he did not challenge).

[17] *Appellees' Brief* at 9-13.

[18] The cases cited by Appellees also did not involve fully developed records or recently discovered evidence on lethal injection, and required the death-sentenced prisoner to meet a higher standard of proof.

appeared in *Weems* has been expanded to include both mutilation and the risk of pain,[19] which makes sense since you cannot ask a dead person if he felt pain. As for the lethal injection claim, the terms "risk" and "unnecessary" are key to determining whether Kentucky's lethal injection processes is cruel and unusual. The dictionary defines "risk" as "a chance."[20] "Unnecessary" is defined as "not required, needless, or avoidable."[21] Thus, any risk or chance of pain that can be avoided is unnecessary and thus violates the 8th Amendment.

The lower court incorrectly believed that the 8th Amendment did not permit the court to consider whether pain or the risk of pain was unnecessary because it could be avoided by using other chemicals or procedures.[22] But the 8th Amendment requires courts to consider whether both pain and the risk of pain are unnecessary. If the lower court had applied this standard, it would have ruled in Appellants' favor because, as the court noted in its order, "evidence was presented that other drugs were available that may decrease the possibility that the condemned inmate may experience pain"[23] - - a factual finding that Appellees ignore during their recitation of court findings.

III. Appellees' procedures and chemicals for carrying out lethal injections pose an unnecessary risk of pain and suffering in violation of the Eighth Amendment.

Appellees' argument suffers from four fatal flaws: 1) they fail to realize that Dr. Heath's testimony regarding pain should be given greater weight than Dr. Dershwitz's testimony because, as Appellees' expert, Dr. Dershwitz, admitted, Dr. Heath is more qualified than he is to talk about pain

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[19] *Appellants' Brief* at 10-12; *see*, *Farmer v. Brennan*, 511 U.S. 825, 846 (1994) (holding that the focus of the 8th Amendment cruel and unusual punishment clause is on whether there exists an "objectively intolerable risk of harm"); *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (holding that the Eighth Amendment requires a court to consider the risk that the prisoner complains of).

[20] Webster's New World Dictionary, Third College Edition (1988) at 1159 (attached).

[21] Webster's New World Dictionary, Third College Edition (1988) at 1461 (attached). Unnecessary is also defined as not necessary. Necessary is defined as unavoidable. *Id*. at 905. Thus, unnecessary can also be defined as avoidable.

[22] TR 2, Vol. V at 693-694 (Order denying declaratory judgment) (page 15-16 of Appellants' Appendix).

[23] *Id*. at 693.

because Dr. Heath's expertise is in mechanisms of pain;[24] 2) they fail to realize that there are levels of consciousness and equate not feeling pain with appearing unconscious; 3) they assume that condemned inmates are unconscious and not suffering pain solely based on observations of witnesses; and, 4) all their arguments are based on the assumption that 3 grams of thiopental circulate through the inmate's bloodstream. Each of these issues and Appellees' other contentions are discussed below.

A. Dr. Heath's testimony is more relevant and weighty than Dr. Dershwitz's testimony.

The 8th Amendment cruel and unusual punishment clause deals almost exclusively with unnecessary pain and suffering and the risk of pain and suffering. Thus, the most important expert testimony deals with pain. This is where Dr. Dershwitz and Dr. Heath differ. Dr. Dershwitz has no special training or expertise in pain and conceded that Dr. Heath's research and career focus is in the mechanisms of pain. Dr. Heath's credentials make his testimony more relevant and persuasive in determining whether Kentucky's lethal injection chemicals and procedures pose an unnecessary risk of pain and suffering.

B. Individuals who appear unconscious can feel painful stimuli.

Appellees continuously say that the testimony shows that the inmate is unconscious after the first chemical is injected, and thus is unable to feel pain. This argument exemplifies a misunderstanding that Appellees have had since the beginning of litigation. There are different levels of consciousness. A person can appear unconscious and not respond to verbal stimuli, but wake up from pain. A higher dose of anesthesia is necessary to achieve general anesthesia (the level of anesthesia where a person does not

[24] Tape 13; 5/2/05; 9:43:31.

feel pain) than to make a person appear unconscious.[25] Dr. Dershwitz's research in this area is unreliable because, as he admitted, his calculations deal only with the amount of thiopental necessary to prevent a person from responding to verbal stimuli.[26] About 39 mg/L of thiopental in the bloodstream is necessary to prevent a person from feeling pain.[27] The level of thiopental found in Harper's bloodstream was much lower than this,[28] suggesting, according to Michael Ward (Kentucky's Chief Toxicologist), that Eddie Harper may have received enough thiopental to be rendered unconscious but not enough to ensure that he did not feel pain.[29]

C. Appellees prevent us from seeing if the condemned inmate suffers pain.

Appellees make a great deal out of the fact that Harper's execution seemed to go quickly - - Harper closed his eyes and died shortly thereafter without giving any indication that he was in pain. Appellants do not dispute this account. Rather, they agree that almost all lethal injections appear painless. But the appearance is misleading and cannot be relied on for any purpose. By administering pancuronium, Appellees make all lethal injections appear painless. Because pancuronium paralyzes all voluntary muscles, it prevents the inmate from giving any verbal or non-verbal indication of pain. It also does exactly what Appellees say they want it to do - - prevent witnesses from seeing the involuntary muscle reactions caused by potassium chloride. Thus, Appellees are administering pancuronium to prevent the public from determining that an inmate is feeling pain. They cannot be allowed to hide behind the false appearance of peacefulness that they have chemically induced as a basis for saying that Appellants have not shown that the condemned inmate may suffer pain during the lethal injection.

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[25] Tape 10; 4/20/05; 1:25:25 – 1:26:50 (Test. Dr. Heath).
[26] Tape 13; 5/2/05; 11:27:14.
[27] TE Plaintiffs' Exhibit 29 (Appendix at 393-96) (Disposition of Toxic Drugs and Chemicals in Man); Tape 8; 4/18/05; 2:54:50 (Test. Michael Ward).
[28] Tape 8; 4/18/;05; 2:56:15 (Test. Michael Ward).
[29] Tape 8; 4/18/05; 2:54:50 – 2:56:15 (stating that amount of thiopental in Harper's body would render him unconscious but would not be enough to prevent him from feeling pain).

D. This case is not about the dose of thiopental being administered.

Appellees keep saying that the lethal injection chemicals cause a quick, painless death because 3 grams of thiopental renders an inmate unconscious within seconds. Appellees, however, miss the point. It is not the dose of thiopental administered that matters, but rather the amount of thiopental that circulates through the bloodstream. Appellees could give 100 grams of thiopental, but if the thiopental is not reaching the bloodstream, it is the same as administering none. Appellees allegedly administered two grams of thiopental to Harper, but only 3 to 6.5 mg/L was in his bloodstream when he died. Thus, the full dose of thiopental never reached Harper. According to Ward, the amount that reached Harper was insufficient to prevent him from feeling pain. The risk that this could reoccur would be lessened by using different chemicals.

E. Analgesics lessen the risk of pain and suffering

Contrary to Appellees' insinuation, Valium is not an analgesic. It relaxes muscles but does not relieve pain. Adding analgesics (pain relievers) - - which are used during surgery to relieve pain- - to the chemical cocktail would lessen the risk that an inmate feels pain during the lethal injection.

F. Thiopental may not reach the bloodstream despite no signs of infiltration.

Appellees believe that the only way that thiopental will not reach the bloodstream is if an infiltration occurs (needle comes out of the vein and chemical goes into body but not bloodstream). That is not the case. An infinite number of problems preventing thiopental from reaching the bloodstream could occur. Appellees' monitor only for infiltration. The Warden testified that he did not know how to monitor for consciousness, and Dr. Dershwitz and Dr. Heath explained numerous methods of monitoring for consciousness before and after the injection of pancuronium. Appellees could easily perform some of these tests without any equipment and could easily obtain the equipment to perform the other monitoring

techniques. Their failure to do so creates an unnecessary risk of pain and suffering.

IV. Appellees' life-saving measures in case of a last-minute stay of execution are insufficient to maintain life.

This claim does not involve the unnecessary risk of pain and suffering. Rather, it involves the fundamental right to life. Thus, substantive due process analysis is appropriate. If a stay of execution is granted, Appellees have no right to take the life of a death-sentenced prisoner. As a result, as long as the prisoner is alive, they must take steps to keep the inmate alive. Appellees suggest that they have taken these steps by having a defribillator and a crash cart on site. As Appellants' brief explains in detail, their steps are useless because the life-saving measures are being performed by an untrained individual and because the crash cart does not contain the proper equipment for maintaining life after the second or even the first chemical has been administered.

Appellees claim that Dr. Haas, a psychiatrist, may not be the doctor standing by to resuscitate Appellants should a last-minute stay of execution be granted.[30] The trial testimony shows otherwise. Dr. Haas testified that that he has had discussions about being present to revive the inmate if a stay is granted.[31] Warden Haeberlin, the warden at the prison where executions are carried out,[32] testified that Dr. Haas would be present to revive Bowling if a stay of execution was granted after the first or second chemical is administered.[33] A psychiatrist is not adequately qualified to reverse the effects of the lethal injection chemicals,[34] which are easily reversible when properly trained people use adequate equipment.

The lower court's finding that it is not probable that a condemned inmate will be revived after injection of the second chemical, pancuronium, is clearly erroneous. The court also ignores the probability

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[30] *Appellees' Brief* at 34-35.
[31] Tape 9; 4/19/05; 12:26:40.
[32] Since the lethal injection trial, Haeberlin has been replaced by Thomas Simpson.
[33] Tape 9; 4/19/05; 10:21:30.
[34] Tape 10; 4/20/05; 2:18:05 (Test. Dr. Heath).

that life can be maintained after the first chemical is injected. No witness testified that it would be difficult to reverse the effects of thiopental (1st chemical) or pancuronium (second). Rather, the testimony was clear that the effects of both these chemicals are easily reversible. Dr. Haas testified that inmate could be revived after thiopental is injected.[35] Dr. Heath testified that reversing the effects of potassium chloride would be difficult, but the effects of the other two chemicals are reversible.[36] Dr. Dershwitz also acknowledged that the effects of the first two chemicals could be reversed in the execution chamber.[37] But, according to Dershwitz, Appellees' are not prepared to maintain life after the first or second chemicals are administered. Their instructions on how to reverse the effects of the chemicals do not mention the following essentials: 1) medications to increase blood pressure; 2) epinephrine; 3) artificial ventilation (only needed after pancuronium has been administered).[38] Dr. Dershwitz also testified that Appellees' crash cart is insufficient to maintain life because it does not contain insulin and neostigmine.[39] Thus, the evidence is clear that reviving an inmate after the first two chemicals are administered does not require a team of cardiac surgeons at a trauma center. All it requires is trained individuals and the proper equipment, which Appellees easily could obtain. Court attempts to halt an execution after a chemical has been injected have occurred in our country, and could occur in Kentucky. Appellees must be adequately prepared for such a situation and must obtain the proper equipment and training to revive an inmate after the first two chemicals have been injected. Anything short of this deprives the inmate of his right to life.

RESPECTFULLY SUBMITTED,

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[35] Tape 9; 4/19/05; 12:16:44.
[36] Tape 10; 4/20/05; 2:15:18, 2:16:40.
[37] Tape 13; 5/2/05; 11:18:45 – 11:23:00.
[38] Tape 13; 5/2/05; 11:18:45 – 11:22:00.
[39] Tape 13; 5/2/05; 11:22:12 – 11:23:15.