

XVI. LOUISIANA’S LETHAL INJECTION PROTOCOL VIOLATES PETITIONER’S EIGHTH AMENDMENT RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENTS

Mr. Louviere faces execution by lethal injection.¹ This execution method as currently administered in Louisiana violates Mr. Louviere’s federal and state constitutional rights, U.S. Const. Amend. VIII; La. Const. Art. I, § 20, as it creates a substantial risk of serious, unnecessary pain. Accordingly, Mr. Louviere’s death sentence must be set aside.

A. A Method Of Execution That Creates A Substantial Risk of Severe Pain Violates The Federal And State Constitutions.

The Eighth Amendment to the U.S. Constitution prohibits the infliction of “cruel and unusual punishments.” Similarly, Article I, Section 20 of the 1974 Louisiana Constitution states, in part, that “[n]o law shall subject any person to euthanasia, to torture, or to cruel, excessive, or unusual punishment.” The Louisiana Supreme Court has held that this provision “affords no less, and in some respects more, protection than that available under the Cruel and Unusual Punishments Clause of the Eighth Amendment . . . “ *State v. Perry*, 608 So.2d 594, 610 (La. 1992); *see also*, *State v. Sepulvado*, 367 So.2d 762, 746 - 66 (La. 1979).

Both the state and federal constitutions forbid the infliction of unnecessary pain in the execution of a sentence of death. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (opinion of Reed, J.); *Perry*, 608 So.2d at 613. “[T]he infliction of a severe punishment by the state cannot comport with human dignity when it is unnecessary and nothing more than the pointless infliction of suffering.” *State v. Perry*, 608 So.2d at 613. For this reason, “The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence.” *Resweber*, 329 U.S. at 463.

In a decision issued this Term, the United States Supreme Court explained how this test should be applied to methods of execution by lethal injection. In *Baze v. Rees*, 128 S. Ct. 1520 (2008), the Court considered the constitutionality of a written protocol adopted by the Kentucky Department of Corrections to implement execution by lethal injection. *Id.* at 1527. Kentucky’s protocol called for the injection of 3 grams of sodium thiopental, 50 milligrams of pancuronium

¹ By statute, condemned prisoners in Louisiana are executed “by the intravenous injection of a substance or substances in a lethal quantity into the body of a person convicted until such person is dead.” La. R.S. 15:569 (B).

bromide, and 240 milliequivalents of potassium chloride. *Id.* The protocol specified that the intravenous lines used to administer these drugs must be flushed with 25 milligrams of saline between injections in order to prevent clogging. *Id.* at 1528. The protocol required that the IV catheters administering these drugs be inserted by qualified personnel with at least one year of professional experience. *Id.* The protocol also contained detailed procedures to be followed in the event the first dose of sodium thiopental does not render the prisoner unconscious. *Id.* Finally, the protocol mandated that a physician be present to revive the prisoner in the event of a last-minute stay of execution. *Id.*

In a fractured plurality opinion, the Court upheld Kentucky's written protocol, citing the multiple, detailed safeguards Kentucky had adopted to minimize the possibility of a "botched" execution. The plurality also set forth a new standard to assess the constitutionality of a particular method of execution: the Eighth Amendment is violated only if the execution method creates a "substantial risk of serious harm." *Id.* at 1531 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846 & n.9 (1994)).

B. Louisiana's Lethal Injection Procedure Creates A Substantial Risk Of Serious Harm.

Unlike Kentucky's protocol, Louisiana's lethal injection procedure lacks nearly every safeguard cited and approved by the United States Supreme Court in *Baze*. As a result, Louisiana's method of execution is substantially likely to result in severe harm to the condemned inmate. For that reason, Louisiana's method of execution violates the Eighth Amendment under *Baze*.

1. Louisiana's Lethal Injection Protocol Lacks the Procedural Safeguards Relied Upon by the United States Supreme Court in finding Kentucky's Protocol Constitutional

Louisiana's written protocol for administering lethal injections appears at title 22, part I, section 103 of the Louisiana Administrative Code. The portion of that section setting forth "procedures" to be followed is eight paragraphs long. Two of those eight paragraphs describe the procedures to be followed in administering lethal injections:

2. The inmate will then be taken to the lethal injection room by the escorting officers. Once in the room, the inmate will be afforded the opportunity to make a last verbal statement if he so desires. He will then be assisted onto the lethal injection table and properly

secured to the table by the officers. Once the officers exit the room, the warden will close the curtain to the witness room and signal the I.V. technician(s) to enter. The I.V. technician(s) will appropriately prepare the inmate for execution and exit the room. The warden will reopen the witness room curtain.

3. The person designated by the warden and at the warden's direction, by intravenous injection, the appropriate substances in a lethal quantity into the body of the inmate until he is deceased.

La. Admin. Code tit. 22, pt. I, § 103.J.2 to 3 (2007).

A comparison of this protocol with the Kentucky protocol upheld in *Baze* shows that Louisiana's written procedures are woefully inadequate:

- Unlike the Kentucky protocol, the Louisiana protocol does not specify the particular chemicals to be used, or the dosages to be administered. While “Kentucky’s protocol called for the injection of 2 grams of sodium thiopental, 50 milligrams of pancuronium bromide, and 240 milliequivalents of potassium chloride,” *Baze*, 128 S. Ct. at 1528, Louisiana’s protocol states only that the executioner shall administer “the appropriate substances in a lethal quantity,” La. Admin. Code tit. 22, pt. I, § 103.J.3.
- Unlike the Kentucky protocol, the Louisiana protocol does not specify who is to prepare and administer the injections, the nature and extent of their training, if any, and their experience, if any, with the instruments used to start an IV line. Whereas Kentucky “reserves responsibility for inserting the IV catheters to qualified personnel having at least one year of professional experience,” and includes “a certified phlebotomist and an emergency medical technician” on the team that administers the injection, *Baze*, 128 S. Ct. at 1528, Louisiana states only that “I.V. technician(s) will appropriately prepare the inmate,” and “[t]he person designated by the warden” will administer the injection. La. Admin. Code tit. 22, pt. I, § 103.J.2 to 3.
- Unlike the Kentucky protocol, the Louisiana protocol does not address how to avoid occlusion of the IV lines. Kentucky requires that members of the execution team flush the IV lines between injections “to prevent clogging of the lines by precipitates that may form when residual sodium thiopental comes into contact with pancuronium bromide.” *Baze*, 128 S. Ct. at 1528. Louisiana says nothing about this.
- Unlike the Kentucky protocol, the Louisiana protocol does not include any procedures to be followed in the event of an emergency. Kentucky provides that if the warden and deputy warden determine that the prisoner is not unconscious within 60 seconds following injection of sodium thiopental, a new dose is administered. *Id.* Kentucky further provides that a physician shall be present to revive the inmate in the event of a last-minute stay of execution. *Id.* Louisiana provides neither.
- Unlike the Kentucky Protocol, the Louisiana protocol does not require the members of the execution team, including the IV technicians, to participate in any practice sessions before a scheduled execution. Kentucky requires the execution team to participate in at least 10 practice sessions per year. “These sessions, required by the written protocol, encompass a complete walk-through of the execution procedures, including the siting of IV catheters into volunteers.” *Id.* at 1534. Louisiana’s protocol is silent on this issue.

Louisiana’s failure to adopt safeguards like Kentucky’s puts inmates at a substantial risk of suffering severe harm during executions. Such safeguards are necessary because lethal injection can cause serious, unnecessary pain if administered improperly. As the *Baze* plurality recognized, “It is uncontested that, failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride.” *Baze*, 128 S. Ct. at 1533.

a. Lethal injections fail frequently.

Lethal injections fail frequently—each time causing unnecessary suffering. There have been twenty-one botched lethal injection executions since 1985. Michael Radelet, *On Botched Executions*, forthcoming in Peter Hodgkinson and William Schabas (eds.), *Capital Punishment: Strategies for Abolition* (Cambridge University Press, 2001) (hereinafter “Radelet”). “Lethal injection, meant to be the neat and modern execution method, [has been] plagued with problems, or ‘execution glitches,’ as they are also referred to in the business.” Stephen Trombley, *The Execution Protocol*, 14 (Random House 1992) (hereinafter “Trombley”).

Several states have documented failed lethal injection executions. In Texas, several inmates have been subjected to excruciating failed executions. *See* Trombley at 14 (Billy Wayne White suffered forty-seven minutes of failed IV insertions; Stephen Morin suffered forty-five minutes of failed IV insertions; Randy Wools suffered though failed IV insertions on two separate occasions; and Stephen McCoy received an excessive dose of poison). In Louisiana, John Ashley Brown convulsed violently after receiving an excessive dose of the lethal solution; the same happened to Scott Dawn Carpenter in Oklahoma. Trombley at 14-15. Raymond Landry lay only half-dead when the IV popped from his vein—his death took twenty-four minutes. *Id.* Prior to Illinois’ abolition of the death penalty, Charles Walker’s IV was inserted incorrectly which caused the poison to flow away from his heart and prolonged the suffering. *Id.* at 156-157, 252.

As these examples demonstrate, the three-drug lethal injection procedure followed by States such as Louisiana can cause serious harm if it is improperly administered. If the chemicals are improperly delivered, or if the dosage of sodium thiopental is insufficient to ensure

that the prisoner is unconscious, or if the first dose of sodium thiopental does not take effect quickly enough, or if the IV lines become clogged, for example, the prisoner will suffer an unnecessarily excruciating death. Louisiana's failure to adopt and implement the safeguards recognized in *Baze* renders its lethal injection process unconstitutional.

b. The absence of medical experts in Louisiana's procedure is constitutionally intolerable.

Louisiana's lethal injection protocol does not require the use of medical experts or automated processes which would reduce execution malfunctions. *See* La. Admin. Code tit. 22 § 103 (2004).² A lethal injection execution is essentially a medical procedure. Effective and humane administration of the lethal solution requires a trained medical professional. Unlike other states that involve medical professionals, *see* *Trombley* at 76, Louisiana does not require those administering lethal injections to have the experience necessary to minimize the possibility of needless pain. And, unlike like other states, Louisiana does not employ sophisticated machines that, if calibrated by medical professionals, would reduce the chance of execution malfunctions. Mr. Louviere may suffer unnecessary torture and suffering because those administering the lethal injections are not medically trained.

C. Conclusion

For the foregoing reasons, Louisiana's method of execution by lethal injection creates a substantial risk of serious harm. As the Supreme Court's recent decision in *Baze* makes clear, the Eighth Amendment prohibits Louisiana from executing Mr. Louviere by lethal injection so long as unnecessary, substantial risks of severe pain are present. Accordingly, Mr. Louviere respectfully requests that this Court find Louisiana's lethal injection protocol unconstitutional and vacate his death sentence. In the alternative, Petitioner requests that this Court order an evidentiary hearing on this claim; order the Department of Corrections to produce, in discovery, any and all materials relevant to lethal injection; and to enjoin the State from proceeding with Petitioner's execution until it adopts and implements safeguards to avoid the risks set forth in herein.

² The regulations only require that a "competent person" administer the lethal injection.

