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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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BAZE ET AL. *v.* REES, COMMISSIONER, KENTUCKY DEPARTMENT OF CORRECTIONS, ET AL.

CERTIORARI TO THE SUPREME COURT OF KENTUCKY

No. 07–5439. Argued January 7, 2008—Decided April 16, 2008

Lethal injection is used for capital punishment by the Federal Government and 36 States, at least 30 of which (including Kentucky) use the same combination of three drugs: The first, sodium thiopental, induces unconsciousness when given in the specified amounts and thereby ensures that the prisoner does not experience any pain associated with the paralysis and cardiac arrest caused by the second and third drugs, pancuronium bromide and potassium chloride. Among other things, Kentucky's lethal injection protocol reserves to qualified personnel having at least one year's professional experience the responsibility for inserting the intravenous (IV) catheters into the prisoner, leaving it to others to mix the drugs and load them into syringes; specifies that the warden and deputy warden will remain in the execution chamber to observe the prisoner and watch for any IV problems while the execution team administers the drugs from another room; and mandates that if, as determined by the warden and deputy, the prisoner is not unconscious within 60 seconds after the sodium thiopental's delivery, a new dose will be given at a secondary injection site before the second and third drugs are administered.

Petitioners, convicted murderers sentenced to death in Kentucky state court, filed suit asserting that the Commonwealth's lethal injection protocol violates the Eighth Amendment's ban on "cruel and unusual punishments." The state trial court held extensive hearings and entered detailed factfindings and conclusions of law, ruling that there was minimal risk of various of petitioners' claims of improper administration of the protocol, and upholding it as constitutional. The Kentucky Supreme Court affirmed, holding that the protocol does not violate the Eighth Amendment because it does not create a substantial risk of wanton and unnecessary infliction of pain, torture,

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or lingering death.

Held: The judgment is affirmed.

217 S. W. 3d 207, affirmed.

CHIEF JUSTICE ROBERTS, joined by JUSTICE KENNEDY and JUSTICE ALITO, concluded that Kentucky's lethal injection protocol satisfies the Eighth Amendment. Pp. 8–24.

1. To constitute cruel and unusual punishment, an execution method must present a "substantial" or "objectively intolerable" risk of serious harm. A State's refusal to adopt proffered alternative procedures may violate the Eighth Amendment only where the alternative procedure is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain. Pp. 8–14.

(a) This Court has upheld capital punishment as constitutional. See *Gregg* v. *Georgia*, 428 U. S. 153, 177. Because some risk of pain is inherent in even the most humane execution method, if only from the prospect of error in following the required procedure, the Constitution does not demand the avoidance of all risk of pain. Petitioners contend that the Eighth Amendment prohibits procedures that create an "unnecessary risk" of pain, while Kentucky urges the Court to approve the " 'substantial risk' " test used below. Pp. 8–9.

(b) This Court has held that the Eighth Amendment forbids "punishments of torture, . . . and all others in the same line of unnecessary cruelty," *Wilkerson* v. *Utah*, 99 U. S. 130, 136, such as disemboweling, beheading, quartering, dissecting, and burning alive, all of which share the deliberate infliction of pain for the sake of pain, *id.*, at 135. Observing also that "[p]unishments are cruel when they involve torture or a lingering death[,] . . . something inhuman and barbarous [and] . . . more than the mere extinguishment of life," the Court has emphasized that an electrocution statute it was upholding "was passed in the effort to devise a more humane method of reaching the result." *In re Kemmler*, 136 U. S. 436, 447. Pp. 9–10.

(c) Although conceding that an execution under Kentucky's procedures would be humane and constitutional if performed properly, petitioners claim that there is a significant risk that the procedures will *not* be properly followed—particularly, that the sodium thiopental will not be properly administered to achieve its intended effect—resulting in severe pain when the other chemicals are administered. Subjecting individuals to a substantial risk of future harm can be cruel and unusual punishment if the conditions presenting the risk are "sure or very likely to cause serious illness and needless suffering" and give rise to "sufficiently imminent dangers." *Helling* v. *McKinney*, 509 U. S. 25, 33, 34–35. To prevail, such a claim must present a "substantial risk of serious harm," an "objectively intolerable risk of harm." *Farmer* v. *Brennan*, 511 U. S. 825, 842, 846, and

n. 9. For example, the Court has held that an isolated mishap alone does not violate the Eighth Amendment, *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 463–464, because such an event, while regrettable, does not suggest cruelty or a "substantial risk of serious harm." Pp. 10–12.

(d) Petitioners' primary contention is that the risks they have identified can be eliminated by adopting certain alternative procedures. Because allowing a condemned prisoner to challenge a State's execution method merely by showing a slightly or marginally safer alternative finds no support in this Court's cases, would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures in implementing execution procedures, petitioners' proposed "unnecessary risk" standard is rejected in favor of *Farmer*'s "substantial risk of serious harm" test. To effectively address such a substantial risk, a proffered alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain. A State's refusal to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for its current execution method, can be viewed as "cruel and unusual." Pp. 12–14.

2. Petitioners have not carried their burden of showing that the risk of pain from maladministration of a concededly humane lethal injection protocol, and the failure to adopt untried and untested alternatives, constitute cruel and unusual punishment. Pp. 14–23.

(a) It is uncontested that failing a proper dose of sodium thiopental to render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and of pain from potassium chloride. It is, however, difficult to regard a practice as "objectively intolerable" when it is in fact widely tolerated. Probative but not conclusive in this regard is the consensus among the Federal Government and the States that have adopted lethal injection and the specific three-drug combination Kentucky uses. Pp. 14–15.

(b) In light of the safeguards Kentucky's protocol puts in place, the risks of administering an inadequate sodium thiopental dose identified by petitioners are not so substantial or imminent as to amount to an Eighth Amendment violation. The charge that Kentucky employs untrained personnel unqualified to calculate and mix an adequate dose was answered by the state trial court's finding, substantiated by expert testimony, that there would be minimal risk of improper mixing if the manufacturers' thiopental package insert instructions were followed. Likewise, the IV line problems alleged by petitioners do not establish a sufficiently substantial risk because IV

team members must have at least one year of relevant professional experience, and the presence of the warden and deputy warden in the execution chamber allows them to watch for IV problems. If an insufficient dose is initially administered through the primary IV site, an additional dose can be given through the secondary site before the last two drugs are injected. Pp. 15–17.

(c) Nor does Kentucky's failure to adopt petitioners' proposed alternatives demonstrate that the state execution procedure is cruel and unusual. Kentucky's continued use of the three-drug protocol cannot be viewed as posing an "objectively intolerable risk" when no other State has adopted the one-drug method and petitioners have proffered no study showing that it is an equally effective manner of imposing a death sentence. Petitioners contend that Kentucky should omit pancuronium bromide because it serves no therapeutic purpose while suppressing muscle movements that could reveal an inadequate administration of sodium thiopental. The state trial court specifically found that thiopental serves two purposes: (1) preventing involuntary convulsions or seizures during unconsciousness, thereby preserving the procedure's dignity, and (2) hastening death. Petitioners assert that their barbiturate-only protocol is used routinely by veterinarians for putting animals to sleep and that 23 States bar veterinarians from using a neuromuscular paralytic agent like pancuronium bromide. These arguments overlook the States' legitimate interest in providing for a quick, certain death, and in any event, veterinary practice for animals is not an appropriate guide for humane practices for humans. Petitioners charge that Kentucky's protocol lacks a systematic mechanism, such as a Bispectral Index monitor, blood pressure cuff, or electrocardiogram, for monitoring the prisoner's "anesthetic depth." But expert testimony shows both that a proper thiopental does obviates the concern that a prisoner will not be sufficiently sedated, and that each of the proposed alternatives presents its own concerns. Pp. 17–23.

JUSTICE STEVENS concluded that instead of ending the controversy, this case will generate debate not only about the constitutionality of the three-drug protocol, and specifically about the justification for the use of pancuronium bromide, but also about the justification for the death penalty itself. States wishing to decrease the risk that future litigation will delay executions or invalidate their protocol would do well to reconsider their continued use of pancuronium bromide. Moreover, although experience demonstrates that imposing that penalty constitutes the pointless and needless extinction of life with only negligible social or public returns, this conclusion does not justify a refusal to respect this Court's precedents upholding the death penalty and establishing a framework for evaluating the constitutional-

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ity of particular execution methods, under which petitioners' evidence fails to prove that Kentucky's protocol violates the Eighth Amendment. Pp. 1–18.

JUSTICE THOMAS, joined by JUSTICE SCALIA, concluded that the plurality's formulation of the governing standard finds no support in the original understanding of the Cruel and Unusual Punishments Clause or in this Court's previous method-of-execution cases; casts constitutional doubt on long-accepted methods of execution; and injects the Court into matters it has no institutional capacity to resolve. The historical practices leading to the Clause's inclusion in the Bill of Rights, the views of early commentators on the Constitution, and this Court's cases, see, *e.g., Wilkerson* v. *Utah*, 99 U. S. 130, 135–136, all demonstrate that an execution method violates the Eighth Amendment only if it is deliberately designed to inflict pain. Judged under that standard, this is an easy case: Because it is undisputed that Kentucky adopted its lethal injection protocol in an effort to make capital punishment more humane, not to add elements of terror, pain, or disgrace to the death penalty, petitioners' challenge must fail. Pp. 1–15.

JUSTICE BREYER concluded that there cannot be found, either in the record or in the readily available literature, sufficient grounds to believe that Kentucky's lethal injection method creates a significant risk of unnecessary suffering. Although the death penalty has serious risks—*e.g.,* that the wrong person may be executed, that unwarranted animus about the victims' race, for example, may play a role, and that those convicted will find themselves on death row for many years—the penalty's lawfulness is not before the Court. And petitioners' proof and evidence, while giving rise to legitimate concern, do not show that Kentucky's execution method amounts to "cruel and unusual punishmen[t]." Pp. 1–7.

ROBERTS, C. J., announced the judgment of the Court and delivered an opinion, in which KENNEDY and ALITO, JJ., joined. ALITO, J., filed a concurring opinion. STEVENS, J., filed an opinion concurring in the judgment. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined. THOMAS, J., filed an opinion concurring in the judgment, in which SCALIA, J., joined. BREYER, J., filed an opinion concurring in the judgment. GINSBURG, J., filed a dissenting opinion, in which SOUTER, J., joined.