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IN THE  
**SUPREME COURT OF THE UNITED STATES**  
OCTOBER TERM, 2006

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**RALPH BAZE, ET AL.**

**PETITIONER**

v.

**JOHN D. REES, ET AL.**

**RESPONDENTS**

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**RESPONDENTS' BRIEF IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF UNITED STATES**

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**CAPITAL CASE**

**\*JEFFREY T. MIDDENDORF**  
**JOHN C. CUMMINGS**  
Justice & Public Safety Cabinet  
Office of Legal Services  
125 Holmes Street  
Frankfort, Kentucky 40601  
(502) 564-3279  
*COUNSEL FOR RESPONDENTS*

Gregory D. Stumbo  
Attorney General of Kentucky

David A. Smith  
Assistant Attorney General  
Office of Criminal Appeals  
1024 Capital Center Drive  
Frankfort, KY 40601  
(502) 696-5342  
*COUNSEL FOR RESPONDENT*

*\* Counsel of Record*

## **COUNTERSTATEMENT OF QUESTIONS PRESENTED**

- I. Does the Eighth Amendment to the United States Constitution require the elimination of remote, insubstantial risks of pain and suffering?
- II. In the unlikely event that a stay of execution is ordered after the administration of one or more of the lethal injection drugs, do the Eighth and Fourteenth Amendments require the Commonwealth of Kentucky to implement extraordinary measures beyond providing reasonable emergency medical care in order to attempt to maintain the life of the inmate?

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**CITATIONS TO OPINION BELOW**

The opinion below, Baze and Bowling v. Rees, et al., is published at 217 S.W.3d 207 (Ky. 2006). The petition for rehearing was denied on April 19, 2007. The unpublished trial court order denying the Petitioners' declaratory judgment was issued on July 8, 2005. A true copy of the order in Baze and Bowling v. Rees, et al., Civil Action No. 04-CV-1094 (Franklin Cir. 2005), is included in the Appendix to the Petitioner's Petition for Writ of Certiorari.

**JURISDICTION**

Respondents accept the statement of jurisdiction appearing in the petition, except that review is barred because the Petitioners now concede that their application for relief was a post-conviction challenge to their sentences of death, and thus, is procedurally barred as an unauthorized successive application for post-conviction relief.

**CONSTITUTIONAL PROVISIONS INVOLVED**

The Constitutional provisions involved are the Eighth and Fourteenth Amendments to the United States Constitution. These Constitutional provisions are quoted from in the petition.

**STATUTORY PROVISIONS INVOLVED**

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## COUNTERSTATEMENT OF THE CASE

On January 30, 1992, Petitioner Ralph Baze ambushed and murdered Powell County, Kentucky Sheriff Steve Bennett and Deputy Sheriff Arthur Briscoe, who were attempting to serve several Ohio felony warrants on the Petitioner. The Petitioner shot Sheriff Bennett three times in the back with an SKS semi-automatic assault rifle, killing the Sheriff. Deputy Briscoe returned fire with a pistol until he ran out of ammunition. The Deputy was attempting to run for cover when the Petitioner shot him twice in the back with the assault rifle. As the officer lay face down, the Petitioner punched Deputy Briscoe with the muzzle of the rifle, then executed the Deputy with a shot to the back of the head from point blank range.<sup>1</sup>

On April 9, 1990, Thomas C. Bowling shot and killed Eddie and Tina Earley, and wounded the Earley's two-year-old son, as the victims sat inside their automobile in a parking lot of a dry cleaning business in Lexington, Kentucky. Petitioner Bowling's automobile had crashed into the driver's side of the Earley's vehicle, Bowling got out of his automobile, shot the victims, then returned to his vehicle and fled from the scene.<sup>2</sup>

The Petitioners filed the action below in the Franklin Circuit Court on August 8, 2004,<sup>3</sup> ostensibly for the purpose of challenging the constitutionality of specific aspects of the lethal injection protocol used to carry out executions in Kentucky. The Petitioners specifically stated that the action was not intended as a challenge to their death sentences or to the carrying out of their death sentences.

Testimony at the trial established that the risk of any condemned inmate being conscious during an execution was extremely remote. The testimony also established that the Petitioners' allegations that the risk of pain and suffering could be reduced by eliminating one or more of the

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<sup>1</sup> See Baze v. Com., 965 S.W.2d 817,819-20 (Ky.1997).

<sup>2</sup> See Bowling v. Com., 873 S.W.2d 175, 176-77 (Ky.1994).

drugs used in Kentucky's lethal injection protocol<sup>4</sup>, or by the use of alternate drugs or combinations of drugs during lethal injections was speculative, at best. The trial court found, and the Kentucky Supreme Court unanimously affirmed, that Kentucky's lethal injection protocol did not expose condemned inmates to a substantial risk of wanton or unnecessary pain or suffering. Baze and Bowling v. Rees, et al., 217 S.W.3d 207, 210-12 (Ky. 2006).

In addition, testimony at trial established that Kentucky's execution protocol calls for a doctor to be present on site and available to provide medical care to the condemned inmate in the unlikely event that a stay is granted after one or more of the lethal injection chemicals were administered to the inmate. The testimony established that an automated defibrillator and a "crash cart" containing certain medical equipment, medications and supplies was present in case a stay was issued and the condemned inmate had to be revived. The testimony also established that the odds of reviving an inmate after administration of the second lethal injection drug (pancuronium bromide) or the third lethal injection drug (potassium chloride) are minimal, even in a hospital setting.

The Petitioners argued that any inmate executed in error because of a late stay would be deprived of due process and fundamental fairness if the state did not take every possible step to correct the error and revive the inmate. The trial court found, and the Kentucky Supreme Court affirmed, that the Kentucky's lethal injection protocol was sufficient to satisfy the due process and fundamental fairness rights of condemned inmates in the event of a late stay, the trial court finding that "[t]he standards the [Petitioners] would have this Court apply would require that all executions take place in a trauma center with a team of cardiac surgeons standing by."<sup>5</sup>

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<sup>3</sup> Baze and Bowling v. Rees, et al., Civil Action 2004-CV-1094 (Franklin Cir.2005).

<sup>4</sup> Kentucky and most other lethal injection states utilize sodium thiopental, pancuronium bromide, and potassium chloride in their lethal injections protocol. See Baze and Bowling v. Rees, et al., 217 S.W.2d 207, 212 (Ky. 2006).

<sup>5</sup> Findings of Fact and Conclusions of Law at 11, Baze and Bowling v. Rees, et al., Civil Action 2004-CV-1094

## REASONS WHY CERTIORARI SHOULD BE DENIED

### I. THE PETITION FOR RELIEF WAS PROCEDURALLY DEFAULTED.

In the case below, the Respondents asserted as an affirmative defense that the Petitioners' action was procedurally barred as the functional equivalent of a successive application for post-conviction relief, which is prohibited under Ky.R.Crim.Proc. 11.42.<sup>6</sup> Throughout this case, however, the Petitioners have evaded the procedural bar of Ky.R.Crim.Proc. 11.42 by contending that their action did not involve a challenge to their death sentences, but rather, challenged only the constitutionality of certain specific procedures used by the State of Kentucky to carry out executions by lethal injection.

After the Kentucky Supreme Court denied the Petitioners' motion for reconsideration on April 19, 2007 in the action below, the Petitioners filed a motion pursuant to Ky.R.Civ.P. 76.44<sup>7</sup> for a stay of enforcement of the Kentucky Supreme Court's Opinion pending the Petitioner's application for a Writ of Certiorari. In relevant part, Ky.R.Civ.Proc. 76.44(a) provides that a stay "shall be granted in appeals involving a sentence of death." The Petitioners, wanting to take advantage of this automatic stay provision of Ky.R.Civ.Proc. 76.44, then made the admission in their CR 76.44 motion to stay enforcement of the Kentucky Supreme Court's Opinion pending application for a Writ of Certiorari<sup>8</sup> that "the 'sentence of death' was clearly at issue in this case," and that "[b]ecause the case involves the carrying out of Baze's and Bowling's death

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(Franklin Cir.2005). A copy of the unpublished Findings of Fact and Conclusions of Law entered by the trial court on July 8, 2005 in Civil Action 2004-CV-1094 was included in the Appendix to the Petitioner's Petition for Writ of Certiorari.

<sup>6</sup> The full text of Ky.R.Crim.Proc. 11.42 is included in the Appendix. *See also Crick v. Commonwealth*, 550 S.W.2d 534 (Ky.1977).

<sup>7</sup> The full text of Ky.R.Civ.Proc. 76.44 is included in the Appendix.

<sup>8</sup> A true copy of the Petitioners' CR 76.44 Motion to Stay Enforcement of Opinion Pending Application for Writ of Certiorari filed on April 19, 2007 in Baze and Bowling v. Rees, et al., Appeal No. 2005-SC-000543, is included in the Appendix.

