

No. 07-5439

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IN THE  
SUPREME COURT OF THE UNITED STATES

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RALPH BAZE, ET AL.,

*Petitioners*

v.

JOHN D. REES, ET AL.,

*Respondents*

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

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**SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF CERTIORARI  
TO BRING TO THE COURT'S ATTENTION  
THE PETITION FOR A WRIT OF CERTIORARI JUST FILED IN  
*TAYLOR V. CRAWFORD* THAT FURTHER EXEMPLIFIES  
THE SPLIT AMONG THE LOWER COURTS**

**CAPITAL CASE**

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September 7, 2007

Petitioners file this supplemental brief to bring to the Court's attention the petition for a writ of certiorari filed on September 5, 2007, in *Taylor v. Crawford* (attached).

### **ARGUMENT**

That petition also asks this Court to resolve the split among the lower courts over the legal standard applicable to Eighth Amendment challenges to particular methods of execution. By doing so, *Taylor* further exemplifies that a split among the lower courts exists and that it is important for the Court to resolve the split now before a wealth of certiorari petitions arrive at the Court. Indeed, the fact that two petitions for a writ of certiorari arguing that the Court should resolve the split concerning the applicable Eighth Amendment standard arrived before the Court within a month of each other evinces the magnitude of the issue. That these two courts, as have so many other courts in the country, applied vastly different legal standards demonstrates how divided are the courts across the country when it comes to figuring out the appropriate legal standard. Petitioners submit that the filing of the petition for a writ of certiorari is further support of the need for the Court to resolve the circuit split. At a minimum, the Court should hold the petition for a writ of certiorari in this case to consider it alongside the petition in *Taylor*.

In Petitioners' certiorari petition, they argue that both the circuit courts of appeals and the state high courts are sharply divided on the applicable standard for determining whether a particular aspect of a method of execution is cruel and unusual punishment. As pointed out in the petition, at one end are courts such as those in the Ninth Circuit jurisdictions that apply an "unnecessary" or "unreasonable" risk of pain standard, somewhere in the middle is Kentucky with its "substantial risk" standard, at the total

other end are courts that require some level of risk of pain along with deliberate indifference. These standards are different, require a different burden of proof, and can result in a different outcome. This is made clear not only in the instant petition for a writ of certiorari but also in Taylor's petition, which cites this case as an example of the different standard and the split among the courts.

*Taylor* arrives at the Court under the deliberate indifference standard. Together, *Taylor* and this case provide the Court with two totally different and incompatible standards - - deliberate indifference versus "substantial risk." And, as articulated in the instant petition for a writ of certiorari, this is only the tip of the iceberg. Numerous other standards are being applied by courts across the country and as those cases proceed through the judicial system, more petitions for a writ of certiorari to resolve this split will arrive at the Court. The time to resolve this issue is now and the instant case and *Taylor* are the cases in which to do it.

The instant case was the first case in the country concerning the chemicals and procedures used in lethal injections to be resolved on the merits based on a fully developed record at a trial. *Taylor* is the second. Many more will come, but these cases provide all the information necessary to resolve the legal issue without any procedural hurdle getting in the way, and it would be a great waste of judicial resources to allow courts to continue applying vastly different, and perhaps erroneous legal standards to resolve an issue that the Court knows to be time consuming and complex. Thus, the Court should use the instant case and *Taylor* to resolve the split among the lower courts and to clarify the appropriate Eighth Amendment standard to apply to a claim that an aspect of a method of execution is cruel and unusual punishment.

## CONCLUSION

Based on the additional development of the filing of the petition for a writ of certiorari in *Taylor* along with the reasons expressed in the instant petition for a writ of certiorari, Petitioners respectfully urge the Court to grant certiorari. In the alternative, Petitioners request that the Court hold this case and decide it in conjunction with the petition for a writ of certiorari in *Taylor v. Crawford*.

Respectfully submitted,

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