

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA  
NORTHERN DIVISION**

DAVID LARRY NELSON, )  
 )  
 Plaintiff, )  
 )  
 v. ) No. 2:03-cv-1008-MHT-WC  
 )  
 RICHARD ALLEN, et al., )  
 )  
 Defendants. )

**DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT**

The defendants previously filed a motion for summary judgment, see Doc. 118 (filed Nov. 15, 2006), that was "denied with leave to renew within 30 days of the Baze decision." Doc. 158 (filed Mar. 31, 2008). The United States Supreme Court recently issued its decision in Baze v. Rees, \_\_ U.S. \_\_, 128 S.Ct. 1520 (Apr. 16, 2008), ruling that Kentucky's lethal injection protocol and States with substantially similar protocols do not violate the Eighth Amendment. Id., 128 S.Ct. at 1537. Accordingly, the defendants renew their previously filed motion for summary judgment, see Doc. 118, and reincorporate all previously filed motions for summary dismissal, see Docs. 42, 63, and 118. The defendants state the following regarding the Supreme Court's Baze decision.

By a 7-2 vote, the Supreme Court held that Kentucky's three-drug lethal injection protocol for executing death-sentenced inmates does not violate the Eighth Amendment's ban on cruel and unusual punishment. Baze, 128 S.Ct. 1520. Kentucky's protocol uses three chemicals: sodium thiopental to render the inmate unconscious; pancuronium bromide to cause paralysis and stop breathing; and potassium chloride to cause cardiac arrest. Id., 128 S.Ct. at 1528. Alabama uses the same three chemicals in carrying out executions. See Williams v. Allen, No. 2:07-cv-307-MEF-SRW; 2007 WL 2206846 (M.D. Ala. 2007) (listing chemicals); Arthur v. Allen, No. 07-0722-WS, 2007 WL 4105113 (S.D. Ala. Nov. 15, 2007) (same).

The plurality opinion found that to constitute cruel and unusual punishment under the Eighth Amendment, an inmate must show that a method of execution (1) presents a "substantial" or "objectively intolerable" risk of serious harm, and that (2) the State, for no "legitimate penological justification," refused to adopt a proffered alternative procedure that is "feasible, readily implemented, and in fact significantly reduce[s]" that risk of severe pain. Id., 128 S.Ct. at 1537-38. Applying that

standard, the plurality noted that "at least" 30 of the 36 States that impose capital punishment use the same three-drug protocol used by Kentucky, which makes "it difficult to regard [the] practice as 'objectively intolerable.'" Id., 128 S.Ct. at 1532-33. The inmate in Baze conceded that, if the drugs are administered properly, the protocol would be humane and constitutional because the first drug, sodium thiopental, ensures that the inmate would not experience any pain associated with the subsequent injections. Id., 128 S.Ct. at 1530-31. Instead, they argued that there is an unnecessary risk that the sodium thiopental will not be properly administered, which would result in severe suffering once the other chemicals are injected. The plurality opinion rejected this argument, finding that the inmate failed to show that the risk of an inadequate dose is either substantial or objectively intolerable. Id., 128 S.Ct. at 1537-38.

The Supreme Court's recent decision in Baze applies to Alabama's execution protocol because it is substantially similar to Kentucky's. Alabama, like Kentucky, has a three-drug sequence to induce death: (1) a rapid-acting anesthetic (sodium pentothal); (2) a drug inducing muscle

paralysis (pancuronium bromide); and (3) a drug administered to stop the heart (potassium chloride). Arthur, 2007 WL 4105113 at \*1. In Baze, the Supreme Court definitively held that Kentucky's lethal injection protocol does not violate the Eighth Amendment's prohibition of cruel and unusual punishment. Baze, 128 S.Ct. at 1532-38. The Baze Court, in ruling that "a lethal injection protocol substantially similar to the protocol we uphold today" complies with the Constitution, removed any question as to the constitutionality of Alabama's lethal injection protocol. Baze, 128 S.Ct. at 1537. It is indeed possible that all nine United States Supreme Court Justices would hold that Alabama's execution protocol is constitutional. Justice Ginsburg's dissent in Baze emphasized that Alabama, among several other States, has adopted the safeguard of assessing consciousness after the anesthesia is injected. Baze, 128 S.Ct. at 1571 (quoting that portion of Alabama's execution protocol). The dissent argued that the lack of a consciousness assessment check in Kentucky's lethal injection was a constitutional deficiency. Id. Thus, the Baze decision has direct application to Alabama's execution protocol.

Applying the standard announced in Baze, Alabama's execution protocol as applied to Nelson is constitutional.<sup>1</sup> As this Court remembers, Dr. Bagley, the Court's independent medical expert, concluded that Nelson "has readily accessible peripheral veins" and that access to "central veins will not be necessary to obtain venous access on David Larry Nelson." Doc. 110, Ex. 1, p. 13. Based on Dr. Bagley's findings, Nelson's execution may be carried out through standard peripheral intravenous access, using personnel with basic intravenous skills. As previously asserted by the defendants, see Doc. 118 at 13, an emergency medical technician (paramedic level) will gain intravenous access at Nelson's execution.<sup>2</sup> Under Alabama law, an EMT-Paramedic is qualified and certified to administer drugs intravenously. See Doc. 118 at 13 n.6 (citing Ala. Admin. Code R. 420-2-1-.14 (a) and (b)). Using qualified execution team members does not cause a "substantial" or "objectively intolerable" risk of serious

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<sup>1</sup> Any attempt by Nelson to raise a general lethal injection challenge would be barred by the relevant statute of limitations. McNair v. Allen, 515 F.3d 1168, 1174 (11th Cir. 2008) ("We hold a method of execution claim accrues on the later of the date on which state review is complete, or the date on which the capital litigant becomes subject to a new or substantially changed execution protocol.").

<sup>2</sup> A medical doctor is available in the unlikely event that a central line procedure is required. See Doc. 118 at 13.

harm. Thus, Baze offers additional support to summarily dismiss this case.

**CONCLUSION**

For these reasons and those asserted in Docs. 42, 63, and 118, defendants request this Court to enter an order dismissing Nelson's second amended complaint, recognizing that it is moot and that no genuine question of material fact or law remains before the Court.

Respectfully submitted,

Troy King  
*Attorney General*

***s/ J. Clayton Crenshaw***  
J. Clayton Crenshaw  
*Assistant Attorney General*

**CERTIFICATE OF SERVICE**

I hereby certify that on May 15, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: **David R. Boyd, Michael Kennedy McIntyre, and H. Victoria Smith.**

*s/ J. Clayton Crenshaw*  
J. Clayton Crenshaw  
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