

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CRIMINAL ACTION NO. 5:06 CR-00019-R

UNITED STATES OF AMERICA

PLAINTIFF

v.

STEVEN D. GREEN

DEFENDANT

UNITED STATES' RESPONSE TO DEFENDANT'S MOTION TO DECLARE
LETHAL INJECTION UNCONSTITUTIONAL

Comes the United States, by counsel, for its response to the motion of the defendant, Steven D. Green, to declare lethal injection unconstitutional as a violation of the Eighth Amendment's prohibition against cruel and unusual punishment.

In his motion, Green argues that use of lethal injection under Kentucky's execution protocol violates the Constitution.¹ He relies primarily on the fact that the Supreme Court granted *certiorari* in the case of *Baze v. Rees*, 217 S. W. 3d 207 (Ky. 2006), to review whether Kentucky's protocol violates the Eighth Amendment. The defendant's motion should be rejected because his claim is not ripe and it is unsupported by any case law.

A. The defendant's claim is not ripe.

The defendant cannot challenge his prospective execution because the issue is not yet ripe. Article III of the Constitution extends the judicial power of the United States only to real cases or controversies. U.S. Const. art. III, § 1; *see Kennedy v. Block*, 784 F.2d 1220, 1222 (4th

¹ Kentucky's execution protocol becomes relevant because the FDPA mandates that federal executions be implemented in the manner prescribed by the law of the State in which the sentence is imposed. 18 U.S.C. § 3596.

Cir. 1986). Thus, federal courts cannot give advisory opinions in hypothetical cases. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 2 L. Ed. 435 (1806). Among other issues, the question of ripeness bears on a federal court's subject matter jurisdiction under Article III. See *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1498-99 (10th Cir.1995). Before a plaintiff may obtain an injunction against future enforcement of a law he must show some substantial hardship – the enforcement must be certain and the only impediment to the case's ripeness is delay before eventual prosecution. *Steffel v. Thompson*, 415 U.S. 452, 462 (1974) (allowing an injunction against police when the plaintiff or his friends had twice before been arrested for distributing the same handbills at the same shopping center); *Crosetto v. State Bar of Wisconsin*, 12 F.3d 1396, 1403 (7th Cir. 1993). The plaintiff bears the burden to allege facts sufficient to demonstrate the appropriateness of a judicial resolution. See *Renne v. Geary*, 501 U.S. 312, 316 (1991).

The defendant has made no effort to demonstrate the ripeness of his complaints about the Kentucky lethal injection protocol. Before the defendant can legitimately argue that the enforcement of Kentucky's protocol against him is "certain," he must first be convicted of a capital murder, sentenced to death, and exhaust his appeals.² Unless and until those events

² "Challenges to the execution of a federal sentence are properly brought under 28 U.S.C.A. § 2241." *United States v. Little*, 392 F.3d 671, 679 (4th Cir. 2004). Challenging the execution of a sentence on the basis of an alleged constitutional violation does not remove it from the ambit of § 2241. *Id.* As an alternative to a properly filed § 2241 petition, defendants can also file *Bivens* actions challenging the specifics of an execution. See *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 415 (1971); see also *Hill v. McDonough*, ___ U.S. ___, 126 S. Ct. 2096, 2103-04 (2006) (permitting a suit under 42 U.S.C. § 1983 to challenge a method of execution). Additionally, the FDPA directs that defendants sentenced to death be committed to the custody of the Attorney General "until exhaustion of the procedures for appeal of the judgment of conviction and for review of the sentence," and only thereafter, "[w]hen the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States Marshal, who shall supervise the implementation of the

come to pass, the defendant's motion is nothing more than a request for this Court to issue an order based on speculation.

B. Defendant's claim is not supported by any case law.

Green fails to cite any case that holds lethal injection to be an unconstitutional method of execution. Instead, he notes only that the Supreme Court granted *certiorari* to consider the lethal injection execution protocol in Kentucky. Nevertheless, the mere grant of *certiorari* did not change existing law and, under the law as it currently exists, the Kentucky execution protocols are valid.³

sentence in the manner prescribed by the law of the State in which the sentence is imposed.” 18 U.S.C. § 3596(a). Thus, the FDPA contemplates that defendants will not face the implementation of a state's execution protocol until after he has exhausted his appeals.

³ It is important to note that the grant of *certiorari* in *Baze* did not extend to the degree the defendant here seems to imply, in that the defendant's claim – that lethal injection is *per se* cruel and unusual – is far broader than the issues the Supreme Court is addressing in *Baze*. In *Baze*, the Supreme Court is considering what standard of review is appropriate to such Eighth Amendment claims and whether, under those potential standards, the precise combination of drugs and the methods employed by Kentucky in administering those drugs, would constitute cruel and unusual punishment. See *Baze v. Rees*, 128 S. Ct. 372 (2007)(granting *certiorari* relating to the petitioner's first three claims), and *Baze v. Rees*, 2007 WL 2781088 (the petition setting forth the precise issues raised). The distinction is important because, even if the Supreme Court determines that the precise execution protocol used by Kentucky is unconstitutional, that ruling would not amount to a holding that lethal injection is *per se* cruel and unusual. Rather, Kentucky would still retain the option of devising an alternative lethal injection protocol and, assuming the defendant here is convicted and sentenced to death, he could lawfully be subjected to execution by lethal injection using whatever revised protocol was implemented (assuming, of course, the revised protocol was, itself, not unconstitutional). See *Johnson v. Little*, 457 F. Supp. 2d 839, 841 (M.D. Tenn. 2006)(holding that a change in the method of execution does not make the punishment more burdensome and does not violate the Ex Post Facto Clause.)

For the foregoing reasons, the United States respectfully requests that the Court deny Green's Motion to Declare Lethal Injection Unconstitutional as a Violation of the Eighth Amendment's Prohibition Against Cruel and Unusual Punishment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 21, 2008, I electronically filed the foregoing response with the Clerk of the Court by using the CM/ECF system, which will send notice of electronic filing to Scott T. Wendelsdorf, Federal Defender; Patrick J. Bouldin, Assistant Federal Defender; and Darren Wolff, counsel for the defendant, Steven D. Green.

/s/ Marisa J. Ford

Marisa J. Ford

Assistant U.S. Attorney