Supreme Court, U.S.
FILED
JAN 14 2004
CLERK

03-8387

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2003

In re KENNETH BRUCE,

Petitioner

ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS

THIS IS A DEATH PENALTY CASE.
KENNETH BRUCE IS SCHEDULED TO BE EXECUTED TODAY AT 6:00 P.M.

Jim Marcus*
Texas Bar No. 00787963
TEXAS DEFENDER SERVICE
412 Main Street
Suite 1150
Houston, Texas 77002
[redacted]

Jared Tyler
Texas Bar No. 24042073
David R. Dow
Texas Bar No. 06064900
TEXAS INNOCENCE NETWORK
University of Houston Law Center
[redacted] Law Center

Michael B. Charlton
Texas Bar. No. 04144800
1744 Norfolk
Houston, Texas 77098
TEL: (713) 572-2333
FAX: (713) 572-2483

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) – which precludes review of a successive claim challenging the method of execution – prevents this Court from exercising its original habeas corpus jurisdiction to review petitioner's Eighth Amendment claim?

2. If AEDPA prevents this Court from reviewing the merits of petitioner's Eighth Amendment claim, whether petitioner will suffer an unconstitutional suspension of the writ of habeas corpus?

3. Whether current standards of decency, as evidenced by the state legislatures (including the Texas legislature), have evolved to the point that the unnecessarily painful use of pancuronium bromide in combination with sodium thiopental in lethal injections constitutes a violation of the Eighth Amendment?

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

STATUTORY PROVISIONS AT ISSUE

The questions presented implicate the following provisions of the United States Code:

28 U.S.C. § 2241(a)

> Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.

28 U.S.C. § 2244(b)(2)

> A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed unless –
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B) (I) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the applicant guilty of the offense.

STATEMENT OF THE CASE

On January 9, 2004, the Petitioner filed a lawsuit, pursuant to 42 U.S.C. § 1983, in the United States District Court for the Southern District of Texas seeking to enjoin the use of a particular array of chemicals for executing death-sentenced inmates in Texas. The Petitioner did not challenge the legality of either his conviction or sentence; he simply sought to be executed without the use of a chemical that causes needless suffering. In support of his suit, the Petitioner

presented evidence of a consistent trend in state legislation (including Texas legislation enacted in 2003) that prohibits euthanizing animals with the same combination of drugs that Texas currently uses to execute death row inmates. The Petitioner also presented a report by the American Veterinary Medical Association (AVMA) published in 2001 that condemns combining a paralytic agent with a sedative when euthanizing animals.

The district court, adhering to Fifth Circuit precedent that a challenge to the method of execution is a "*de facto* habeas challenge," held that "habeas corpus provides the appropriate mechanism for addressing Bruce's claims." *Bruce v. Johnson, et. al*, No. 04-0044 (S.D. Tex. Jan. 9, 2004) at 1-2. Accordingly, the district court dismissed the Petitioners' suit as a successive habeas petition pursuant to 28 U.S.C. § 2244(b)(3)(A). *Id.* at 4.

On appeal, the Petitioner acknowledged that prior to December 1, 2003, Fifth Circuit precedent squarely foreclosed the instant action. *Martinez v. Texas Court of Criminal Appeals*, 292 F.3d 417, 423 (5th Cir. 2002) ("Accordingly, § 1983 challenges to an impending execution (like § 1983 challenges to a state's method of execution or § 1983 challenges seeking immediate or speedier release from prison) must be brought as habeas actions."). However, the Petitioner argued that this Court's grant of *certiorari* in *Nelson v. Campbell*, 540 U.S. ___, 2003 WL 22327593 (Dec. 1, 2003), expressly calls into question the continuing validity of the Fifth Circuit's holding in *Martinez*.

The Defendants argued that Mr. Bruce's suit was barred by Fifth Circuit precedent – both on jurisdictional grounds and based on a 1986 Fifth Circuit decision that lethal injections do not constitute cruel and unusual punishment. The Defendants also offered a summary of Texas'

purported execution protocol – though they cited no authority and provided no documentation authenticating the protocol – which raised new[2] questions about Texas' procedures.

In reply, Mr. Bruce argued that, while any attempt to resolve the merits on appeal is premature, the merits of his Eighth Amendment claim – a claim predicated on new evidence of evolving standards of decency – was certainly not controlled by a 1986 decision, and that the Fifth Circuit implicitly held as much last month in *Zimmerman v. Johnson*, 2003 WL 22903367, *1 (5th Cir. Dec. 9, 2003).[3] Mr. Bruce further questioned the accuracy and authenticity of the Defendants' proffer of a protocol because: (1) the proffered protocol differed from opposing counsel's alleged second-hand source for the information (and counsel refused to acknowledge whether he was in fact privy to Texas' execution protocol); and, (2) according to the Office of the General Counsel for the Texas Department of Criminal Justice, Texas' execution procedure "is generally not reduced to writing, and is known to only a few people within the Department." Mr. Bruce noted that the State of Texas refuses to disclose any information about its execution

---

[2] The unattributed information about Texas' alleged execution protocol proffered by the Defendants in the courts below was not disclosed in the litigation that culminated in this Court's order in *Zimmerman v. Johnson*, ___ U.S. ___, 2003 WL 22938548 (Dec. 15, 2003) (Mem.).

[3] Faced with an Eighth Amendment claim identical to Mr. Bruce's, the Fifth Circuit stated: "Substantively, Plaintiffs-Appellants have submitted evidence that appears to be facially stronger than that which has supported prior complaints of this nature; but we are not in a posture to deal further with it under our present precedent." *Zimmerman*, 2003 WL 22903367, at *1.

policies, the training of personnel who carry out executions, and its policies with regard to "cut down" procedures. Mr. Bruce documented, however, that Texas resorts to "cut down" procedures when it cannot locate a suitable vein.

The Court of Appeals – without comment on the merits of Mr. Bruce's lawsuit – dismissed Mr. Bruce's appeal, and denied a stay of execution, based solely on its precedent that § 1983 was not an available remedy for prisoners seeking to challenge the procedures involved in their executions. *Bruce v. Johnson, et. al.*, No. 04-70001 (5th Cir. Jan. 13, 2004) at 1-2.

On January 14, 2003, Mr. Bruce filed a subsequent application for writ of habeas corpus in the Texas Court of Criminal Appeals, arguing that evidence of an evolving standard of decency in support of his Eighth Amendment claim did not exist at the time he filed his previous application. The Court of Criminal Appeals dismissed the application as an abuse of the writ for failing to meet the successor requirements of Section 5 of Article 11.071 of the Texas Code of Criminal Procedure. App. 1.

REASONS FOR GRANTING THE WRIT

I. SOME PROCEDURAL AVENUE MUST EXIST FOR MR. BRUCE TO RAISE NEW EVIDENCE OF AN EVOLVING STANDARD OF DECENCY IN SUPPORT OF AN EIGHTH AMENDMENT CLAIM THAT CHALLENGES NEITHER THE LEGALITY OF HIS SENTENCE NOR THE LEGALITY OF HIS CONVICTION BUT INSTEAD ARGUES THAT TEXAS' EXECUTION PROCEDURES INFLICT NEEDLESS AND EXCESSIVE CRUELTY.

This Court must provide a mechanism for this claim to be heard for the very first time on the merits. Evidence of a consensus signifying a national standard of decency banning the **use of neuromuscular blocking agents in euthanizing animals was not available** at the time Mr. Bruce filed his previous state habeas application in 1997. He concedes that it has been clear for

some time that the chemicals used in the Texas lethal injection process have the potential to cause excruciatingly painful, torturous deaths. However, he contends that ***evidence of a societal, legislative, and professional trend*** away from the use of these chemicals was factually unavailable in 1997.

Despite Mr. Bruce's timely efforts to raise the issue pursuant to 42 U.S.C. § 1983, the Court of Appeals recharacterized the civil rights lawsuit in a way that prevented him from obtaining any federal review of his method-of-execution claim. Such a ruling cannot be correct, as Mr. Bruce ***must*** be allowed to seek merits review either by motion for authorization under 28 U.S.C. § 2244 or by petition for writ of habeas corpus under 28 U.S.C. § 2241 (if this claim can only be raised in a habeas proceeding).[4] This petition thus presents the "exceptional circumstances [that] warrant the exercise of this Court's discretionary powers." S. Ct. Rule 20.4(a).

[4] The question of whether a complaint brought under 42 U.S.C. § 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the procedures for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. Sec. 2254 is currently before this Court in *Nelson v. Campbell*, 540 U.S. ___, 2003 WL 22327593 (Dec. 1, 2003).

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 43,165-03

EX PARTE KENNETH EUGENE BRUCE

HABEAS CORPUS APPLICATION FROM COLLIN COUNTY

Per Curiam. Price and Johnson, JJ., would grant.

ORDER

This is a subsequent application for writ of habeas corpus filed pursuant to the provisions of Art. 11.071, Sec. 5, V.A.C.C.P.

Applicant was convicted of capital murder on February 27, 1992. We affirmed the judgment and sentence on February 8, 1995. Applicant's original application for writ of habeas corpus, filed with the trial court on November 3, 1997, was considered by this Court and relief denied on October 27, 1999. Applicant has filed a subsequent application under the provisions of TEXAS CODE OF CRIMINAL PROCEDURE, Article 11.071, § 5, asserting for the first time that the chemicals used in the execution process could cause unnecessary pain, torture, and lingering death and would be a cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

The basis for this claim was not unavailable at the time of his trial or at the time of his original application for habeas relief.

Additionally, applicant filed a Petition for Writ of Prohibition and Stay of Execution asserting that this Court should stay his execution while he files a writ of certiorari in the Supreme Court from his action in the 5th Circuit Court of Appeals. The underlying claim is under 42 U.S.C. §1983 and states a claim solely cognizable under federal law.

Applicant's subsequent application for habeas corpus is dismissed, leave to file writ of prohibition is denied, and his motion for stay of execution is denied.

IT IS SO ORDERED THIS THE 14TH DAY OF JANUARY, 2004.

Do Not Publish