Justices Weigh Injection Issue for Death Row

WASHINGTON — With conservative justices questioning their motives and liberal justices questioning their evidence, opponents of the American manner of capital punishment made little headway Monday in their effort to persuade the Supreme Court that the Constitution requires states to change the way they carry out executions by lethal injection.

Donald B. Verrilli Jr., the lawyer for two inmates on Kentucky's death row who are facing execution by the commonly used three-chemical protocol, conceded that theoretically his clients would have no case if the first drug, a barbiturate used for anesthesia, could be guaranteed to work perfectly by inducing deep unconsciousness.

But as a practical matter, Mr. Verrilli went on to say, systemic flaws in Kentucky's procedures mean that there can be no such guarantee, and the state's refusal to take reasonable steps to avoid the foreseeable risk of "torturous, excruciating pain" makes its use of the three-drug procedure unconstitutional.

It was here that Mr. Verrilli met resistance from both sides of the court, and the closely watched case appeared to founder in this gap between theory and practice.

Of the 36 states with the death penalty, all but Nebraska, which still uses only the electric chair, specify the same three-drug sequence for lethal injections. The second drug, pancuronium bromide, paralyzes the muscles with suffocating effect. The third, potassium chloride, stops the heart and brings about death, but not before causing searing pain if the anesthesia does not work as intended. The paralyzing effect of the second drug gives the inmate a peaceful appearance and, even if he is in great pain because of inadequacy of the anesthesia, renders him unable to communicate that fact.

Mr. Verrilli said the risk of pain could be eliminated if medically trained personnel, rather than the prison warden, monitored the anesthesia. When Justice Antonin Scalia objected that the American Medical Association's ethical code prohibited doctors from participating in executions, Mr. Verrilli replied, "That's why there is another practical alternative here, which solves that problem." The alternative, he said, is a "single dose of barbiturate, which does not require the participation of a medically trained professional."

Chief Justice John G. Roberts Jr. asked what the court should do "if you prevail here, and the next case is brought by someone subject to the single-drug protocol, and their claim is, 'Look, this has never been tried.'"

Further, the chief justice said, the inmate might object that death would take longer without the third drug, and would appear less "dignified" because of muscle contractions that are suppressed by the second drug.

“You have objections that would apply even to your single-drug protocol,” Chief Justice Roberts said.

While the chief justice’s skepticism was not unexpected, Justice Stephen G. Breyer’s response to Mr. Verrilli’s argument was a surprise. Justice Breyer told Mr. Verrilli he had read scientific articles supporting the one-drug protocol that were cited in the briefs filed by the inmates and had found them confusing.

“So I’m left at sea,” he said. “I understand your contention. You claim that this is somehow more painful than some other method. But which? And what’s the evidence for that? What do I read to find it?”

“I ended up thinking, of course there is a risk of human error,” Justice Breyer continued. “There is a risk of human error generally where you’re talking about the death penalty, and this may be one extra problem, one serious additional problem. But the question here is, Can we say that there is a more serious problem here than with other execution methods?”

Often, such doubts about the quality of the evidence lead the court to send a case back to the lower courts for further factual development. Mr. Verrilli said that although the record was sufficiently clear for the justices to proceed, “it certainly would be a reasonable thing to do” to send the case back to the Kentucky courts, which rejected the challenge to the three-drug protocol without considering whether the availability of the single-drug alternative meant that inmates were being subjected to an unnecessary risk of pain.

But Justice Scalia served notice that the conservatives on the court would be disinclined to take that route. “I’m very reluctant to send it back to the trial court so we can have a nationwide cessation of all executions while the trial court finishes its work,” he said, “and then it goes to another appeal to the State Supreme Court, and ultimately — well, it could take years.”

Since September, when it agreed to hear this case, Baze v. Rees, No. 07-5439, the Supreme Court has routinely granted stays of execution to inmates challenging lethal injection. State and lower federal courts have also granted stays, leading to a de facto national moratorium that brought executions last year to the lowest level since 1994.

The Supreme Court’s actions, first in agreeing to hear the case and then in granting the stays of execution, raised expectations among some opponents of the death penalty that the justices were inclined to be sympathetic to the arguments against the three-drug protocol. But as the argument proceeded on Monday, another possibility appeared at least as likely: that the votes to hear the case had come from justices who regarded the challenge as insubstantial and wanted to dispose of it before many more state and federal courts could be tied up with similar cases.

If that was the case, then the subsequent stays of execution were simply routine, different only in context from the dozens of federal sentencing appeals that were held up pending the justices' decisions in two cases on the federal sentencing guidelines. The justices disposed of all the sentencing cases in orders issued on Monday, their first day back at work since the two decisions were issued on Dec. 10.

Arguing for Kentucky, Roy T. Englert Jr. said the state "has excellent safeguards in place" to ensure the adequacy of the anesthesia. Any risk that the inmate will feel pain is minimal, he told the justices. The one execution that Kentucky has carried out by lethal injection did not cause any known problems.

"The record is very persuasive in your favor, I have to acknowledge," Justice John Paul Stevens told Mr. Englert.

Justice Stevens then pressed Mr. Englert to justify the state's use of the second drug, and Mr. Englert replied that it served to protect the inmate's dignity. The justice was unpersuaded, remaining "terribly troubled," he said, by the fact that the drug appeared "almost totally unnecessary" except to spare witnesses the "unpleasantness" of seeing the inmate twitch or grimace.

But perhaps sensing that there would not be five votes to eliminate the drug, Justice Stevens suggested a minimalist approach: rule that "Kentucky is doing an adequate job of administering this protocol" and save the underlying question of the protocol's constitutionality for another day.