

## ***FIERRO v. GOMEZ* (1996)**

### **Cruel and Unusual Punishment**

#### **SUMMARY**

By a 3-0 vote, a panel of the United States Court of Appeals for the Ninth Circuit has ruled that execution by lethal gas constitutes cruel and unusual punishment in violation of the Eighth Amendment. The decision was issued in *Fierro v. Gomez* on February 21, 1996.

#### **BACKGROUND**

This suit was brought by three inmates who had been sentenced to death under California law. They claimed that the method of execution in California, lethal gas, violated the Eighth Amendment's ban on cruel and unusual punishment.

The trial court concluded that the suit raised serious questions and granted a temporary restraining order delaying executions in California while an evidentiary hearing was held. The defendants, however, appealed that order and the court of appeals vacated it. One of the inmates was subsequently executed.

During the time the case was being heard in the trial court, the California legislature amended the state's law to allow lethal injection as an alternative means of execution. The statute provided that lethal gas would be used unless the inmate chose lethal injection.

After an eight-day bench trial, the trial court concluded that death by lethal gas was cruel and unusual. The court heard from several expert witnesses and reviewed medical literature, official records, and eyewitness accounts of executions.

The court concluded that persons being executed by lethal gas remained fully conscious for 15 to 60 seconds and partially conscious for some minutes after that. It found that the inmates experienced serious pain during that time, and it described the pain as equivalent to having a major heart attack or being held under water. Additional side effects included extremely painful muscle contractions, panic, and terror.

Relying on earlier case law for the definition of *cruel and unusual*, the trial court found that serious pain lasting more than a few seconds and possibly as long as several minutes constituted cruel and unusual punishment. This appeal followed.

#### **ANALYSIS**

Trial courts are the finders of facts. They have the advantage of hearing live testimony of witnesses and thus can judge the credibility and intelligence of witnesses in a way that appellate courts can never do by reading the transcripts of the testimony. For this reason, appellate courts are required to respect the factual findings of trial courts unless they find them to be "clearly

erroneous.” The contrast, when a trial court describes or interprets the law, the appellate court is not bound to agree with the court.

The court of appeals in this case recognized that over the years, several other appellate courts had refused to find that execution by lethal gas constituted cruel and unusual punishment. However, it found that the factual findings in those cases did not have the substantial evidence and testimony available in this case. Based on the record, the court could not find that the district court’s factual findings were clearly erroneous. Given the level of pain and the length of time that an inmate would have to endure such pain, the appellate court agreed that executions by lethal gas constituted cruel and unusual punishment.

#### EXCERPTS FROM THE OPINION (By Judge Pregerson)

“The Eighth Amendment prohibits governmental imposition of ‘cruel and unusual punishments,’ . . . and bars ‘infliction of unnecessary pain in the execution of the death sentence,’ . . . ‘Punishments are deemed cruel when they involve torture or a lingering death.’ ”

“Although this court has never addressed whether execution by lethal gas is cruel and unusual punishment, we recently applied Eighth Amendment standards to execution by hanging. . . . [We] held that hanging, when conducted according to Washington State’s detailed protocol, did not constitute cruel and unusual punishment.”

“[In that case] we stated that, when analyzing a method of execution, as opposed to the proportionality of a punishment to a particular crime, judicial review ‘focuses more heavily on the objective evidence of the pain involved in the challenged method’ . . . ”

“The execution records [in the case at hand] provided information regarding the exact time that certain events occur during the execution process. These events include the time the cyanide is released into the gas chamber, the time that the gas first strikes an inmate’s face, the time that an inmate lapses into apparent unconsciousness, the time of certain unconsciousness, and the time of an inmate’s last bodily movement. . . . For example, [one inmate] did not lapse into apparent unconsciousness until two minutes after the cyanide gas first hit his face. He did not appear certainly unconscious until an additional minute had passed. . . .

The district court summarized its findings from this evidence as follows:

[I]nmates who are put to death in the gas chamber at San Quentin do not become immediately unconscious upon the first breath of lethal gas . . . [A]n inmate probably remains conscious anywhere from 15 seconds to one minute, and . . . there is a substantial likelihood that consciousness, or a waxing and waning of consciousness, persists for several additional minutes. During this time, . . . inmates suffer intense, visceral pain, primarily as a result of lack of oxygen to the cells. The experience of ‘air hunger’ is akin to the experience of a major heart attack, or to being held under water. Other possible effects of the cyanide gas include tetany, an exquisitely painful contraction of the muscles, and painful build-up of lactic acid and adrenaline. Cyanide-induced cellular suffocation causes anxiety, panic, terror, and pain. . . .

We accept [the district court's factual findings] because they are fully supported by the record and thus are not clearly erroneous. Under [an earlier case], such horrible pain, combined with the risk that such pain will last for several minutes, by itself is enough to violate the Eighth Amendment. . . .

[The fact that other courts have come to a different conclusion does] not alter our conclusion in this case. The district court in the instant case conducted an eight-day trial and was the first to consider extensive evidence on the pain involved in execution by lethal gas, and the first to make extensive factual findings regarding this pain.

In short, we hold that the district court's extensive factual findings concerning the level of pain suffered by an inmate during execution by lethal gas are not clearly erroneous. The district court's finding of extreme pain, the length of time this extreme pain lasts, and the substantial risk that inmates will suffer this extreme pain for several minutes require the conclusion that execution by lethal gas is cruel and unusual. Accordingly, we conclude that execution by lethal gas under the California protocol is unconstitutionally cruel and unusual and violates the Eighth and Fourteenth Amendments.