No. 05-___

IN THE

Supreme Court of the United States

Abu-Ali Abdur'Rahman,

Petitioner,

v.

Phil Bredesen et al.

On Petition for a Writ of Certiorari
to the Tennessee Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE – NO DATE OF EXECUTION SET

Petitioner has been sentenced to death by the State of Tennessee, which uses a lethal injection protocol devised by prison officials that includes the drug Pavulon. During the extensive evidentiary hearing in this case, the state acknowledged both that Pavulon serves no purpose and that it may result in the infliction of substantial pain on the inmate. Indeed, the drug is so potentially horrifying that thirty states, including Tennessee, have banned the use of Pavulon in the euthanasia of animals.

QUESTION PRESENTED

Whether, consistent with the Eighth Amendment, a state may adopt a method of execution that has a substantial component which serves no purpose and has the clear potential to inflict great pain on the inmate, particularly when the state has not instituted reasonable safeguards to protect against that risk.

PARTIES TO THE PROCEEDING BELOW

The following parties were named as defendants in the Chancery Court proceedings: Don Sundquist, then the Governor of the State of Tennessee; Donal Campbell, then the Commissioner of the Tennessee Department of Correction; Ricky Bell, Warden of Riverbend Maximum Security Institution; Virginia Lewis, Warden of Special Needs Facility; and the Tennessee Department of Correction.

In the Court of Appeals of Tennessee and the Tennessee Supreme Court, the following parties were appellees: Phil Bredesen (who succeeded Don Sundquist as the Governor of the State of Tennessee); Quenton White (who succeeded Donal Campbell as the Commissioner of the Tennessee Department of Correction); Ricky Bell; Virginia Lewis; and the Tennessee Department of Correction.

Quenton White was succeeded by George Little as the Commissioner of the Tennessee Department of Correction. In addition to the parties named in the caption, Little, Bell, Lewis, and the Tennessee Department of Correction are respondents here.

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Petitioner Abu-Ali Abdur'Rahman respectfully petitions for a writ of certiorari to review the judgment of the Tennessee Supreme Court in this case.

OPINIONS BELOW AND JURISDICTION

The opinion of the Tennessee Supreme Court, Pet. App. 1a-31a, is designated for publication but not yet published. The opinion of the Court of Appeals of Tennessee, *id.* 32a-74a, is unpublished, as is the opinion of the Chancery Court for the Twentieth Judicial District, Davidson County, Tennessee, *id.* 75a-93a. The judgment of the Tennessee Supreme Court was entered on October 17, 2005. On January 6, 2006, Justice Stevens extended the time to file this Petition to and including February 16, 2006. App. No. 05A605. This Court has jurisdiction pursuant to 28 U.S.C. 1257.

RELEVANT CONSTITUTIONAL PROVISION

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT

1. The State of Tennessee intends to execute petitioner Abu-Ali Abdur'Rahman, who was previously convicted of murder in that state, through the following execution protocol adopted by prison officials. One hour before the execution, Warden Ricky Bell will prepare a set of seven syringes, along with a back-up set of each: one syringe containing a solution that includes five grams of sodium Pentothal; two syringes of saline; two syringes of pancuronium bromide (referred to throughout the proceedings below by one of its trade names, Pavulon); and two syringes of potassium chloride. "The syringes are not labeled with the names of the substances in them." Pet. App. 78a.

At the appointed time, an "extraction team" of correctional officers will strap petitioner to a gurney and transport him to the execution chamber. There, an "IV team" composed of two paramedics and one correctional officer will insert an IV catheter above petitioner's elbow on each arm.[1] The catheter will be connected to the injection delivery device, which is located in the adjacent executioner's room, by extensive tubing, junctions, and valves. Once saline begins to flow into petitioner's arm, the IV team will leave. This is the only part of the execution in which medically trained personnel will participate.

Warden Bell will signal the "executioner" – who is a correctional official – in the executioner's room. The executioner will first inject the syringe of sodium Pentothal into several feet of intravenous tubing. Sodium Pentothal is a barbiturate that, in surgical doses, will produce an anesthetic effect lasting only a few minutes; for that reason, it is used in medical procedures only to induce – but not to maintain – anesthesia.

The executioner will not pause to see if sodium Pentothal has rendered petitioner unconscious. He will next inject a syringe of saline. He will then inject the two syringes of Pavulon into the tubing. Pavulon is a neuromuscular blocking agent that will paralyze all of petitioner's voluntary muscles. In the dosages administered by the state, this drug will paralyze petitioner's diaphragm.

The executioner will then inject the second syringe of saline, followed by the two syringes of potassium chloride, into the tubing. Potassium chloride interrupts the signaling functioning of the heart. If the dose is lethal, it will cause rapid cardiac arrest.

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[1] If the "IV team" is unable to insert the catheters, a physician will perform a "cutdown" procedure, in which an incision is made to facilitate the insertion of the catheter in a larger artery. Pet. App. 8a.

Everyone will then wait for five minutes. After that time, the state medical examiner will determine if petitioner is dead. If not, the process will be repeated with the set of back-up syringes.

2. On July 26, 2002, petitioner brought this suit in state Chancery Court, challenging the protocol that the State intends to use to execute him.[2] Petitioner asserted claims under the Eighth and Fourteenth Amendments of the U.S. Constitution. The court held a lengthy evidentiary hearing with live witnesses and numerous exhibits, at which the following was disclosed.

The Tennessee protocol was adopted not out of a legislative judgment or an independent determination that it was appropriate, but instead simply by untrained, inexperienced prison officials copying the approach of other states. "Unlike other state legislatures that provided specific directions regarding the lethal injection procedure, the Tennessee General Assembly left it entirely to the Department of Correction 'to promulgate necessary rules and regulations to facilitate the implementation' of execution by lethal injection." Pet. App. 38a-39a (quoting Tenn. Code Ann. 40-23-114(c)). The Commissioner of the State's Department of Correction set up an "ad hoc" committee composed of Department of Correction personnel, none of whom had any medical or scientific training or any prior experience with executions. 2 Trial Tr. 202-09. "In preparing the lethal injection method used by Tennessee, the proof revealed that the State did not consult physicians or pharmacologists." Pet. App. 88a. The group instead met four times over five months; none of the meetings were public and it never sought public input. *Id.* 6a. Nor did it consult with any person who had any medical or scientific training. 3 Trial Tr. 263-64, 268.

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[2] As provided by state law, the action was initiated as a request to the Commissioner of the State's Department of Correction for a declaratory order. See Pet. App. 5a. That request was denied.

Rather, the "ad hoc" committee delegated to Warden Bell – who also has no medical or scientific training or any experience with executions, or indeed a college education – the task of putting together the execution protocol. 2 Trial Tr. 209-10. Warden Bell, in turn, simply adopted the State's present protocol based on those used by other states. Pet. App. 18a. However, he did not identify any states that he consulted other than Texas and Indiana, see 2 Trial Tr. 210-19, 227. Moreover, while he acknowledged that Tennessee's protocol is different in some respects from those employed in other states, see 2 *id.* 211, he was not aware of the reasoning behind other states' adoption of their protocols. 2 *id.* 210-12.

In devising the protocol, neither the committee nor Warden Bell ever considered current standards of decency, 2 Trial Tr. 204 – including, for example, the fact that neuromuscular blocking agents such as Pavulon are strictly prohibited in Tennessee for use in the euthanasia of domesticated animals, 3 *id.* 271-72, because of the risk that they will cause unnecessary pain and suffering, see Pet. App. 80a. Neither the committee nor Warden Bell ever considered the use of alternative methods, such as the use of pentobarbital. 3 Trial Tr. 262-63.

Several expert witnesses testified that the Tennessee protocol is deeply problematic. There is a genuine danger that the prison officials will actually torture petitioner when they attempt to execute him.

The root of the problem is that the Warden and the executioner are carrying out a complex series of medical procedures without the necessary expert medical training. The State's position is that the first drug in the protocol, sodium Pentothal, will knock petitioner unconscious, so that he will not feel any pain from the second and third drugs. 4 Trial Tr. 336-37. The testimony established, however, that there is a genuine prospect that the first drug will not work properly. The State's Chief Medical Officer, when asked whether the protocol included adequate safeguards to ensure

that the lethal injection would proceed without an unreasonable risk of complications, was unable to give an affirmative answer. 4 *id.* 390-91. Nor could he draw any conclusions, as a general matter, as to whether the protocol contained sufficient safeguards to ensure that the sodium Pentothal injection would have its desired anesthetic effect on petitioner. 4 *id.* 394. The State's Department of Correction also generated an internal memorandum recognizing a variety of problems in prior executions by lethal injection. Trial Exh. 14.

Dr. Mark Heath, Assistant Professor of Anesthesiology at Columbia University, testified regarding Tennessee's "sloppy" procedures that make it "reasonably likely to not render the prisoner unconscious before the injection of the painful drugs." Pet. App. 90a. First, the sodium Pentothal used to anesthetize the inmate poses a number of potential problems, any one of which could result in the inmate's being insufficiently anesthetized when the Pavulon is administered. See, *e.g.*, 3 Trial Tr. 273-74, 321.

Second, the sequence used to administer the drugs is "extraordinarily overcomplex," thereby increasing the risk of error and lengthening the time taken to administer the potassium chloride. 2 Trial Tr. 127.

Dr. Heath testified that these problems are compounded by the State's failure to determine whether the inmate is fully anesthetized prior to injecting the Pavulon. 2 Trial Tr. 133-36. Moreover, there are other "deviations from standard anesthesiological practice," including "the physical separation of the executioner (who administers the drugs to the prisoner in another room with long tubing that run from the prisoner through a portal in the wall to a syringe held by the executioner), the absence of a physician in the execution chamber to assure intake of the Pentothal, and the failure to label the syringes with the names of the drugs." Pet. App. 83a.

If these substantial risks come to pass, and the sodium Pentothal does not work as the state intends, petitioner will suffer inhuman pain. As the court of appeals later summarized the testimony, it was "essentially uncontradicted that the injection of either Pavulon or potassium chloride, by themselves, in the dosages required by Tennessee's three drug protocol would cause excruciating pain." Pet. App. 68a.

The second drug, Pavulon, will freeze petitioner's muscles, but will otherwise leave him fully conscious, with the ability to hear, think, and experience pain and fear. 1 Trial Tr. 54-57; 2 *id.* 111-12. The muscles that will be paralyzed include petitioner's diaphragm and lungs, so he will feel himself being asphyxiated. Pet. App. 39a n.23, 68a. But because petitioner's muscles will be frozen, he will be utterly incapable of expressing that he is suffering gravely. 1 Trial Tr. 65-66. One witness who had personally undergone surgery while under the effects of a neuromuscular blocking agent similar to Pavulon but while insufficiently anesthetized described the effects as torture. Pet. App. 12a.

Although the State is fully aware of Pavulon's potentially horrifying effects, it does not contend that Pavulon actually serves any purpose. Instead, Warden Bell and the committee included Pavulon in the execution protocol simply because other states use it. Pet. App. 88a. The state's Chief Medical Examiner candidly testified that he knew of no legitimate purpose for the use of Pavulon (4 Trial Tr. 395-96) and acknowledged that the effect of the Pavulon under insufficient anesthesia would be horrifying (4 *id.* 392). As the Chancery Court found, "the use of Pavulon is * * * unnecessary" and the state has no reason for using such a "psychologically horrific" drug to execute petitioner. Pet. App. 89a. It was uncontested that "if the Pavulon were eliminated from the Tennessee lethal injection method, it would not decrease the efficacy or the humaneness of the procedure." *Id.* 81a.

Pavulon's use is so illogical and potentially devastating that the American Veterinary Medical Association Guidelines

ban its use "by itself or in combination with other drugs" in euthanizing even *animals*. 1 Trial Tr. 61-62; Pet. App. 84a. A majority of states follow the guidelines. Many, including Tennessee, have adopted as law the prohibition of the use of Pavulon in euthanasia of domesticated animals, either alone or in combination with other drugs. See Tenn. Code Ann. 44-17-303(c).

The testimony further established that, if an error occurs in the administration of sodium Pentothal, petitioner's horror in asphyxiating from Pavulon will be compounded by the excruciating pain caused by the third drug, potassium chloride. While potassium chloride (in contrast to Pavulon) may be used in limited circumstances in animal euthanasia, it is used only under careful administration – by expert veterinary personnel – and only after a general anesthesia has first created a deep state of unconsciousness. 1 Trial Tr. 87-89. The drug will literally "deliver the maximum amount of pain [petitioner's] veins can deliver" as it brings on cardiac arrest. Pet. App. 68a. Tennessee apparently derived its use of potassium chloride from the protocols of other states, which in turn apparently relied on the work of Fred Leuchter, a gentleman with no relevant training who (with no available data) simply relied on information on the use of the drug on pigs. Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 99 (2002).

The expert testimony established that all of these risks are wholly unnecessary. Tennessee could simply administer, for example, a single intravenous injection of pentobarbital, a stable and longer-acting barbiturate that causes death within three minutes. Pentobarbital is both inexpensive and the most common method of euthanizing domesticated animals. 1 Trial Tr. 71-72.

3. The Chancery Court nonetheless rejected petitioner's federal constitutional claims on the merits. Pet. App. 75a-

93a. It relied on two principal conclusions. First, Tennessee's protocol comports with that used by approximately thirty states. *Id.* 83a. Second, because in the court's view the first drug in the protocol was shown "to be reliable in rendering an inmate unconscious," petitioner had "failed to demonstrate that Tennessee's lethal injection method poses a reasonable likelihood of a cruel or inhumane death." *Id.* 77a. The court found decisive that the protocol apparently had worked properly once before in Tennessee. *Id.* 90a-91a. In addition, the prison officials had trained on the administration of the protocol, and prison conditions justify the departure from standard surgical procedures. *Id.* 84a-85a, 91a-92a. The court on that basis concluded that "there is less than a remote chance that [petitioner] will be subjected to unnecessary physical pain or psychological suffering." *Id.* 92a.

The court recognized that the utterly purposeless use of Pavulon, the use of which is prohibited in executing even animals, gives rise to a substantial claim that the protocol violates the Eighth Amendment by offending the dignity of petitioner and society. Pet. App. 88a; *id.* 82a (citing *Weems* v. *United States*, 217 U.S. 349 (1910)). The Court also acknowledged that the Pavulon "put[s] a chemical veil over what death by lethal injection really looks like," thereby "giv[ing] a false impression of serenity to viewers, making punishment by death more palatable and acceptable to society." *Id.* 87a-88a. But it found decisive that the State had not intended that result but rather was going to use Pavulon to execute petitioner "out of ignorance and by just copying what other states do." *Id.* 88a. With "no showing of malice," and also because of the purportedly slim prospect that petitioner would not in fact be rendered unconscious, petitioner's claim failed. *Ibid.*

4. On petitioner's appeal, the Tennessee Court of Appeals affirmed. Pet. App. 32a-74a. The court of appeals imposed on petitioner "the heavy burden of proving that a societal consensus against executions by lethal injection in

general, or executions by lethal injection incorporating Pavulon or potassium chloride in particular, has emerged. Either society has set its face against lethal injections, or the use of Pavulon and potassium chloride, or it has not." *Id.* 65a. The court found decisive that twenty-seven other states use Pavulon and potassium chloride in their execution protocols. *Id.* 66a n.64. From that, it concluded, it "necessarily follows that Mr. Abdur'Rahman has failed to present sufficient evidence to warrant a conclusion that Tennessee's three-drug protocol offends the dignity of the prisoner or society." *Id.* 67a.

The court of appeals also dismissed as "speculative" the prospect that the sodium Pentothal will not be effective, subjecting petitioner to excruciating pain from the Pavulon and potassium chloride. Pet. App. 67a. The court reasoned that "the dose of Sodium Pentothal called for in the protocol is lethal." *Id.* 68a. Although the court acknowledged evidence of "other states encountering problems during executions by lethal injection," it found that "does not prove that Tennessee's three-drug protocol exposes prisoners to an unacceptable risk of the infliction of needless physical pain or psychological suffering." *Id.* 70a. In sum, the protocol was not "so haphazard or lackadaisical" as to "carry [petitioner's] heavy burden of proving that the Department's three-drug lethal injection protocol" gives rise to an Eighth Amendment violation. *Id.* 71a.

5. The Tennessee Supreme Court granted petitioner leave to appeal and affirmed. Pet. App. 1a-31a. The court found that Tennessee's execution protocol comports with contemporary standards of decency because it is similar to that employed by a majority of states. *Id.* 18a-19a. The court agreed that there was no "legitimate reason for the use of Pavulon in the lethal injection protocol," but deemed that fact irrelevant because "only two states [that use lethal injection] do not use some combination of sodium Pentothal, Pavulon, and potassium chloride." *Id.* 18a.

The court also agreed that "the injection of Pavulon and potassium chloride would alone cause extreme pain and suffering," but found that fact immaterial because "a dosage of five grams of sodium Pentothal as required under Tennessee's lethal injection protocol causes nearly immediate unconsciousness and eventually death." Pet. App. 19a. The court found "no evidence in the record that the procedures followed under the lethal injection protocol have resulted in the problems feared by the petitioner." *Id.* 20a. While "acknowledg[ing] and shar[ing]" the trial court's concerns, the Supreme Court was not prepared to judge the lethal injection protocol "based solely on speculation as to problems or mistakes that *might* occur." *Id.* 20a-21a.

REASONS FOR GRANTING THE WRIT

The petition for certiorari presents, by far, the best vehicle for resolving the frequently recurring challenges to states' use of lethal injection protocols that needlessly create the prospect of torturing the inmate to death. The record regarding Tennessee's protocol was thoroughly developed below, unhurried by the prospect of an imminent execution. Petitioner's state-law right to bring his federal constitutional claim is moreover uncontested. The decision below further warrants this Court's review because it rests on a fundamental misunderstanding of this Court's Eighth Amendment jurisprudence. This Court has held that conduct giving rise to unnecessary pain and suffering is unconstitutional, without regard to whether other states engage in the same conduct. The national consensus on which the lower courts relied is moreover entirely illusory. Only a small minority of state legislatures have dictated an execution protocol similar to the one employed by Tennessee, and none of those specify a process with such poor training and a concomitant great risk of error. The best evidence of national consensus in fact supports petitioner, as a substantial majority of states (including Tennessee) prohibit the use of the drug most directly in question here, Pavulon, to execute even animals.

I. The Tennessee Supreme Court's Decision Upholding the Needless Use of Pavulon in the Execution Protocol Is Contrary to This Court's Precedents.

A. Tennessee's Execution Protocol, Particularly in Its Use of Pavulon, Offends Human Dignity and Reflects the State's Deliberate Indifference to the Risk of Needless Suffering.

1. The record in this case establishes, respondent's own witness conceded, and the lower courts found that Tennessee's use of Pavulon in executing petitioner will serve no legitimate purpose. See *supra* at 6, 8-9; see also, *e.g.*, *Beardslee* v. *Woodford*, 395 F.3d 1064, 1076 (CA9) (describing California's failure to explain inclusion of Pavulon in its execution protocol as, "to say the least, troubling"), cert. denied, 125 S. Ct. 982 (2005). As the Tennessee Supreme Court emphasized, on the state's view that the prison officials will implement the protocol flawlessly, the first drug – "a dosage of five grams of sodium Pentothal" – will "cause[] nearly immediate unconsciousness and eventually death. *Id.* 19a.

Because the use of Pavulon – or, for that matter, potassium chloride – in the execution protocol serves no purpose, it has only two possible effects. First, if petitioner is not properly anesthetized, the Pavulon will "cause extreme pain and suffering" as he begins to asphyxiate. See Pet. App. 19a. Second, the Pavulon will paralyze all of petitioner's voluntary muscles, creating a "chemical veil" that would preclude correctional officials and witnesses (including petitioner's attorney) from detecting the extraordinary pain suffered by him as a result of the Pavulon-induced asphyxiation and, subsequently, the potassium chloride. *Id.* 10a.

It is well established that such a pointless risk of extraordinary pain is unconstitutional. First, the Eighth

Amendment prohibits punishment that involves "torture or a lingering death," *In re Kemmler*, 136 U.S. 436, 447 (1890), or "the unnecessary and wanton infliction of pain," *Gregg* v. *Georgia*, 428 U.S. 153, 173 (1976) (citing *Furman* v. *Georgia*, 408 U.S. 238, 392-93 (1972) (Burger, C.J., dissenting); *Wilkerson* v. *Utah*, 99 U.S. 130, 136 (1879); *Weems* v. *United States*, 217 U.S. 349, 381 (1910)); *Hope* v. *Pelzer*, 536 U.S. 730, 737 (2002) ("We have said that 'among "unnecessary and wanton" inflictions of pain are those that are "totally without penological justification."'"). Second, and equally importantly, subjecting an inmate to such unnecessary pain violates human dignity, which is the very foundation of the prohibition against cruel and unusual punishments. *Trop* v. *Dulles*, 356 U.S. 86, 100 (1959); see also *Roper* v. *Simmons*, 543 U.S. 551, 560 (2005) ("By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons."); *Estelle* v. *Gamble*, 429 U.S. 97, 102 (1976) (to determine whether a particular method of execution comports with society's "evolving standards of decency," this Court considers whether it comports with "broad and idealistic concepts of dignity, civilized standards, humanity, and decency").

Correctional officials in Tennessee have displayed precisely the kind of deliberate indifference to this pointless risk of pain and suffering that this Court has repeatedly deemed unconstitutional in cases such as *Estelle*, 429 U.S. at 104 ("We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." (citation omitted)), and *Helling* v. *McKinney*, 509 U.S. 25, 32 (1993). Indeed, given that – as the lower courts have found and state officials have conceded – the use of Pavulon and potassium chloride serves absolutely no purpose, the conduct of correction officials borders on deliberate cruelty.

Tennessee officials are fully aware of the risks inherent in the Tennessee lethal injection protocol, several of which were documented in a 1999 internal memorandum that was circulated to Warden Bell. That memorandum indicated that executions in two states – Texas and Arkansas – had experienced collapsed veins after the administration of the first drugs and pointed to a National Legal Aid & Defender Association study that recorded fifteen cases of "botched" lethal injection procedures between 1985 and 1997, Trial Exh. 14; indeed, Tennessee officials have themselves experienced problems with both veins and clogged IV lines during practice sessions, see 2 Trial Tr. 234-37.[3]

Nor did state officials ever consider any of the risks associated with the drugs employed in the lethal injection protocol, notwithstanding that – pursuant to state laws and AVMA standards – none of the drugs are normally employed in animal euthanasia, while some are specifically prohibited. See 3 Trial Tr. 264, 271; see also *infra* at 22-24. Moreover, the State's own expert was unable to confirm either that the protocol included adequate safeguards to ensure that the lethal

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[3] Similarly, although expert testimony has established that the "cutdown" procedure is a "dangerous and antiquated medical procedure," *Nelson* v. *Campbell*, 541 U.S. 637, 642 (2004), that is "'rarely performed' in the practice of medicine," Pet. App. 11a, the Tennessee protocol nonetheless provides that a physician – who is on standby outside the execution chamber – will perform the cutdown if the IV team is unable to insert the catheters, see *id.* 8a. The protocol does not, however, require that the physician performing the cutdown have any experience with the procedure. See *id.* 11a; compare with *Nelson*, 541 U.S. at 642 (acknowledging expert testimony that cutdowns should be performed "only by a trained physician in a clinical environment with the patient under deep sedation"). The decision to use the cutdown procedure was based solely on the use of the procedure in other states, *id.* 8a; officials did not consider the possibility of using an alternative procedure that is more widely used, simpler, and safer, *id.* 11a; 2 Trial Tr. 232.

injection would proceed without an unreasonable risk of complications, 4 Trial Tr. 390-91, or that the protocol contained sufficient safeguards to ensure that the sodium Pentothal injection would have its desired anesthetic effect, 4 *id.* 394. The state does not even take the simple step of assuring by physical examination that the condemned has reached a surgical plane of anesthesia before administering drugs that undisputedly would cause pain to an inadequately anesthetized individual. As such, the problems inherent in the lethal injection protocol cannot be dismissed as the kind of "unforeseeable accident" that this Court has declined to hold unconstitutional. See *Estelle*, 429 U.S. at 105 (citing *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459 (1947)). Rather, the problems described are the direct and inevitable consequence of a poorly designed protocol carried out by unqualified personnel.[4]

Given that state officials have consciously opted to disregard the risk that the sodium Pentothal will not adequately anesthetize petitioner, thereby subjecting him to inhuman pain, it is immaterial whether there is a societal consensus for or against the use of Pavulon. Simply put, when faced with the "unnecessary and wanton infliction of pain," including "those that are 'totally without penological justification,'" this Court does not inquire whether other states inflict the same pain, as such conduct is barred by the Eighth Amendment. See, *e.g.*, *Hope*, 536 U.S. at 738 (inquiry is "whether the officials involved acted with 'deliberate indifference'").

Tennessee surely could not, consistent with the Eighth Amendment, adopt a protocol that would omit the sodium Pentothal for every one-hundredth condemned inmate, torturing that inmate to death. It would make no difference if *all fifty* states did the same thing. It should make no

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[4] See also *infra* at 22 (training required by other states for personnel participating in executions).

difference that the prospect of a death by torture arises from the known risk of a preventable accident when the State imposes that risk for no purpose whatsoever.

Finally, the pointless inclusion of Pavulon in Tennessee's lethal injection protocol is unconstitutional for the further reason that, even putting aside the risk that petitioner will suffer extreme pain, it is deeply offensive to petitioner's dignity to be subjected to the use of Pavulon when Tennessee's legislature has specifically deemed that drug inappropriate for the euthanization of a dog or pot-bellied pig. See Tenn. Code Ann. 44-17-303(c) ("[A]ny substance which acts as a neuromuscular blocking agent * * * may not be used on any nonlivestock animal for the purpose of euthanasia."); *id.* § 39-14-201(3) ("non-livestock animal" includes "a pet normally maintained in or near the household or households of its owner or owners," as well as "pet rabbits, a pet chick, duck, or [pet] pot bellied pig"). As Justice Brennan explained in *Furman* v. *Georgia*, "[m]ore than the presence of pain * * * is comprehended in the judgment that the extreme severity of a punishment makes it degrading to the dignity of human beings." 408 U.S. at 272 (Brennan, J., concurring). Rather, the "true significance of [such] punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the [Cruel and Unusual Punishments] Clause that even the vilest criminal remains a human being possessed of common human dignity." *Id.* at 272-73.

2. Nor is it any answer that the risk of inadequate anesthesia is a small one.

First, even if such a risk were small, there is simply no need to expose petitioner to the risk given that the use of Pavulon and potassium chloride is both entirely gratuitous and could cause him to endure inhuman pain. See *supra* at 5-9. Any risk at all is further unreasonable given that simpler and more humane alternatives – such as a single dose of

pentobarbital – is not only readily available, but is in fact widely used in animal euthanasia, see 1 Trial Tr. 71.

Second, the mere presence of the risk injures petitioner. The trial court recognized that Pavulon is "psychologically horrific." Pet. App. 89a. This Court has long held that the Eighth Amendment protects not only against "physical mistreatment [or] primitive torture," *Trop* v. *Dulles*, 356 U.S. at 101, but also against undue psychological injury, including a "fate of ever-increasing fear and distress," *id.* at 102. See also *Weems* v. *United States*, 217 U.S. 349 (1910). Here, an inmate facing the prospect of execution by lethal injection may experience extreme psychological terror simply from the knowledge that, as a result of the myriad flaws in protocols such as Tennessee's and in mute and unacknowledged terror, he may experience extraordinary pain from the effects of the Pavulon and potassium chloride.

The risk similarly harms society. As this Court has recently reiterated, "[t]he integrity of the criminal justice system depends on full compliance with the Eighth Amendment." *Johnson* v. *California*, 543 U.S. 499, 511 (2005) (citing *Spain* v. *Procunier*, 600 F.2d 189, 193-94 (CA9 1979) (Kennedy, J.)). That integrity is undermined when, as here, there is a not-insubstantial risk that an inmate will undergo extraordinary physical and psychological pain as a result of drugs that are entirely unnecessary to the execution.

3. In any event, the risk that an inmate will suffer extraordinary pain as a result of flaws in the lethal injection protocol is genuine. The Tennessee Supreme Court's finding to the contrary relied heavily on the fact that an adequate dosage of sodium Pentothal, if properly administered, should cause "nearly immediate unconsciousness and eventually death." Pet. App. 19a. That finding, it held, allayed any concerns regarding the remainder of the protocol. The court thereby deemed immaterial that the myriad problems with Tennessee's protocol, taken *in toto*, unnecessarily compound

the risk of great pain to the inmate and psychological suffering attendant on the inmate's legitimate fears of a procedural mishap:

- The Department of Correction receives sodium Pentothal in powdered form, a state in which it has a short shelf life. Although Warden Bell was himself uncertain as to crucial facts regarding sodium Pentothal, including its shelf life and proper dosage, see 3 Trial Tr. 273, 321, he testified that he believed the shelf life to be six months, 3 *id.* 273-74. The sodium Pentothal intended for use in petitioner's scheduled June 2003 execution was requisitioned in December 2002; as such, it would in all likelihood have been nearing the end of its shelf life in powdered form by the time it was used in petitioner's execution. 3 *id.* 273, 321.
- Prior to the execution, the powdered sodium Pentothal must be mixed – either by Warden Bell or by some other correctional officer lacking medical or scientific training, 3 Trial Tr. 294 – with sterile water, Pet. App. 78a.
- The potency of the liquid sodium Pentothal solution can be diminished by, for example, contamination. 2 Trial Tr. 102; 2 *id.* 129-30. Warden Bell acknowledged the risk of contamination during mixing but never discussed that problem with anyone having a medical or scientific background. See 2 *id.* 233-34. Indeed, there are no rules, regulations, or guidelines of any sort regarding the handling or mixing of the sodium Pentothal, 3 *id.* 269-70.
- Once in liquid form, sodium Pentothal "starts to deteriorate immediately," 2 Trial Tr. 109, creating a risk that, even if properly mixed and administered, it would not sufficiently anesthetize the inmate.
- The risk of improper anesthesia is compounded because "sensitivity to sodium pentothal varies greatly

among the population." *Beardslee* v. *Woodford*, 395 F.3d at 1074.

- The syringes containing the drugs and saline to be used in the lethal injection do not contain labels identifying the contents of each syringe by name, but instead are color-coded – a methodology that petitioner's expert described as unacceptable in the medical field "because of the opportunity for confusion and error." 2 Trial Tr. 124-25.
- Neither Warden Bell nor the executioner has medical training in administering anesthetics. Pet. App. 7a.
- No one ensures that the condemned inmate is properly anesthetized before the executioner injects the first syringe of Pavulon. 3 Trial Tr. 270. However, if the IV catheter were improperly inserted, some or all of the drugs would be diverted from the inmate's circulatory system. Moreover, although both the warden and the executioner have some means of visually monitoring the inmate, such visual observations – standing alone – cannot determine either whether the catheter is improperly inserted or whether the anesthetic has taken effect.
- The unnecessary injection of two syringes of Pavulon solution, coupled with the syringe of saline solution required to prevent the sodium Pentothal from crystallizing on contact with the Pavulon, substantially increases the length and complexity of the procedure. See 2 Trial Tr. 127, 129.
- No saline flush is required between the injections of Pavulon and potassium chloride. 2 Trial Tr. 129. The length of tubing increases the chance of kinking, which would impede the flow of the drugs; and the use of multiple connections increases the possibility of leakages. 2 *id.* 136-37, 140-41.
- If the inmate does awaken from the anesthesia, the paralysis caused by the Pavulon prevents the inmate

from alerting the executioner to the need for more anesthesia. 2 Trial Tr. 153, 196-97.

B. Tennessee's Lethal Injection Protocol Is Unconstitutional Notwithstanding Other States' Use of Similar Protocols.

1. The Tennessee Supreme Court rejected petitioner's Eighth Amendment claim principally on the ground that the state's protocol is "consistent with the overwhelming majority of lethal injection protocols used by other states and the federal government." See Pet. App. 17a-18a. To be sure, this Court has repeatedly emphasized that "the clearest and most reliable objective evidence of contemporary values is the *legislation* enacted by the country's legislatures," *Atkins* v. *Virginia*, 536 U.S. 304, 312 (2002) (emphasis added; citation omitted), because "in a democratic society legislatures * * * are constituted to respond to the will and consequently the moral values of the people," *Furman*, 408 U.S. at 383 (Burger, C.J., dissenting). See also *Gregg*, 428 U.S. at 175 (joint opinion of Stewart, Powell, and Stevens, JJ.); *Roper* v. *Simmons*, 543 U.S. at 616 (Scalia, J., dissenting) ("The reason for insistence on legislative primacy is obvious and fundamental * * *."). However, the widespread use of similar lethal injection protocols cannot be said to reflect any legislative consensus or determination that such protocols are appropriate, much less that they reflect contemporary values.

First, although virtually all of the thirty-seven states that have adopted lethal injection as the primary means of execution, see Pet. App. 18a, use a three-drug cocktail similar to the one that Tennessee plans to use to execute petitioner, twenty-one states have not enacted legislation prescribing the form of the protocol.[5] As such, those states certainly could

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[5] See Ala. Code 15-18-82.1; Ariz. Rev. Stat. 13-704; Cal. Penal Code 3604(a); Conn. Gen. Stat. 54-100(a); Del. Code Ann. tit. 11, § 4209(f); Fla. Stat. 922.105(1); Ga. Code Ann. 17-10-38(a); Ind. Code 35-38-6-1(a); Ky. Rev. Stat. Ann. 431.220(1)(a); La.

not have made any legislative determination that the lethal injection protocols employed by correctional officials reflected contemporary values. See *Thompson* v. *Oklahoma*, 487 U.S. 815, 826 (1988) (plurality opinion) (in considering constitutionality of death penalty for fifteen-year-olds, declining to consider states that either prohibited capital punishment or failed to explicitly set a minimum age for the death penalty, explaining that "[i]f * * * we accept the premise that some offenders are simply too young to be put to death, it is reasonable to put this group of statutes to one side because they do not focus on the question of where the chronological age line should be drawn"). Instead, those states merely designated lethal injection as the means of execution and delegated the task of formulating the protocol to correctional officials. In Tennessee, for example, the legislature left it to the Department of Correction to "promulgate necessary rules and regulations to facilitate the implementation' of execution by lethal injection," Pet. App. 38a-39a (quoting Tenn. Code Ann. 40-23-114(c)); the Department of Correction then delegated the task of formulating a protocol to an "ad hoc" committee of unelected correctional officials, which in turn delegated the task to Warden Ricky Bell. Neither Warden Bell nor the other members of the "ad hoc" committee had any medical or scientific training, sought public input on the process, or made any inquiry into prevailing community standards.

Rev. Stat. Ann. 15:569B; Mo. Rev. Stat. 546.720; Nev. Rev. Stat. 176.355; Ohio Rev. Code 2949.22(A); S.C. Code Ann. 24-3-530(A); Tenn. Code Ann. 40-23-114; Tex. Code Crim. Proc. art. 43.14; Utah Code Ann. 77-18-5.5; Va. Code Ann. 53.1-233; Wash. Rev. Code 10.95.180. Although neither Kansas nor New York prescribes the form of the protocol, see Kan. Stat. Ann. 22-4001(a); N.Y. Correct. Law 658, courts in those states have held the states' death penalty statutes unconstitutional, see *State* v. *Marsh*, 102 P.3d 445 (Kan. 2004), cert. granted, 125 S. Ct. 2017 (2005); *People* v. *LaValle*, 817 N.E.2d 341 (N.Y. 2004).

Instead, Warden Bell and the committee "just cop[ied] what other states" were doing. Pet. App. 88a.

Second, only fourteen states have enacted legislation specifically requiring the use of an ultra-short-acting barbiturate (such as sodium Pentothal) combined with a chemical paralytic agent (such as Pavulon, although no state expressly requires that Pavulon or pancuronium bromide be used) and, in some cases, potassium chloride.[6] Moreover, the evidence suggests (and Tennessee did not in this case dispute) that the use of the drug cocktail was originally adopted in Oklahoma and was then subsequently copied by other legislatures. See Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 95, n.205 (2002). See also *Beardslee*, 395 F.3d at 1074 n.11 (noting that "[t]he history of the use of the three chemical protocol gives some force to

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[6] See Ark. Code Ann. 5-4-617(a)(1); Idaho Code Ann. 19-2716; 725 Ill. Comp. Stat. 5/119-5(a)(1); Md. Code Ann., Corr. Servs. 3-905(a); Miss. Code Ann. 99-19-51; Mont. Code Ann. 46-19-103(3); N.H. Rev. Stat. Ann. 630:5(XIII); N.M. Stat. Ann. 31-14-11; N.C. Gen. Stat. 15-187; Okla. Stat. tit. 22, § 1014(A); Or. Rev. Stat. 137.473(1); 61 Pa. Stat. Ann. 3004(A); S.D. Codified Laws 23A-27A-32; Wyo. Stat. Ann. 7-13-904. Although Colorado employs a three-drug cocktail consisting of sodium Pentothal, Pavulon, and potassium chloride, see http://www.doc.state.co.us/DeathRow/deathrow.htm#Location, neither the Pavulon nor the potassium chloride is required by statute, see Colo. Rev. Stat. 18-1.3-1202 (defining "lethal injection" as "a continuous intravenous injection of a lethal quantity of sodium thiopental or other equally or more effective substance sufficient to cause death"). And while New Jersey's lethal injection statute requires the use "of a lethal quantity of an ultrashort-acting barbiturate in combination with a chemical paralytic agent in a quantity sufficient to cause death," see N.J. Stat. Ann. 2C:49-2, there is currently no specific protocol for lethal injections in that state, see *infra* note 7 and accompanying text.

[the] argument that * * * the precise protocol was never subjected to the rigors of scientific analysis"). Nor does any state specifically mandate the various details of the protocol – such as the lack of trained personnel to administer the drug and ensure that it has taken effect and the failure to label the syringes – that create the risk that the sodium Pentothal will not work properly.

To the contrary, there are considerable differences in both the protocols by which states carry out execution by lethal injection and the standard of care to which they adhere. Idaho, for example, requires the Department of Corrections to find "expert technical assistance * * * to assure that infliction of death by administration of such substance or substances can be carried out in a manner which causes death without unnecessary suffering." Idaho Code 19-2716. Connecticut requires that executioners be trained to the satisfaction of a licensed and practicing physician. Conn. Dep't of Corrections Directive No. 6.15(3)(A) (Oct. 2004). Missouri requires that IV access be achieved by a surgeon. Tr. of TRO Hr'g 27, *Johnston* v. *Crawford*, No. 04-CV-1075 (E.D. Mo. Aug. 26, 2005). New Jersey's Department of Corrections has conceded, with respect to execution protocols, that "the state of the art is changing daily," such that it currently has no specific protocol for drug administration.[7]

2. The Tennessee Supreme Court further erred by deeming irrelevant the widespread prohibition on the use of Pavulon in animal euthanasia. Although that court recognized petitioner's claim – not at issue here – that Tennessee's lethal injection protocol violated Tennessee's Nonlivestock Animal Human Death Act, it concluded that the Act did not prohibit the state from using a neuromuscular

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[7] *In re Proposed Amendment: N.J.A.C. 10A:23-2.2 and Proposed New Rule: N.J.A.C. 10A:23-2.12*, Tr. of Procs. Before Ronald Bollheimer, Supervisor of Legal and Legis. Affairs for the N.J. Dep't of Corrs. 33-34 (Feb. 4, 2005).

blocking agent such as Pavulon in human executions because petitioner is not a "nonlivestock animal." Pet. App. 28a.

Societal consensus regarding standards of decency is properly measured by the array of laws that illuminate a societal consensus on matters raised by a particular Eighth Amendment challenge. In *Roper* v. *Simmons*, for example, this Court referred to an array of legislation recognizing the comparative immaturity and irresponsibility of juveniles in holding that the juvenile death penalty violated society's evolving standards of decency. 543 U.S. at 569.

The widespread prohibition on the use of neuromuscular blocking agents such as Pavulon in animal euthanasia reflects a national consensus that the use of Pavulon is an inhumane method of causing death. Thirty states, twenty-three of which impose capital punishment, prohibit the use of Pavulon in euthanizing animals. Of these thirty states, nine – including Tennessee – expressly prohibit the use of neuromuscular blocking agents such as Pavulon to euthanize animals.[8] Twenty-one more states prohibit the use of such neuromuscular blocking agents by implication, either by specifically mandating a method for animal euthanasia that does not involve the use of a neuromuscular blocking agent or by otherwise expressing a legislative preference for sodium pentobarbital.[9] These laws are particularly instructive because

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[8] See Fla. Stat. 828.058 & 828.065; Ga. Code Ann. 4-11-5.1; Me. Rev. Stat. Ann. tit. 17, § 1044; Md. Code Ann., Crim. Law, § 10-611; Mass. Gen. Laws ch. 140, § 151A; N.J. Stat. Ann. 4:22-19.3; N.Y. Agric. & Mkts. Law 374; Okla. Stat. tit. 4, § 501; Tenn. Code Ann. 44-17-303.

[9] Ala. Code 34-29-131; Alaska Stat. 08.02.050; Ariz. Rev. Stat. Ann. 11-1021; Cal. Bus. & Prof. Code 4827; Colo. Rev. Stat. 18-9-201; Conn. Gen. Stat. 22-344a; Del. Code Ann. tit. 3, § 8001; 510 Ill. Comp. Stat. 70/2.09; Kan. Stat. Ann. 47-1718(a); La. Rev. Stat. Ann. 3:2465; Mich. Comp. Laws 333.7333; Mo. Rev. Stat. 578.005(7); Neb. Rev. Stat. 54-2503; Nev. Rev. Stat. Ann. 638.005; Ohio Rev. Code Ann. 4729.532; Or. Rev. Stat. 686.040(6); R.I.

they reflect a considered judgment by the legislatures that enacted them. See *Thompson*, 487 U.S. at 829 (examining only the states that had "expressly established a minimum age in their death penalty statutes").

Moreover, this widespread legislative consensus is consistent with the national ethical standards promulgated by the American Veterinary Medical Association's Panel on Euthanasia. The Panel has deemed "unacceptable" and "absolutely condemned" the use of neuromuscular blocking agents for animal euthanasia, both as sole agents and in combination with barbiturates, a class of drugs including sodium pentobarbital and sodium Pentothal. American Veterinary Medical Association Panel on Euthanasia, *1993 Report of the AVMA Panel on Euthanasia*, 202 J. A.V.M.A. 229 (1993); American Veterinary Medical Association Panel on Euthanasia, *2000 Report of the AVMA Panel on Euthanasia*, 218 J. A.V.M.A. 669, 675 & 681 (2001). Instead, the AVMA standards require that a medically qualified individual stay in constant contact with the patient to be euthanized so that an assessment of muscle tone and breathing can be made and an accurate assessment of patient pain or distress can be made. The same concerns animating the prohibition on the use of neuromuscular blocking agents to euthanize animals apply equally to the use of Pavulon in executing humans: *viz.*, the risk that the animal will be inadequately anesthetized and thus (without the knowledge of the veterinarians administering the drugs) fully conscious while suffocating. Pet. App. 80a.

Gen. Laws 4-1-34; S.C. Code Ann. 47-3-420; Tex. Health & Safety Code Ann. 821.052(a); W. Va. Code 30-10A-8; Wyo. Stat. Ann. 33-30-216.

II. This Case Presents an Ideal Vehicle for Examining the Important Issue of Pavulon's Use in a State's Execution Protocol.

A. Pavulon's Use in Lethal Injection Protocols Raises an Important Question.

1. The question presented by this petition affects the overwhelming majority of executions in the United States. At least 3361 of America's 3415 death row inmates, including 108 in Tennessee, face the prospect of execution by the use of a neuromuscular blocking agent.[10] Indeed, all but one of the fifty-nine executions carried out in the United States in 2004 used neuromuscular blocking agents as part of the execution process. [11] See Bureau of Justice Statistics Capital

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[10] For information on the methods of execution used in each state, see Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What it Says About Us*, 63 OHIO ST. L.J. (2002); Mary Orndorff, *Lethal Injection Drug Under Attack*, BIRMINGHAM NEWS, May 29, 2004, at A1; *Johnson* v. *Reid*, 105 Fed. Appx. 500, 502 (CA4 2004); *Beardslee* v. *Woodford*, 395 F.3d 1064, 1071 (CA9), cert. denied, 125 S. Ct. 982 (2005); Arizona State Prison Complex-Florence, http://www.azcorrections.gov/prisons/florenceHist.htm#EXECUTION (last visited Jan. 19, 2006); Sid Gaulden, *Killer Dies "Very Dignified" Death*, THE POST & COURIER, Sept. 26, 1998, at B1; Deborah Yetter, *Doctor Defends Lethal Injection*, THE COURIER JOURNAL, May 3, 2005, available at http://www.courier-journal.com/apps/pbcs.dll/article?AID=/20050503/NEWS0104/505030366&SearchID=73206964572007; COMM. ON CRIM. JUSTICE, THE FLORIDA SENATE, A MONITOR: METHODS OF EXECUTION & PROTOCOLS (1997), http://www.fcc.state.fl.us/fcc/reports/monitor/methmon.html. For information on the number of death row inmates in each state as of July 1, 2005, see CRIMINAL JUSTICE PROJECT, NAACP LEGAL DEF. & EDUC. FUND, INC., DEATH ROW U.S.A. 6-7 (2004).

[11] The remaining execution was by electrocution. Bureau of Justice Statistics Capital Punishment Statistics, http://www.ojp.usdoj.gov/bjs/cp.htm (last visited Jan. 14, 2006).

Punishment Statistics, *available at* http://www.ojp.usdoj.gov/bjs/cp.htm (last visited Jan. 14, 2006).

2. Furthermore, the risks associated with the three-drug protocol are not unique to Tennessee, but are instead common to virtually all of the states that use lethal injection as a method of execution. See Denno, *supra* at 98-100. This is to be expected, as the officers who developed the Tennessee protocol "just cop[ied] what other states" were doing. Pet. App. 88a. Indeed, legal injection protocols similar to the one used by Tennessee have been the subject of repeated legal challenges in a number of states."[12]

Courts around the country have recognized that concerns about execution protocols warrant serious attention. See, *e.g.*, *Morales* v. *Hickman* (Nos. C 06 219 JF & C 06 926 JF RS) (N.D. Cal.); *Murphy* v. *Oklahoma*, 124 P.3d 1198, 1209 n.23 (Okla. Crim. App. 2005) ("The specific allegations (chronicled by a report from an euthanasia panel and affidavits from Oklahoma State Penitentiary Warden Mike Mullin, physician Mike [sic] Heath, and two attorneys who witnessed the execution of Loyd Lafevers on January 30,

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[12] See, *e.g.*, *Johnson* v. *Reid*, 105 Fed. Appx. 500 (CA4), app. to vacate stay granted, 542 U.S. 959 (2004); *Hines* v. *Johnson*, 83 Fed. Appx. 592 (CA5), app. to stay denied, 540 U.S. 1087 (2003); *Williams* v. *Taft*, 359 F.3d 811 (CA6), app. to stay denied, 540 U.S. 1146 (2004); *Robinson* v. *Crosby*, 358 F.3d 1281 (CA11), app. to stay denied, 540 U.S. 1171 (2004); *Vickers* v. *Johnson*, 83 Fed. Appx. 592 (CA5), app. to stay denied, 540 U.S. 1170 (2003); *Brown* v. *Crawford*, 408 F.3d 1027 (CA8), app. to stay denied, 125 S. Ct. 2289 (2005); *Bieghler* v. *State*, 839 N.E.2d 691 (Ind. 2005), cert. denied & app. to stay denied, No. 05-8824, 2006 U.S. LEXIS 1076 (Jan. 26. 2006); *Hill* v. *Florida*, No. SC06-2, 2006 Fla. LEXIS 8 (Fla. Jan. 17, 2006), pet. for cert. pending (No. 05-8731); *Baker* v. *Saar*, 2005 WL 3299369 (D. Md. 2005); *Oken* v. *State*, 381 Md. 580 (2004); *White* v. *Johnson*, 429 F.3d 572 (CA5), app. to stay denied, 126 S. Ct. 601 (2005); *Boyd* v. *Beck*, 2005 WL 3289333 (E.D.N.C. 2005); *Beck* v. *Rowsey*, 2005 WL 3289333 (D.N.C. 2005).

2001) are disconcerting. If true, they merit serious attention from the legislature and/or those in charge of the statutorily based responsibility of carrying out the execution 'according to accepted standards of medical practice.' However, it appears Oklahoma's protocols, i.e., the exact drugs and distribution method, are not statutorily based. Corrections officials change those protocols from time to time, as new information is gathered. If Petitioner's allegations have merit, we have every reason to believe the necessary changes will be implemented.").

The number of executions that fail to proceed according to plan, and official acknowledgment of these irregularities, further highlight the importance of the question presented. The memorandum drafted by a member of the Tennessee Department of Correction and circulated within that Department indicated that "[l]ethal injections are the most frequently botched means of execution * * *." Trial Exh. 14. There were thirty-one botched executions by lethal injection in the United States between 1982 and 2001.[13] Denno, *supra*, at 137. The Ninth Circuit has found evidence that four California executions, conducted using the same three-drug combination used by Tennessee, had problems that may have resulted in the inmate being conscious during the administration of the Pavulon. *Beardslee*, 395 F.3d at 1075.

B. This Case Is an Ideal Vehicle for Deciding the Question Presented.

The present case presents an especially suitable vehicle to resolve the question presented. While this Court has rejected several requests for execution stays based on similar constitutional challenges, those challenges have typically arisen on the eve of execution and been encumbered with

[13] A "botched execution" is one in which complications arose that resulted in the inmate undergoing pain and suffering that would not occur in an error-free execution.

additional complications.[14] Because this challenge was not brought on the eve of execution – indeed, no execution date is pending for petitioner – the courts below were able to develop a complete record, and the parties thoroughly litigated the relevant issues unencumbered by either time pressures or the threshold legal issues involved when seeking a stay. The issue was clearly raised and decided below and the petitioner would manifestly benefit from a favorable ruling.

1. The question presented was clearly raised and decided on constitutional grounds through every level of the state court system. The Tennessee Supreme Court explicitly held that the lethal injection protocol, including the use of Pavulon, did not violate the Eighth Amendment's prohibition on cruel and unusual punishment. Pet. App. 21a. The court also held that the execution protocol violated neither the Tennessee Constitution nor any state statutory requirements. Thus no alternate state grounds exist on which to avoid the constitutional question. Pet. App. 21a, 24a-30a.

2. The petitioner, along with the thousands of other inmates facing execution with neuromuscular blocking agents, would manifestly benefit from a favorable ruling. Petitioner does not challenge the constitutionality of the death penalty *per se*, nor does he seek to avoid execution by lethal injection altogether. Rather, he merely seeks to ensure that his execution, if carried out, will not include a drug that admittedly serves no purpose but could inflict substantial pain. Indeed, the petitioner actually suggests an alternative method, without a neuromuscular blocking agent, and including the injection of pentobarbital, that would cause

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[14] See, *e.g.*, *Johnson* v. *Reid*, 105 Fed. Appx. 500 (CA4), app. to vacate stay granted, 542 U.S. 959 (2004); *Hines* v. *Johnson*, 83 Fed. Appx. 592 (CA5), app. to stay denied, 540 U.S. 1087 (2003); *Williams* v. *Taft*, 359 F.3d 811 (CA6), app. to stay denied, 540 U.S. 1146 (2004); *Robinson* v. *Crosby*, 358 F.3d 1281 (CA11), app. to stay denied, 540 U.S. 1171 (2004); *Vickers* v. *Johnson*, 83 Fed. Appx. 592 (CA5 2003), app. to stay denied, 540 U.S. 1170 (2004).

death in a far more humane manner. A favorable ruling on the question presented would thus secure the petitioner's right to a dignified and humane execution.

3. This case presents an especially suitable vehicle to resolve the question presented. Unlike earlier challenges, it has a uniquely well-developed record and arises before the eve of execution.

Petitioner's execution date was stayed throughout lower court consideration of the question presented, thereby allowing ample time to develop a complete record and comprehensively litigate the issue in the lower courts. The Tennessee Supreme Court issued a thorough opinion with the benefit of two detailed lower court opinions, extensive briefing on both sides of the issue, and a full evidentiary hearing. In contrast, other cases in which this Court has recently considered the question presented were brought shortly before a scheduled execution and thus lacked the time to develop a thorough record for this Court's review. *Beardslee*, for example, was a last-minute challenge in which the plaintiff did not receive an evidentiary hearing and was forced to rely on affidavits; while the Ninth Circuit found the use of Pavulon "extremely troubling," it ultimately deemed the record "insufficient" to warrant relief. 395 F.3d at 1075.

Not only was the question presented raised and explicitly resolved below, but it is brought in a manner that allows this Court to squarely address the question presented. Several other challenges to Pavulon's use in executions were appeals from denials of preliminary injunctions. Such denials are reviewed for abuse of discretion, and the fact that in execution appeals a denial of a preliminary injunction is tantamount to a denial of permanent relief does not alter this standard. See, *e.g.*, *Beardslee*, 295 F.3d at 1068 (citing *Bay Area Addiction Research & Treatment, Inc.* v. *City of Antioch*, 179 F.3d 725, 730 (CA9 1999)). The review is "limited and deferential." *Ibid.* (citing *Southwest Voter Registration Educ. Project* v. *Shelley*, 344 F.3d 914, 918

(CA9 2003)). This standard of review, combined with the insufficient record, led the court in *Beardslee* to conclude that although the "evidence, coupled with the opinion tendered by Beardslee's expert, raises extremely troubling questions about the protocol," petitioner had not met his burden of showing "that the district court abused its discretion in denying the preliminary injunction." *Id*. at 1075.

Nor is this case clouded by the question whether petitioner's claim is precluded as a successive federal habeas action. Cf. *Hill* v. *Crosby*, No. 05-8794, cert. granted, 2006 U.S. LEXIS 1074 (Jan. 25, 2006). Petitioner's state-law right to bring the claim is uncontested.

Petitioner also did not delay this claim until the eve of execution, and accordingly does not face the "strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Nelson* v. *Campbell*, 541 U.S. 637, 650 (2004). For example, the Fifth Circuit has held that an unnecessary delay in challenging a method of execution indicated a motivation to delay, and not to actually challenge the method of, execution. *Harris* v. *Johnson*, 376 F.3d 414, 418 (2004), cert. denied, 124 S. Ct. 2933 (holding that inmate's choice to wait eighteen years before raising a constitutional challenge to the use of Pavulon in the execution protocol shortly before his execution evinced a true desire to merely postpone the execution). Petitioner's execution date remains stayed and thus the grant of a writ of certiorari does not require a stay. As such, the equitable presumption of *Nelson* is inapposite.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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